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Judicial Review: A short guide to claims in the Administrative Court

This paper examines judicial review, a High Court Procedure for challenging administrative actions. Judicial review is a legal procedure, allowing individuals or groups to challenge in court the way that Ministers, Government Departments and other public bodies make decisions. The paper seeks to explain how claimants bring applications for judicial review and also discusses the procedures for lodging and defending a claim. It considers the statistical trends in the Administrative Court and assesses some of the conflicts that have been identified between the executive and the judiciary following claims for judicial review, particularly in the field of Home Affairs. It also provides some brief information about the application of the *Human Rights Act* by the Administrative Court and some consideration of the proposals contained in the *Draft Tribunals, Courts and Enforcement Bill*

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Summary of main points

This paper seeks to provide a short guide to administrative law (often referred to as public law) and particularly the procedures for bringing claims for judicial review in the Administrative Court (part of the High Court) in England and Wales. It does not provide guidance to procedures in Scotland or Northern Ireland.

Judicial review allows individuals, businesses, and other groups to challenge the lawfulness of decisions made by Ministers, Government Departments, local authorities and other public bodies. The main grounds of review are that the decision maker has acted outside the scope of its statutory powers, that the decision was made using an unfair procedure, or that the decision was an unreasonable one. The *Human Rights Act 1998* created an additional ground, making it unlawful for public bodies to act in a way incompatible with Convention rights.

There has been an increase in the number of claims for judicial review over the past three decades, particularly in the field of asylum and immigration. Detailed statistics showing the number of applications for judicial review over the past five years and a breakdown into broad subject areas can be found at Appendix 1. There has been much debate about the reasons for this increase in claims, some commentators blaming judicial 'activism', while others believe that the expansion of the modern state and what some view as increasingly draconian legislation in the field of home affairs has made an increase in judicial reviews inevitable.

There have also been a number of attempts to restrict the right to bring judicial review proceedings, from the historic (in the case of *Anisminic Ltd. v. Foreign Compensation Commission* in the 1960s) to the more recent "ouster" clause contained in the *Asylum and Immigration (Treatment of Claimants) Bill*. The Government plans to introduce further legislation that would have an impact on the Administrative Court – the *Draft Tribunals, Courts and Enforcement Bill*. The Bill would make provision for certain "classes" of case to be transferred from the Administrative Court to an "Upper Tribunal", although there is a practical limitation to this power (in that for a case to be transferred, it would have to be within a specified "class of case", designated by a practice direction made by or on behalf of the Lord Chief Justice).

Over the past decade, increasingly volatile conflicts between the executive and the judiciary have occurred, following decisions of the courts, (most of these in relation to home affairs). A number of different Home Secretaries have criticised what they viewed as a liberal and out of touch judiciary. These difficulties appear to have increased following the introduction of the *Human Rights Act* in 1998. In July 2006, the Department for Constitutional Affairs produced a paper entitled *Review of the Implementation of the Human Rights Act*, which considered the impact of the Act. It concluded that the Act had been dogged by public misconceptions and urban myths and misapprehensions.

Judicial review is always likely to prove a contentious process, since it allows groups and individuals to challenge decisions made by the Government. This paper attempts to address some of the more common questions about the procedure.

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I What is administrative law?

Administrative (or public) law is generally concentrated on the control of the Government (or public authorities). Wade and Forsyth have indicated that:

The primary purpose of administrative law [...] is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok.¹

This control is sometimes affected by use of the courts and judicial review provides one (of a number) of legal controls on administrative actions. De Smith, Woolf and Jowell argue that “judicial review should be seen in the context of the general administrative system where different mechanisms are employed to hold public bodies accountable.”² They suggest that these mechanisms also include, *inter alia*, the use of ombudsmen, tribunals, internal reviews and action by Members of Parliament, the National Audit office and regulatory agencies.

Professor Paul Craig has explained the conceptual justification for judicial intervention in this way:

It is readily apparent that the execution of legislation may require the grant of discretionary power to a minister or an agency. Parliament may not be able to foresee all the eventualities and flexibility may be required to implement the legislation. The legislature will of necessity grant power subject to conditions [...] Herein lies the modern conceptual justification for judicial intervention. It was designed to ensure that those to whom such grants of power were made did not transgress the sovereign will of Parliament.³

He went on to suggest that if the courts did not intervene, ministers or agencies would be allowed to exercise a power in areas not specified by Parliament.

The 2000 edition of the Treasury Solicitors' publication, *The Judge Over Your Shoulder* provides a useful description of who is affected by administrative law indicating that:

1.2 “Administrative” or “public” law governs the acts of public bodies and the exercise of public functions. Public bodies include “non-departmental public bodies”, such as the Committee on Standards in Public Life, and Next Steps Agencies like HM Prison Service.

1.3 Private sector bodies may also be subject to administrative law when they exercise a public function. Generally, bodies exercise public functions when they act and have authority to act for the collective benefit of the general public. The

¹ Wade & Forsyth, *Administrative Law*, 9th Edition, 2004, p5

² De Smith, Woolf and Jowell's *Principles of Judicial Review*, Sweet & Maxwell, 1999, p4

³ Professor P.P Craig, *Administrative Law*, 5th Edition, 2003, Sweet & Maxwell, p5

activities of City institutions with market regulatory functions, like the London Stock Exchange, are a good example.⁴

The recently published Fourth Edition of the publication goes on to add that:

The Human Rights Act 1998 is part of administrative law because it governs the exercise of statutory powers by public authorities. For example, the Act has an important bearing on the way in which those powers are to be interpreted. The devolution legislation is part of administrative law for the same reason. Likewise European Community (EC) law may be relevant to the exercise of statutory powers.⁵

A. Judicial review

Judicial review is a High Court procedure for challenging administrative actions. Delegated legislation may also be challenged. It allows individuals, businesses or groups to challenge in court the lawfulness of decisions taken by Ministers, Government Departments and other public bodies. These bodies include local authorities, the immigration authorities, and regulatory bodies (such as OFCOM and the OFGEM) and some tribunals.⁶ In the case of *R v HM the Queen in Council, ex parte Vijayatunga*⁷, Mr Justice Simon Brown (now Lord Brown of Eaton Under Heywood) observed that “judicial review is the exercise of the court's inherent power at common law to determine whether action is lawful or not; in a word to uphold the rule of law”.

Her Majesty's Courts Service indicates that:

The supervisory jurisdiction [of the Administrative court], exercised in the main through the procedure of Judicial Review, covers persons or bodies exercising a public law function - a wide and still growing field.⁸

In the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (often referred to as the *GCHQ* case), Lord Diplock observed that:

The subject matter of every judicial review is a decision made by some person or (body of persons) whom I shall call the ‘decision maker’ or else a refusal by him to make a decision.

The Fourth Edition of *The Judge Over Your Shoulder* provides a helpful analysis of what constitutes a “decision”:

⁴ Treasury Solicitor, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 3rd Edition, 2000

⁵ Treasury Solicitor, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006

⁶ For guidance relating to courts and tribunals susceptible to judicial review see *R v Cripps, ex parte Muldoon* [1984] QB 68 (DC), [1984] QB 686 (CA). The decisions of superior courts are not open to judicial review, but inferior courts, such as magistrates' courts and coroners' courts are susceptible to judicial review

⁷ [1988] QB 322

⁸ <http://www.hmcourts-service.gov.uk/cms/admin.htm>

Administrative law (and the Court procedure called Judicial Review) is said to govern the making of "decisions" by public authorities, and the application of decision-making procedures. "Decisions" typically relate to a particular matter actually affecting an individual person or group. Examples are: the grant of a planning application to an individual or company; the determination of a person's immigration status; the allocation of a school place; assigning a prisoner to a particular security category. The scope of administrative law does however go wider than "decisions" of this direct kind: the Courts have held that Judicial Review extends to subordinate legislation, and things like policies (of general application), reports and recommendations, and advice or guidance.⁹

This is not an exhaustive list. For example the court also has the power to act when an authority fails to reach a decision – Rule 54.1(2)(a)(ii) of the *Civil Procedure Rules*¹⁰ ("the CPR") provides that a claim for judicial review includes a "failure to act in relation to the exercise of a public function".

The Administrative Court Office has published a description of when the use of judicial review is appropriate, noting that:

Judicial review is the procedure by which you can seek to challenge the decision, action or failure to act of a public body such as a government department or a local authority or other body exercising a public law function. If you are challenging the decision of a court, the jurisdiction of judicial review extends only to decisions of inferior courts. It does not extend to decisions of the High Court or Court of Appeal. Judicial review must be used where you are seeking:

- a mandatory order (i.e. an order requiring the public body to do something and formerly known as an order of mandamus);
- a prohibiting order (i.e. an order preventing the public body from doing something and formerly known as an order of prohibition); or
- a quashing order (i.e. an order quashing the public body's decision and formerly known as an order of certiorari);
- a declaration;
- Human Rights Act Damages.

Claims will generally be heard by a single Judge sitting in open Court at the Royal Courts of Justice in London. They may be heard by a Divisional Court (a court of two judges) where the Court so directs.

The court is now referred to as the Administrative Court. Prior to 2000, judicial review cases were heard by High Court judges sitting in the Crown Office List. The Administrative Court is part of the Queen's Bench Division of the High Court. In strict terms the Administrative Court refers to the list of judges authorised by the Lord Chief Justice to sit on Administrative law cases. HM Court Services indicates that:

⁹ Treasury Solicitor, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, para 2.1

¹⁰ The *Civil Procedure Rules* (CPR) govern the way in which court cases are conducted in England and Wales. They were introduced in April 1999 with the aim of enabling courts in England and Wales to deal with cases justly and streamlining the civil justice process by resolving as many cases as possible without resorting to court proceedings and are available at:
http://www.dca.gov.uk/civil/procrules_fin/current.htm

Judges are nominated by the Lord Chief Justice to sit on Administrative cases. There are presently 37 judges, including judges of the Chancery Division and of the Family Division who act as additional judges of the Queen's Bench Division when dealing with Administrative Court cases. The Honourable Mr Justice Collins is the Lead Judge and has judicial oversight and control of the Administrative Court.¹¹

Richard Gordon QC has suggested that “the rationale for nominating certain judges to deal with the Crown Office List was the hope that a degree of specialism would result in a more efficient and consistent despatch of court business”.¹²

The Administrative Court does not merely deal with judicial reviews claims, and has jurisdiction to hear:

- Statutory appeals and applications - the right given by certain statutes to challenge decisions of e.g. Ministers, Local Government, Tribunals;
- Appeals by way of case stated - appeals against decisions of magistrates' courts and the Crown Court (predominantly criminal cases);
- Applications for *habeas corpus*;
- Applications for committal for contempt;
- Applications for an order preventing a vexatious litigant from instituting or continuing proceedings without the leave of a judge
- Applications under the *Coroners Act 1988*

Usually, judicial review claims are heard by a single High Court judge, though sometimes a ‘Divisional Court’ of two or three judges may sit – for example where the claim relates to criminal proceedings or is particularly controversial.

Judicial review proceedings are brought in the name of the Crown. Cases are often listed in the following way: R (on the application of A) v B, following the decision to cease using the Latin term “*ex parte*.”¹³ In the case of *R v Commissioner of Customs and Excise, ex p Kay and Co*¹⁴ Mr Justice Keene indicated that “it might be thought that [...] the bringing of [...] judicial review proceedings in the name of the Crown is no more than a formality. However, it reflects the fact that the court is dealing with what are essentially issues of public law.”

1. The limits of the Administrative Court’s role and the *Wednesbury* principle

Judicial review is not concerned with the ‘merits’ of a decision or whether the public body has made the ‘right’ decision. The only question before the court is whether the public

¹¹ <http://www.hmcourts-service.gov.uk/cms/admin.htm>, NB from July 1999, cases involving Welsh devolution issues can be initiated and heard in Wales

¹² Richard Gordon QC, *Judicial Review and Crown Office Practice*, Sweet & Maxwell, 1999

¹³ The term *Ex p* in the title of a case was previously used to indicate the name of the party on whose application the hearing had taken place

¹⁴ [1996] STC 1500

body has acted unlawfully.¹⁵ In particular, it is not the task of the courts to substitute its judgement for that of the decision maker. The courts would traditionally only intervene where a public body had used a power for a purpose not allowed by the legislation (acting *ultra vires*) or in circumstances where when using its powers, the body has acted in a manner that was obviously unreasonable or irrational. In cases where there is a real unfairness, the courts may now be willing to intervene where the public body has made a serious factual error in reaching its decision.¹⁶ In the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp*¹⁷ in 1948, Lord Greene MR set out the circumstances in which the courts would intervene. The case is of such historical importance a substantial excerpt of Lord Greene's judgment is set out below:

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the [...] authority has contravened the law to establish that proposition [...] It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters [...] I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable." It is true the discretion must be exercised reasonably. Now what

¹⁵ The court can intervene where there has been an error of fact (although it may be cautious to entertain a fact based challenge) however case law makes plain that "a court of supervisory jurisdiction does not, without more, have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact finding power has been entrusted" (*Adan v Newham London Borough Council* [2001] EWCA Civ 1916)

¹⁶ *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] Q.B 1044

¹⁷ [1948] 1 KB 223

does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short v. Poole Corporation* [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

Professor Paul Craig has argued that "[I]f the challenged decision was so unreasonable that no reasonable body could have made it, then the court was justified in quashing it. The very fact that something extreme would have to be proven legitimised the judicial oversight and served to defend the courts from the charge that they were overstepping their remit and intervening too greatly on the merits".¹⁸

2. A relaxation of the *Wednesbury* principle?

Subsequent case law, can be seen to have "loosened" the *Wednesbury* test.¹⁹ *Fordham's Judicial Review Handbook* argues that "the most popular broad classification of judicial review grounds is Lord Diplock's *GCHQ* threefold division, into illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness)". He states that "judicial review has come a long way since 1948."²⁰

In *R v Secretary of State for the Environment, ex p Nottinghamshire County Council* [1986] AC 240 Lord Scarman explicitly indicated that *Wednesbury* was not an exhaustive statement of the law, noting that:

'*Wednesbury* principles' is a convenient legal 'shorthand' used by lawyers to refer to the classical review by Lord Greene MR in the *Wednesbury* case of the circumstances in which the courts will intervene to quash as being illegal the exercise of an administrative discretion. No question of constitutional propriety arose in the case, and the Master of the Rolls was not concerned with the constitutional limits to the exercise of judicial power in our parliamentary democracy. There is a risk, however, that the judgment of the Master of the Rolls may be treated as a complete, exhaustive, definitive statement of the law.

¹⁸ Professor P.P. Craig, *Administrative Law*, 5th Edition, 2003, p611

¹⁹ *Ibid*, p612, see for example the cases of *Congreve v Home Office* [1976] QB 629, *R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860, *R v Parliamentary Commissioner for Administration, ex p Balchin* [1997] C.O.D 146

²⁰ Michael Fordham, *Judicial Review Handbook*, Fourth Edition, 2004, Hart Publishing, para 45.1 and 45.3, referring to the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

B. The grounds for judicial review

In the case of *Council of Civil Service Unions v Minister for the Civil Service*²¹ (a case concerning the lawfulness of the union ban at GCHQ and therefore generally referred to as the *GCHQ* case) Lord Diplock attempted to set out the main grounds for judicial review in a modern way:

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community [...]

Dividing the grounds for judicial review into the *GCHQ* categories, further subcategories emerge. Grounds that are now considered acceptable to bring claims for judicial review include:

1. Illegality

In the *GCHQ* case, Lord Diplock confirmed that "by illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question".²² A number of examples of illegality are listed below.

a. Decision maker acting *ultra vires*

When a body is described as acting *ultra vires* it is acting beyond its prescribed powers. An action can be *ultra vires* where it the body has taken an action which is incompatible with a higher legal authority (such as EC legislation or domestic primary or subordinate legislation).²³

Difficulties in this area can also arise where a body is using a statutory power for a collateral purpose (namely one which is alien to the purpose for which it was granted).²⁴

Where a body (such as a local authority) is exercising a power where the statute under which it acts has set out a particular prescribed procedure, if the procedure is not followed, this may (in some circumstances) also make the action *ultra vires*.

²¹ [1985] AC 374

²² [1985] AC 374

²³ See for example *R v London Boroughs Transport Committee, ex p Freight Transport Association Ltd* [1991] 1 WLR 828 in the context of EC Law and *Stewart v Perth and Kinross Council* [2004] UKHL 16 in relation to domestic legislation

²⁴ *Bromley LBC v Greater London Council* [1983] 1 AC 768

b. Unlawfully delegating power or fettering discretion

A public body is not entitled either to improperly delegate its powers or to act under a completely inflexible policy. In particular, while it is accepted that Ministers cannot personally make every decision issued in their name²⁵ where legislation confers a power on a specified individual or body, the power cannot be delegated to another person or body.

Moreover, a body or tribunal is not entitled blindly to follow policy guidelines. Neither is it entitled to fetter the exercise of its discretion. In the case of *Port of London Authority, ex p Kynoch Ltd*²⁶ Lord Justice Banks observed that:

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 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 his case [...] 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.

It is this latter course of action which is not acceptable. In the more recent case of *R v Secretary of State for the Home Department, ex p Venables*²⁷, Lord Browne-Wilkinson observed that:

When Parliament confers a discretionary power exercisable from time to time over a period, such a power must be exercised on each occasion in the light of the circumstances at that time. In consequence, the person on whom the power is conferred cannot fetter the future exercise of his discretion by committing himself now as to the way he will exercise the power in the future [...] By the same token, the person on whom the power has been conferred cannot fetter the way he will use that power by ruling out of consideration on the future exercise of that power factors which may then be relevant to such an exercise. These considerations do not preclude the person on whom the power is conferred from developing and applying a policy as to the approach which he will adopt in the generality of case [...] But the position is different if the policy adopted is such as to preclude the person on whom the power is conferred from departing from the policy or from taking into account circumstances which are relevant to the particular case [...] If such an inflexible and invariable policy is adopted, both the policy and the decision taken pursuant to it will be unlawful.

c. Taking into account irrelevant considerations

A claim for judicial review can lie where a body or tribunal has either disregarded a relevant consideration, or taken into account an irrelevant consideration when reaching a decision. In the case of *R (on the application of Alconbury Developments Ltd) v*

²⁵ *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560

²⁶ [1919] 1 KB 176

²⁷ [1998] AC 407

*Secretary of State for the Environment, Transport and the Regions*²⁸ Lord Slynn observed that:

It has long been established that if the Secretary of State [...] takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside.

2. Irrationality

Richard Clayton and Hugh Tomlinson have argued that the “standard exposition” of irrationality is contained in the observations of Lord Greene MR²⁹ (set out above). In the *GCHQ* case, Lord Diplock observed that:

By ‘irrationality’ I mean what can now be succinctly referred to as ‘*Wednesbury* unreasonableness’ [...] it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.³⁰

a. *The obligation to act reasonably*

As mentioned above, it is not the task of the courts to substitute its judgment for that of the decision maker and accordingly, the courts will only interfere on a matter of reasonableness when the claimant is able to provide a strong clear case. *The Judge Over Your Shoulder* states that “reasonable”:

[I]s not the same as saying [a] decision must be absolutely correct or that the Court would necessarily have made the same decision. It means that in making the decision you must apply logical or rational principles. If a decision is challenged, the Court will examine the decision to see whether it was made according to logical principles, and will often expressly disavow any intention to substitute its own decision for that of the decision maker [...] There are sound practical, as well as legal/constitutional reasons for the Court adopting this “hands off” approach: the decision maker may be aware of policy implications or other aspects of the public interest which are not obvious to the Court.³¹

²⁸ [2001] UKHL 23

²⁹ Clayton and Tomlinson, *Judicial Review: A Practical Guide*, Longman, 1st Edition, 1993, para 2.5

³⁰ [1985] AC 374

³¹ *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, Treasury Solicitor, paras 2.22-2.23

3. Procedural Impropriety

Complaints can also be made, not merely in respect of the decision taken, but the procedure by which the decision was made. Some examples are listed below:

a. **Failure to give each party to a dispute an opportunity to be heard**

Where a body or tribunal is determining a dispute, it is obliged to give each party a fair opportunity to put their case.³²

b. **Bias**

While actual bias is rare, the court will also be seeking to examine whether there has been an appearance of bias. The case of *Magill v Porter* [2001] UKHL 67 (in which Lord Hope observed that: “The question is whether the fair minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”) provides a good example of the test that will be used.

c. **Failure to conduct a consultation properly**

Where a consultation exercise is undertaken by a public body, it must be conducted properly. The Cabinet Office has produced a *Code of Practice on Written Consultations*³³ indicating that “Government departments should carry out a full public consultation whenever options are being considered for a new policy or if new regulation is planned”.

In the case of *R v North and East Devon Health Authority, ex p Coughlan*³⁴ the Court of Appeal determined that:

To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be consciously taken into account when the ultimate decision is taken.

d. **Failure to give adequate reasons**

Challenges to “reasons” are commonly heard in the Administrative Court. The main ways in which a duty to give reasons can arise has been considered in Fordham’s *Judicial Review Handbook* which concludes that it arises: where it is expressly required in legislation; where it is called for in fairness, under the duty of candour³⁵ owed by a body under challenge; and, where a response which is unreasoned may be seen as unreasonable.

³² See for example *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456

³³ Which can be found at www.cabinetoffice.gov.uk/regulation/consultation/index.asp

³⁴ [2001] QB 213

³⁵ The duty of candour is explained in section D below

The Divisional Court considered the position in relation to the existence of a duty to give reasons in the case of *R v Ministry of Defence, ex parte Murray*³⁶. It recognised that while the law did not at present recognise a general duty to give reasons, there was a perceptible trend towards an insistence on greater openness in the making of administrative decisions.

Where reasons are required from a body (for example when a tribunal makes a determination, or a planning authority reaches a decision on the merits of a planning appeal), “it is required to give reasons which are proper, adequate and intelligible and enable the person affected to know why they have won or lost.”³⁷

e. Legitimate expectation

The doctrine of legitimate expectation addresses circumstances in which a decision maker may have operated a practice or made a promise that raised expectations that it would be unfair or unreasonable to dishonour. Whether a legitimate expectation has arisen (and whether it can be overridden) will depend on a number of factors. *The Judge Over Your Shoulder* suggests that these include:

- Whether the words or conduct which gave rise to the expectation were clear and unequivocal,³⁸
- Whether the person who promised the benefit had the legal power to grant it (or whether he was acting *ultra vires*), and;
- Whether the recipient of the promise took action in reliance upon it to their detriment.³⁹

Wade and Forsyth suggest that the doctrine has developed both in the context of reasonableness and in the context of natural justice.^{40 41} It is also a fundamental principle of EC law.

The above list, however, should in no way be taken as a comprehensive record of the traditional grounds under which a claimant could pursue a challenge. Moreover, it is important to note that commentators consider that while they have “aged well”⁴² the *GCHQ* grounds are neither exhaustive nor mutually exclusive. Any reader wanting to address this issue further will find a bibliography at Appendix 2 to this paper, which contains a list of books and other sources.

³⁶ [1998] COD 134

³⁷ *R v Brent London Borough Council, ex p Baruwa* (1997) 29 HLR 915

³⁸ See for example *Association of British Civilian Internees – Far Eastern Region v Secretary of State for Defence* [2003] QB 1397

³⁹ *R v Department of Education and Employment, ex p Begbie* [2000] 1 WLR 1115, see also *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, Treasury Solicitor, para 2.55

⁴⁰ Wade & Forsyth, *Administrative Law* 9th Edition, 2004, p500

⁴¹ A substantial discussion of the doctrine of legitimate expectation can be found in the article *Legitimate Expectations in English Public Law: An Analysis* by Philip Sales and Karen Steyn, [2004] P.L 564

⁴² Michael Fordham, *Judicial Review Handbook*, Fourth Edition, 2004, Hart Publishing, para 45.1

C. Other potential challenges

In addition to the above grounds, the use of a power may also be unlawful if the effect of the decision is to contravene a claimant's rights under the European Convention on Human Rights, or his rights under EC law. This paper does not seek to provide particular guidance on pursuing EC law rights, since this is a complex and weighty subject in its own right. It does, however, provide some brief information about the changes brought about by the introduction of the *Human Rights Act 1998*, although again, it should be noted that this is a substantial area. This paper does not seek to draw out all the complex constitutional arguments in respect of the changes that the Act has wrought. Further information about the Human Rights Act can be found in the Library Standard Note *Human Rights Act 1998: two years on*.⁴³

1. The *Human Rights Act 1998*

The preamble to the *Human Rights Act 1998* indicates that it will “give further effect to the rights and freedoms guaranteed under the *European Convention on Human Rights*” Prior to the implementation of the *Human Rights Act*, while the judiciary would try to interpret legislation in line with Convention obligations, the limits of statutory interpretation could be reached in cases where there was a clear cut conflict between the wording of the domestic law and the requirements of the Convention. In the case of *Taylor v Co-operative Retail Services*⁴⁴ Lord Denning described the dilemma, noting that:

Mr Taylor was subjected to a degree of compulsion which was contrary to the freedom guaranteed by the European Convention on Human Rights. He was dismissed by his employers because he refused to join a trade union which operated the ‘closed shop’. He cannot recover any compensation from his employer under English Law because under the Acts of 1974 and 1976, his dismissal is to be regarded as fair. But those Acts themselves are inconsistent with the freedom guaranteed by the European Convention. The UK Government is responsible for passing those Acts and should pay him compensation. He can recover it by applying to the European Commission and thence to the European Court of Human Rights [...] He cannot recover compensation in these courts. But if he applies to the ECHR, he may in the long run – and I am afraid it may be a long run – obtain compensation there. So in the end justice may be done. But not here.

Following the entry into force of the Act, victims of unlawful acts by public authorities were able to raise Convention issues in the domestic courts. Section 6(1) of the Act provides that:

It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

⁴³ SN/HA/1966, available on the Library's intranet

⁴⁴ [1982] Industrial Cases Reports 600, at 610

The constitutional position of the *Human Rights Act 1998* and the impact that it has had on the Administrative Court is a matter of some debate. Fordham's *Judicial Review Handbook* has claimed that:

The Human Rights Act is a constitutional text, which cements and enhances the Court's role in protecting against post 2.10.00 violations by public authorities of the codified Convention rights, and which has changed the face of judicial review.⁴⁵

Richard Gordon QC has gone further than this, stating that:

The Human Rights Act provides a new constitutional basis for the court's function in judicial review. No longer is the court searching for a solution to the fictional [...] question of what Parliament actually intended and in reviewing the power found to have been conferred; from 2 October 2000, it is engaged in the (essentially active) exercise of seeking to protect designated Convention rights.⁴⁶

Section 3 of the *Human Rights Act 1998*, in effect, permits judicial review of Acts of Parliament,⁴⁷ although unlike the Supreme Court in the United States, the UK Courts are not entitled to strike down legislation, but instead can make rulings that legislation is incompatible with the Convention under s 4 of the Act.

This is not a frequent occurrence. Professor Brice Dickson has indicated that to date, the Law Lords have only exercised this option on three occasions.⁴⁸ The cases were *R (on the application of Anderson) v Secretary of State for the Home Department*⁴⁹ (the Secretary of State's power to alter the tariff of life sentenced prisoners), *Bellinger v Bellinger*⁵⁰ (about the rights of a male to female post-operative transsexual) and *A v Secretary of State for the Home Department*⁵¹ (where the detention of non-British nationals was held to be discriminatory).

The use of the *Human Rights Act* in the Administrative Court has introduced different concepts like "proportionality" and the court has acknowledged that these might yield different results to traditional grounds of review.⁵² Proportionality had previously been

⁴⁵ Michael Fordham, *Judicial Review Handbook*, Fourth Edition, 2004, Hart Publishing, para 9.1

⁴⁶ Richard Gordon QC and Tim Ward, *Judicial Review and the Human Rights Act*, Cavendish Publishing, 2000, para 1.38

⁴⁷ See for example Richard Gordon QC, "Principles for Judicial Deference", [2006] JR 109 for a discussion of the Constitutional Status of the Human Rights Act and a consideration of "judicial supremism". In particular he indicates that Section 3 of the Act represents "a radical change to the conventional view of Parliamentary sovereignty [... representing] a significant change from the views expressed by Lord Reid in *Pickin v British Railway Board* [1974] AC 765

⁴⁸ Brice Dickson, "Safe in their hands? Britain's Law Lords and human rights", *Legal Studies*, Vol 26, No. 3 September 2006, pp 329-346

⁴⁹ [2003] 1 AC 837

⁵⁰ [2003] 2 AC 467

⁵¹ [2005] 2 AC 68

⁵² *R (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26, in which Lord Steyn indicated that "The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review". He also reiterated that "[T]he intensity of review in a public law case

considered a facet of irrationality/*Wednesbury* unreasonableness,⁵³ but while there is some overlap between the concepts, the “intensity” of review is considered greater under the proportional approach.

Under the European Convention on Human Rights, a restriction placed on a freedom guaranteed by the Convention has to be “proportionate to the legitimate aim pursued.”⁵⁴ If a Convention right is to be subject to a restriction, any measure will satisfy the proportionality test only if it meets three criteria:

- The legislative objective must be sufficiently important to justify limiting a fundamental right;
- The measures designed to meet the legislative objective must be rationally connected to that objective – they must not be arbitrary, unfair or based on irrational considerations;
- The means used to impair the right or freedom must be no more than is necessary to accomplish the legitimate objective – the more severe the detrimental effects of a measure, the more important the objective must be if the measure is to be justified in a democratic society.⁵⁵

Richard Clayton QC has argued that:

It is the constitutional character of the HRA which authorises a court to engage in a detailed factual examination to test whether legislative decisions use the least restrictive means of accomplishing their objective. Such an interventionist approach is also supported by the terms of s.3 of the [Human Rights] Act, which requires legislation, so far as possible, to be read and given effect in a way which is compatible with Convention rights.⁵⁶

will depend on the subject matter in hand [...] That is so even in cases involving Convention rights. In law context is everything”

⁵³ For example in the case of *R v Secretary of State for Transport ex p. Pegasus Holdings (London) Ltd* [1988] 1 WLR 990 Mr Justice Schiemann observed that “one aspect of reasonableness is proportionality: that is, that the means adopted should be reasonable, having regard to the aim to be achieved and the effects of any course adopted”

⁵⁴ *Handyside v United Kingdom* (1976) 1 EHRR 737

⁵⁵ Lester and Pannick, *Human Rights Law and Practice*, 2nd Edition, Lexis Nexis Butterworths, para 3.10 and see also Richard Clayton, *Proportionality and the HRA 1998: Implications for Substantive Review* [2002] JR 124; Mark Elliot, *The HRA 1998 and the Standard of Substantive Review* [2002] JR 97 and Nicholas Blake, *Importing Proportionality: Clarification or Confusion* [2002] EHRLR 19.

⁵⁶ Richard Clayton, “Proportionality and the HRA 1998: Implications for Substantive Review” [2002] JR 124

D. The procedure for lodging a claim

1. Standing to bring a claim

To be entitled to apply for judicial review of a decision, in principle a person must have a "sufficient interest" (or standing). Standing has previously been referred to as *locus standi*. There appear to be two separate tests, dependent upon whether a person is relying on the *Human Rights Act* or not. Where a person is not relying on the *Human Rights Act*, they will have to show "sufficient interest". This is a broad test, since the word person includes "legal persons". This means that organisations, such as trade unions, may have sufficient interest.

The Judge Over Your Shoulder states that:

If the person challenging the decision can say that he is affected by it and there is no more appropriate challenger, and there is substance in his challenge, the court will not usually let technical rules on whether he has sufficient interest stand in its way.⁵⁷

Both representative groups⁵⁸ and pressure groups⁵⁹ acting in the 'public interest' have also been found to have sufficient standing, on the basis that they represent the interests of the persons directly affected.

In the case of *R v Monopolies and Mergers Commission, ex parte Argyll Group plc*⁶⁰, Lord Donaldson MR observed that:

The first stage test which is applied on the application for leave [now called permission], will lead to a refusal if the applicant has no interest whatsoever and is, in truth, no more than a meddling busybody. If, however, the application appears to be otherwise arguable and there is no other discretionary bar, such as dilatoriness on the part of the applicant, the applicant may expect to get leave to apply, leaving the test of interest or standing to be reapplied as a matter of discretion on the hearing of the substantive application. At this second stage, the strength of the applicant's interest is one of the factors to be weighed in the balance

Where a claimant is seeking to rely on the *Human Rights Act 1998*, a different and more restrictive test is used to prove standing, generally referred to as "the victim test". Section 7(1) of the 1998 Act provides that:

⁵⁷ See *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, Treasury Solicitor, para 3.4, referring to the case of *R v DPP ex parte Bull and Another* [1998] 2 All ER 755 QBD in which Amnesty International UK was held to have standing

⁵⁸ Such as the Law Society and the Royal College of Nursing

⁵⁹ In the case of *R v Inspectorate of Pollution, ex p Greenpeace* [1994] 1 WLR 570, the court ruled that the issue of whether an interest group or other body had sufficient standing should be decided on the facts of each case as a matter of discretion. For a commentary on the issue of "standing" see Edite Legere, *Locus Standi and the Public Interest: A Hotchpotch of Legal Principles* [2005] JR 128

⁶⁰ [1986] 1 WLR 763 and see also *R v Somerset County Council ex p Dixon* [1997] COD 323

A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may - (a) bring proceedings against the authority under the Act in the appropriate court or tribunal or (b) rely on the Convention right or rights concerned in any legal proceedings but only if he is (or would be) a victim of the unlawful act.

Clayton and Tomlinson claim “it is arguable that the effect of sections 7(1) and (3) is to widen the category of victims under the Human Rights Act to include *potential* victims”.⁶¹

2. The pre action protocol, time limits and the permission stage

The procedure which governs making a claim for judicial review is set out in the Civil Procedure Rules: CPR Part 54. Judicial review is a remedy of last resort. Parties are expected to have exhausted all other remedies, before commencing a claim – including alternative remedies such as statutory appeals and appeals to relevant tribunals.⁶² There is also a “pre-action protocol”, designed to allow parties to avoid litigation. This involves the claimant producing a letter before action, which should identify the decision being challenged, and the basic reasons (such as procedural defects, failure to take into account relevant fact, defective reasoning). The defendant ought to be allowed 14 days to reply before the claimant lodges his claim (however see below). Despite the desire to avoid a court hearing, claimants are obliged to act promptly.

CPR Part 54.5 indicates that:

- (1) The claim form must be filed –
 - (a) promptly; and
 - (b) in any event not later than three months after the grounds to make the claim first arose [...]

This does not imply that potential claimants have three months to commence their claims, since the emphasis is on the claimant to act promptly.⁶³ Moreover, the obligation to comply with the pre action protocol mentioned above does not seem to exempt a claimant from the 3 month rule – *Civil Procedure Volume 1* (also known as the “*White Book*”) indicates that:

⁶¹ Clayton and Tomlinson, *The Law of Human Rights*, Volume 1, Oxford, 2000, para 22.37; The case of *Soering v United Kingdom* (1989) 11 EHRR 439 already demonstrates that a person may be a victim if there is a risk that their Convention rights will be breached in the future

⁶² See for example *R v Sandwell Metropolitan Borough Council, ex p Wilkinson* (1998) 31 HLR 22 and *R v Law Society ex parte Kingsley* [1996] COD 59. In that context, the Department for Constitutional Affairs is encouraging a move towards ‘proportionate dispute resolution’ which expressly seeks to encourage aggrieved citizens away from court and towards mediation, alternative dispute resolution (“ADR”), internal complaints procedures, ombudsmen and tribunals. For further details see <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>. It is important to note that the jurisdiction of the court is not ousted if an alternative remedy is available.

⁶³ See for example *R v Independent Television Commission, ex p TV NI Ltd*, *The Times*, December 30, 1991 and *R v Cotswold District Council, ex p Barrington Parish Council* (1997) 75 P & C.R 515 in which it was also held that the time for bringing a judicial review ran from the date of the relevant decision and not from the date of the subjective knowledge of the applicant

If [complying with the pre action protocol] means that the claim would be lodged outside the three-month period, the sensible course of action would be to lodge the claim and to explain, in the claim form, why the need for urgency meant that it was not possible to comply [...]⁶⁴

The claim form is served on the defendant and must be filed in the Administrative Court. If the claim is not resolved during the pre action phase, the defendant authority (if it wishes to contest the claim) is obliged to file an acknowledgement of service (pursuant to CPR 54.8) within 21 days of service of the claim form. This has to be served on the claimant and the Administrative Court and has to contain a summary of the defendant's grounds for contesting the claim.

The process then enters the "permission stage" which is designed to filter out those claims which have no prospect of success. In practice this means that before a claimant may proceed to a full hearing of his claim, he has to obtain the permission of the Administrative Court. Once the claim form, the acknowledgements of service⁶⁵ (and any supporting documents) are received by the Administrative Court Office, they are passed to an Administrative Court judge for consideration on the papers. If the judge grants permission, the case will go on to a full oral hearing. If the judge refuses permission, the claimant is entitled to seek (within seven days) that the matter be reconsidered at an oral hearing (under CPR 54.12). If at the oral hearing the judge again refuses permission, the claimant will have a right to apply for permission to appeal to the Court of Appeal against that refusal pursuant to CPR 52.15.

a. The duty of candour

One other feature of the procedure that is relevant is the duty of candour (mentioned above). In judicial review claims, parties rely upon one another to provide the relevant information, since the court does not normally expect oral examination or cross examination of witnesses. In the case of *Banks v Secretary of State for the Environment, Food and Rural Affairs*⁶⁶ the judge observed that:

Frank disclosure of the decision making process does not mean referring to so much of the truth as assists the public body's case. It means presenting the whole truth including so much of the truth as assists the applicant for judicial review.

The obligation to be frank and honest lies on both parties, and a claimant who presents an incomplete or misleading claim may find this in itself is a good reason to reject that claim.

However *The Judge Over Your Shoulder* acknowledges that:

⁶⁴ *Civil Procedure Volume 1, The White Book Service*, Sweet and Maxwell, 2006, p54.5.1

⁶⁵ There may be other interested parties and under CPR 54.6 the claimant is obliged to state the name and address of any person he considers to be an interested party. Such parties would be entitled to take part in the judicial review and would be obliged to file an acknowledgment of service

⁶⁶ [2004] EWHC 1031

The duty of candour lies if anything even more heavily on the public body (which after all will be in possession of the information showing why the decision was made) [...] the public body is representative of the public interest and it cannot be in the public interest for the Court to be presented with an incomplete or inaccurate account of the facts. [...] When a public authority is found wanting in this respect, the criticism is correspondingly greater.⁶⁷

3. The oral hearing

The Fourth Edition of *The Judge Over Your Shoulder* provides a useful guide as to the procedure at an oral hearing, if permission is granted:

3.30 Procedure at the substantive hearing is very simple:

The Case will normally be heard by a single Judge from the Administrative Court Panel, that is Judges appointed to a panel because of their experience, and he will have read the papers beforehand;

Counsel appearing for the Claimant introduces the case, refers to the witness statements and addresses the Court about the law. Counsel will often refer to cases previously decided by the Courts which concern similar points of law (called "precedents" or "authorities"). The Department's Counsel will then present the case in answer to the Claimant. - Finally the Claimant's Counsel will have the last word and will address the Court again on any points arising from the Department's case. The Court then considers the rival arguments and delivers a decision, either immediately or after taking time for consideration (a judgment delivered later is called a "reserved judgment").

3.31 All parties are required to prepare in advance an outline ("skeleton") argument for the use of the Court at the substantive hearing. This is part of a tendency to encourage parties to reduce their case as much as possible to writing, though the Court will still be anxious to let everybody have their say. So far as witnesses are concerned, remember that the aim of Judicial Review is to examine the legality of a decision, and to ensure that proper procedure is followed: the Court is not well equipped to carry out a fact finding exercise and will not normally embark upon one. For that reason it is rare for the witnesses who have made statements to be called to give oral evidence or to be cross-examined on their statements.⁶⁸

4. A successful result?

All the remedies available to the Court are discretionary which means that a successful claimant has no absolute right to a remedy. A successful claim for judicial review does not guarantee a claimant a favourable outcome.

⁶⁷ *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, Treasury Solicitor, para 3.12

⁶⁸ *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, Treasury Solicitor

Where the court rules against the defendant, cases are often remitted back to the decision maker (although the court can grant other remedies, listed above). This means that the decision maker is obliged to reconsider the matter afresh. It does not mean, however, that the decision maker cannot reach the same conclusion for different (or more detailed) reasons.⁶⁹ It is possible that the court will determine that a particular approach or course of action is unlawful and may give some guidance as to how a matter should be reconsidered.⁷⁰ The court may also order that the matter is remitted to a differently constituted decision maker.⁷¹

Fordham's *Judicial Review Handbook* indicates that:

Although many successful judicial review cases will lead to the claimant ultimately securing the desired outcome, many will not. The chance of reconsideration afresh can be worth fighting for. But claimants need to understand that victory in judicial review may sometimes leave their circumstances unchanged and, worse than that, can leave their position (or that of others) even worse than before.⁷²

Professor Ross Cranston has observed that "what is evident is that a limited number of decisions do have a significant impact on public policy."⁷³

In particular, he has identified that

In the areas of public law, the impact of judicial decisions may generally be more important than elsewhere [...] Even if successful, the particular applicant may not succeed when the matter is administratively redetermined, and other applicants in a similar position may be thwarted by regulatory or administrative changes. Nevertheless, a decision sometimes has effects on government administration beyond its particular circumstances.⁷⁴

⁶⁹ See for example *R (on the application of Ali) v Secretary of State for the Home Department* [2003] EWHC 899 (Admin) in which Mr Justice Goldring commented: "[...] dependent upon reconsideration on sufficient and proper evidence, the Secretary of State may reach exactly the same decision"

⁷⁰ See for example *R v Immigration Appeal Tribunal, ex parte Singh* [1987] 1 WLR 1394, where the court determined that the case would be remitted for reconsideration "in the light of the views on the law expressed by this court"

⁷¹ See for example *R (on the application of Secretary of State for the Home Department) v Mental Health Review Tribunal* [2004] EWHC 1029 where a case was remitted back to a differently constituted Mental Health Review Tribunal and *R (on the application of Partingdale Lane Residents Association) v Barnet London Borough Council* [2003] EWHC 947 Admin, in which Rabinder Singh QC, sitting as a Deputy High Court Judge stated that: "It will be a matter for the defendant to reconsider the matter in accordance with the law, but without the involvement of Councillor Coleman [who he had ruled had predetermined a specific issue]. I cannot prejudge the outcome of that reconsideration following a lawful and fair consultation process"

⁷² Michael Fordham, *Judicial Review Handbook*, Fourth Edition, 2004, Hart Publishing, para 3.2

⁷³ Ross Cranston QC, *How law works: The Machinery and Impact of Civil Justice*, Oxford, 2006. In January 2006, Professor M Sunkin (Essex University) commenced a research project entitled *Impact of Litigation and Public Law on the Quality & Delivery of Public Services*. The end date for the project is not until January 2008. It is aiming to "further understanding of the impact of public law, including human rights, on the quality, performance and delivery of public services, and thus on public welfare". For further information see the Economic and Social Research Centre website: <http://www.esrc.ac.uk/ESRCInfoCentre/index.aspx>

⁷⁴ Ibid

De Smith, Woolf and Jowell also considered the impact of judicial review on administrative practices, noting that:

An evaluation of the practical impact of judicial review on the quality of government decisions is still constrained by the limited empirical research in the field. The whole picture is likely to be a patchy one. In some contexts, the principles of judicial review may play a role in promoting high standards of public administration⁷⁵ but this will happen routinely only where officials and politicians invest resources in translating and transposing the words handed down in judgments to their own day-to-day practices and ethos.⁷⁶

Where the effects of judicial review impact upon Government administration, however, tensions can arise between the judiciary and the Government. These tensions can lead to conflict and are discussed in the latter sections of this paper.

E. Other routes to redress

Given that judicial review is an option of last resort, it is important to note that there are other options for people who wish to obtain redress against administrative decisions. Many of these are discussed in the Department for Constitutional Affairs (DCA) Paper *Transforming Public Services: Complaints, Redress and Tribunals*⁷⁷. This research paper will not explore these other options in any detail, but the DCA suggest that alternative remedies include:

- Complaints to the decision making Department or agency;
- Complaints to independent complaints handlers;⁷⁸
- Complaints to a Member of Parliament;
- Complaints to the Parliamentary Ombudsman.

Where a constituent's complaint is about the way in which their case has been handled, rather than the substantive decision, it is open to Members to supplement their own efforts with a reference to the Parliamentary Ombudsman (also called the Parliamentary Commissioner for Administration). The office of Parliamentary Ombudsman was established by statute in 1967 under the *Parliamentary Commissioner Act* (as amended). The Ombudsman is appointed by the Queen by Letters Patent and is independent of both Government and Parliament. The Parliamentary Ombudsman can investigate complaints from people who consider they have been caused injustice by administrative fault (maladministration) in connection with the actions or omissions of bodies within the Ombudsman's jurisdiction. Complaints must be directed through a Member of Parliament (the so-called 'MP filter') and the complainant must first have put their grievance to the department concerned in order to allow officials to respond before taking the matter

⁷⁵ See David Feldman, *Judicial Review: A Way of Controlling Government?*, (1988) 66 Pub. Admin 21

⁷⁶ De Smith, Woolf and Jowell's *Principles of Judicial Review*, Sweet and Maxwell, 1999, pg 25

⁷⁷ Cm 6243, July 2004, available at: <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>

⁷⁸ Some Departments have set up independent complaints handling arrangements, for example in 1993, the Inland Revenue set up Adjudicator's Office. Remit is confined to matters of administration, with decisions which are appealable – for example the quantum of a tax assessment or the valuation of a property – reserved to the respective tribunals

further. The DCA indicates that the Parliamentary Ombudsman has considerable investigative powers and can require departments to disclose all the relevant papers.⁷⁹ Further information about the Ombudsman can be found in the Library Standard Note *Parliamentary Ombudsman: rights of appeal*.⁸⁰

⁷⁹ Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243, July 2004, para 3.19

⁸⁰ SN/PC/3079, July 2006 available on the Library's Intranet

II The increase in claims for judicial review

There can be no doubt that in recent decades there has been an increase in the number of cases being brought before the Administrative Court. It has been claimed by Professor Robert Stevens that in terms of the expansion of judicial influence:

[T]he most obvious and public change concerned the expansion of judicial review to provide an extensive power for the courts to intervene in procedural due process over a wide range of public and quasi public matter[s].⁸¹

In 1987 this trend was acknowledged by the Treasury Solicitor's Department with the publication of the first edition of *The Judge Over Your Shoulder* (see above).⁸²

The growth of judicial review has occurred over some time. However, following the introduction of the *Human Rights Act*, there appears to be a perception, both in the media and amongst Parliamentarians that we have entered a new period of judicial activism. The current edition of *The Judge Over Your Shoulder* indicates that judicial review is:

[A] growth industry. In 1974 there were 160 applications for leave to seek judicial review in England and Wales. By 1998 the figure was 4,539.⁸³

De Smith, Woolf and Jowell also identify changes stemming from the 1970s, noting that:

From the 1970s onwards a number of pressure groups consciously adopted "test case strategies" in which judicial review, in conjunction with other forms of legal proceedings⁸⁴ and together with conventional forms of political action, was used to seek changes in government policy [...] Success, however, was often temporary, limited and indirect: judicial review generated publicity and was capable of inflicting political embarrassment on ministers. The response of government however, was often to nullify or sidestep the effects of an unpalatable judicial decision by enacting primary legislation [...]⁸⁵

In July 2006, David Amess MP asked Parliamentary Questions of both the Department for Constitutional Affairs and the Home Office, requesting:

⁸¹ Robert Stevens, *The English Judges – Their role in the changing constitution*, Hart Publishing 2002

⁸² Currently in its fourth edition, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, Treasury Solicitor. Meanwhile Garry Slapper and David Kelly indicate that "records show that in 1980, there were only 525 applications for judicial review; in 1996, 4,586; in 1997, 4636 such applications; and by 1998, applications had passed the 5,000 mark and continue to rise". Slapper and Kelly, *English Law*, 2nd Edition, 2006, p159

⁸³ Treasury Solicitor, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 3rd Edition, 2000

⁸⁴ Including tribunals, litigation on rights conferred under European Community law and proceedings under the European Convention on Human Rights

⁸⁵ De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 5th Edition, 1995

[O]n what occasions an (a) individual and (b) organisation has applied for a judicial review of decisions of [the] Department in each year since 1997; and what the outcome was of each case where proceedings have been completed.⁸⁶

Both Departments replied that:

The information requested is not held centrally and could be obtained only at disproportionate cost.⁸⁷

The same question was posed to the most other Government Departments. Only the Treasury⁸⁸ was able to provide a substantive answer, possibly because the number of challenges it received over the time period was very small.

The Home Office was, however, able to identify the amounts that it had spent defending claims for judicial review, in answer to a Parliamentary Question by Howard Flight MP in June 2004.⁸⁹

Fig 1:

The amount paid by the Home Office to the Treasury Solicitor for handling judicial review cases from May 1997. The figures comprise Treasury Solicitor's charges and disbursements, including counsel's fees.

Amount (£)	
1997	1,723,587
1998	4,392,654
1999	3,395,411
2000	4,979,425
2001	5,294,852
2002	5,920,377
2003	6,231,668
2004	2,695,265
Total	34,633,239

⁸⁶ HC Deb 6 July 2006, c1345W and HC Deb 11 July 2006, c1784W

⁸⁷ Ibid

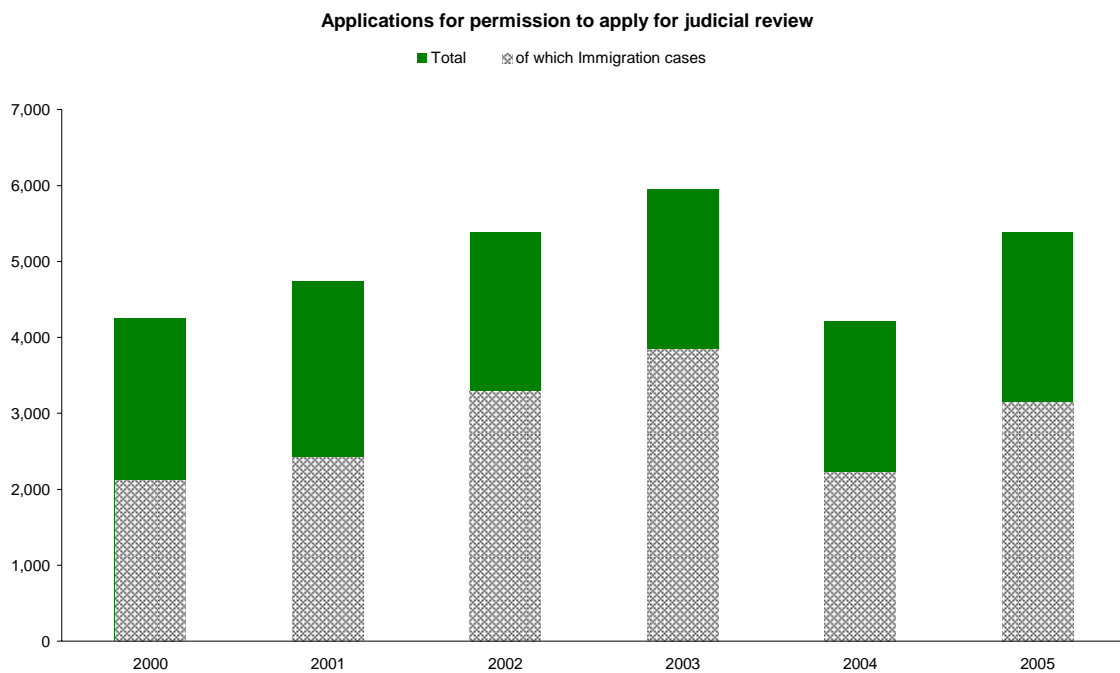
⁸⁸ HC Deb 10 July 2006, c1641-2W where the Department replied that: "Our records show that the number of occasions on which persons have written a letter before action or instituted a claim for judicial review against HM Treasury have been one each in 1997 and 1998, three in 1999, 0 in 2000, five in 2001, 0 in 2002, two in 2003, one in 2004 and four in 2005. There were three applications for judicial review in 2005. Two of these were unsuccessful at permission stage and the other one was withdrawn on the basis of a settlement agreed between the parties. The former cases concerned the award of a waste management contract and a refusal to permit the payment of taxes into a separate fund out of which military expenditure is not paid. The latter case concerned the Operating and Financial Review for public companies. It is not possible to provide similar information for cases in earlier years without incurring disproportionate cost. The Treasury have been involved in other litigation since 1997 in addition to the cases mentioned but it is not possible to distinguish those further cases which were judicial reviews without incurring disproportionate cost"

⁸⁹ HC Deb 10 June 2004, c520-4W, NB figures for 2004 only relate to money spent up to 19 May

a. Judicial Review in Asylum and Immigration cases

One of the main reasons for the increase in applications for permission for judicial review seems to be the number of asylum and immigration cases. From the figures at Appendix 1 (below), it is apparent that the total number of applications fluctuates dependent upon the number of immigration and asylum cases going through the system. The chart below illustrates both the total number of applications for permission to apply for judicial review and the proportion of those applications which relate to immigration cases.

Fig 2



The charts below demonstrate the percentage of applications for permission to apply for judicial review by nature of review in the years 2000, 2003 and 2005.

Fig 3

**Applications for permission to apply for judicial review, 2000
by nature of review**

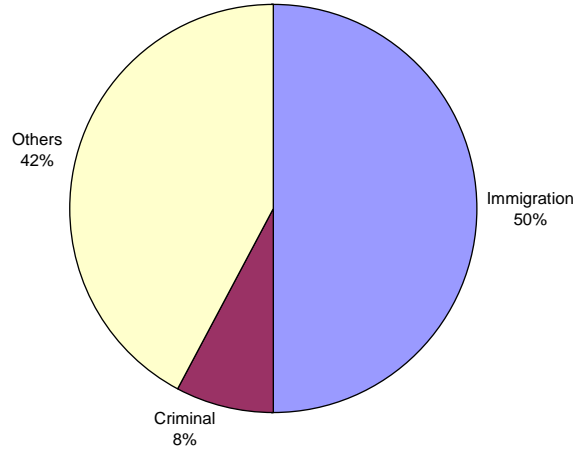


Fig 4

**Applications for permission to apply for judicial review, 2003
by nature of review**

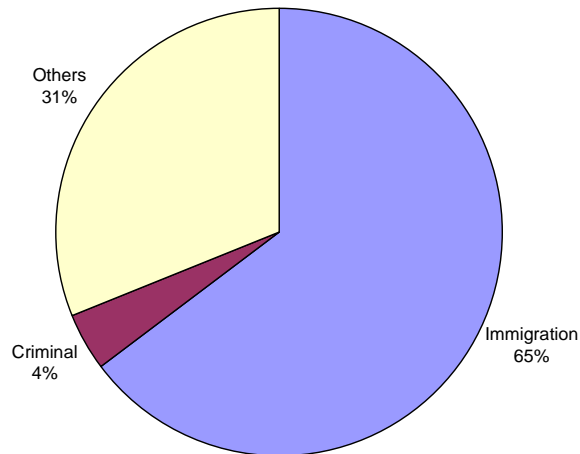
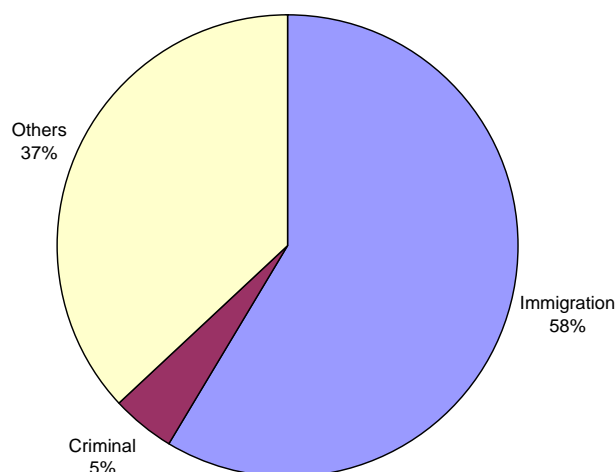


Fig 5

Applications for permission to apply for judicial review, 2005
by nature of review



As can be seen from Figures 3-5, the percentage of applications for permission relating to immigration matters is consistently 50% or higher.

The statistics contained in Appendix 1 also demonstrate that applications for permission to apply for judicial review in immigration cases have a disproportionately high failure rate compared to those in other designations.⁹⁰ The success rate at substantive hearing for immigration cases is much closer to that of other types of case, suggesting that the permission stage successfully filters out the weakest cases.

In evidence to the Home Affairs Select Committee, Mr Justice Collins confirmed that the number of immigration and asylum cases was a burden upon the Administrative Court, indicating that:

The problem from our point of view is largely numbers. It means that a High Court judge is really dealing with matters which perhaps are not entirely necessarily suitable for the High Court judge to be used for. I appreciate the importance of the end result. These are largely asylum cases. It puts a very great burden upon the Administrative Court. Let me give you some figures. In 2005 we had a total of about 10,500 cases coming in to the Administrative Court and immigration accounted for 7,500 of those. That is not only reconsiderations, that is judicial reviews also. The reconsideration opt-ins amounted to something over 3,000 of those numbers. So you can see the pressure that is upon us as a result of

⁹⁰ For example in 2005, 1,500 applications for permission were refused and 242 were granted in immigration cases (a 'success' rate of approximately 14%). This compared to the grant of permission of 412 cases designated 'other', with the refusal of 733 application (a 'success' rate of approximately 36%)

immigration. The bulk of the other judicial reviews are cases brought when there are final attempts to remove and this is another real problem because there is frequently, of course, a delay between the ending of the appeal process and the attempt to remove the individual who has lost his appeal. That sometimes means the circumstances have changed and it leads to a suggestion they have a fresh claim. That is rejected by the Home Office and we get judicial review of the refusal to treat it as a fresh claim. Frequently, too, Article 8 of the European Convention on Human Rights is raised, for example, if someone has got married here and had a child and then says that because of the lapse of time they have put down roots here and they have got a family life here. I am sure some of you will have had constituents who have raised this [...]

It is a real problem. That accounts for quite a lot of the judicial reviews that come before us. There is also the question of removal. Sometimes there is not a lot of advance notice of removal and so we get last minute applications usually to the duty judge first and then if the duty judge feels it necessary, (as frequently he will because he will not have the full information) to say, "Do not remove him tomorrow. Let him have a chance to make an application," the matter will be considered and dealt with then. We are very anxious to see whether we can set up some system which gives a fair opportunity to those who feel that they have a real claim that they should not, despite having lost their appeals, be removed when the decision is made to remove but that we should not enable them—because the fact is, the majority are not meritorious—to delay the removal for no good reason. This is a real problem. I think it is important that we should try to set up some procedural system which ensures that we can deal with these cases very speedily.⁹¹

b. *A downward trend in appeals from the Administrative Court*

The trend is not entirely upwards however. In a recent article, Lord Justice Brooke, the Vice-President of the Court of Appeal, indicated that the number of cases reaching the Court of Appeal from the Administrative Court was shrinking, noting that:

From a Court of Appeal perspective, it has been striking to see how the number of substantive appeals from the Administrative Court has been going down year after year. There were 183 in 2000 and a straight line reduction to 130 four years later.⁹²

It is difficult to know whether this decline in numbers is due to the improved quality of decisions from the Administrative Court, the cost of litigating or funding arrangements for claimants (such as legal aid).

c. *The potential impact of the Draft Tribunals, Courts and Enforcement Bill*

Lord Justice Brooke has also stated that there is also growing trend of creating statutory rights of appeal to supplement or replace judicial review,⁹³ a trend that he believed would accelerate once the unified Tribunal Service was up and running.

⁹¹ Home Affairs Committee, *Immigration Control*, 23 July 2006, HC775-III, 2005-6, Q343-343

⁹² Lord Justice Brooke, "Access to Justice and Judicial Review", [2006] JR 1

⁹³ Ibid

This argument is supported by the introduction of the *Draft Tribunals, Courts and Enforcement Bill* by the Department for Constitutional Affairs in July 2006. The Draft Bill provides, *inter alia*, for the transfer of applications for judicial review from the High Court to a new “Upper Tribunal”, as well as granting the “Upper Tribunal” jurisdiction to make certain orders (such as mandatory orders, prohibiting orders, quashing orders, declarations or injunctions).

The explanatory note to the Draft Bill explains that the introduction of these powers would:

[E]nable the user to have the benefit of the specialist expertise of the Upper Tribunal in cases akin to those which the Upper Tribunal routinely deals with in the exercise of its statutory appellate jurisdiction.⁹⁴

The detail of this proposal can be found at clauses 12-16 to the Bill. In particular, clause 16 provides for the transfer of judicial review applications from the High Court (Clause 16(1)(2) provides for the mandatory transfer of certain categories of application, provided that certain conditions are met). The explanatory notes to the Bill recognise that:

Clause 16 amends the Supreme Court Act 1981 and the Judicature (Northern Ireland) Act 1978 to give effect to clauses 12 to 15. As a result, certain applications for judicial review **will have to be** transferred to the Upper Tribunal. [Emphasis Added]⁹⁵

The practical limitation to this power is that for a case to be transferred, it will have to be within a specified “class of case”, designated by a practice direction made by or on behalf of the Lord Chief Justice, with the concurrence of the Lord Chancellor.⁹⁶

⁹⁴ Department for Constitutional Affairs, *Explanatory note to the Draft Tribunals, Courts and Enforcement Bill*, Cm 6885, para 84

⁹⁵ Department for Constitutional Affairs, *Explanatory note to the Draft Tribunals, Courts and Enforcement Bill*, Cm 6885, para 91

⁹⁶ see Cl 5 to the Bill and para 85 to the explanatory notes

III Concern about judicial ‘activism’ and accountability

An issue that has frequently emerged over the past two decades has been the extent to which the ‘unaccountable’ judiciary uses its power to ‘political’ ends. Typically, academic consideration of judicial ‘activism’ addresses the judicial role in the law making process. However, in this paper, the topic is only addressed insofar as it has been raised in a purely political context. As late as 1989, Professor Michael Zander, considering whether the role of the judiciary should be active or passive, wrote that “the traditional and dominant posture of the English judiciary on this question has been that the judge’s role is broadly passive.”⁹⁷

While rarely accused of political partisanship, judges have frequently been criticised (particularly by Home Secretaries), often for their ‘liberal’ views or judgments.⁹⁸ Professor Robert Stevens has claimed that:

During the 1960s [...] the judges, of their own volition, began rebuilding administrative law which had been largely demolished by the Liberal Law Lords just before the First World War. Naturally, they explained that, in fact, judicial review was merely a restating of what had been good nineteenth-century law. It was, however, to change the face of administrative decision making in Britain. Suddenly, ministers and their civil servants had to live with *The Judge over your Shoulder*, as the resulting Civil Service pamphlet was called.⁹⁹

During his time as Home Secretary, David Blunkett MP, made some vociferous criticisms of the judiciary, stating in particular that:

This relationship [between Parliament and the judiciary] has changed beyond all recognition over the past 30 years, thanks to the use of judicial review - the process by which an individual can ask the court to overturn effect or implementation of a law on their individual circumstance. Judges now routinely use judicial review to rewrite the effects of a law that Parliament has passed.¹⁰⁰

His has not been the only voice and indeed the previous administration made similar complaints in 1996 when Mr Justice Collins struck down an attempt by Michael Howard MP and Peter Lilley MP to block measures to remove welfare support from rejected asylum seekers in the case of *R v Hammersmith and Fulham Borough Council ex p M and others*.¹⁰¹

More recently, Michael Howard MP wrote in the Daily Telegraph that:

⁹⁷ Michael Zander, *The Law Making Process*, 3rd Edition, Butterworths, 1993

⁹⁸ See for example “Reid attacks judges who hamper ‘life and death’ terrorism battle” *Independent*, 10 August 2006 and in contrast Lord Lester of Herne Hill QC’s article “The Prime Minister is undermining public confidence in the rule of law and the judiciary”, *The Guardian*, 16 May 2006

⁹⁹ Professor Robert Stevens, *Reform in haste and repent at leisure*, Constitutional Innovation (A special issue of Legal Studies), Butterworths, 2004, pg 13

¹⁰⁰ David Blunkett MP, “I won’t give in to the judges”, *Evening Standard* 12 May 2003

¹⁰¹ See “Judges Swipe at Asylum Law”, *The Guardian*, 9 October 1996 and “Judges Dismayed Tory Ministers – Asylum ruling”, *The Times* 8 September 2001

Given that judicial activism seems to have reached unprecedented levels in thwarting the wishes of Parliament, it is time, I believe, to go back to first principles. The British constitution, largely unwritten, is based on the separation of powers. Ever since the Glorious Revolution established its supremacy, Parliament has made the law and the judiciary has interpreted it [...] A decade ago, the former Lord Chancellor, Derry Irvine, urged the judiciary to show restraint in deference to the sovereignty of Parliament when exercising its powers of judicial review. The need for such restraint is even greater today.¹⁰²

John Denham MP, the current Chairman of the Home Affairs Select Committee has also been critical claiming that “the current culture is dismissive of the elected Parliament and the difficult decisions we have made about public policy”.¹⁰³

In contrast, the *Economist* has opined that:

The expansion of the modern state has seemed to make administrative review inevitable. The reach of government, for good or ill, now extends into every nook and cranny of life. As a result, individuals, groups and businesses all have more reason than ever before to challenge the legality of government decisions or the interpretation of laws. Such challenges naturally end up before the courts.¹⁰⁴

Interestingly, while most commentators accept that judicial decisions have a substantial impact on public policy, assessing the judicial bent seems an entirely subjective exercise. The views of previous Home Secretaries of a ‘liberal judiciary’ can be contrasted with those expressed by Professor John Griffiths, who has stated that:

My thesis is that judges in the United Kingdom cannot be politically neutral, because they are placed in positions where they are required to make political choices which are sometimes presented to them, and often presented by them, as determination of where the public interest lies; that their interpretation of what is in the public interest and therefore politically desirable is determined by the kind of people they are and the positions they hold in society; that this position is part of the established authority and so is necessarily conservative and illiberal.¹⁰⁵

It has also been argued that while judges are not accountable within the confines of the electoral system, they are accountable in other ways. In particular, the judgments of the court set out the reasoning and logic by which a conclusion has been reached. This has

¹⁰² Michael Howard MP, “Judges must bow to the will of Parliament”, *Daily Telegraph* 10 August 2005

¹⁰³ John Denham MP, “This is a clash between the courts and elected MPs”, *Independent*, 30 June 2006 and see also “Worlds apart: Politicians, the judiciary and the threat of terrorism” *The Times*, 30 June 2006 and a counter argument in the *Guardian* that: “In the US, and in different ways in the UK, politicians have been cavalier in insisting that terrorism justifies departure from due process. We should be grateful that judges have been willing to ask them to think again”, “Terror and the law, fine judgments”, *The Guardian*, 30 June 2006

¹⁰⁴ “The Gavel and the robe”, *The Economist*, 7 August 1999

¹⁰⁵ J.A.G Griffiths, *The Politics of the Judiciary*, 3rd edition, London, 1985, pg 225. A more recent example of the subjective approach to judicial decision making can be seen following the decision of Mr Justice Ouseley to deport a suspected terrorist suspect to Algeria, which was described by human rights groups as “an affront to justice and wrong”, “Row as judges back Blair in key terror case”, *The Guardian*, 25 August 2006

been described as a “very public form of explanation, open to consideration and dispute.”¹⁰⁶

Other methods of judicial accountability that have been identified include:

- Publication of an annual report by the court;
- Rights of appeal to higher courts;
- Academic commentary on particular judgments and the conduct of courts generally;
- Scrutiny of the judicial appointments process.¹⁰⁷

One restraint on the UK courts is that they do not have the power to strike down statutes. Under the *Human Rights Act*, even if the court makes a declaration of incompatibility, it is then up to Parliament to decide what to do next: whether to amend the legislation, or press ahead with it regardless of the incompatibility. In contrast, many constitutional courts in other jurisdictions have the power to nullify laws as unconstitutional, a power currently lacked by the Judicial Committee of the House of Lords and which the Government specifically did not grant the Supreme Court under the Constitutional Reform Act 2005.¹⁰⁸

Complaints about “judicial activism” occur in most common law jurisdictions (in comparison to the civil law jurisdictions, such as France, where the judiciary is often organised along a bureaucratic civil service model, with career judges). The issue was considered recently by the Hon Judge Michael Kirby AC CMG (a Justice of the High Court of Australia). He identified that in Australia, following a closely divided decision of the High Court on ‘native title’ in favour of Aboriginal claimants¹⁰⁹, the majority judges were accused of “activism”. Whilst in America, the majority decision of the US Supreme Court in *Bush v Gore* was denounced by its critics as “judicial activism”, as was the more recent decision in *Lawrence v Texas*¹¹⁰ declaring that State sodomy offences were unconstitutional.^{111 112}

In particular, Judge Kirby argued that:

As the United Kingdom moves towards the creation of its own new Supreme Court – even if it is one very different from those of the United States and Australia – it is as well to be alert to the controversies that tend to beset such courts. The visibility, mode of appointment, functions and public role of the judges

¹⁰⁶ Richard Hodder-Williams, *Judges and Politics in the Contemporary Age*, Bowerdean, Publishing, 1996, p98

¹⁰⁷ See for example, Andrew Le Sueur, *Developing mechanisms for judicial accountability in the UK*, Constitutional Innovation (A special issue of Legal Studies), Butterworths, 2004

¹⁰⁸ See DCA Consultation Paper CP11/03, para 23 and House of Commons Library, *The Constitutional Reform Bill [HL]: A supreme court for the United Kingdom and judicial appointments*, 13 January 2005, Research Paper 05/06

¹⁰⁹ *Wik Peoples v State of Queensland* (1996) 187 CLR 1

¹¹⁰ 539 U.S 558 (2003)

¹¹¹ The Hamlyn Lectures on Judicial Activism, University of Exeter, 19-20 November 2003 and University of Cardiff, 24 November 2003 available at: http://www.hcourt.gov.au/publications_05.html#MichaelKirby

¹¹² See also Antonin Scalia, “Mullahs of the West: Judges as Authoritative Expositors of the Natural Law, The Sir John Young Oration”, Trinity College (University of Melbourne), 2005

of such courts tend to make them and their institutions a lightning rod for those who resent their power and who challenge their decisions. Particularly where those decisions affirm the rights of the weak against the powerful. To defend our judiciary and legal system as they truly are, citizens must know more about them. They must learn that, contrary to myth, judges do more than simply apply law. They have a role in making it and always have.¹¹³

A. Attempts to exclude judicial review

There have been a number of attempts by the executive to introduce legislation to exclude or oust the possibility of judicial review. Generally these exclusions are construed by the court in a restrictive fashion, so as not to deprive the courts of their ability to exercise a supervisory jurisdiction.¹¹⁴ In the case of *Anisminic Ltd. v. Foreign Compensation Commission*,¹¹⁵ the court considered certain issues pursuant to Orders made under the *Foreign Compensation Act 1950*. Section 4(4) of the 1950 Act provided that the determination by the Foreign Compensation Commission of any application "shall not be called into question in any court of law".

In his judgment, Lord Reid observed that:

Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law [...]

Another example of the willingness of the courts to avoid statutory formulations is the case of *R v Secretary of State for the Home Department, ex p Fayed*¹¹⁶. In that instance, the statutory provision, contained within the *British Nationality Act* provided that a decision of the Home Secretary "shall not be subject to appeal to, or review in any court". Further consideration of this case is provided in the section of judicial deference below.

More recently, the relationship between the judiciary and the executive seemed particularly strained by the (now defunct) proposals contained within the *Asylum and Immigration (Treatment of Claimants etc) Bill* which sought to restrict the rights of the courts by ousting their powers of judicial review.^{117 118}

¹¹³ University of Exeter, *The Hamlyn Lectures on Judicial Activism*, 19 November 2003

¹¹⁴ See for example Supperstone and Knapman, *Administrative Court Practice*, Butterworths LexisNexis, 2002, para 2.7

¹¹⁵ [1969] 2 A.C. 147

¹¹⁶ [1998] 1 WLR 736

¹¹⁷ It should be noted that the main clause under discussion (the proposed "ouster clause") had a number of different designations as the Bill passed through the House, and is referred to below both as clause 11 and clause 14

¹¹⁸ Professor Andrew Le Sueur argued that the Bill "provoke[d] something of a constitutional crisis" [2004] P.L 225

During the course of debate, the then Home Secretary, David Blunkett MP, was overtly critical of the way that lawyers had used the judicial review procedure in asylum cases, stating that:

[H]ad people been more modest in their operation of the law and their approach to their job, they would not have cooked the goose that laid the golden egg. I am talking about lawyers who simply abused the judicial review system by dragging out cases for months and, in some instances, years. That is what happens when those who preach liberalism lead us down the wrong path so that those who try to protect human rights and individual interests find that the system has been so abused that we have to remove the golden thread. The legal aid budget has doubled to £174 million. That is public money that has not gone towards asylum seekers or people in the community but into lawyers' pockets. That is a disgrace that is coming to an end.¹¹⁹

Nonetheless, the proposed “ouster clause” met sustained resistance. JUSTICE described the clause in the following way:

The ouster of judicial review. Clause 14 would abolish of all existing rights of appeal, including the right of judicial review and statutory review by the higher courts. Clause 14 explicitly forbids any challenge on the grounds of lack of jurisdiction, irregularity, error of law, breach of natural justice or any other matter. The only exception to this is for challenges against certificates which disallow an in-country right of appeal (i.e. safe country and unfounded claim certificates) or if a person is alleging that a member of the Tribunal has acted in bad faith, for which ‘significant evidence’ of dishonesty, corruption or bias has to be adduced. Clause 14 also seeks to prevent judicial scrutiny of the Home Secretary’s removal decisions.¹²⁰

The response to the proposal by the judiciary, the legal profession and other interested Non-Governmental Organisations to the clause was overwhelming. In submissions to the Constitutional Affairs Committee, Nicholas Blake QC, on behalf of the Bar Council, stated that the Bill contained “the most draconian ouster clause ever seen in Parliamentary legislative practice”, whilst in a written submission to the Committee prior to the publication of the Bill, Mr Justice Collins indicated that there would be difficulties in prohibiting the supervisory jurisdiction of judicial review because of the House of Lords decision in the case of *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 A.C. 147.¹²¹

The Constitutional Affairs Committee concluded that:

We are deeply concerned that the provisions of the new ouster clause are intended to prevent the courts from reviewing any deportation or removal

¹¹⁹ HC Deb 1 March 2004, c719

¹²⁰ JUSTICE briefing paper on the *Asylum and Immigration (Treatment of Claimants) Bill*, Clause 14, for the House of Lords Second Reading Debate, March 2004

¹²¹ Constitutional Affairs Committee: *Asylum and Immigration Appeals*, 2 March 2004, HC 211-II 2003-4, “The proposals cannot achieve what the government wants unless judicial review of adjudicators’ decisions is prohibited. There are difficulties in achieving that because of the decision of the House of Lords in *Anisminic*.”

decision; this may include cases involving serious error, for example where the wrong person has been identified for removal. [...] An ouster clause as extensive as the one suggested in the Bill is without precedent. As a matter of constitutional principle some form of higher judicial oversight of lower Tribunals and executive decisions should be retained. This is particularly true when life and liberty may be at stake.^{122 123}

The Joint Committee on Human Rights also considered the proposals set out in the Bill and observed that:

Ousting the review jurisdiction of the High Court over the executive is a direct challenge to a central element of the rule of law, which includes a principle that people should have access to the ordinary courts to test the legality of decisions of inferior tribunals. Clause 11 of the Bill seeks to make the immigration and asylum process operate outside normal principles of administrative law and legal accountability. This sets a dangerous precedent: governments may be encouraged to take a similar approach to other areas of public administration¹²⁴

The clause was eventually dropped by the Government in March 2004, a concession which was announced at the Second Reading debate in the House of Lords. At the time, there was press speculation that the Lord Chancellor, Lord Falconer, had dropped the clause following sustained opposition from his predecessor, Lord Irvine of Lairg.¹²⁵

Lord Donaldson told the Guardian that:

Derry Irvine put his foot down implicitly and they abandoned that. [...] Had they successfully pursued the ouster clause then we certainly should have been in a very interesting constitutional crisis. If they really did that - and people like James Mackay (the former Tory lord chancellor) thought as a matter of wording it was wholly effective and stopped up every loophole - we would simply have to say: 'We (the judges) are an independent estate of the realm and it's not open to the legislature to put us out of business. And so we shall simply ignore your ouster clause'.¹²⁶

Lord Falconer spoke to the Government amendments in Committee in May 2004, indicating that:

¹²² Constitutional Affairs Committee: *Asylum and Immigration Appeals*, 2 March 2004, HC 211-1 2003-4, paras 69-70

¹²³ These conclusions were strongly supported by the then Lord Chief Justice, Lord Woolf in his Squire Centenary Lecture entitled *The Rule of Law and a Change in the Constitution*, Cambridge University, 3 March 2004, where he indicated that the Government's actions "are totally inconsistent and I urge the Government to think again as the cross-party Constitutional Affairs Committee recommends. There is still time. The implementation of the clause would be a blot on the reputation of the Government and undermine its attempts to be a champion of the rule of law overseas. I trust the clause will have short-shrift in the Lords, but, even then, the attempt to include it in legislation could result in a loss of confidence in the commitment of the Government to the rule of law."

¹²⁴ Joint Committee on Human Rights, *Asylum and Immigration (Treatment of Claimants) Bill*, 2 February 2004, HC 304 2003-4, para 57

¹²⁵ See for example "Labour U-turn on asylum Bill", *Daily Telegraph*, 16 March 2004, , which had suggested that: "Lord Falconer's concession, at the start of the Second Reading debate, proved sufficient to persuade Lord Irvine, his immediate predecessor, not to make his first speech since being sacked by Tony Blair last June. Lord Irvine had been intending to speak against the clause yesterday [...]"

¹²⁶ "Judges reveal fears over curbs on power", *The Guardian*, 26 April 2005

Clause 14 is the central part of the Bill and it has provoked considerable interest and discussion. Clause 14 will create a unified appellate structure for asylum and immigration appeals but, as I said at Second Reading, we need to ensure that we have proper and appropriate judicial oversight of the system so that it is independent, thorough and fair. I agreed at Second Reading that we did not have that correct just yet, but I made it clear that any new system of judicial oversight must also ensure an increase in speed and a reduction in abuse.

For this reason I have brought forward these amendments to replace the judicial review ouster with a new system allowing oversight by the Administrative Court and Court of Appeal.¹²⁷

B. 'Politicisation' of the judiciary

Another issue of concern has been the alleged 'politicisation' of the judiciary. When the Department of Constitutional Affairs issued a consultation paper in July 2003 proposing to establish a Supreme Court for the United Kingdom, it appeared to imply that some commentators believed that the judiciary was in danger of being 'politicised'. The paper commented that:

The considerable growth in judicial review in recent years has inevitably brought the judges more into the political eye. It is essential that our systems do all that they can to minimise the danger that judges' decisions could be perceived to be politically motivated. The Human Rights Act 1998, itself the product of a changing climate of opinion, has made people more sensitive to the issues [...]¹²⁸

'Politicisation' is a complex concept. Different commentators place different emphases on the term. Some have conflated politicisation with judicial activism and use of the *Human Rights Act*.¹²⁹ Some academics have taken a more nuanced view, looking at the judicial appointments system (particularly in countries with confirmation procedures), how representative the judiciary is of society and how it can become more accountable.

In the course of such an argument, Professor Kate Malleson has claimed that:

The emergence of the judiciary as the third branch of government, checking and scrutinising the executive, has removed the gap between the functions of the senior judiciary and elected politicians. Judges are not politicians in wigs but they are increasingly required to reach decisions in relation to politically controversial issues which cannot be resolved without reference to policy questions.¹³⁰

¹²⁷ HL Deb 4 May 2004 c996

¹²⁸ Department for Constitutional Affairs, *Constitutional Reform: A Supreme Court for the United Kingdom*; CP 11/03 July 2003

¹²⁹ See for example Melanie Phillips, "Goodbye lords, hello dictatorship of the judges", *Sunday Times*, 14 November 1999

¹³⁰ Professor K.E Malleson, *Rethinking the Merit Principle in Judicial Selection* (2006) 33 *Journal of Law and Society* 126

It seems universally accepted that since the 1960s, the judiciary has come more into the public eye and at the same time, questions of judicial accountability have come increasingly to the fore.

Nevertheless, the idea of holding confirmation hearings (for appointments to the highest court) of the type that occur in the United States has never really taken hold in the United Kingdom. The suggestion was discounted by the Department for Constitutional Affairs consultation paper, *Constitutional Reform: A Supreme Court for the United Kingdom*. When the matter was later considered by the Constitutional Affairs Committee, it concluded that it had “heard no convincing evidence to indicate that confirmation hearings would improve the process of appointing senior judges.”¹³¹

C. Continuing controversy

The Administrative Court has itself recognised that its judgments may constrain the actions of the elected Government and impose certain costs. In *R v Secretary of State for Trade and Industry, ex parte Greenpeace Ltd*¹³² Mr Justice Laws stated that:

The judicial review court, being primarily concerned with the maintenance of the rule of law by the imposition of objective legal standards upon the conduct of public bodies, has to adopt a flexible but principled approach to its own jurisdiction. Its decisions will constrain the actions of elected government, sometimes bringing potential uncertainty and added cost to good administration. And from time to time its judgments may impose heavy burdens on third parties. This is a price which often has to be paid for the rule of law to be vindicated.

Nonetheless, judicial reviews (and human rights challenges) are probably the most controversial decisions made by the courts. Recent cases that have caused controversy include:

- *R (on the application of Begum) v Head teacher and Governors of Denbig High School*¹³³ in which the House of Lords considered whether a school had excluded a pupil, unjustifiably limited her right under article 9 of the *European Convention on Human Rights* to manifest her religion or beliefs and violated her right not to be denied education under article 2 of the First Protocol to the Convention;
- *A (FC) and others v Secretary of State for the Home Department*¹³⁴ in which the House of Lords considered whether the Special Immigration Appeals Commission when hearing an appeal under section 25 of the *Anti-terrorism, Crime and Security Act 2001* by a person certified and detained under sections 21 and 23 of that Act, was allowed to receive evidence which might have been

¹³¹ Constitutional Affairs Committee, *Judicial Appointments and a Supreme Court (final court of appeal)*, 10 February 2004, HC48-I 2003-4, para 87

¹³² [1998] Env LR 415

¹³³ [2006] UKHL 15

¹³⁴ [2005] UKHL 71

procured by torture inflicted by officials of a foreign state without the complicity of the British authorities;

- *Jackson and others v Her Majesty's Attorney General*¹³⁵ in which the House of Lords considered the legal validity of the *Hunting Act 2004*, on the basis of a constitutional challenge to the *Parliament Act 1949*.

More recently, the Home Secretary and the Prime Minister have been critical of the way that the judiciary has interpreted the law in relation to a decision in respect of certain "Afgan hijackers". The Prime Minister is quoted as having said:

We can't have a situation in which people who hijack a plane, we're not able to deport back to their country. It's not an abuse of justice for us to order their deportation, it's an abuse of common sense, frankly, to be in a position where we can't do this.¹³⁶

In response, following an appeal against the original judgment of Mr Justice Sullivan, the Court of Appeal appeared critical of the Government indicating that:

The history of this case through the criminal courts, the immigration appellate authority and back into the civil courts has attracted a degree of opprobrium for carrying out judicial functions. Judges and adjudicators have to apply the law as they find it, and not as they might wish it to be.¹³⁷

D. The Department for Constitutional Affairs Review of the *Human Rights Act*

The Government has acknowledged that the public perception of the *Human Rights Act* in particular has been dogged by urban myths and misapprehensions. In July 2006, the Department for Constitutional Affairs produced a paper entitled *Review of the Implementation of the Human Rights Act*. The paper stated that:

The Human Rights Act has not significantly altered the constitutional balance between Parliament, the Executive and the Judiciary [...]

- The Human Rights Act has been widely misunderstood by the public, and has sometimes been misapplied in a number of settings.
- Deficiencies in training and guidance have led to an imbalance whereby too much attention has been paid to individual rights at the expense of the interests of the wider community.
- This process has been fuelled by a number of damaging myths about human rights which have taken root in the popular imagination.¹³⁸

¹³⁵ [2005] UKHL 56

¹³⁶ "Victory for Afgan Hijackers fighting to remain in Britain" *The Times*, 5 August 2006

¹³⁷ *S and others v Secretary of State for the Home Departments* [2006] EWCA Civ 1157

¹³⁸ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, Executive Summary

The paper goes on to add, however, that:

There is no settled consensus as to the impact of the Human Rights Act 1998 (“HRA”) on decisions of the courts of England and Wales in the period of five years and eight months since it came into force.¹³⁹ There is no doubt that a substantial body of case law has been generated. No overall statistics are available but the comprehensive Casetrack database of appellate cases shows 552 cases under the “human rights” classification¹⁴⁰ over this period, being approximately 2% of the total number of cases determined by these courts. The highest density of HRA cases is in the House of Lords, concentrating as it does on new issues of principle. The HRA has been substantively considered in about one-third of the 354 cases which the House decided in this period and could be said to have substantially affected the result in about one-tenth of those cases.¹⁴¹

E. Judicial deference

The courts have in fact acknowledged their obligation to defer to democratic institutions. Michael Fordham has identified a number of situations in which, when considering whether a public body has exceeded its powers, the courts will show restraint.¹⁴²

The judiciary has made a number of relevant observations. In an annual lecture to the Commercial Bar Association (COMBAR), Lord Hoffman recognised that:

However slow, obtuse and maddening the democratic process may be, there is a legitimacy about the decisions of elected institutions to which judges, however enlightened, can never lay claim.¹⁴³

Lord Hoffman repeated this view in the case of *Secretary of State for the Home Department v Rehman*¹⁴⁴ in which he stated that:

Such decisions [which might have serious potential results for the community] require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons who the people have elected and whom they can remove.

In the case of *R v Lambert*¹⁴⁵ the then Lord Chief Justice, Lord Woolf commented that:

¹³⁹ For general studies of the impact of the HRA see F Klug and K Starmer, “Standing Back from the Human Rights Act: how effective is it five years on?” [2005] PL 716; Lord Steyn 2000-2005: “Laying the Foundations of Human Rights Law in the United Kingdom” [2005] EHRLR 349. The fullest analysis of the case law is in M Amos, *Human Rights Law* (Hart, 2006).

¹⁴⁰ A case is given a “human rights” classification if it involves a substantial discussion of issues under the HRA.

¹⁴¹ Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, July 2006, pg 10

¹⁴² See Michael Fordham, *Judicial Review Handbook*, Fourth Edition, 2004, Hart Publishing, paras 13.1-13.77

¹⁴³ Lord Hoffman, 2001 Annual Combar Lecture, 23 October 2001

¹⁴⁴ [2001] UKHL 47

¹⁴⁵ [2002] QB 1112

[T]he legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention.

Nonetheless, it has been argued that under the *Human Rights Act* “the courts are charged by Parliament with delineating the boundaries of a rights based democracy” and that “the courts have a more central role in our governance than we have traditionally assumed”.¹⁴⁶ Lord Hoffman, in the case of *R (on the application of the Pro Life Alliance) v BBC*¹⁴⁷ observed that:

[T]he word ‘deference’ is now very popular in describing the relationship between the judiciary and other branches of government, I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening.

Lord Justice Dyson has commented that “Traditionally under the shackles of the *Wednesbury* principle, our courts have been very cautious in striking down administrative decisions. But the HRA has demanded a different approach. I think that the *Belmarsh* decision is one of great importance. It provides a strong steer against an unduly deferential approach by the courts”.¹⁴⁸

The Judge Over Your Shoulder posed the question “are any kinds of decision immune from judicial review?” The Treasury Solicitor took the view that:

If the decision or action falls within the field of “public law” [...] then in principle the Court is entitled to review it – “in principle”, because there are still a handful of types of decision which the Court is reluctant to concern itself – the making of treaties, and the award of honours are two examples. We have moreover already seen ([from] the *Al Fayed* case [...]) that even where statute has attempted to place a category of decision beyond the reach of effective review, the Court still found a means of reviewing it.¹⁴⁹

When asked in a Parliamentary Question what acts of the executive, acting under prerogative power, could not be challenged in the courts, the Lord Chancellor replied that:

¹⁴⁶ Richard Clayton QC, *Principles for Judicial Deference*, [2006] JR 109

¹⁴⁷ [2003] UKHL 23

¹⁴⁸ Lord Justice Dyson, *Some Thoughts on Judicial Deference*, [2006] JR 103, referring to the case of *A v Secretary of State for the Home Department* [2004] UKHL 56

¹⁴⁹ Treasury Solicitor, *The Judge Over Your Shoulder, A Guide to Judicial Review for UK Government Administrators*, 4th Edition, 2006, para 2.67, in the case of *R v Secretary of State for the Home Department, ex parte Al Fayed* [1998] 1 WLR 763 CA the court determined that the Secretary of State was obliged to notify the claimant of matters causing him concern when refusing him a certificate of naturalisation, despite the fact that s 44(2) of the British Nationality Act provided that the Secretary of State was not “required to assign any reason for the grant or refusal of any application” and s 44(3) provided that decisions should not be subject to appeal or review in any court

The courts have taken the view that whether the exercise of a power under authority of the prerogative is susceptible to judicial review depends upon the subject matter of that power. It is therefore a question that is determined on a case-by-case basis. The courts have considered matters that involve questions of high policy, such as the power to enter into treaties (or to deploy the Armed Forces), as not being amenable to the judicial process. They have, however, seen matters affecting the private rights and legitimate expectations of individuals, such as the decision to refuse to issue a passport or the decision to issue a warrant to intercept telephones, as being susceptible to judicial review.¹⁵⁰

¹⁵⁰ HL Deb, 13 June 2006, c13WA

Appendix 1: The performance of the Administrative Court – Judicial Review Cases 2000-2005

All Figures taken from Judicial Statistics Annual Reports, published by the Department for Constitutional Affairs.¹⁵¹

Table 1

Applications for permission to apply for judicial review received

	Immigration		Criminal		Others		Total
2000	2,120	50%	336	8%	1,791	42%	4,248
2001	2,421	51%	330	7%	1,981	42%	4,733
2002	3,286	61%	249	5%	1,842	34%	5,378
2003	3,848	65%	245	4%	1,856	31%	5,950
2004	2,221	53%	301	7%	1,685	40%	4,208
2005	3,149	59%	251	5%	1,981	37%	5,382

Source: Table 1.13, Judicial Statistics, various years

Table 2

Applications for permission to apply for judicial review granted/refused

	Immigration		Criminal		Others	
	Granted	Refused	Granted	Refused	Granted	Refused
2000	641	1,179	148	163	675	597
2001	507	2,172	127	288	766	1,107
2002	476	2,961	90	252	558	993
2003	829	2,575	86	194	525	1,023
2004	469	1,428	77	279	490	1,029
2005	242	1,500	90	163	412	733

Source: Table 1.13, Judicial Statistics, various years

¹⁵¹ Available at: <http://www.dca.gov.uk/dept/depstrat.htm#part4>

Table 3

	Applications for judicial review disposed of and results					Total
	Determined by the Court					
	Single Judge		Divisional Court		Withdrawn	
Allowed	Dismissed	Allowed	Dismissed			
<i>2000</i>						
Immigration	409	338	1	1	0	749
Criminal	0	0	113	64	15	192
Others	254	223	5	6	32	488
Total	663	561	119	71	47	1,429
<i>2001</i>						
Immigration	270	80	0	1	83	434
Criminal	0	233	53	53	11	350
Others	180	153	2	3	203	541
Total	450	466	55	57	297	1,325
<i>2002</i>						
Immigration	32	74	0	2	7	115
Criminal	2	5	27	41	0	75
Others	99	148	3	3	15	268
Total	133	227	30	46	22	458
<i>2003</i>						
Immigration	51	63	0	0	7	121
Criminal	10	3	32	28	0	73
Others	89	112	4	2	11	218
Total	150	178	36	30	18	412
<i>2004</i>						
Immigration	26	40	0	0	2	68
Criminal	5	3	38	16	0	62
Others	87	116	0	3	9	215
Total	118	159	38	19	11	345
<i>2005</i>						
Immigration	25	38	0	0	1	64
Criminal	2	1	27	28	0	58
Others	64	84	0	4	7	159
Total	91	123	27	32	8	281

Source: Table 1.13, Judicial Statistics, various years

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