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Trends and Forecasts

Proportionality and collateral challenge – lessons from the county court

1. In *Mullen v Salford City Council* [2010] HLR 35 Defendants sought to rely on Article 8 to defend a claim for possession. The case involved 5 claims against occupiers who had no security of tenure. 3 of them were introductory tenants and 2 had been granted tenancies pending a decision on their homelessness cases. The case provides a useful starting point to consider some of the issues that are likely to occupy the courts in relation to proportionality and forum.

2. The availability, or not, of an Article 8 defence is the subject of an ongoing difference between the domestic Courts and Strasbourg. The history is too long to trace here but the essential background is that in *LB Harrow v Qazi* [2004] 1 AC 983 the House of Lords held by a 3:2 majority that the domestic framework under which some occupiers did not enjoy protection and others was itself the product of careful legislative choice which exhausted the range of options open to a Defendant who wanted to rely on Article 8. Thus if there was no defence under domestic law there was no defence under Art 8 either. *Qazi*'s claim was ruled inadmissible by the ECtHR but shortly afterwards two cases in Strasbourg *Blecic v Croatia* (2004) 41 EHRR 185 and *Connors v United Kingdom* (2004) 40 EHRR 189 appeared to suggest that the ratio of *Qazi* was wrong and that the domestic scheme ought directly to allow for a proportionality defence.

3. *Kay v LB Lambeth* [2006] 2 AC 465*, (*followed by *Doherty v Birmingham City Council* [2009] AC 367) decided that only a modest change to the rule in *Qazi* was needed. A Defendant without any domestic law right to remain would normally have no defence but there were two options open to them, which have become known as gateway A and B respectively. Gateway A applied where the Defendant argued that domestic legal order did not allow for adequate protection of their Convention rights. In that case the court would have to construe the relevant provision compatibly if it could but would otherwise have to grant a declaration of incompatibility. Gateway B enabled the occupier to mount a public law challenge to the decision to bring proceedings for possession. So stated this is simply the conventional proposition that the decision was amenable to judicial review. But the House of Lords went further in two critical respects.

    a. Firstly they held that the grounds of any such challenge were restricted to domestic public law grounds and did not include a claim that the proceedings were disproportionate under Art 8. However, they appeared to suggest that public law grounds might be wider than were previously thought.

    b. Secondly, they held that a defence claiming public law protection could, unless the statutory scheme provided otherwise, be made in the county court and the Defendant did not have to seek an adjournment in order to apply for judicial review.

4. Both of these propositions cause difficulties and are examined below. In a real sense this entire debate has been caused by the failure of the highest domestic courts to recognise that they made a mistake in *Qazi* in holding that an Art 8 defence was not available and this has led to artificial attempts to try and make domestic principles of judicial review accommodate the demands of proportionality on an *ad hoc* basis. The debate may yet be short circuited when the Supreme Court hands down judgment in *Manchester CC v Pinnock* [2009] EWCA Civ 852. In the meantime the Strasbourg Court has continued to hand down one judgment after another making clear its view that the court ought to consider the proportionality of an eviction, most recently in *Kay* itself, of which more below. Consideration of *Mullen* also helps to show how wide may be the gulf between what the courts say and what they do. In a recent article Thomas Poole has argued that we are witnessing a reconfiguration in the law of judicial review, "intimations of which can be found on the surface of both the cases and the commentary" and that "rights and substantive review, like Cinderella, have escaped subservient positions to take centre stage"[1]. The housing cases tend to show just how far substantive review may still be confined to the surface.

5. The debate also has the odd feature of being confined to Article 8 (and Art 1 Protocol 1). If an occupier is able to rely on some other Convention right then they can argue that the court must directly consider the proportionality of the eviction even though they have no domestic right to remain. So, in *Hall & Ors v Mayor of London* [2010] EWCA Civ 817 protesters forming Democracy Village camped on Parliament Square. The Mayor took swift action to remove them and they had no arguable right to remain. However, they were able to raise a defence based directly on Article 10.

Proportionality

6. In *Doherty* Lord Hope appeared to suggest some relaxation or flexibility in established principles of domestic judicial review. Although spoken in the housing context these comments have a wider significance. At para 55 he said:

   "I think that … it would be unduly formalistic to confine the review strictly to traditional *Wednesbury* grounds. The considerations that can be brought into account are wider. An examination of the question whether the [authority's] decision was reasonable, having regard to the aim which it was pursuing and to the length of time that the [defendant] and his family have resided on the site, would be appropriate. But that requisite scrutiny would not involve the judge substituting his own judgment for that of the local authority. In my opinion the test of reasonableness should be, as I said in [110] of Kay , whether the decision to recover possession was one which no reasonable person would consider justifiable."

7. It was initially thought that the effect of *Kay* precluded a defence based on personal circumstances because that must have been contemplated by the statutory framework as a whole. But in *Liverpool v Doran* [2009] 1 WLR 2365 Toulson LJ explained the effect of Doherty as being that there was no formulaic list of factors that could or could not be taken into account and that the range of factors that an authority may have to take into account can be very wide (see R v Lincolnshire County Council, Ex p Atkinson (1995) 8 Admin LR 529

[1] Thomas Poole: The Reformation of English Administrative Law 2009 CLJ 142.

and R (Casey) v Crawley Borough Council [2006] LGR 239). However, the standard remained a common law one and was not to be approached through the lens of the Convention. Despite this:

"52. Having said that the question whether the council's decision was unreasonable has to be decided by applying public law principles as they have been developed at common law, it is to be remembered that those principles are not frozen. Even before the enactment of the [Human Rights Act 1998], our public law principles were being influenced by Convention ways of thinking. Since its enactment, the process has gathered momentum. It is now a well recognised fact that the Convention is influencing the shape and development of our domestic public law principles, whether one uses the metaphors of embedding, weaving into the fabric, osmosis or alignment: see the opinion of Lord Walker in the Doherty case, at para 109"

8. In *Mullen* the Court of Appeal summarized the effect:

"61. It follows that the House of Lords' decision in Doherty establishes that, whilst conventional judicial review is increasingly informed by principles of fundamental rights, a public law, gateway (b) challenge to a decision by a local authority to seek possession does not permit a proportionality review under art.8(2) of the Convention as contemplated in [39] of Lord Bingham in Kay , quoted in [63] below".

9. These comments suggest that domestic Judicial Review is edging towards, but has not reached, a proportionality standard of review at least in this context. In fact what they describe is far from it. Proportionality requires the court to evaluate the reasons for the interference[2] whereas the statements in *Mullen* and other cases are still framed very firmly in *Wednesbury* terms.

10. The position is even more stark when one considers how the court thought that these principles would actually play out. At para 62 in *Mullen* the court held that it should assume that Parliament has passed laws that are Art 8 compliant [62] and accepted, without any further discussion that the statutory regimes in issue were Art 8 compliant so that only in highly exceptional circumstances will a defence succeed [ibid and para 65].

11. In connection with the introductory tenancy regime:

"Thus for example it would be contemplated that difficult questions of fact as to whether antisocial behaviour had occurred or not would be something that Parliament would contemplate as likely. A local authority would not have to conduct a full inquiry to establish the truth or otherwise of such allegations knowing that those are just the situations in which getting witnesses to attend and give evidence would be difficult. With allegation and counter-allegation the local authority has to take a decision and unless it could be shown that it was arguable that no reasonable authority with the duties it had to perform in relation to managing its social housing could have taken the decision, there should be no

[2] See Lord Cooke in *Daly v Secretary of State* [2001] UKHL 27. This formulation has never been questioned - see Denbigh (below) at para 30. See B Gould, L Lazarus and G Swiney Public Protection, Proportionality and the Search for Balance Ministry of Justice (2007) for an examination of how proportionality is actually applied in practice.

question of adjourning the case until a tenant had brought judicial review proceedings. As Waller L.J. said in McLellan at [97],

"… under the introductory tenancy scheme it is not a requirement that the council should be satisfied that breaches of the tenancy agreement have in fact taken place. The right question under the scheme will be whether in the context of allegation and counter-allegation it was reasonable for the council to take a decision to proceed with termination of the introductory tenancy."" [para 65].

12. For homelessness cases the consequences are not much better:

"67 Where a notice to quit has been served on a non secure tenant occupying accommodation as a homeless person it will take highly exceptional circumstances for there to be a gateway (b) defence. Barber may be an example of such circumstances where it seemed the local authority had been unaware when it served a notice to quit of the mental illness of the occupier and of the risk to his life if he were moved. Anything less than that kind of risk would be unlikely to qualify as so exceptional as to provide an arguable gateway (b) defence in the context of the homeless legislation".

13. This hands a huge procedural and substantive margin of discretion to the authority and it is extremely difficult to see in what sense this is an augmented standard or review or anywhere near it.

14. Despite all of this the Court in Strasbourg seems to have taken the domestic courts at their word. *Kay* was a shortlife occupier whose rights to remain had been brought to an end when Lambeth terminated the arrangement that it had with the intermediate landlord housing association. There were no particularly exceptional features about his personal circumstances. The ECtHR held that there had been a violation of his Art 8 rights because as matters stood at the time "it was not possible to challenge the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances" [74].

15. At para 73 the court said:

"The Court welcomes the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of Article 8. A number of their Lordships in *Doherty* alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional *Wednesbury* grounds (see Lord Hope at paragraph 55; Lord Scott at paragraphs 70 and 84 to 85; and Lord Mance at paragraphs 133 to 135 of the House of Lords judgment). However, notwithstanding these developments, the Court considers that at the time that the applicants' cases were considered by the domestic courts, there was an important distinction between the majority and minority approaches in the House of Lords, as demonstrated by the opinions in ***Kay*** itself. In *McCann*, the Court agreed with the minority approach although it noted that, in the great majority of cases, an order for possession could continue to be made in summary proceedings and that it would be only in very exceptional cases that an applicant would succeed in raising an arguable case which would require a court to examine the issue (see *McCann*, cited above, § 54). **To the extent that, in light of *Doherty*, the gateway (b) test set out by Lord Hope in *Kay* should now be applied in a more flexible manner, allowing for personal circumstances to be relevant to the county court's assessment of the reasonableness of a decision to seek a possession order, the Court emphasises that this development occurred after the disposal of the applicants' proceedings".**

16. This seems to imply that a challenge brought now might well fail. This was said before the decision in *Mullen* but even then there was nothing to justify the confidence expressed by the Court. Despite claims that what was being applied was a looser than *Wednesbury* test the actual reasoning shows that the test was more restrictive as it tended to exclude considerations that would normally be thought to be relevant. The Court seems to have confused the factors that may be taken into account with the test for proportionality.

What if the Supreme Court in *Pinnock* does decide that the County Court may directly assess proportionality?

17. It might now seem to be settled law that it is for the Court to assess proportionality and that it is concerned with the outcome and not the process by which the decision-maker arrived at the decision[3]. This has been repeatedly stated now by a series of decisions at the highest levels. In *R (Nasseri) v Secretary of State for the Home Department* [2010] 1 AC 1, Lord Hoffmann said, citing the Denbigh High School case [2007] 1 AC 100 ,

"Lord Bingham of Cornhill said, in para 29:

"the focus at Strasbourg is not and has never been on whether a challenged decision or action is the product of a defective decision-making process, but on whether, in the case under consideration, the applicant's Convention rights have been violated."

"13 Likewise, I said, in para 68:

"In domestic judicial review, the court is usually concerned with whether the decision-maker reached his decision in the right way rather than whether he got what the court might think to be the right answer. But article 9 is concerned with substance, not procedure. It confers no right to have a decision made in any particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under article 9(2)?"

"14 The other side of the coin is that, when breach of a Convention right is in issue, an impeccable decision-making process by the Secretary of State will be of no avail if she actually gets the answer wrong".

18. This approach is not uncontroversial and it leaves unanswered a number of questions.

19. Firstly, it is not entirely clear what is meant when it is said that the court is concerned with whether the interference was in fact justified? In *Denbigh* itself Lord Bingham insisted that this was not equivalent to merits review and at para 30 said:

"The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action **could very well** be maintained and properly so".

[3] This in itself demonstrates why the attempt to reconcile Art 8 and conventional review in the housing case are doomed to failure. On this analysis they are directed to different aspects of the decision making process.

20. Lord Hoffmann made the same point and held at para 68:

"The fact that the decision-maker is allowed an area of judgment in imposing requirements which may have the effect of restricting the right does not entitle a court to say that a justifiable and proportionate restriction should be struck down because the decision-maker did not approach the question in the structured way in which a judge might have done. Head teachers and governors cannot be expected to make such decisions with textbooks on human rights law at their elbows. The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law".

21. The area of judgment given to the decision-maker obviously varies according to the subject matter. But the fact that it exists at all creates uncomfortable consequences when combined with the notion that the decision-making process is irrelevant. In conventional judicial review the requirement to have regard to relevant considerations can be seen as a feature of the constitutional balance between the executive and the courts. The decision maker is given latitude if, and only if, they exercise their powers within the limits granted to them by statute and one of these limits is the requirement that they guide themselves by reference to relevant considerations only. The outcome approach still gives the latitude but permits a decision to pass as long as it is within the discretionary zone. This is so even though it has not taken account of relevant considerations and even though neither the court nor the decision maker would actually have come to the same decision had those factors been taken into account. Moreover, if the only standard of review is to do with the final decision reached then authorities have no incentive to respect Convention Rights. They might stand a better chance of reaching an unreviewable decision if they do but might equally calculate that they need not bother.

22. Considerations like these have led a number of commentators to criticize the outcome approach[4] and to suggest that some obligation to have proper regard to Convention rights must continue to exist.

23. A recent attempt to reconcile the two approaches is *Westwater v Secretary of State for Justice* [2010] EWHC 2403 Admin. W was serving an 11 year sentence for sex offences and sought telephone contact with his niece. The Defendant was prepared to allow written contact only. The Claimant complained that the Defendant had acted disproportionately because she had not carried out an adequate risk assessment in accordance with her policy. Ryder J directed himself by reference to *Nasseri* and went on to say:

"49 However, it is fundamental to the proportionality of the policy that a decision in an individual case is made on the basis of the assessments described. A decision made otherwise is likely to be arbitrary and lacking in the justification necessary for the interference which, one should recollect, would be both as respects the prisoner and the child whose personal relationship and direct contact with both parents is interrupted".

24. The assessment was defective because it relied solely on the index offence and did not analyse the facts relevant to the Claimant's niece. Ryder J therefore held:

[4] Thomas Poole, loc cit brings together many of the references although he is a powerful advocate of the substantive review approach. For the contrary view see Tom Hickman: The Forbidden Process Element in Judicial Review - available at http://www.adminlaw.org.uk/library/publications.php

"the Defendant was not entitled on the evidence and information before the court to reach the conclusion that he did. His decision was arbitrary and accordingly a disproportionate interference with the Convention rights of the Claimant and for that matter his child".

25. The insistence on due process as an element in the decision not being arbitrary (which is an essential ingredient in any interference not being "in accordance with law") is revealing. It is well established that the Strasbourg cases include procedural obligations and these were referred to in *Denbigh*. But they also require individual consideration of cases and that the decision-maker weigh relevant factors, and there may be no reason why this should not form part of the duty of "respect" for private life. *Kay v UK* can be seen as an example of this. The Court there found a violation because individual circumstances could not be taken into account and not because the outcome actually was disproportionate. That said, *Westwater* can also be explained a as classic application of the *Denbigh* approach. The governor had not conducted a proper risk assessment and since he had not done so he simply did not have the material to justify the interference before the only decision-maker who mattered – the judge.

26. A further issue that this will force on the Courts is how far the court on judicial review should assume the role of primary fact finder. If the question before the court is whether an existing state of affairs is proportionate then it seems unavoidable that the Court may have to apprise itself of the relevant facts to a degree that it will not do now. Lord Scott in *Doherty* suggested that this would be a matter of routine in the County Court but the High Court has so far been less willing to embark on factual enquiries except in cases involving constitutional rights such as in *Tweed*. However, case like *McVey* (below) may show that this is beginning to change.

Collateral challenge

27. In *Mullen* the Court of Appeal accepted that an occupier may raise a public law defence in the County Court unless the statutory scheme precludes this. Regimes for introductory tenants (*Mullen* following *McLellan v Bracknell* [2002] QB 1129) and demoted tenancies (*Pinnock*) are examples of such statutory exclusions and for those cases an occupier must apply for judicial review if they want to challenge the decision to bring proceedings.

28. The councils in *Mullen* challenged the availability of a collateral challenge at all in certain classes of case. To explain it is necessary to consider how we have arrived here. In *Wandsworth v Winder* [1985] AC 461 the Defendant challenged a claim for rent arrears saying that the landlord had never lawfully increased his rent. This was shortly after the founding decision on procedural exclusivity in *O'Reilly v Mackman* [1983] 2 AC 237. The House of Lords allowed the defence to proceed on essentially two grounds; that the claim was being raise by way of defence and that defence asserted that the act of the authority had unlawfully interfered with his right and he was entitled to claim that that act was invalid. His argument therefore amounted to a true defence because if he succeeded then the additional rent would not be owed at all.

29. The councils in *Mullen* [para 47] have founded their argument on the second part of the justification in *Wandsworth*. They say that in a case where a person has no right to remain because they are a trespasser then a challenge to the vires of the decision to evict will still not produce a defence because the occupier will remain a trespasser. They point out that the County Court cannot grant prerogative remedies (s. 38 County Courts Act 1984). For the time being this argument is precluded because of House of Lords authority. In *Kay* and *Doherty* the House of Lords relied on *Winder* to say that a county court defence would be available but without analysing the different senses in which a public law challenge might be available. It is a point that may be addressed by the Supreme Court in *Pinnock* although that is a case where the occupier has an underlying right.

30. In fact in *Mullen* the Court of Appeal went further than *Kay* or *Doherty*. It allowed a gateway B defence not only to the original decision to evict but also to any decision to maintain the proceedings.

31. Allowing a collateral challenge to proceed in circumstances like this raises many questions. In the specific context of possession proceedings what happens if the occupier has no right to remain but it is unreasonable or disproportionate to seek possession? What then is the status of the occupier? The county court cannot make the authority grant a tenancy so they seem to be left in a state of limbo, unable to be removed but with no relationship with the owner.

32. A further problem is common to all collateral challenges and is the opposite of the *Denbigh* issue discussed above. If the occupiers challenged a decision by judicial review then relief would be discretionary. It might, for example be refused if the authority had failed to consider relevant matters but the outcome would have been the same. But that possibility does not exist if the challenge is a collateral one. The prevailing view is that unlawful acts are void throughout even though they may have consequences in the meantime and may still serve as a foundation for valid acts by others (*Boddington v British Transport Police* [1999] 2 AC 143[5]).

33. It is easy to apply that in the classic *Winder* kind of case. The underlying right, be it a tenancy or other entitlement, remains even though relief might have been refused in judicial review. But what about the kind of case where there is no such right? Does the County Court judge have a discretion analogous to the judge hearing a judicial review claim and if so how? If not then the occupier is actually better off in the County Court which will, by a sidewind have been give a more powerful judicial review jurisdiction than the High Court.

34. A series of recent cases have touched on problems caused by invalidity where the challenge is not directly in judicial review. Courts have been particularly unwilling to allow public authorities to rely on their own pubic law errors to recover property or remove rights that have apparently been conferred.

[5] This is often described as the "second actor" analysis following the discussion by Lord Steyn at page 172.

35. In *Birmingham CC v Qasim* [2010] PTSR 471 it was the public body that sought to rely on its own unlawful action. Q and others had been granted tenancies in breach of the Council's allocation scheme. S. 167(8) of the Housing Act 1996 states that "a local housing authority shall not allocate housing accommodation except in accordance with their allocation scheme". The Council claimed that the tenancies were *ultra vires* and not binding on them. The Court of Appeal rejected the council's argument. It treated the council as exercising two separate functions, one being the selection of an applicant to be a secure tenant and the other being the grant of a tenancy under statutory powers. Therefore, the actual grant of the tenancy was not unlawful. However, it had undoubtedly been caused by the unlawful allocation and as Sedley LJ paraphrased the council's argument "nothing can come of nothing".

36. The reasoning of the Court of Appeal suggests that some unlawful actions by the authority might be valid until set aside by the court although this was not strictly necessary for the purposes of the decision. Strictly speaking these passages are obiter because the case can be explained as an application of the principle that not all breaches of statutory procedures result in invalidity and whether they do or do not have that result is a matter of statutory constriction in each individual case (see *North Somerset DC v Honda Motor Europe Ltd & Ors* [2010] EWHC 1505 (QB) Burnett J for a recent review of the principles here in the context of time limits).

37. Lord Neuberger held that the Council had failed to comply with a procedural requirement of the allocation scheme but that the allocation remained effective "at least unless and until it was set aside by the court" [para 27]. The subsequent grant of the tenancy was therefore not void unless the statute provided otherwise.

"28 In other words, the fact that the anterior public law procedural requirement of compliance with the scheme was not complied with by no means necessarily means that the subsequent grant of a tenancy was invalid. Although the issue on this appeal was not directly in point in that case, it is worth referring to the illuminating discussion in the judgments of Neill and Hobhouse LJJ in the Crédit Suisse case [1997] QB 306 , 343 A -344 C and 355 G -357 E , respectively. For present purposes, the important point about those passages is that they tend to support the contention that the fact that a procedural course taken by a public body which is unlawful in the sense of being susceptible to judicial review does not mean that any action taken by the body on the basis of that procedure must be outwith the capacity of, or *ultra vires*, the authority".

Sedley LJ also suggested that the error was one that might not invalidate the allocation until there was a court order quashing it. He said:

"48 What then is the effect of a departure from the scheme? Clearly if an allocation bears what Lord Radcliffe in Smith v East Elloe Rural District Council [1956] AC 736 called the brand of invalidity on its forehead (if, for example, it was issued by the doorkeeper) it is of no legal effect. But that will be because it does not even purport to be a lawful allocation. By contrast where, as here, it is made by an officer of a department empowered to make allocations, it

is in my present view legally effective unless and until it is revoked; and the ability to revoke it must evaporate once a tenancy is granted or the allocation otherwise becomes spent. It is on ground 5 alone, if it applies, that the lessor can thereafter recover possession.

"49 Even if an allocation is void, I do not therefore accept that this produces a domino effect in relation to official acts based on it. As Lord Browne-Wilkinson said in Boddington v British Transport Police [1999] 2 AC 143 , 164 subsequent recognition of the invalidity of an ultra vires act "cannot rewrite history as to all other matters done in the meantime in reliance on its validity". This must be especially the case where, as here, a public authority is relying on its own illegality to unravel otherwise perfectly lawful arrangements on which the well-being of individuals now depends".

38. The Court was influenced by the consequences that would follow otherwise. Even a minor breach would lead to the grant being ultra vires and that might not be recognized for many years. Moreover, if a council's allocation scheme was effective for some reason then *all* of its tenancies would be void.

39. The Court recognized, but did not have to decide, that the case also raised a difficult question whether a *ultra vires* action could, even if void, create possessions for the purposes of Art 1 Protocol 1 and whether on the facts Article 8 would have been engaged.

40. In *Mossell Jamaica v Digicel* [2010] UKPC 1 the Privy Council affirmed the general proposition that executive orders and the like are presumed to be lawful but if and when they are successfully challenged and found to be *ultra vires* then "generally speaking it is as if they had never had any legal effect at all". The decision left open whether a declaration of invalidity could be made prospectively or for the benefit of others or whether the acts could have some legal consequences in the meantime. Similarly in *HM Treasury v Ahmed & Ors* [2010] UKSC 2 the Court raised the possibility of prospective overruling but did not need to consider it because it was not argued for.

41. *In Rose Gibb v Maidstone and Tunbridge Wells NHS Trust* [2010] EWCA Civ 678 Ms Gibb had been the chief executive of the Trust. There was an outbreak of *C. difficile* and following a critical Health Commission report the Trust reached a compromise agreement under which she would leave her post and be paid £250,000 compensation. Some £75,000 represented her notice entitlement but the balance was far in excess of what she would have recovered in an Employment Tribunal. The Trust paid the notice pay element but withheld the rest arguing that it was irrationally generous. The Claimant brought a claim for the balance. Her claim failed before Treacy J but the Court of Appeal allowed her appeal.

42. The Court reiterated what was said in *Newbold v Leicestershire CC* [1999] ICR 1182, that no court is going to be astute to allow public authorities to escape too easily from their commercial commitments particularly where legitimate expectations have been aroused in the other party, where the relationship between the parties is essentially of a private law character, where it is the authority itself which is seeking to assert its own lack of *vires,* and

where that is said to stem not from the true construction of its statutory powers but rather from its own *Wednesbury* irrationality. In the present case, the judge at first instance had erred in the following ways: a) He had substituted his own view of what financial prudence required. b) it cannot be assumed the, absent the compromise agreement, the Trust would have settled the appellant's unfair dismissal claim for the lower statutory maximum and have admitted that the apellant's dismissal was unfair. c) It was relevant for the Trust to have taken into account the appellant's many earlier years of good service and the time it might take her to find other employment. A reasonable employer is not limited to the replication of the statutory maximum available to an employee through legal redress.

43. Sedley LJ's judgment merits attention in particular because of his reminder that in this kind of case the doctrine of ultra vires should be confined to real cases of abuse of power. He considered a detailed "tick list" approach to relevant considerations "schematic and unsubtle". At para 57 he said:

"It is only if the figures are inexplicable on their face, or palpably inflated in the light of evidence, that the court will in general be justified in examining their elements, and then not in order to remake the calculation but to see if it has indeed gone beyond the bounds set by law".

44. A majority of the Court also held that even if the payments had been *ultra vires* the Claimant could still pursue her claim in unjust enrichment to the level of the payment that the Trust could lawfully have made. The Court accepted that the benefits received by the trust such as freedom from an unfair dismissal claim were capable of founding such a claim even though they were the product of *ultra vires* acts. Citing Rix LJ in *Eastbourne BC v Foster* [2002] ICR 234:

"services provided in exchange for those purposes have been made in the real world, and, even though the conventional scheme under which payments and services have been exchanged has vanished into thin air, the provider of those services may be entitled to have them taken into account for the purpose of a claim to a *quantum meruit* or *quantum valebat*".

45. The opposite situation is under consideration in *R (CPAG) v Secretary of State for Work and Pensions* [2010] 1 WLR 1886. This concerns the practice of the Department in recovering over payments made to benefit claimants. Under s. 71 of the Social Security Administration Act 1992 overpayments are recoverable in the case of misrepresentation or failure to disclose. But some overpayments are made because of errors by the Department not involving any conduct within s. 71. The Department's practice has been to write to claimants asking them to repay. In this challenge brought by CPAG the Court of Appeal held that s. 71 was the only available route to recovery and that the Department could not pursue a restitutionary claim based on the payment being made under a mistake of law or fact. The Court accepted that s. 71 enacted and exhaustive regime for recovery against a background where entitlement to any payment was contained in an award which was valid unless and until set aside.

46. The case is listed before the Supreme Court for hearing on 25 October 2010. The arguments in the Court of Appeal appear to have suggested that the Departments common law claim to recovery was on the ground of mistake of fact or law but there is a separate principle, derived from *Auckland Harbour Board v. R* [1924] AC 318 to the effect that monies paid without the specific authority of Parliament can be recovered. At first instance the Department accepted that this principle did not apply ([2009] EWHC 341 (Admin) para 18). However, this concession has since been criticized as being based on too narrow a view of the Auckland principle[6] and it remains to be seen whether the issue will be revisited b the Supreme Court. It is likely though that the reasoning of the Court of Appeal provides that same answer to it. The determination on which the payment is based is the authority for it and the Parliamentary scheme must be taken to have contemplated the possibility that such determinations may have been mistaken. If so then the authority for payment can always be revised.

Tribunals - amenability to judicial review

47. A comparison between two of this year's cases gives insight into not only the approach of the courts to the new tribunals system but also the constitutional function of judicial review.

48. *Wiles v Social Security Commissioner* [2010] EWCA Civ 258 arose in the old tribunal system, where the Court of Appeal considered the approach to judicial review of the Social Security Commissioner. The Commissioner had refused the appellant permission to appeal against the decision of the social security tribunal. On her application for judicial review of that refusal, the Secretary of State argued that conventional judicial review principles ought not to apply because of the statutory scheme. The argument rested on *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 and *R (Sinclair Gardens Investments (Kensington) Ltd) v Lands Tribunal* [2006] 3 All ER 650, which established that decisions of the County Court and Lands Tribunal respectively could only be subject to judicial review in exceptional circumstances such as a mistake about jurisdiction, a fundamental failure to allow a fair hearing, or possibly a failure to deal with a difficult point of law of general importance.

49. Dyson LJ, giving the lead judgment, held that judicial review was available on conventional public law grounds. He considered that the Court should not depart from the consistent approach to that effect in previous case law. Had it not been for that line of authority he would have taken a stricter view based on principle and the nature of the statutory scheme. He held that Parliament had not intended to exclude judicial review altogether and the limits of judicial review have to be determined as a matter of judicial policy having regard to all the relevant factors. *Sivasubramaniam* and *Sinclair Gardens* do not provide a blueprint applicable to all cases. They are authority for the proposition that the over-arching question is whether the statutory scheme, viewed as a whole, provides a fair, adequate and proportionate protection against the risk that the lower tribunal or court may have fallen into error. The social security appellate system was different from the County Court and LVT in that

"they are an administrative tribunal, frequently called upon to adjudicate on significant legal issues which have far-reaching consequences well beyond the individual case, including

[6] Charles Mitchell: Recovery of Ultra Vires Payments by Public Bodies [2010] PL 747

important issues of human rights and EU law. I accept that issues such as the right to life and the right not to be tortured are unlikely to arise in a social security case. But a social security case may well involve the right of a claimant to subsistence income and so directly affect their access to the most fundamental necessities of life" [para 46].

50. Against this background he said he would have held that the same test should apply as in the case of a second appeal to the Court of Appeal: there must either be an important point of principle or practice or some other compelling reason for the Court of Appeal to hear it. This, he held, would "strike a fair balance between the competing considerations which arise where a commissioner refuses leave to appeal" [para 48].

51. All members of the Court accepted the actual decision on jurisdiction in this case was by then academic because the relevant function had been transferred to the Upper Tribunal, and the Divisional Court in *Cart* had already determined that the scope of judicial review in that case is much more restricted. With an eye to what was then the forthcoming hearing of *Cart* in the Court of Appeal, Longmore LJ "warmly endorsed" the second appeal test for judicial review of the UT. Although, as will be seen, the Court of Appeal did not adopt that approach, *Wiles* remains relevant for two reasons.

52. First, it gives valuable guidance as to the approach to be adopted where a decision maker suggests that the decision-making context restricts ordinary principles of judicial review. Second, the decision also contains a telling antidote to floodgates arguments in judicial review. At para 82-3 Sedley LJ said:

    "I would add that the time has long gone when the floodgates argument can properly be advanced on jurisdictional issues of public law. I know of no instance in which the courts have accepted jurisdiction in a novel field of public law and been overwhelmed by a consequent deluge of litigation…

    "A better principle is that enunciated by Holt CJ in Ashby v White (1703) 2 Ld. Raym. 938, a case in which the court was warned of a deluge of litigation if it started to intervene in corrupt elections by entertaining claims of misfeasance in public office:

    "[I]t is no objection to say that it will occasion multiplicity of actions: for if men will multiply injuries, actions must be multiplied too …"

53. The Divisional Court[7] in *Cart* had, by the time *Wiles* was considered by the Court of Appeal, already addressed the question whether judicial review extends to decisions of the Upper Tribunal (UT) and also the Special Immigration Appeals Commission (SIAC). It is appropriate here to revisit that judgment before considering what the Court of Appeal concluded regarding the UT.

54. The relevant secretaries of state had contended that, as both tribunals are designated by the legislation creating them as superior courts of record, they were immune from judicial review or, alternatively, were only amenable to judicial review in the most exceptional circumstances.

[7] R (Cart) v Upper Tribunal; R (U and C) v Special Immigration Appeals Commission [2009] EWHC 3052 (Admin); [2010] 2 WLR 1012

55. Laws LJ (who gave the judgment of the Divisional Court) said that, even if it were the case that historically prerogative writs have not run to superior courts of record, it does not follow that the bare designation by Parliament of an institution as such a court, as has been done by the SIAC Act and the Tribunals Courts and Enforcement Act, excludes judicial review. As judicial review can only be ousted by the most clear and explicit words and *Sivasubramaniam* makes it clear that judicial review cannot be removed by statutory implication[8], far less can it be ousted by a formula that amounts in effect to a deeming provision. In a fascinating and careful analysis, Laws LJ explained that the reluctance of the courts to countenance the statutory exclusion of judicial review derives from the rule of law which, though having many facets, for present purposes requires that Parliament should not be able to dispense with the requirement for an independent, impartial, authoritative judicial body to interpret the law and, instead, constitute the body that acts as the last judges of the law that they have to apply. The paradigm example for an authoritative body to interpret the law is the High Court. Any other court offering the same quality must amount to an alter ego of the High Court.

56. Moreover Laws LJ held that the term "superior court of record" does not define the limits of the reach of judicial review. Some courts are liable to judicial review and some are not, in most cases because some courts possess only limited jurisdiction and some do not. Unreviewable courts of limited jurisdiction are exceptional. The High Court is of unlimited jurisdiction and is not reviewable.

57. So the question whether SIAC or the UT are amenable to judicial review depends not on their designation but on whether either is the alter ego of the High Court, even though both have limited jurisdictions (although that of the UT is cast very wide because of its statutory "judicial review" functions). He held the answer to that question depends on an examination of the foundation for judicial review - ie. excess of jurisdiction. That phrase possesses two meanings: first, transgression beyond the boundaries of the court's permitted subject matter (the narrow, pre-*Anisminic* meaning); second making a legal error. Unlike administrative and executive decision-makers, who have no jurisdiction to get the law wrong (see *Anisminic*), a court may be the final judge of the law it has to apply (subject to any statutory appeal). It can only exceed its jurisdiction in the second sense if it is not the final judge.

58. On that basis, Laws LJ held that SIAC is not the alter ego of the High Court. It is plainly reviewable for excess of jurisdiction. SIAC is also amenable to judicial review on the same basis as the AIT, that is for error of law. The jurisdiction of the two is in many cases identical, and it has historically been judicially reviewable. However, as judicial review is a discretionary remedy of last resort, it will not lie against appealable decisions. And in relation to non-appealable decisions, it could not be used as a surrogate appeal process. A sharp-edged error of law would have to be shown rather than a *Wednesbury* challenge to a fine judgment.

59. Laws LJ reached a different conclusion on the UT, with which the Court of Appeal did not agree. He concluded that it is the alter ego of the High Court. It is at the apex of a new and comprehensive judicial structure and, although not unlimited, its jurisdiction was very wide including a judicial review jurisdiction. It is an authoritative, impartial and independent judicial source for the interpretation and application of statutory texts. It has the final power to interpret for itself the law that it has to apply and is not amenable to judicial review for

[8] para [44]

error of law but only on grounds of outright excess of jurisdiction in the narrow pre-*Anisminic* sense or denial of procedural justice.

60. There was no appeal against the decision regarding SIAC, but Rex Cart did appeal that relating to the UT[9]. The Court of Appeal agreed with the conclusion of the Divisional Court, although not for entirely the same reasons.

61. The Court agreed with Laws LJ that to treat statutory designation of the UT as a "superior court of record" did not of itself exclude judicial review. However, the Court of Appeal disagreed with the conclusion of Laws LJ that the UT was the alter ego of the High Court. It was the very position of the UT at the head of the new tribunals structure, relied upon by Laws LJ as vesting it with the qualities of the High Court, that led to the opposite conclusion by the Court of Appeal. Sedley LJ, giving the judgment of that Court, said that the UT does not stand in the shoes of the High Court but in the shoes of the tribunals it has replaced.

62. The Court said that the supervisory jurisdiction of the High Court runs to all statutory tribunals unless ousted in the plainest possible statutory language of which there is none in the Tribunals Courts and Enforcement Act. That Act invests the UT with standing and powers precisely because it and the High Court are not courts of co-ordinate jurisdiction.

63. The Claimant, and the Public Law Project intervening, argued that, once judicial review was available, there was no warrant for cutting down its scope, recognising however that grant of permission and relief was discretionary and so not every grievance about the UT would secure judicial review. But Sedley LJ said that the scope of judicial review, of which the principle of remedy of last resort is one dimension, is a matter of law not discretion. The judges can change the substantive principles of judicial review to meet the need to preserve the integrity of the rule of law in the face of social, governmental and legislative changes. The complete reordering of administrative just brought about by the TCEA is such a change and calls for reconsideration of the principles of law by which judicial review of the new tribunals is to be governed, and the High Court, as a court of unlimited jurisdiction, is the sole arbiter as to what falls within its jurisdiction.

64. Turning then to the new tribunals system, Sedley LJ made the following principal points:

    a. Although social security decisions have been subject to judicial review notwithstanding the high legal expertise of the Commissioners, one of the principal purposes of the TCEA is to unify the procedures of the disparate tribunals gathered into its structure. It contains no space for historical exemptions of that kind. As Sedley LJ pointed out, this could call into question the exception acknowledged by the court in *Sivasubramaniam* making asylum decisions amenable to the full reach of judicial review because of their unique subject-matter, but it was not for the Court in *Cart* to determine that.

    b. In deciding whether the full ambit of judicial review should be available as before across the board, the Court had to reconcile two legal principles: that of the relative autonomy of the tribunals as a whole and the UT in particular, and the constitutional role of the High Court as the guardian of standards of legality and due process from which the UT is not exempt. There is a true jurisprudential difference between an

[9] *R (Rex C) v the Upper Tribunal and others* [2010] EWCA Civ 859

error of law made in the course of an adjudication which a tribunal is authorised to conduct and conducting of an adjudication without lawful authority. The new system is designed to be so far as possible a self sufficient regime, dealing internally with errors of law made at first instance and resorting to higher appellate authority only where a legal issue of difficulty or of principle requires it.

c. Thus, the *Sivasubramaniam* model respects the intention of Parliament – it "secures the boundaries of the system but does not invade it". Judicial review of the UT is available only for outright excess of jurisdiction or denial of procedural justice. And in so concluding, Sedley LJ rejected the call by the Court in *Wiles* to adopt the second appeal approach.

65. It is not clear why it was important to emphasise that the question of scope of judicial review is a matter of law rather than discretion. Given the importance of the High Court being empowered to respond to social and legislative changes, as Sedley LJ emphasised, it is difficult to see why that is important or, indeed, why discretion would not be a preferable approach providing more flexibility to deal with changes as they arise. Indeed, previous case law including *Sivasubramaniam* and *Wiles* suggests that some discretion to judge what Dyson LJ identified as the core issue ("whether the scheme as a whole provides a fair, adequate and proportionate protection against the risk that the lower tribunal or court may have fallen into legal error") is necessary.

66. Moreover, if the question is a matter of law including giving effect to the rule of law, it is not clear why such particular emphasise is laid on the intention of Parliament as is found in this judgment rather than exercising a judgment as to the efficacy of the scheme in protecting against legal error.

67. It remains to be seen whether the approach in this case will stand the test of experience of the operation of the UT in practice or whether these issues will have to be revisited in the future. Moreover, as Sedley LJ indicated, if there is no place for historical exemptions to general principles of amenability to judicial review then there is a question whether asylum and immigration decisions should be subject to its full reach.

68. The willingness of the courts, as shown in these judgments, to consider different standards of review to different bodies raises the question whether there is a move towards revival of the pre-*Anisminic* approach to judicial review and, if so, in what circumstances. It is striking that the courts have so preciously guarded judicial review against parliamentary ousting and yet seem to be content to circumscribe its scope in part to reflect the will of parliament.

69. Finally, issues might arise from the differences between the rules relating to appeals from the different chambers. In appeals from the FTT social entitlement chamber the judge has a discretion whether to consider the permission application on the papers or orally, and an unsuccessful appellant has no right to renew. Appellants from other chambers have a right to renew to an oral hearing. There seems to be a potential unfairness of an appellant being refused permission on the papers, with no right to renew, appeal or seek judicial review.

Access to Justice and Open Justice

Closed material , Special Advocates and open justice

70. It is only 13 years since Parliament gave birth to the Special Advocate. The Special Immigration Appeals Commission Act 1997 was enacted in response to the decision of the European Court in *Chahal v UK* 23 EHRR 413 in which the European Court held that a secret process for scrutinising deportation decisions made on grounds of national security (the "Three Wise Men") violated articles 5 and 13. Encouraged by comments of the European Court regarding a similar system in Canada, the SIAC Act introduced the Special Advocate. Since then legislation has permitted a closed material procedure involving special advocates in a number of other jurisdictions, the most well known probably being control order proceedings, but extending over a range of others from planning enquiries to employment tribunal proceedings. The use of special advocates has also been sanctioned in PII cases[10].

71. These procedures have spawned a considerable volume of litigation and the last twelve months have seen their fair share of recent developments in that arena. Not all of these cases are judicial reviews, but they have plain implications for public law litigation.

72. The present position as at summer 2009 was established by the House of Lords in *MB v SSHD* [2008] 1 AC 440 and in *SSHD v AF and others* [2009] 3 WLR 74[11]. Although the right of a person to be informed of the case against him and be permitted to respond to it could be limited in the interests of national security, in so far as that was strictly necessary and that it was permissible to mitigate the effects of the use of closed material by the use of special advocates, there is a core irreducible minimum of fairness which article 6 guarantees. A controlled person has to be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. It might be acceptable not to disclose the source of evidence that founded the grounds of suspecting that a person had been involved in terrorism-related activities, but there would not be a fair trail if the open material consisted only of general assertions and the case against the controlee was based solely or to a decisive degree on closed materials, however cogent the case based on the closed materials might be. In essence, a party could not be kept in ignorance of the case against him.

73. Subsequent recent litigation has established the importance of the Secretary of State having in mind the requirements of article 6 from the outset. In *AN v SSHD* [2010] EWCA Civ 869 the Court of Appeal held that, although making a control order is an administrative act, it will not be lawful for the Secretary of State to make the order where s/he knows that s/he would not be prepared to disclose in the course of control order proceedings the material that is relied upon to justify the making of the order[12]. So the Secretary of State must apply his or her mind to the problem in advance and if s/he fails to do so or gets it wrong, then the order will be found to be unlawful.

74. The principle in *AN* has been applied outside the control order context, recently for instance in relation to banking directions prohibiting financial sector dealings on grounds of terrorist financing or money laundering. In *Bank Mellat v HM Treasury* [2010] 3 WLR 1090, the Court of Appeal said that it was not sufficient to disclose sufficient material to enable the person to give sufficient instructions to deny the allegations. Dislcosure had to be sufficient to enable him/her actually to refute the essential allegations relied on by the Treasury to justify the making and continuance of the Direction.

75. *Tariq v Home Office* [2010] ICR 1034 was a race discrimination claim in the Employment Tribunal, where the rules of procedure provide for a closed material procedure. The Court

[10] *R v H* [2004] 2 AC 134
[11] *AF (No 3)*
[12] *AN v SSHD* [2010] EWCA Civ 869

of Appeal held that neither the EU directive prohibiting race discrimination nor article 6 prevented such a procedure but, following *AF* in the House of Lords, the claimant was entitled to know the essence of the case against him even if that put a public authority in the invidious position of making difficult decisions on disclosure and how to defend a claim. The Court made clear that the principles in *AF (No 3)* apply in contexts other than where the state is seeking to interfere with a person's liberty.

76. However, the courts have made it plain that, absent a statutory basis for doing so, there is little if any room for a closed material and special advocate process. *Al Rawi v Security Service* [2010] 3 WLR 1069 concerned the Guantanamo compensation claims. The government sought to rely upon a closed material procedure involving special advocates. The Court of Appeal held, "firmly and unambiguously"[13] that, in the absence of a statutory power, it was not open to a court in the exercise of its inherent jurisdiction to order such a procedure. It would undermine the fundamental principle of the common law that a litigant was entitled to see and hear all the evidence and argument seen and heard by the court. In any event, the court had no jurisdiction under the CPR to order such a procedure. The court left open, however, whether such a procedure could be adopted either if the parties agreed or there was a substantial public interest dimension, but thought it quite likely that, at least in exceptional cases, such a procedure could be adopted[14]. Such cases involve a "triangulation" of interests where the judge has a function beyond that in ordinary civil litigation of being arbiter between the claimants and defendants.

77. *Al Rawi* and *Tariq* are both coming before the Supreme Court early next year.

78. These principles were applied in the judicial review context in *A (A child) v Chief Constable of Dorset and B* [2010] EWHC 1748 (Admin). The claimant (A) was a 16 year old who, while on a night out with friends, was taken by police to a safe centre and his parents were called. He had done nothing wrong but the police claimed that their actions were justified under s 46 Children Act 1989 on the grounds that A had been seen with an "inappropriate adult" and they had a reasonable belief that he would be likely to suffer significant harm. B had been with A at the time.

79. The police contended that, due to B's interests, they only had to give broad outline reasons for the removal of A but full reasons were provided to the court. B sought the court's directions to prevent the police from serving A with confidential material concerning him.

80. Blake J held that the principles set out by the Court of Appeal in *R (Al Rawi)* applied because, although the application for judicial review raised an issue as to the legality of police policy, the claim was essentially one for damages for unlawful detention and breach of human rights. The function of the court was to sit as arbiter between the parties in a claim between a citizen and the state regarding interference with the right to liberty protected by common law. It was for the defendant to justify its action and if he was not willing to do so for public interest reasons, the detention could not be defended. It was not open to the defendant to explain it only to the court because the claimant was entitled to know why the claim was defended and the reasons for the court's decision.

81. Although not of the same nature as the "triangulation" in cases of national security or protection of children, there was some triangulation of interests in that the sensitive material had potential adverse implications for the rights of B. But Blake J held that, even if it was available in principle for that reason, there were objections to the Special Advocate

[13] Lord Neuberger MR at [11]
[14] Thus see *In re K (Infants* [1965] AC 201; *Roberts v Parole Board* [2005] 2 AC 738

procedure, also referred to in *Al Rawi.* It would give rise to practical difficulties as to the boundaries between what the special advocate could do and the common law principle in *Al Rawi*, and would lead to delay and additional costs. Moreover, he doubted that in practice the Special Advocate would be able to resolve the triangulation of interests in that case.

82. The dilemma presented to the court was resolved by A being willing to instruct his legal team to examine the material without it being disclosed to himself personally, as long as the gist of the nature of the harm was disclosed to him. It was feasible in that case because Blake J considered that A and his parents needed to know why he was being protected and why it took the particular form that it did, but there was no need to see the specific information on which the grounds to fear harm were based. A could have given little by way of instruction on the sufficiency of the underlying material.

83. My forecast is that, given the increasing volume of national security concerns in public policy, and the large number of cases in which public interest decisions are made on the basis of highly sensitive information about individuals, the courts are likely to have to grapple with the question in judicial review challenges to such policy decisions. Given the indications in *Al Rawi* (and subject to whatever the Supreme Court decides when it hears that appeal in January), my guess is that the courts will allow a closed material procedure in some such cases.

84. Another important feature of open justice is that of the identity of litigants. The Supreme Court considered the question of anonymity in relation to asset freezing cases in *In re Guardian News and Media Ltd* [2010] UKSC 1. The Court said:

    a. The court has power to make an anonymity order restraining publication of the identity of an individual named in such proceedings or judgment, so as to fulfil the UK's positive obligation under Article 8 of the European Convention.

    b. Article 10 is also engaged in the making of such an order.

    c. Neither article has precedence over the other and it is for the court to weigh the competing claims under each article.

    d. The weight to be attached to the competing interests is fact specific.

85. In that case, the individual who sought anonymity did so on the basis that he feared that if his designation as a suspected terrorist was revealed, that may lead to a loss of contact for himself and his children with the local Muslim community and that it would cause serious damage to his reputation. The Court concluded that the general interest in identifying the individual in any report of the proceedings justified the curtailment of the individual's rights which would be caused by his being identified.

86. The approach of the Supreme Court indicates that it will be harder for individuals seeking protection from public scrutiny in sensitive cases to obtain anonymity. But it all depends on the facts and the nature of the interests at stake. In *SSHD v AP (No 2)* [2010] 1 WLR 1652 the Supreme Court concluded that anonymity for a controlled person was appropriate taking into account the risk to him of physical violence, and the impact on his article 8 rights in the light of his isolated situation and medical evidence as to his psychological and emotional state.

87. A review of the significant cases of the year cannot omit the constitutionally important decision of *Ahmed and others v HM Treasury* [2010] 2 WLR 378. The Court declared ultra vires orders in council providing for the freezing of assets and other resources of individuals who were designated by the UN on grounds of alleged terrorism. The grounds upon which

the orders were held to be ultra vires included failure to make provision for basic procedural fairness so that those designated under it were deprived of their fundamental right of access to an effective judicial remedy by which their listing could be reviewed. Moreover, on the Treasury's application following judgment the Court refused to suspend its order. It held that, where provisions were found to be ultra vires, suspension of a declaration to that effect or of a quashing order did not alter the position in law that they were of no effect. The Court considered that it should not do anything which might convey to third parties including banks, that the provisions remained in force.

Disclosure and cross-examination

88. *Tweed v Parades Commission* [2007] 1 AC 650 represented a partial break with the previous approach to disclosure in judicial review. In that case the House of Lords determined that it was no longer the rule that disclosure would only be ordered where the decision-maker's affidavit could be shown to be materially inaccurate or misleading. The courts should now adopt a more flexible, less prescriptive approach and judge the need for disclosure on the facts of the individual case. This was particularly important in human rights cases where the proportionality of a decision restricting a protected Convention right would, on the substantive application, call for careful factual assessment in the context of the relevant margin of appreciation.

89. There has in fact been surprisingly little reported use made of the principle in *Tweed*[15]. However, what little there has been indicates that the principle is not limited to human rights claims.

90. *R (Al-Sweady) v Secertary of State for Defence* [2009] EWHC 2387 (Admin); [2010] HRLR 2 did involve claims of human rights violations - by British troops in Iraq. During numerous interlocutory hearings, issues arose as to cross-examination and disclosure. Before the proceedings were concluded the Secretary of State decided to hold a full investigation into the disputed incidents and the proceedings were stayed. The Divisional Court gave this judgment in order to explain how it had dealt with the procedural matters, as they would be likely to arise not only in other claims against the Secretary of State for Defence but also in other cases where there are disputed allegations that human rights have been infringed. The Court noted that the usual procedure in judicial review cases for there to be no oral evidence and, in so far as there are factual disputes between the parties, ordinarily for them to be resolved in favour of the defendant, would mean that the defendant would always succeed if sued for an infringement of human rights which was disputed and so a different approach was needed. It decided that it was necessary to allow cross-examination in relation to "hard-edged" questions of fact. As a consequence, disclosure would be needed to enable effective and proper cross-examination to take place. The duty of disclosure was heightened by the fact that the allegations raised concerned some of the most important and basic rights under the ECHR. Moreover, the parties and the court should always scrutinise carefully the stance of parties to judicial review applications (especially where human rights claims were involved) to ascertain if there as any critical factual issues which required orders for cross-examination or disclosure and should not be reluctant to make such orders in suitable cases.

[15] For an analysis of the impact of *Tweed* in reported and unreported cases see "Disclosure in Judicial Review", James Maurici, [2009] JR 311

91. *McVey v Secretary of State for Health* [2009] EWHC 3084 (Admin) is an example of the applicant of the principle in a very different context. The challenge there was that the Secretary of State had failed to keep under review and make necessary changes to a compensation scheme for the victims of vCJD. The Claimant sought disclosure of communications between the secretary of state and trustees of the compensation fund. As the Claimant's case was that the secretary of state had delayed when a need for change had been identified by the trustees, and as the secretary of state's case was that he had been engaged in discussions with the trustees with a view to change, the correspondence would be material. Black J said that a relevant factor in deciding whether to order disclosure would be not only the relevance of the material but also the practical consequences of ordering disclosure such as delay, although in that case is turned out not to be an issue.

92. The issue arose again in the judgment on the substantive merits of *McVey* at [2010] EWHC 437 (Admin). There remained a substantial dispute of fact between the claimant and the secretary of state, but no application had been made by the claimant's legal advisers to cross-examine the relevant witness. Silber J acknowledged that the approach to cross-examination adopted in *Al-Sweady* could apply to other types of judicial review and summarised the proper approach to disputed evidence in judicial review:

    a. The basic rule is that where there is a dispute no evidence then, in the absence of cross-examination, the facts in the defendant's evidence must be assumed to be correct.

    b. An exception arises where the documents show that the defendant's evidence cannot be correct.

    c. Where a claimant wishes to challenge the correctness of an important matter of fact in the defendant's evidence upon which the judge will have to make an important factual finding, the claimant should apply to cross-examine the relevant witness.

93. Another non-human rights judicial review claim in which the issue of disclosure and evaluation of contested evidence has arisen recently is *R (Shoesmith) v OFSTED and others* [2010] EWHC 852 (Admin). In that case there was a dispute of fact between the Claimant and OFSTED as to whether and/or the extent to which the Claimant had had an opportunity to address points of concern during OFSTED's inspection. For various practical and procedural reasons, no cross-examination of the witnesses took place and the judge had to evaluate the disputed evidence on the documents. The Claimant relied upon the observations of Stanley Burnton J in *S v Airedale NHS Trust* [2002] EWHC 1780 (Admin):

    "It is a convention of our litigation that at trial in general the evidence of a witness is accepted unless he is cross-examined and is thus given the opportunity to rebut the allegations made against him. There may be an exception where there is undisputed objective evidence inconsistent with that of the witness that cannot sensibly be explained away (in other words, the witness's testimony is manifestly wrong)..."

94. However, Foskett J did not consider that the evidence in this case necessarily fell within that exception. Moreover, suggestions that were tantamount to dishonesty (as here) should be confronted in cross-examination.

95. Notwithstanding the above, and the statement in *Al-Sweady* that the normal rule is that factual disputes should be resolved in favour of the defendant, Foskett J considered that

because of defective and late disclosure by OFSTED, he should adopt a more liberal approach to the evaluation of the evidence. Therefore, he paid particularly close attention to such contemporaneous documentation as had been revealed. That would not generally, however, enable him to form a view on the credibility, reliability or competence of a particular witness.

96. Closely linked to the duty of disclosure is the duty of candour. These are distinct duties but there are obvious links not least, as was observed by Foskett J in *Shoesmith* the duty of candour is discharged, at least in part, by the disclosure of documents. The link is also made in the Treasury Solicitor's "Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings" issued in January this year.

97. Alleged breach of the duty of candour was considered in *Shoesmith,* where it was advanced on the claimant's behalf that evidence had been destroyed by Ofsted so that all the facts should be presumed against them[16]. Foskett J rejected the submission on the basis that, although there were a number of unsatisfactory features of the disclosure given by Ofsted, there was no basis for saying that an instruction to the inspection team to delete any emails referring to Baby P or Haringey (which had then been revoked) was intended to frustrate or impede the claim.

98. Although one might have expected more disclosure issues to have arisen in the reported cases since *Tweed*, it may be considered, with hindsight, that the culture in Judicial reivew has changed towards making disclosure without the need for the courts' intervention. This may be particularly assisted by the House of Lords' guidance in *Tweed* that where witness statements refer to documents they should generally be exhibited or explain why they are not.

Costs

99. An attempt was made in *R (Scott) v LB Hackney (Public Law Project Intervening)* [2009] EWCA Civ 217 to revisit the principles stated by Scott Baker LJ in *R (Boxall) v Waltham Forest London Borough Council* 4 CCLR 258 for awards of costs in public law cases when they settle before a full hearing. In *Boxall* it was held that the court should conduct a broad and proportionate assessment of the prospects for either party succeeding. However, the court must take care not to discourage settlement and in the absence of "a good reason to make any order the fallback should be to make no order as to costs".

100. At the time *Boxall* might have been seen as a progressive decision from the point of view of Claimants because it recognised a power to award costs and gave some structure to its exercise. But the difficulty was that it too easily lead to the conclusion that there should be no order for costs. The problem is particularly acute in welfare cases where the Defendant can easily argue that the case has been overtaken by events.

101. These arguments were made in *Scott* but the court was not persuaded that any substantial revision of the *Boxall* guidance was needed. Hallett LJ emphasized that the judge must make a "reasonable and proportionate attempt to analyse the situation and determine whether an order for costs is appropriate" and should "not be tempted too readily to adopt

[16] "Omnia praesumuntur contra spoliatorem"

the fallback position of no order as to costs" [para 51]. However, the Court did not consider that there was evidence that this was happening in the Administrative Court generally and it upheld the decision to award no costs in the case under appeal. This approach has since been applied in the different context of company law where the appellants were awarded their costs of an unfair prejudice petition where they would probably have succeeded on the main issue . The relevant principles are set out at paragraphs 30-9[17].

102. It is unlikely that further development will come without a change to the CPR. In *Scott* an attempt to introduce a presumption in favour of costs was abandoned and the Court of Appeal clearly thought it would be doomed to fail (para 40).Lord Justice Jackson's review[18] has made two significant recommendations that by now are well known.

a. The first is to introduce a presumption that if the Defendant settles a judicial review claim after issue and the Claimant has complied with the protocol, the normal order should be that the Defendant do pay the Claimant's costs [5.1. p. 313].

b. The second is that there should be one-way cost shifting. This would be given effect by a rule change stating: "costs ordered against the claimant in any claim for personal injuries, clinical negligence or judicial review shall not exceed the amount (if any) which is a reasonable on for him to pay having regard to all the circumstances including (i) The financial resources of the parties, and (ii) Their conduct in connection with the dispute to which the proceedings relate".

103. If this change is accepted then there would no longer be any recoverable success fee in CFA cases.

104. The proposed rule change is explicitly modeled on the test for costs liability for publicly funded litigants now in s. 11(1) of the Access to Justice Act 1999. There is of course a major difference between an order under s. 11 and one envisaged by this proposal. In the normal case a publicly funded litigant will have no means against which an order can be enforced and so the normal consequence is that no costs are payable. An unsuccessful litigant under the new rule may well have modest means and this will require an assessment of what it is reasonable for them to pay. Costs in judicial review proceedings (even those that go to a full hearing) are often relatively modest and this will add to the costs of assessment and may make them disproportionate.

Enforcement

[17] The Court there quoted, with apparent approval, the observation of Longmore LJ in Brawley v Marczynski [2002] EWCA Civ 756, [2004] 4 All ER 106 in to the effect that no order would be appropriate when it is "truly impossible to say what the likely outcome would have been".

[18] Review of Civil Litigation Costs: Final Report December 2009

105. Two important recent practice points deserve attention.

106. In *R (MA) v LB Croydon* [2010] 1 WLR 1658 Collins J upheld the general practice of the Administrative Court not to attach a Penal Notice to its orders. He held that the prospect of an adverse finding together with indemnity costs should normally be sufficient to ensure compliance. If there are specific reasons why a notice should be required then an application can be made to the judge to direct that a notice be attached.

107. In *Glenford Lewis v Secretary of State for the Home Department* [2010] EWHC 1749 (Admin) Blake J the Claimant started judicial review proceedings and obtained a stay on the day that he was due to be deported to Jamaica. The Order was faxed to the UKBA but did not come to the attention of the relevant officers until the flight had left. The question was whether the court could order his return. The Claimant argued that it could because he had been unlawfully removed in breach of the order for a stay. The Defendant argued that the removal was not unlawful because no officer was aware of the order at the time.

108. Blake J held that the removal had not been in breach of the order because no officer in UKBA had been aware of it when the removal took place. However, the court still had the power to direct that the Secretary of State return. He held at para 35:

"In my judgment the court does not lose its power to supervise such an order merely because the order has proved ineffective without anyone being guilty of contumacious conduct. It was open to the judge of his own motion or on application made to him to require the return of the claimant from Jamaica. In my judgment it remains open to this court on the substantive hearing of this application to issue such relief"

109. However, the judge declined to order return as a matter of discretion. Among other things he took into account: (a) removal was not illegal, (b) the Claimant's solicitors had in part contributed to the order being ineffective because they failed to take obvious steps to communicate it (for example by telephone), the Claimant could pursue an Article 8 claim from abroad and the judge found that in fact he was unlikely to be substantially prejudiced in the presentation of his appeal by the fact that he was not in the UK.