Part II

GROUNDS OF JUDICIAL REVIEW

CHAPTER 5

ILLEGALITY

SCOPE

5–001 This Chapter considers the question of legality in relation to the following issues.

- A discussion of the history of discretionary power.[1]
- Statutory interpretation in the context of pubic authorities' powers and duties.[2]
- Mandatory and "directory" powers and duties.[3]
- The interpretation of policies.[4]
- Exercise of power for extraneous purposes.[5]
- The failure of a public authority to have regard to a relevant consideration and the taking into account of a legally irrelevant consideration.[6]
- Partial illegality and severance.[7]
- The lawfulness of delegation by a public authority.[8]

INTRODUCTION

5–002 An administrative decision is flawed if it is illegal. A decision is illegal if it:

(a) contravenes or exceeds the terms of the power which authorises the making of the decision;

(b) pursues an objective other than that for which the power to make the decision was conferred;

[1] See 5–007.
[2] See 5–020.
[3] See 5–049,
[4] See 5–073.
[5] See 5–075.
[6] See 5–010.
[7] See 5–135.
[8] 5–138.

(c) is not authorised by any power;

(d) contravenes or fails to implement a public duty.[9]

5–003 The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or statutory instrument, but it may also be an enunciated policy, and sometimes a prerogative or other "common law" power.[10] The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

5–004 At first sight this ground of review seems a fairly straightforward exercise of statutory interpretation, for which courts are well suited. It is for them to determine whether an authority has made an error of law. Yet there are a number of issues that arise in public law that make the courts' task more complex. First, is the fact that power is often conferred, and necessarily so in a complex modern society, in terms which grant the decision-maker a broad degree of discretion. Statutes abound with expressions such as: "the Secretary of State may" (do some act); conditions may be imposed as the authority "thinks fit"; action may be taken "if the Secretary of State believes" circumstances to exist or "considers it appropriate" to take action. These formulae, and others like them, appear on their face to grant the decision-maker infinite power, or at least the power to choose from a wide range of alternatives, free of judicial interference. The courts, however, insist that such seemingly unconstrained power is confined by the purpose for which the statute conferred the power. This task is made easier where the purpose is clearly defined, or where the considerations which the body must take into account in arriving at its decisions are clearly spelled out. In such cases the courts require the decision-maker to take into account the specified considerations and ignore the irrelevant. But many

[9] Compare this definition, albeit slightly extended from the 5th edition of this work, with the variety of instances of illegality specified under the South African Promotion of Administrative Justice Act 2000, s.6 of which permits judicial review of an administrative action if the administrator who took it was "not authorised to so by the empowering provision" (s.6(2)(a)(i)); or "acted under a delegation of power which was not authorised by the empowering provision" (s.6(2)(a)(ii)); or if " a mandatory and material procedure or condition prescribed by an empowering provision was not complied with" (s.6(2)(b)); or "the action was materially influenced by an error of law" (s.6(2)(d)); or the action was taken: "for a reason not authorised by the empowering provision; for an ulterior purpose or motive; because irrelevant considerations were taken into account or relevant considerations were not considered; because of the unauthorised or unwarranted dictates of another person or body; in bad faith; or arbitrary or capriciously (s.6(2)(e)(i)-(vi)). In addition, review is available if the action itself "contravenes the law or is not authorised by the empowering provision" (s.6(2)(f) i)), and finally "if the action concerned consists of a failure to take a decision" (s.6(2)(g)). Other provisions deal with irrationality and procedural fairness.

[10] See 3–032(on prerogative powers) and 5–022(on the "Ram doctrine").

statutes provide only the framework for subsequent decisions,[11] or delegate power to the executive further to specify those considerations. In any event the distinction between considerations which are "relevant" from those which are not is not always immediately obvious.

5–005 Secondly, statutes do not exist in a vacuum.[12] They are located in the context of our contemporary European democracy. As has been discussed above, the rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them.[13] There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[14] The courts should therefore strive to interpret powers in accordance with these principles. International law, both customary and treaty obligations are also part of the context which cannot be ignored. European Community Law is part of our law, as now is the European Convention on Human Rights. Breach of European Community law and Convention rights thus amounts to illegality.

5–006 It is because of these considerations that for a substantial part of this chapter it is necessary to focus closely on issues as to the appropriate manner in which legislation should be construed. This is necessary in order to identify the all important dividing line between decisions that can be reached lawfully and those that are unlawful.

Discretionary power: A brief history of judicial attitudes

5–007 The concept of discretion in its legal context implies power to make a choice between alternative courses of action or inaction.[15] If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no unique legal answer to a problem. There may, however, be a number of answers that are wrong in law. And even in cases where the power is discretionary, circumstances can exist which mean the discretion can only be exercised in one way. There are

[11] See, e.g. 5–033–34 on planning powers where, under the Town and Country Planning Acts over the years, the term "planning" has never been given statutory definition.

[12] *R. v Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: "Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law").

[13] See 1–015–021 See also 11–059–061.

[14] *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become "the ultimate controlling factor in our unwritten constitution"; and see J. Jowell, "Parliamentarys Sovereignty under the New Constitutional Hypothesis" [2006] P.L. 262.

[15] *cf.* K.C. Davis, *Discretionary Justice*(1969), p.4: "A public officer has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction".

degrees of discretion, varying the scope for manoeuvre afforded to the decision-maker.[16]

5–008 At the outset it should be emphasised that the scope of judicial review of the exercise of discretion will be determined mainly by the wording of the power and the context in which it is exercised.[17] Parliament employs a great variety of different formulae to confer discretion and to guide the exercise of that discretion. Sometimes, a statute exhaustively specifies the ways in which a discretion may be deployed, such as by enumerating the types of conditions which an authority may attach to the grant of a licence. In such cases, the attachment of any other type of condition may be illegal. Or it may lay down general standards to which the exercise of a power must conform.[18] Sometimes, however, the exercise of a statutory discretion is not limited by the express provisions of the Act and in those cases the courts embark upon an interpretation of the objects and purposes of the statute in order to identify the limitations to which the discretion is subject.

5–009 As was said by Lord Upjohn in *Padfield*,[19] even if a statute were to confer upon a decision-maker an "unfettered discretion";

> "[T]he use of that adjective [unfettered], even in an Act of Parliament, can do nothing to unfetter the control which the judiciary have over the executive, namely, that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and

[16] Ronald Dworkin makes the distinction between "strong discretion" (the sergeant's discretion to pick "any five men" for a patrol) and "weak discretion" (the sergeant's discretion to pick "the most five experienced men"): *Taking Rights Seriously* (1977), p.32. See also D. Galligan, *Discretionary Powers* (1986); G. Richardson, A. Ogus and P. Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (1982); K. Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (1984); B. Hutter, *The Reasonable Arm of the Law: The Law Enforcement Procedures of Environmental Health Officers* (1988); K. Hawkins (ed.), *The Uses of Discretion* (1992) and its review by D. Feldman, "Discretion, Choices and Values" [1994] P.L. 279; T. Buck, D. Bonner and R. Sainsbury, *Making Social Security Law: The Role and Work of the Social Security and Child Support Commissioners* (2005); F. Bennion, "Judgment and Discretion Revisited: Pedantry or Substance?" [2005] P.L. 368; T. Endicott, *Vagueness in Law* (2000); J. King, "The Justiciability of Resource Allocation" (2007) M.L.R. 197, 201–207.

[17] *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 at 1047 (Lord Wilberforce: "there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at").

[18] The extent to which discretionary power should be confined by rule in any particular context will not be considered here. For concern with the "optimal precision" of rules, see R. Posner, *An Economic Analysis of Law*, 6th edn (2003); T. Endicott, *Vagueness in Law*(2000); J King (2007) M.L.R. 197 For earlier accounts of the need to confine discretion see: D. Oliver, "Regulating Precision" in A. Hawkins and J. Thomas (eds), *Making Regulatory Policy* (1985); C. McRudden, "Codes in a Cold Climate: Administrative Rule-Making by the Commissions for Racial Equality" (1988) 51 M.L.R. 409; R. Baldwin "Why Rules Don't Work" (1990) 53 M.L.R. 321; D. McBarnet and C. Whelan, "The Elusive Spirit of the Law: Formalisation and the Struggle for Legal Control" (1991) 54 M.L.R. 848; C. Reich, "The New Property" 73 Yale L.J. 733; J. Jowell, *Law and Bureaucracy* (1975) and "The Legal Control of Administrative Discretion" [1973] P.L. 178; R. Baldwin and K. Hawkins, "Discretionary Justice: Davis Reconsidered" [1984] P.L. 570. *cf*. G. Mashaw, *Bureaucratic Justice* (1983).

[19] *Padfield v Minister of Agriculture Fisheries and Food* [1968] A.C. 997.

its scope and object in conferring a discretion upon the minister rather than by the use of adjectives."[20]

5–010 Those words are true today and to some extent have always been true, subject to some notable decisions to the contrary in the past, particularly during times of war or public emergency. The criteria by which the exercise of a discretion could be judged were indicated early in the 17th century. Lambard's advice to justices—"no way better shall the Discretion of a Justice of the Peace appear than if he (remembering that he is *lex loquens*) do contain himself within the listes of the law, and (being soberly wise) do not use his own discretion, but only where both the law permitteth, and the present case requireth it"[21]—was fortified by dicta and decisions of the courts. Discretion, said Coke, was *scire per legem quod sit justum;*[22] it was "a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections".[23] In 1647 it was laid down by the King's Bench that "wheresoever a commissioner or other person hath power given to do a thing at his discretion, it is to be understood of sound discretion, and according to law, and that this Court hath power to redress things otherwise done by them".[24] The concept of a judicial discretion, which was not confined to courts in the strict sense, was later stated by Lord Mansfield to import a duty to be "fair, candid, and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike".[25] In 1591 the discretion of licensing justices was expressed to mean that they were to act "according to the rules of reason and justice, not according to private opinion . . . according to law, and not humour". Their discretion was to be "not arbitrary, vague, and fanciful, but legal and regular".[26]

[20] [1968] A.C. 997 at 1060. For interpretation of a statute which came close to conferring unfettered discretion, but which nevertheless permitted judicial review, see *R. v Secretary of State for the Environment Ex p. Norwich CC* [1982] Q.B. 808 ("Where it appears to the Secretary of State that tenants . . . have or may have difficulty in exercising the right to buy [council houses]"; held that evidence of such difficulty existed); *R. (on the application of Mehanne) v Westminster Housing Benefit Review Board* [2001] UKHL 11; [2001] 1 W.L.R. 539 at [13] (the power to decide as the Board "considers appropriate" is the "language of discretion"); *R. (on the application of G) v Barnet LBC* [2003] UKHL 57; [2004] 2 A.C. 208 (local authority's duties in relation to children under Children Act 1989).
[21] W. Lambard, *Eirenarcha or of the Office of the Justices of Peace* (1581), p.58.
[22] *Keighley's case* (1609) 10 Co.Rep. 139a at 140a.
[23] *Rooke's case* (1598) 5 Co.Rep. 99b at 100a (assessment by Commissioners of Sewers); and R. Callis, *Readings upon the Statute of Sewers*, 2nd edn, pp.112–113; *Hetley v Boyer* (1614) Cro. Jac. 336: *case of Commendams* (1617) Hob. 140 at 158–159.
[24] *Estwick v City of London* (1647) Style 42 at 43 (suspension of a councillor).
[25] *R. v Askew* (1768) 4 Burr. 2186 at 2189 (determination by College of Physicians as to competence to practise medicine).
[26] *Sharp v Wakefield* [1891] A.C. 173 at 179 (Lord Halsbury L.C., substantially recapitulating a dictum of Lord Mansfield C.J., in *R. v Wilkes* (1770) 4 Burr. 2528 at 2539, concerning discretions exercised by courts of justice). *Roncarelli v Duplessis* [1959] S.C.R. 122 at 140; *Ward v James* [1966] 1 Q.B. 273 at 293–295; and *Birkett v James* [1978] A.C. 297, 317 (discretion on interlocutory order reviewable on appeal to promote consistency).

5–011 It follows that a discretionary power which is prima facie unfettered has always been held to be subject to implied limitations set by the common law.[27] Indeed, at an early date the courts drew a distinction between judicial discretions and executive discretions, recognising that it would be inappropriate to apply the same criteria to all classes of discretions;[28] and the courts would sometimes characterise a discretion as judicial when they wish to assert powers of review,[29] but as executive or administrative when they wished to explain their inability or unwillingness to measure it by reference to any objective standard.[30]

5–012 Various formulae have been drafted over the years to stretch administrative discretion to its outer limits, and even with the intention of making public officials "judge-proof". Some authorise an authority to take a prescribed course of action if *satisfied* that the action is "necessary" or "appropriate". Initially in this situation the courts held that they could not go behind a statement by the competent authority (in the absence of proof of bad faith) that it was satisfied that the statutory condition for the exercise of the power existed.[31] But it was later conceded that if prima facie grounds could be established for the proposition that the authority could not have been so satisfied, a court will be entitled to hold the act or decision to be invalid unless the authority itself persuades the court that it did in fact genuinely form the opinion which it claims to have held.[32] However, in any event, the burden cast upon a person seeking to impugn such an act or decision was likely to be a heavy one to discharge.[33]

[27] A. Barak, *Judicial Discretion* (1989); and *The Judge in a Democracy* (2006).

[28] D. Gordon, "Administrative" Tribunals and the Courts' (1933) 49 L.Q.R. 419 (where, however, the degree of immunity of discretionary powers from judicial review is overstated).

[29] *R. v Manchester Legal Aid Committee Ex p. Brand (RA) & Co* [1952] 2 Q.B. 413.

[30] *Johnson (B) & Co (Builders) Ltd v Minister of Health* [1947] 2 All E.R. 395 at 399–400 (Minister's decision whether or not to confirm a compulsory purchase order) and *Attorney General v Bastow* [1957] 1 Q.B. 514 (Attorney General's decision to sue for injunction to restrain continuance of criminal offence); *Robinson v Minister of Town and Country Planning* [1947] K.B. 702; *Holmes (Peter) & Son v Secretary of State for Scotland* 1965 S.C. 1 (designation of large areas as subject to comprehensive redevelopment and compulsory purchase); *Webb v Minister of Housing and Local Government* [1964] 1 W.L.R. 1295 at 1301. Cf. *R. v Secretary of State for the Environment Ex p. Ostler* [1977] Q.B. 122 (administrative nature of minister's discretion to confirm a compulsory purchase order offered as one reason for the court's inability to review its legality outside the statutory time limitation for impugning it).

[31] *Re Beck & Pollitzer's Application* [1948] 2 K.B. 339 (order stopping up a highway); *Land Realisation Co v Postmaster-General* [1950] Ch. 435 (compulsory purchase order); *Shand v Minister of Railways* [1970] N.Z.L.R. 615 (closure of railway line); *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014, 1025 (Lord Denning M.R. commenting to the effect that the statements in the wartime and post-war cases "do not apply to-day").

[32] *cf. R. v Brixton Prison Governor Ex p. Soblen* [1963] 2 Q.B. 243 at 302, 307–308 (Home Secretary alleged to have used his power to order the deportation of an alien, a power exercisable whenever he deemed it to be "conductive to the public good", for the ulterior purpose of effecting an unlawful extradition).

[33] In *Soblen* [1963] 2 Q.B. 243, evidence relating to intergovernmental communications was withheld from production when the Secretary of State certified that its production would be injurious to good diplomatic relations.

5–013 In *Liversidge v Anderson*[34] the House of Lords held that the Secretary of State's power to order the detention of any person whom he had "reasonable cause to believe" to be of hostile origins or associations, and over whom it was therefore necessary to exercise control, was validly exercised unless it was shown that he had not honestly considered that he had had reasonable cause for his belief.[35]

5–014 In 1970 powers were given to the tax authorities to issue a warrant to enter premises where they have "reasonable ground" for suspecting an offence. Having entered the premises they had the power to seize and remove items found there which they had "reasonable cause to believe" may be required as evidence of the offence.[36] Suspecting tax fraud, the Inland Revenue officials obtained search warrants, entered premises and seized documents without informing the applicants of the offences suspected or the persons suspected of having committed them. The House of Lords upheld the Inland Revenue's actions and held that the applicants had no right to be informed of the alleged offences, or of the "reasonable ground" for suspecting an offence.[37] Nevertheless, it was held that the existence of "reasonable cause to believe" was a question of objective fact, to be tried on evidence, and Lord Diplock said that "the time has come to acknowledge openly that the majority of this House in *Liversidge v Anderson* were expediently and, at that time perhaps, excusably wrong and the dissenting speech of Lord Atkin was right.[38]

5–015 In the immediate aftermath of the Second World War judicial deference to the executive and other public authorities was still the norm, even where the statutory purposes were defined with close precision. In cases involving public control over land use and housing accommodation, one could point to dicta to the effect that an order shown to be perverse or otherwise lacking in any evidentiary support might be held ultra vires because the competent authority could not be deemed to have been genuinely satisfied that it was appropriate for a purpose sanctioned by legislation.[39] Yet if persons claimed to be aggrieved they invariably failed in the courts; and the judgments persistently laid a heavier emphasis on the amplitude of the discretionary power than on the need to relate it to the purposes of the Act.[40] The incantation of statements denying the absoluteness of

[34] [1942] A.C. 206; see Lord Atkin (at 225–247) who delivered a powerful dissenting judgment. The nature of the "objective" test that Lord Atkin thought appropriate has sometimes been misrepresented; see 246–247 of his judgment, in which he gave his reasons for agreeing with the other members of the HL in the analogous case of *Green v Home Secretary* [1942] A.C. 284.

[35] The only other admissible ground for challenge was that the detention order was improperly made out; see *R. v Home Secretary Ex p. Budd* [1942] 2 K.B. 1 at 22.

[36] Taxes Management Act 1970 s.20C (now Finance Act 2006 s.174).

[37] *R. v I.R.C. Ex p. Rossminster* [1980] A.C. 952.

[38] At 1011.

[39] *Robinson v Minister of Town and Country Planning* [1947] K.B. 702 at 724; *Demetriades v Glasgow Corp* [1951] 1 All E.R. 457 at 463.

[40] *Minister of Agriculture and Fisheries v Price* [1941] 2 K.B. 116; *Robinson* [1947] K.B. 702; *Taylor v Brighton Corp* [1947] K.B. 736; *Swindon Corp v Pearce* [1948] 2 All E.R. 119; *Holmes (Peter) & Son v Secretary of State for Scotland* 1965 S.C. 1.

administrative discretion in such cases was little more than a perfunctory ritual to satisfy the consciences of the judges.

5–016 Sometimes the question before a court is whether words which apparently confer a discretion (words such as "may", or "it shall be lawful if") are instead to be interpreted as imposing a duty. The word "may" has, over the years, primarily been construed as permissive, not imperative.[41] However, exceptionally, it was construed as imposing a duty to act, and even a duty to act in one particular manner.[42]

5–017 Conversely, an apparently absolute duty cast by statute upon a public authority may be interpreted as granting a discretion as to the manner and extent of its performance. Thus, a local authority required by statute to provide suitable alternative accommodation for those displaced by a closing order was held not to be obliged to place them at the top of its housing waiting list.[43] The local authority was in effect given discretion in relation to which it had to use its best endeavours to deal with the result of a housing shortage in the most satisfactory way. Similarly, the manner and timing of the performance by a highway authority of its statutory duty to remove obstructions from the highway are to a large extent within the discretion of the authority.[44] Discretion, in other words, may be conferred implicitly as well as expressly.

[41] *Julius v Bishop of Oxford* (1880) 5 App.Cas. 214. Students may wish to consider the following problem: "I learned afterwards that in the scholarship examination another man had obtained more marks than I had, but Whitehead had the impression that I was the abler of the two. He therefore burned the marks before the examiners' meeting, and recommended me in preference to the other man" (*The Autobiography of Bertrand Russell, 1872–1914* (1967), p.57). Discuss. (Notes for Guidance: (1) Assuming that there were no formal rules prescribing criteria for the award of scholarships, do you think the examiners had an implied duty to award them to the highest placed candidates, or did they have a discretion? (2) If the former, what legal remedy, if any, would the candidate with higher marks have had, and against whom? (3) If the latter, did the exercise of Whitehead's discretion taint the subsequent proceedings with invalidity? (4) If not, why not? (5) If yes, what legal remedies would the other candidate have had, and against whom? (The answers to these questions are not provided in this book.))

[42] *lderman Blackwell's case* (1683) 1 Vent. 152; and authorities cited in *Stroud's Judicial Dictionary* (4th edn), Vol.3 ("May") and examined in *Julius v Bishop of Oxford* (1880) 5 App. Cas. 214. See also *Shelley v LCC* [1949] A.C. 56; *Peterborough Corp v Holdich* [1956] 1 Q.B. 124; *Re Shuter* [1960] 1 Q.B. 142; *Annison v District Auditor for St Pancras BC* [1962] 1 Q.B. 489; *R. v Derby Justices Ex p. Kooner* [1971] 1 Q.B. 147; *Lord Advocate v Glasgow Corp* 1973 S.L.T. 3, HL; *Re Pentonville Prison Governor Ex p. Narang* [1978] A.C. 247; *R. v Secretary of State for the Home Department Ex p. Phansopkar* [1976] Q.B. 606. For an analysis of the uses of "may" and "shall", "duty" and "power" see *R. v Berkshire CC Ex p. Parker* [1997] C.O.D. 64.

[43] *R. v Bristol Corp Ex p. Hendy* [1974] 1 W.L.R. 498; *Thornton v Kirklees MBC* [1979] Q.B. 626; *cf. Salford CC v McNally* [1976] A.C. 379; *R. v Kerrier DC Ex p. Guppys (Bridport) Ltd* (1976) 32 P. & C.R. 411, where it was held that local authorities have no discretion to serve abatement notices under the Public Health Act 1936 or to discharge their obligations under the Housing Act 1957 in respect of houses unfit for human habitation: the duties imposed by both statutes are cumulative. See also *R. v Hillingdon AHA Ex p. Wyatt* (1978) 76 L.G.R. 727 (duty to provide home nurses).

[44] *Haydon v Kent CC* [19781 Q.B. 343.

Change of approach

5–018 More than a decade was to elapse after the Second World War before the pendulum swung and the emphasis shifted. In New Zealand in 1959 a power vested in the Governor-General to make such regulations as he "thinks necessary in order to secure the due administration" of an Education Act was held to be invalidly exercised in so far as his opinion as to the necessity for such a regulation was not reasonably tenable.[45] In England in 1962 the power of the Commissioners of Customs and Excise to make regulations for "any matter for which provision appears to them necessary for the purpose of giving effect" to the Act was not construed as constituting them as the sole judges of what was in fact necessary for the purposes of the Act; and a regulation in which they gave themselves power to determine conclusively the amounts of tax payable was held to be ultra vires.[46] Again, in 1964, the courts were not deterred by a subjectively worded formula from holding that a compulsory purchase order made ostensibly for the purpose of coast protection work was invalid because the land in question was not in fact required for such a purpose.[47] As was observed in a leading Canadian case, "there is always a perspective within which a statute is intended to operate".[48]

5–019 The decision in 1968 of the House of Lords *Padfield*[49] was an important landmark.[50] The minister had refused to appoint a committee, as he was statutorily empowered to do at his discretion, to investigate complaints made by members of the Milk Marketing Board that the majority of the Board had fixed milk prices in a way that was unduly unfavourable to the complainants. The House of Lords held that the minister's discretion was not unfettered and that the reasons that he had given for his refusal showed that he had acted ultra vires by taking into account factors that were legally irrelevant and by using his power in a way calculated to frustrate the policy of the Act.[51] The view was also expressed by four of

[45] *Reade v Smith* [1959] N.Z.L.R. 996; *Low v Earthquake and War Damages Commission* [1959] N.Z.L.R. 1198 at 1207 (dicta).
[46] *Customs and Excise Commissioners v Cure and Deeley Ltd* [1962] 1 Q.B. 340. A number of the authorities referred to in the preceding pages were considered in the judgment at 366–368. But on different facts, a similarly worded provision of a subsequent Act was interpreted literally in *Marsh (B) (Wholesale) Ltd v Customs and Excise Commissioners* [1970] 2 Q.B. 206.
[47] *Webb v Minister of Housing and Local Government* [1964] 1 W.L.R. 1295; [1965] 1 W.L.R. 755 (a complicated case, in which the enabling legislation was couched partly in subjective and partly in objective terms); J. Bennett Miller, "Administrative Necessity and the Abuse of Power" [1966] P.L. 330; A.W. Bradley, "Judicial Review and Compulsory Purchase" [1965] C.L.J. 161.
[48] *Roncarelli v Duplessis* [1959] S.C.R. 122 at 140 (Rand J.); *Rogers v Jordan* (1965) 112 C.L.R. 580 (dicta).
[49] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.
[50] For some critical comments upon this decision and, more generally, upon judicial willingness to imply limitations upon the scope of subjectively worded discretion, see R. Austin, "Judicial Review of Subjective Discretion" (1975) 28 C.L.P 150, 167–173.
[51] The minister's reasons for refusing to accede to the complainants' request had been that it was the purpose of the statutory scheme that issues of the kind raised by the complainants

their Lordships that even had the minister given no reasons for his decision, the court would not have been powerless to intervene: for once a prima facie case of misuse of power had been established, it would have been open to the court to infer that the minister had acted unlawfully if he had declined to supply any justification at all for his decision.[52] In the years that followed the Court of Appeal[53] and the House of Lords[54] set aside as ultra vires the exercise of discretion that included a substantial subjective element. It is interesting to note that important as the decision in *Padfield* has been in the evolution of judicial attitudes, the minister was ultimately able to uphold the Board's decision without resorting to legislation. Another feature of those decisions was the willingness of the courts to assert their power to scrutinise the factual basis upon which discretionary powers have been exercised.[55]

Statutory interpretation

5–020 The law reports abound with cases involving challenges to the interpretation by public officials of statutory power. Sometimes the exercise of interpretation by the courts of the statutory provision in question involves

should be settled by the representatives of the producers from the different regions who sat on the Board, and that were the committee to uphold the complainants, it would be politically embarrassing for him if he decided not to implement the committee's recommendations. After the decision of the HL the minister complied with the order by referring the complaint to a committee of investigation. The committee reported in favour of the complainants; the minister declined to follow the recommendation.

[52] [1968] A.C. 997 at 1032–1933 (Lord Reid), 1049 (Lord Hodson), 1053–1054 (Lord Pearce), 1061–1062 (Lord Upjohn).

[53] See, e.g. *Congreve v Home Office* [1976] Q.B. 629 (subjective power to revoke television licences not validly exercisable to prevent avoidance of prospectively announced fee increase); *Laker Airways Ltd v Department of Trade* [1977] Q.B. 643 (neither statutory power to give directions to Civil Aviation Authority nor non-statutory power conferred by treaty validly exercisable to defeat legislative scheme); *R. (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.1)* [2002] EWCA 1409.

[54] See, e.g. *Daymond v Plymouth CC* [1976] A.C. 609 (statutory power to make charges for sewerage services as the authority thought fit did not authorise charging those not in receipt of the services): *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 (minister improperly exercised power to give directions to a local education authority when satisfied that the authority was proposing to act unreasonably).

[55] For review on the basis of fact is see 4–047 et seq. and see the discussion of review for mistake of fact at 11–041. See *Tameside* [1977] A.C. 1014, especially at 1047 at 1065–1066, 1072; but the statutory standard on which the minister had to be satisfied was by no means wholly subjective. Their Lordships did not indorse the wider scope of inquiry into the underlying facts advanced in the CA by Scarman L.J. at 1030–1031. *cf.* Sir Leslie Scarman, *English Law—The New Dimension* (1974), pp.48–50. See also *Laker Airways* [1977] Q.B. 643 at 706. But see the "Draconian" powers given to the Secretary of State under s.23 of the Housing Act 1980 to intervene to exercise the powers of a local housing authority to do "all such things as appear to him necessary or expedient" to enable tenants to exercise the right to buy. Under that statute he may exercise those powers "Where it appears [to him] that [the tenants] have or may have difficulty in exercising their right to buy effectively or expeditiously". In *R. v Secretary of State for the Environment Ex p. Norwich CC* [1982] Q.B. 808 (Kerr L.J., it was held that this formula did not require the Secretary of State to intervene only when the authority had acted "unreasonably" but, it seems, there had to be some objective evidence that the tenants were experiencing "difficulty").

no more than a search for the "natural and ordinary meaning" of a word or term. For example, a number of cases under various statutes requiring local authorities to house the homeless have considered the meaning of terms such as "homelessness",[56] or "intentionally homeless".[57] Others have considered the duty to provide "adequate accommodation" to gypsies "residing in or resorting to the area".[58] The term "ordinarily resident in the United Kingdom" has also been construed in various contexts.[59] Planning authorities, when deciding whether to grant permission in conservation areas, are required to pay special attention to the desirability of "preserving or enhancing the character or appearance" of the designated conservation area.[60] Do those words require that permission be granted only for development which positively improves the area, or do they merely require that the standards of amenity in the area are maintained at their existing level and not harmed? The House of Lords, after various interpretations in the courts below,[61] held the latter interpretation to be correct.[62]

5–021 Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[63] We have seen that the expression "may" can mean "must" in the context of the purpose of the statute as a whole, and we shall see below that the opposite may also apply.[64] Where the statute gives power to the decision-maker to act as he "thinks appropriate", or as he "believes", or "thinks fit", the courts nowadays tend to require those thoughts or beliefs to be "reasonably and objectively justified by relevant facts".[65] Although in judicial review the courts should not put themselves into the position of the primary decision-maker and reassess the facts or decide the merits of the original decision, we shall see in Chapter 11 that there is growing "culture of justification",[66] where even the broadest

[56] See, e.g. *R. v Hillingdon LBC Ex p. Islam* [1981] 1 A.C. 688.
[57] See, e.g. *R. v Secretary of State for the Environment Ex p. Tower Hamlets LBC* [1993] Q.B. 632.
[58] Caravan Sites Act, 1968 s.6 (repealed by the Criminal Justice and Public Order Act 1994, s.80); *W Glamorgan v Rafferty* [1987] 1 W.L.R. 457; *R. v Gloucester CC Ex p. Dutton* [1992] C.O.D. 1.
[59] See, e.g. *Shah v Barnet LBC* [1983] 2 A.C. 309 (in the context of a student seeking non-overseas status).
[60] Planning (Listed Buildings and Conservation Areas) Act 1990 s.72.
[61] See, e.g. *Steinberg v Secretary of State for the Environment* (1988) 58 P. & C.R. 453.
[62] *South Lakeland DC v Secretary of State for the Environment* [1992] A.C. 141.
[63] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd v Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.
[64] See 5–049–072.
[65] *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142; [2004] 4 All E.R. 1103 at [45].
[66] See 11–04 and 098–102.

discretionary formula will not justify an arbitrary decision, or one that is not demonstrably justified (or at least demonstrably unjustified).[67]

Non-statutory sources of power and the Ram Doctrine

5–022 Virtually all of interpretation of legality engages statutory sources, but to what extent is government permitted to achieve its aims by "extra-statutory" means? The power of the Executive is derived from statute, but also, as we have seen, from the royal prerogative.[68] We also consider below that local authorities may enjoy implied powers to achieve objectives which are "incidental" to their other activities.[69] They must surely be able to employ staff, convey property and buy stamps and cleaning equipment and may not need specified power for that kind of activity (although it is sometimes granted). However, there is another source of power, known variously as a "*de facto*",[70] or "common law discretionary"[71] power, which is employed for the kind of "incidental" activities which are required at the level of central government. This authority is derived from what is known as the "Ram doctrine",[72] which states that a minister of the Crown may exercise any powers that the Crown may exercise, except in so far as the minister is precluded from doing so, either expressly or by necessary implication.

5–023 In a written reply to Lord Lester's question in the House of Lords about the scope of the doctrine, Baroness Scotland of Asthal explained that under the Ram doctrine ministers and their departments, "like many other persons" have common law powers which derive from the Crown's status as a corporation sole. She said that to require parliamentary authority for every exercise of the common law powers exercisable by the Crown "either would impose upon Parliament an impossible burden or produce legislation in terms that simply reproduced the common law".[73] The Ram doctrine has also been commented on by the Cabinet Office's Performance and Innovation Unit which claimed that doctrine permitted "a department [to] do anything a natural person can, provided it is not forbidden from doing so".[74]

[67] Although sometimes the court will not consider decisions (e.g. of elected local authorities in respect of the issuance of taxi licenses) "with over-refinement": R. v Great Yarmouth BC Ex p. Sawyer [1989] R.T.R. 297, [55]; *R. (on the application of Johnson) v Reading BC* [2004] EWHC 765; [2004] A.C.D. 72.

[68] See Ch.3.

[69] See 5–091.

[70] M. Elliott, *The Constitutional Foundations of Judicial Review* (2001), p.166; P. Cane, *Administrative Law*, 4th edn. (2004), p.50.

[71] P. Craig, *Administrative Law*, 5th edn. (2003), p.555.

[72] After Sir Granville Ram, First Parliamentary Counsel 1937–47, who set out the doctrine in a memorandum of November 2, 1945; it was first made public in a written parliamentary answer on January 22, 2003, HL *Hansard*, Vol.643, col.WA98. See B. Harris, "The 'Third Source' of Authority for Government Action Revisited" (2007) 123 L.Q.R. 225; M. Cohn, "Medieval Chains, Invisible Inks: On Non-Statutory Powers of the Executive" (2005) 25 O.J.L.S.97.

[73] HL *Hansard*, Vol.645, col.WA12 (February 25, 2003).

[74] Cabinet Office, *Report on Privacy and Data Sharing* (2002).

5–024 As Lester and Weait and point out,[75] these interpretations of the Ram doctrine appear to be based upon the approach taken in *Malone v Metropolitan Police Commissioner*, where Sir Robert Megarry V.C. permitted telephone tapping by the police on the ground that England "is not a country where everything is expressly permitted; it is a country where everything is permitted except what is expressly forbidden".[76] The European Court of Human Rights subsequently held that the actions of the police violated Art.8.[77]

5–025 While government must be able to carry out incidental functions that are not in conflict with its statutory powers, it is wrong to equate the principle pertaining to private individuals—that they may do everything which is not specifically forbidden—with the powers of public officials, where the opposite is true. Any action they take must be justified by a law which "defines its purpose and justifies its existence".[78] The extension of the Ram doctrine beyond its modest initial purpose of achieving incidental powers[79] should be resisted in the interest of the rule of law.[80] However, in any event it seems that the courts are, also in accordance with the rule of law, increasingly insisting that all powers, whatever their source, are reviewable.[81]

[75] Lord Lester and M. Weait, "The Use of Ministerial Powers Without Parliamentary Authority: The Ram Doctrine" [2003] P.L. 415, p.421.

[76] [1979] Ch. 344 at 357.

[77] *Malone v UK* (1984) 7 E.H.R.R. 14 at paras 67–68 (action was not "in accordance with law" for the purposes of ECHR Art.8). The Interception of Communications Act 1985 was enacted to provide a statutory framework for telephone tapping.

[78] *R. v Somerset CC Ex p. Fewings* [1995] 1 All ER 513 at 524 (Laws L.J.), where he made the distinction between the powers of the private citizen "which are not conditional upon some affirmative justification for which he must burrow in the law books" and the powers of a public body, which has no rights of its own . . . beyond its public responsibility which defines its purpose and justifies its existence"; also Sir Thomas Bingham M.R. in the CA [1995] 1 W.L.R. 1037 at 1042.

[79] Lester and Weait [2003] P.L. 415, pp.417, 421.

[80] Cases where the doctrine has been liberally construed are *R. v Secretary of State for Health Ex p. C* [2000] 1 F.L.R. 627 and *R. v Worcester CC Ex p. SW* [2000] 3 F.C.R. 174, both cases which considered the legality of the Consultancy Services Index (CSI), a database maintained by the Secretary of State for Health without statutory authority. In both cases the CA and High Court respectively held that the Secretary of State could maintain the database just as a natural person could (see 3–026). The matter was considered in *R. v Secretary of State for Work and Pensions Ex p. Hooper* [2005] UKHL 29; [2005] 1 W.L.R. 1681, in the context of the "common law" power of the Secretary of State to make extra-statutory payments to widowers in order to achieve equality with the pensions provided solely to widows. The CA had rejected the submissions [2003] EWCA Civ 875; [2003] 1 W.L.R. 2623 at [135] and the Ram doctrine was not specifically considered in the HL but Lord Hoffmann at [47] felt that they contained "a good deal of force".

[81] See, e.g. *R. (on the application of Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] U.K.H.R.R. 76 at [106] ("It is not an answer to a claim for judicial review to say that the source of the power of the Foreign Office is the prerogative. It is the subject-matter that is determinative"); *Secretary of State for Foreign and Commonwealth Affairs v Bancoult* [2007] EWCA Civ 498.

The discovery of Parliament's intent and use of Hansard

5–026 Because a body like Parliament can have no mind, it is not possible to "consolidate individual intentions into a collective, fictitious group intention".[82] Therefore the provisions of a statute need to be understood in the context of the purpose of the statute as a whole. This first requires an understanding of the context in which it was enacted and the "mischief" at which it was aimed. In *Pepper v Hart*,[83] the term in dispute was that of "cost" in s.63 of the Finance Act 1976. The question was whether teachers at independent schools whose children were educated at the school at much reduced fees should be taxed on the "marginal cost" to the school of educating those children (which would be a small sum), or on the "average cost" (which would be significantly higher). The issue had implications for the in-house benefits of many other employees as well. It was decided that the statutory purpose favoured the interpretation most favourable to the teachers. Departing from previous authority,[84] the House of Lords referred to parliamentary material to assist the construction of the ambiguous provision. Reference may now therefore be made to the parliamentary record to aid the construction of legislation. However, as Lord Browne Wilkinson made plain the exclusionary rule should be relaxed to permit reference to parliamentary materials only where: "(a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if necessary with such other parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied on are clear".[85]

5–027 This important step may aid the "purposive" or "teleological" approach to statutory interpretation. There are however, dangers: it encourages the artificial manufacture of parliamentary intent. Lobby groups seeking a particular interpretation of a statutory provision seek "Pepper v Hart" statements from the minister. The rule may even lead to the confounding of the presumption of parliamentary respect for certain fundamental constitutional principles where the intention clearly reveals that Parliament

[82] R. Dworkin, *Law's Empire* (1986), pp.335–336.

[83] [1993] A.C. 593.

[84] *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234; *Davis v Johnson* [1979] A.C. 264; *Hadmor Productions Ltd v Hamilton* [1983] A.C. 191. *Hansard* reports have been directly referred to in some cases, e.g. *Pickstone v Freemans Plc* [1989] A.C. 66, and *Owen Bank v Bracco* [1992] A.C. 443 and in others (mainly involving national security issues) the Crown has referred to *Hansard* see, e.g. *R. v Secretary of State for the Home Department Ex p. Brind* [1991] A.C. 696.

[85] [1993] A.C. 640. It was not foreseen that any statement other than that of the minister or other promoter of the bill was likely to meet those criteria. The Australian Acts Interpretation Act 1901 (Cth) s.15AB(1) provides that extrinsic material may be referred to ascertain the meaning of a statutory provision where there is ambiguity or obscurity or where the ordinary meaning of the text leads to a result that is manifestly absurd or unreasonable. A non-exhaustive list of material may be considered which includes the second-reading speech of the minister (s.15AB(2)). Australian States have similar legislation.

wished, say, to oust the court's jurisdiction or to breach the rule of law.[86] It no doubt increases the cost of litigation in certain cases. Perhaps its most troubling aspect has been pointed out extra-judicially by Lord Steyn: "To give the executive, which promotes a Bill, the right to put its own gloss on a Bill is a substantial inroad on a constitutional principle, shifting legislative power from Parliament to the Executive".[87]

5–028 The House of Lords in *Spath Holme* sought to mitigate some of these negative effects of *Pepper v Hart* by permitting reference to ministerial statements only to clarify the meaning of a statutory expression (such as the term "cost of a benefit" in *Pepper v Hart)*, and not to clarify the scope of the ministerial power (such as, in *Spath Holme*, whether a statutory power to make delegated legislation to restrict rent levels could be employed for a purpose other than the control of inflation).[88] In the latter case, only if a minister were to give a "categorical assurance" to Parliament that a power would be used in a particular way, could the statement be admissible.[89]

5–029 While *Spath Holme* restricted recourse to statements in Parliament, the House of Lords in *Wilson v First County Trust Ltd*[90] somewhat extended it in cases where the courts are, under the Human Rights Act 1998, considering whether a statute may be incompatible with the ECHR. Since the courts have to consider, in the context of some Convention rights, whether the legislation pursued a legitimate objective and did so proportionately, it was necessary to assess the "practical effect" of the legislation and thus it might occasionally be necessary to consider the words spoken by a minister in the course of a debate on a Bill. The House of Lords was clear that such a resort to the parliamentary record was only for the purpose of "background information". Lord Nicholls said that "the court is called upon to evaluate the proportionality of the legislation, not the adequacy of the minister's exploration of the policy options or of his explanations to Parliament. The Latter would contravene Art. 9 of the Bill of Rights 1689" (which provides that "the freedom of speech and debates

[86] D. Oliver, "*Pepper v Hart*: A Suitable Case for Reference to Hansard?" [1993] P.L. 5; T. Bates, "Parliamentary Material and Statutory Construction: Aspects of the Practical Application of *Pepper v Hart*" (1993) 14 Stat.L.R. 46, p.54; F. Bennion, "Executive Estoppel: *Pepper v Hart* Revisited" [2007] P.L.1.

[87] Lord Steyn, "*Pepper v Hart*; A Re-Examination" (2001) 21 O.J.L.S. 59. Lord Nicholls sought in *Jackson v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 to rescue *Pepper v Hart* from the "cloud" under which Lord Steyn had placed it; his Lordship sought to invoke the post-enactment history of the Parliament Acts as an aid in their construction, a course which Lord Steyn "emphatically rejected" (at [99]), as did Lord Cooke in "A Constitutional Retreat" (2006) 122 L.Q.R. 224. See also Lord Nicholls' dicta in *R. (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349 at 396 and in *Wilson v First County Trust Ltd (No.2)* [2003] UKHL 40; [2004] 1 A.C. 816 at 827.

[88] *Spath Holme* [2001] 2 A.C. 349, Lords Nicholls and Cooke dissenting. Which also held that in interpreting a consolidated statute, reference could be had to earlier versions of the various consolidated acts.

[89] *Spath Holme* [2001] 2 A.C. 349 at 212 (Lord Bingham of Cornhill).

[90] *First County Trust Ltd* [2003] UKHL 40; [2004] 1 A.C. 816.

or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament").[91]

5–030 The European Court of Human Rights has, however, been more willing to have recourse to the reasoning (or lack of reasoning) of parliamentary debates. In *Hirst v United Kingdom (No.2)*[92] the Court considered whether the United Kingdom's blanket ban on convicted prisoners voting in general and local elections breached ECHR Art.3 of Protocol 1. It held that the *failure* by Parliament to give adequate reasons for the relevant statutes displayed lack of evidence that Parliament had assessed the proportionality of the ban.[93] The absence of the required justification led the Court to hold that the ban violated the prisoners' Convention rights. This approach is diametrically opposed to that of the House of Lords in *Wilson*, and may well violate Art.9 of the Bill of Rights 1689 if employed by a domestic court in the future.

5–031 The practice, since 1999, of publishing Explanatory Notes, prepared by departmental lawyers to accompany all bills and updated during the course of the bills' passage through Parliament, provide contextual information on the Bill that may be helpful in interpreting its provisions and purpose.

Always-speaking statutes

5–032 Reference to the parliamentary record and the "original intent" of a statute may be of limited value, especially in cases where its purpose is not defined, or in the case of a "framework Act", which deliberately leaves the definition of purpose to be developed in the course of the statute's implementation. However, even in cases where a term seems at the time of enactment relatively specific, its meaning over time may alter. For example, in *McCartan Turkington Breen v Times Newspapers Ltd*, the question was whether "public meeting" could include a press conference; Lord Bingham said, in relation to the Defamation Act (Northern Ireland) 1955: "Although the 1955 reference to "public meeting" derives from 1888, it must be interpreted in a manner which gives effect to the intention of the legislature *in the social and other conditions which obtain today*".[94] And Lord Steyn said that, unless they reveal a contrary intention, statutes are to be interpreted as always speaking.[95] The notion of the "always speaking" statute or constitution has been applied in a number of recent cases considering the interpretation of Commonwealth constitutions,[96] but it has

[91] *First County Trust Ltd* [2003] UKHL 40; [2004] 1 A.C. 816.
[92] (2006) 42 E.H.R.R. 41.
[93] At [78]–[85].
[94] [2001] 2 A.C. 277 at 292 (emphasis added).
[95] [2001] 2 A.C. 277 at 296.
[96] See, e.g. *Balkissoon Roodal v The State* [2003] UKPC 78; *Matthew v State of Trinidad and Tobago* [2004] UKPC 33; *R. v Ireland* [1998] A.C. 147; *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] N.I. 390.

relevance to statutory interpretation in different contexts.[97] As we shall soon consider, courts should of course be careful in accepting ministerial or other statements of policy as the best evidence of a change in a statute's meaning.[98] However, especially in cases where the purpose of a statute has never been defined, either generally, or by reference to any particular relevant considerations, its purposes may well change over time. The area of land-use planning provides a vivid example.

5–033 Since 1947, when the systematic control of land use and development was introduced by the Town and Country Planning Act of that year, local authorities and the Secretary of State for the Environment[99] on appeal, have possessed seemingly unlimited power to grant and refuse planning permission. The governing statute[100] requires "regard to be had" to the development plan as drafted by the local authority, but it has always allowed "other material considerations" also to be considered.[101] Conditions may be imposed upon permissions as the authority "think fit".[102]

5–034 The judicial construction of the Town and Country Planning Act over time shows that the purposes pursued by a statutory scheme may not be static. When first enacted, the Act was concerned largely with what have been called physical criteria: questions such as access to the site, siting of the buildings, their height, bulk, set-back, mass, design and external appearance. It was held unequivocally that the "character of the use of the land, not the particular purposes of a particular occupier"[103] was the concern of planning, and therefore the authority could not seek to pursue social policies through its planning policies, for example, requiring developers to provide housing for the less well-off.[104] Over time, however, policies changed, and the courts accepted that the pursuit of "affordable housing" may be a material planning consideration.[105]

[97] *In re McFarland* [2004] UKHL 17; [2004] 1 W.L.R. 1289 at [25] (Lord Steyn: "legislation, whether primary or secondary, must be accorded an always-speaking construction unless the language and structure of the statute reveals an intention to impress on the statute a historic meaning. Exceptions to the general principle are a rarity"). For cases displaying a similar approach in New Zealand, see J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–199.

[98] On interpretation of policies, see 5–073–074.

[99] Formerly the Minister of Housing and Local Government; currently Secretary of State for Communities and Local Government, via the First Secretary of State (the official office of the Deputy Prime Minister).

[100] Now the Town and Country Planning Act 1990.

[101] Formerly the development plan and other material considerations had equal influence. Since 1991, however, the development plan shall be followed unless other material considerations "indicate otherwise"; Town and Country Planning Act 1990 s.54A.

[102] Town and Country Planning Act 1990 s.70(1).

[103] *East Barnet UDC v British Transport Commission* [1962] 2 Q.B. 484 (Lord Parker C.J.).

[104] *R. v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] Q.B. 720.

[105] *Mitchell v Secretary of State for the Environment* [1994] J.P.L. 916, CA (upheld the refusal of permission to change the use of a house in multiple occupation to self-contained flats in order to meet the need for cheap rental accommodation); *ECC Construction Ltd v Secretary of State for the Environment* (1994) 69 P. & C.R. 51. Since these cases the law has changed to the extent that if a policy (such as to pursue affordable housing) is articulated in the development plan, then if the policy is lawful there is a presumption (under s.54A of the Act)

5–035 The experience of the interpretation of planning powers over time provides a salient reminder of the fluid nature of statutory purposes and the danger of freezing their purpose for all time through undue reliance upon the so-called "original intent" of the legislature (even if such intent is capable of discovery).[106] The goals of a scheme of public regulation can be gauged by a number of sources of public law. In the planning area these include statutory instruments as well as various policy documents known as Planning Policy Guidance (PPGs) issued by the relevant department from time to time on different subjects. Although not having the force of law, they nevertheless are considerations to which the decision-maker must have regard and therefore themselves fall within the scope of the statutory power. Interpretation of the contemporary scope of planning therefore requires some understanding of what planners on the ground actually do. The court will therefore need to be guided by those who keep abreast of changing social and professional expectations and approaches.

Interpretation in relation to constitutional principles and constitutional rights

5–036 The Human Rights Act 1998 now incorporates provisions of the European Convention on Human Rights into domestic law.[107] Breach of Convention rights by anyone exercising public functions therefore offends legality. However, what we now explicitly call constitutional rights, based on constitutional principle such as the rule of law, have always been acknowledged in the common law. In *Simms* the common law "principle of legality" was enunciated.[108] It means that, in the absence of express language or implication to the contrary, the courts will assume that even the most general statutory words were intended to be subject to the basic rights of the individual (in that case freedom of expression).

5–037 The rule of law as a fundamental constitutional principle will be considered in more detail in Chapter 11.[109] Of the common-law presumptions, the most influential in modern administrative law is one based on the rule of law, namely, that the courts should have the ultimate jurisdiction to pronounce on matters of law. Accordingly, only in the most exceptional

that the development plan should be followed: *Persimmon Homes (North West) Ltd v First Secretary of State and West Lancashire DC* [2006] EWHC 2643 (Admin). In addition, Local Government Act 2000 s.4 requires every local authority to prepare a "community strategy" for "promoting or improving the economic, social and environmental well-being of their area". Under the Planning and Compulsory Purchase Act 2004, s.62(5) local planning authorities must have regard to the "community strategy".

[106] If parliamentary records are resorted to in cases such as these they may well inhibit, if not used sensibly, the kind of incremental development of purpose seen in planning law.

[107] See Ch.13.

[108] *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115 at 131 (Lord Hoffmann).

[109] See 11–059; and W. Sadurski, "Judicial Review of the protection of constitutional Rights (2002) 22 O.J.L.S. 275.

circumstances will the courts construe statutory language so as to endow a public body with exclusive authority to determine the ambit of its own powers.[110] Access of the individual to the courts, another fundamental requirement of the rule of law, is similarly recognized.[111] In *Raymond v Honey* it was held that the Home Secretary had no power to make prison rules to "authorise hindrance or interference with so basic a right" as the citizen's right of access to the court.[112] In *Leech (No.2)*,[113] the Court of Appeal held unlawful a regulation which permitted a prison governor to read and stop correspondence between a prisoner and his legal advisor. Despite a generally worded governing statute,[114] it was held, following *Raymond v Honey* that a prisoner retains all his rights which are not taken away expressly or by necessary implication. It was also held that a prisoner's right of unimpeded access to his solicitor was an inseparable part of the right of access to the courts themselves.[115]

5–038 Well before the principle of legality had been expressly articulated, the courts made the presumption that Parliament does not intend to deprive the subject of his or her common-law rights and therefore, in the absence of express words or necessary intendment, statutes are not to be interpreted so as to authorise their interference. Among other rules of construction, express words are necessary to empower a public authority to

[110] See Ch.4.

[111] *See, e.g. In re Boaler* [1915] 1 K.B. 21 at 36 (Scrutton J.: "One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King"); *R. v Secretary of State for the Home Department Ex p. Leech* [1994] Q.B. 198, 210; *R. v Lord Chancellor Ex p. Witham* [1998] Q.B. 575 at [13] (Laws L.J.: "the common law has clearly given special weight to the citizens' right of access to the courts"). *Witham* distinguished in *R. v Lord Chancellor Ex p. Lightfoot* [2000] Q.B. 597 and *R. (on the application of Ewing) v Department for Constitutional Affairs* [2006] EWHC 504; [2006] 2 All E.R. 993. See also ECHR Art.6 on fair trails (See 7–119) and Art.13 on effective remedies (See 13–010).

[112] [1983] A.C. 1 at 11 (Lord Wilberforce).

[113] *R. v Secretary of State for Home Affairs Ex p. Leech (No.2)* [1994] Q.B. 198.

[114] Prison Act 1952 s.47(1), conferring power on the Home Secretary to make rules for the "regulation and management" of prisons and for the "classification, treatment, employment, discipline and control of persons required to be detained therein". The material part of the disputed rr.33(3) and 37A of the Prisons Rules 1964 provided that the prison governor could read every letter to or from a prisoner and stop any letter that was "objectionable or of inordinate length", except for correspondence between a prisoner who was party to proceedings in which a writ had been issued and his legal advisor.

[115] See also *Golder v UK* (1975) 1 E.H.R.R. 524 In *Drew v Attorney General* [2002] 1 N.Z.L.R. 58, the New Zealand CA struck down a prison regulation as ultra vires the Penal Institutions Act 1954. The regulation purported to deny prisoners legal representation in every disciplinary hearing. The empowering provision was in general terms, authorising the making of regulations to ensure "the discipline of inmates" including "prescribing the procedures for the hearing of such complaints". The Court reached this result by "applying common law principles of construction guided by the principles of natural justice", and did not need to refer to the guarantee of the observance of natural justice in the New Zealand Bill of Rights Act, s.27.

raise money from the subject,[116] or to warrant the exercise of a statutory power with retroactive effect.[117]

5–039 In Chapter 1 we outlined the constitutional justification for recognising and protecting rights in this way which, in the absence of a codified constitution or a domestic bill of rights, might otherwise seem perplexing.[118] For many years the courts have recognised rights such as the privilege against self-incrimination,[119] limitations on searches of premises and seizure of documents,[120] and even the ancient right to fish in tidal waters.[121] We now see "the common law's emphatic reassertion in recent years of the importance of constitutional rights",[122] among which are the following.[123]

- The right to life.[124]

[116] *Attorney General v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884; *Brocklebank (T & J) Ltd v R.* [1924] 1 K.B. 647 (reversed on other grounds, [1925] 1 K.B. 252); *Liverpool Corp v Maiden (Arthur) Ltd* [1938] 4 All E.R. 200; *Davey Paxman & Co v Post Office*, *The Times*, November 16, 1954, which made it necessary to pass the Wireless Telegraphy (Validation of Charges) Act 1954; *City Brick & Terra Cotta Co v Belfast Corp* [1958] N.I. 44; *Daymond v Plymouth CC* [1976] A.C. 609 (see Water Charges Act 1976 ss.1, 2); *Congreve v Home Office* [1976] Q.B. 629; *Clark v University of Melbourne* [1978] V.R. 457 at 463–465. Unparliamentary taxation for the use of the Crown contravenes the Bill of Rights 1689; *cf. Cobb & Co v Kropp* [1967] 1 A.C. 141; *Customs and Excise Commissioners v Thorn Electrical Industries Ltd* [1975] 1 W.L.R. 1661 at 1673 (Kilbrandon L.J.: the presumption may have outlived its usefulness, "A modern Hampden would in many quarters be pilloried as a tax-evader"); *McCarthy and Stone (Developments) Ltd v Richmond-upon-Thames LBC* [1992] A.C. 48.

[117] See 5–00.

[118] *Watkins v Home Office* [2006] UKHL 17; [2006] 2 A.C. 395 at [47]–[64] (Lord Rogers).

[119] *Master Ladies Tailors Organisation v Minister of Labour and National Service* [1950] 2 All E.R. 525 at 528; *Howell v Falmouth Boat Construction Co* [1951] A.C. 837; *cf. Sabally and Njie v Attorney-General* [1965] 1 Q.B. 273. See also *R. v Pentonville Prison Governor Ex p. Azam* [1974] A.C. 18; *Scott v Aberdeen Corp* 1976 S.L.T. 141; *Re O (Disclosure Order)* [1991] 2 Q.B. 520.

[120] *Marcel v Commissioner of Police* [1992] Ch. 225 (approving the words of Lord Browne-Wilkinson in *Re* O); Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] P.L 397, 407.

[121] *Anderson v Alnwick DC* [1993] 1 W.L.R. 1156 (byelaws invalid for restricting digging for lugworms—if not ragworms—from the foreshore as bait). Another ancient right, the right to hunt, was referred to by Laws J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 All E.R. 513. In the late 19th century the validity of a number of byelaws prohibiting the playing of musical instruments in the street was challenged by the Salvation Army. Sometimes the challenges were successful, e.g. *Powell* (1884) 51 L.T. 92 (Stephen J.: "the liberty of the subject always consists in doing something that a man is not forbidden to do"); *cf. Johnson v Croydon Corp* (1886) 16 Q.B.D. 708; *Slee v Meadows* (1911) 75 J.P 246; *Kruse v Johnson* [1898] 2 Q.B. 91.

[122] *D v Secretary of State for the Home Department* [2005] EWCA Civ 38; [2006] 1 W.L.R. 1003 at [130] (Brooke L.J.).

[123] For a somewhat different attempt to catalogue the rights, see Lord Lester of Herne Hill and D. Oliver (eds), *Constitutional Law and Human Rights* (1997). For an account of judicial review that reject rights, and promotes legitimacy, as the basis for judicial review, see T. Poole, "Legitimacy, Rights and Judicial Review" (2005) 25 O.J.L.S. 697.

[124] See, e.g. *R. v Secretary of State for the Home Department Ex p. Bugdaycay* [1987] A.C. 514 at 531 (Lord Bridge, in a deportation case "The most fundamental of human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny"); *R. v Secretary of State for the Home Department Ex p. Khawaja* [1984] A.C. 74 at 110–111 (Lord Scarman). See also ECHR Art.2, discussed at 7–128. For 'anxious scrutiny' see 11–086.

- The liberty of the person.[125]
- The doing of justice in public[126]
- The right to a fair hearing.[127]
- The prohibition on the retrospective imposition of criminal penalty.[128]
- Freedom of expression[129]
- The rights of access to legal advice and to communicate confidentially with a legal adviser under the seal of legal professional privilege.[130]

[125] See, e.g. *Bowditch v Balchin*(1850) 5 Exch. 378 (Pollock C.B.: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute"); *R. v Thames Magistrate Ex p. Brindle* [1975] 1 W.L.R. 1400, CA (Roskill L.J.: "When [a court] has to consider a matter involving the liberty of the individual, it must look at the matter carefully and strictly, and it must ensure that the curtailment of liberty sought is entirely justified by the Act relied on by those who seek that curtailment"); *Liversidge v Anderson* [1942] A.C. 206 (Lord Atkin, in his courageous dissent: "It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law; *Raymond v Honey* [1983] 1 A.C. 1 at 13 (Lord Wilberforce: "a basic right" of prisoners to enjoy liberty not necessary for their custody); "). See also ECHR Art.5, discussed at 13–070.

[126] See, e.g. *Scott v Scott* [1913] A.C. 417 at 477 (Lord Shaw of Dunfermline: "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand"); *R. (on the application of Malik) v Central Criminal Court* [2006] EWHC 1539; [2006] 4 All E.R. 1141 at [30]. See also ECHR Art.6 (see 7–119).

[127] See, e.g. *R. (on the application of McCann) v Manchester Crown Court* [2002] UKHL 39; [2003] 1 A.C. 787 at [29] (Lord Steyn: "Moreover, under domestic English law they undoubtedly have a constitutional right to a fair hearing in respect of such proceedings"—for a breach of an anti-social behaviour order).

[128] See, e.g. *Pierson v Secretary of State for the Home Department* [1998] A.C. 539 (Lord Steyn: "It is a general principle of the common law that a lawful sentence pronounced by a judge may not retrospectively be increased").

[129] See, e.g. *Attorney-General v Guardian Newspapers Ltd (No.2)* (the "Spycatcher case")[1990] 1 A.C. 109 at 283–284 (Lord Goff, remarking that in the field of freedom of speech there is no difference in principle between English law on the subject and ECHR Art.10); *Derbyshire CC v Times Newspapers Ltd* [1993] A.C. 534 at 547 (Lord Keith, in a case in which a local authority sought to sue for defamation: "it is of the highest public importance that a democratically elected body should be open to uninhibited criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on free Speech"); *R. v Secretary of State for the Home Department Ex p. Simms* [2000] 2 A.C. 115 (Lord Steyn, in a case concerning restrictions on prisoners communicating with journalists: "The starting point is the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible. Nevertheless, freedom of expression is not an absolute right. Sometimes it must yield to other cogent social interests"). See also ECHR Art.10, discussed at 13–089.

[130] See, e.g. *R. v Secretary of State for the Home Department Ex p. Daly* [2001] UKHL 26; [2001] 2 A.C. 532, [5] (Lord Bingham of Cornhill); *Colley v Council for Licensed Conveyancers (Right of Appeal)* [2001] EWCA Civ 1137; [2002] 1 W.L.R. 160 at [26] ("The right of access to a court is of fundamental constitutional importance. It is scarcely necessary to refer to authority for that obvious proposition"). See also ECHR Art.8 (discussed at 13–084).

- Limitations on searches of premises and seizure of documents.[131]
- Prohibition on the use of evidence obtained by torture.[132]
- That a British citizen has a fundamental right to live in, or return to, that part of the Queen's territory of which he is a citizen.[133]
- The deprivation of property rights without compensation.[134]
- The privilege against self-incrimination.[135]
- A duty on the State to provide subsistence to asylum-seekers.[136]
- Freedom of movement within the United Kingdom.[137]

5–040 The foundation in precedent for the presumption against the infringement of human rights in English domestic law is therefore solid. The foundation in theory is less apparent in the absence of a written constitution or

[131] See, e.g. *Marcel v Commissioner of Police* [1992] Ch. 225, CA, approving the words of Sir Nicholas Browne-Wilkinson V.-C. reported at [1991] 2 W.L.R. 1118 ("Search and seizure under statutory powers constitute fundamental infringements of the individual's immunity from interference by the state with his property and privacy—fundamental human rights"). See also ECHR Art.8 (discussed at 13–084).

[132] *A v Secretary of State for the Home Department* [2005] UKHL 71; [2006] 2 A.C. 221 at [11]–[12](Lord Bingham of Cornhill, holding the prohibition of evidence received through torture "more aptly categorized as a constitutional principle than as a rule of evidence" and "In rejecting the use of torture, whether applied to potential defendants or potential witnesses, the common law was moved by the cruelty of the practice as applied to those not convicted of crime, by the inherent unreliability of confessions or evidence so procured and by the belief that it degraded all those who lent themselves to the practice").

[133] See, e.g. *R v Secretary of State for the Foreign and Commonwealth Office Ex p. Bancoult* [2001] Q.B. 1067.

[134] See, e.g. *Central Control Board v Cannon Brewery Co* [1919] A.C. 744 at 752; *Bournemouth-Swanage Motor Road & Ferry Co v Harvey & Sons* [1929] 1 Ch. 686, 697; *Colonial Sugar Refining Co v Melbourne Harbour Trust Commrs* [1927] A.C. 343; *Consett Iron Co v Clavering Trustees* [1935] K.B. 42, 65; *Foster Wheeler Ltd v Green (E) & Son Ltd* [1946] Ch. 101, 108; *Hall v Shoreham-by-Sea UDC* [1964] 1 W.L.R. 240; *Hartnell v Minister of Housing and Local Government* [1965] A.C. 1134; *Langham v City of London Corp* [1949] 1 K.B. 208 at 212, 213; *Burmah Oil Co v Lord-Advocate* [1965] A.C. 75 (prerogative powers; *cf*. War Damage Act 1965). The presumption is still stronger where powers conferred by delegated legislation are in question: *Newcastle Breweries Ltd v R.* [1920] 1 K.B. 854. But the force of the presumption is weak in the context of modern planning legislation: *Westminster Bank Ltd v Beverley BC* [1971] A.C. 508; *Hoveringham Gravels Ltd v Secretary of State for the Environment* [1975] Q.B. 754; *R. v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] Q.B. 720. See also ECHR Protocol 1, Art.1.

[135] See, e.g. *W v P* [2006] EWHC 1226, Ch; [2006] Ch. 549 (principle extends not only to the right to refuse to answer questions but also to incriminating material); *Master Ladies Tailors Organisation v Minister of Labour and National Service* [1950] 2 All E.R. 525 at 528; *Howell v Falmouth Boat Construction Co* [1951] A.C. 837. *cf. Sabally and Njie v Attorney General* [1965] 1 Q.B. 273; *R. v Pentonville Prison Governor Ex p. Azam* [1974] A.C. 18; *Scott v Aberdeen Corp* 1976 S.L.T. 141; *Re O* [1991] 2 W.L.R. 475 at 480.

[136] *R. v Secretary of State for Social Security Ex p. Joint Council for the Welfare of Immigrants* [1997] 1 W.L.R. 275, CA (Simon Brown L.J., citing Lord Ellenborough, C.J. in *R v Inhabitants of Eastbourne* (1803) 4 East 103: "As to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving").

[137] *R. v Secretary of State for the Home Department Ex p. McQuillan* [1995] 4 All E.R. 400 (Sedley J.).

enumerated bill of rights. However, fundamental rights can be properly viewed as integral features of a democratic state.[138] Freedom of speech is an obvious component of any democratic society, as are other rights, both those which address democratic procedures and those which address the treatment of individuals in a democracy.[139] Courts in other countries have recognised this explicitly.[140]

Interpretation of Convention rights

5–041 The Human Rights Act 1998 at s.3(1) places the following interpretive obligation on courts: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".[141] The courts are also under an obligation, under s.2, to "take into account" the case law of the European Court of Human Rights and the former Commission.[142] These issues are considered in Chapter 13. What is important to note at this point is that the interpretive obligation created by s.3 of the HRA applies only where a Convention right, as defined by the HRA, exists; legislation may therefore be interpreted differently depending on whether or not a Convention right is involved.[143]

[138] See, e.g. R. Dworkin, "Equality, Democracy and the Constitution" (1990) Alberta L.R. 324 This view was enunciated in the UK By Lord Browne-Wilkinson, "The Infiltration of a Bill of Rights" [1992] P.L. 406, 406 ("Can it really be suggested that Parliament intended to authorise, for example a directive prohibiting broadcasts which are critical of the government for the time being in power, or of the Home Secretary himself?"); R. Cooke, "Fundamentals" [1988] N.Z.L.J. 158; Sir John Laws, "Is the Constitution the Guardian of Fundamental Rights?" [1993] P.L. 59; "Law and Democracy" [1995] P.L. 72; Sir Stephen Sedley, "The Sound of Silence: Constitutional Law without a Constitution" (1994) 110 L.Q.R. 270; M. Kirby, "Lord Cooke and Fundamental Rights", in P. Rishworth (ed.), *The Struggle for Simplicity in Law: Essays in Honour of Lord Cooke of Thorndon* (1998), p.331; M. Elliott, *The Constitutional Foundations of Judicial Review* (2001); M. Hunt, *Using Human Rights Law in English Courts* (1997), Ch.6; T. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001);); M. Kirby, "Deep-Lying Rights—A Constitutional Conversion Continues" (2004) 3 N.Z.J. of International and Public Law 195; D. Dyzenhaus, *The Constitution of Law* (2006). *cf.* T. Poole, "Legitimacy, Rights and Judicial Review" (2005) O.J.L.S. 697.

[139] T. Allan, *Law, Liberty and Justice* (1993).

[140] See, e.g. Israel—D. Kretzmer, "The New Basic Laws and Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) *Israel Law Review* 238; S. Goldstein, "Protection of Human Rights by Judges: The Israeli Experience" (1994) St Louis U.L.J. 605; A. Barak, The *Judge in a Democracy* (2006). Australia—H.P. Lee, "The Australian High Court and Implied Fundamental Guarantees" [1993] P.L. 606. South Africa—C. Hoexter, "The Principle of Legality in South African Administrative Law" (2004) Macquarie L.J. 165. See the endorsement of this approach in New Zealand in *R. v Pora* [2001] 2 N.Z.L.R. 37 at [53], [157], CA (Elias C.J., Tipping and Thomas JJ.); *Ngati Apa Ki Te Waipounama Trust v R* [2000] 2 N.Z.L.R. 659 at [82].

[141] See 13–040.

[142] See 13–034.

[143] *R. (on the application of Hurst) v HM Coroner for Northern District London* [2007] UKHL 13; [2007] 2 W.L.R. 726 at [10]–[12] (Lord Rodger).

Interpretation of European Community law

5–042 European Community law requires national courts interpreting national legislation to apply the principle of "conforming interpretation" in those situations in which there is a potential infringement of Community law, a matter we consider in Chapter 14.[144]

Interpretation and international law

5–043 In considering the approach of the domestic courts to international law,[145] a distinction must be drawn between (a) interpretive questions relating to treaties and similar instruments of international law which have been incorporated into national law—in the United Kingdom's dualist legal system, international treaties are not part of domestic law unless and until they are expressly incorporated by legislation; (b) the use that the domestic courts may make of treaties that have been ratified but not expressly incorporated into national law; and (c) customary international law.[146]

Incorporated treaties

5–044 The constitutional importance and complexity of two bodies of treaties require special consideration—the reception of Convention rights from the ECHR into domestic law by the Human Rights Act 1998[147] and the treaties establishing the European Union and European Community.[148] Here we focus on other treaties. It is wrong to think of incorporation as a single phenomenon; a treaty may be received into and given effect in the law of England and Wales in more than one way. The most straightforward situation is where an Act of Parliament is enacted to bring a treaty into English law, but even here there are various drafting techniques. In some Acts, the text or part of the text, of a treaty has been "copied out"; in others parliamentary counsel have used English statutory language to give general effect to the treaty (but which may, upon proper interpretation, confer rights that are narrower or broader than those contained in the treaty). There are other ways of bringing about incorporation—including

[144] See 14–046.

[145] We deal with the following aspects of the relationship between judicial review and international law: see 3–043(the extent to which questions international law falls outside the jurisdiction of the Administrative Court or is non-justiciable); interpretation of international law (see 5–043); whether international law may be a relevant consideration to which a public authority ought to have regard in exercising a public function (see 5–123); and the court's adaptation of the unreasonableness test to "anxious scrutiny" to decisions which affect fundamental rights, some of which may be reflected in unincorporated treaty provisions (See 11–086).

[146] See generally S. Fatima, *Using International Law in Domestic Courts* (2005); D. Feldman, "The internationalization of public law and its impact on the United Kingdom", Ch.5 in J. Jowell and D. Oliver (eds), *The Changing Constitution*, 6th edn (2007).

[147] See Ch.13.

[148] See Ch.14.

what may variously be called "indirect" or "for practical purposes" or an "informal mode" of incorporation. Thus, s.2 of the Asylum and Immigration Act 1993 provides, under the heading "Primacy of the Convention" that "Nothing in the immigration rules [made under the Immigration Act 1971] shall lay down any practice which would be contrary to the Convention"—a reference to the Convention and Protocol relating to the Status of Refugees.[149]

5–045 If a treaty has been incorporated (by whatever technique) into domestic law, the question then is how should the courts approach the task of interpreting the treaty. The language of treaties is often broader and more open-textured than the precise wording that is the earmark of English statutory drafting. The Vienna Convention on the Law of Treaties 1969, especially Arts 31–33, provides the basic guidelines.[150] Generally, it can be said that:[151] the starting point is the language and structure of the text in question; words should be given the natural and ordinary meaning, avoiding over-sophisticated analysis and "prolonged debate about the niceties of language";[152] treaties may contain implied as well as express provisions;[153] where a provision is ambiguous, "the interpretation which is less onerous to the State owing the Treaty obligation is to be preferred"[154] and regard may be had to the traveaux préparatoires; good faith is required in the interpretation and performance of a treaty;[155] the provisions "must be read together as part an parcel of the scheme" of the treaty;[156] relevant reservations and derogations must be considered;[157] and, above all, a broad, purposive interpretation is required.[158] The court must not lose sight of the fact that it is an international legal instrument that is being interpreted, and that its concepts have a meaning that is autonomous of the particularities of a domestic legal system.[159] Interpretations reached by courts in other national systems is of persuasive authority;[160] inevitably, however, courts in different legal systems may reach interpretations that are difficult to reconcile.

[149] Cmnd 9171 and Cmnd 3906. See *R. (on the application of European Roma Rights Centre) v Immigration Officer, Prague Airport* [2004] UKHL 55; [2005] 2 A.C. 1.
[150] In force since January 27, 1980 and strictly speaking applying only to treaties in force after that date—but the main provisions concerning interpretation (Arts 31 and 32) reflect customary international law: see European Roma Centre [2004] UKHL 55; [2005] 2 A.C. 1 at [18].
[151] Fatima (2005) Ch.4 and the cases surveyed there.
[152] *Horvath v Secretary of State for the Home Department* [2001] 1 A.C. 489 at 508.
[153] As the ECHR and its interpretation by the European Court of Human Rights amply illustrate: see Ch.13.
[154] *R. (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3; [2002] Eu. L.R. 225 at [58].
[155] *European Roma Centre* [2004] UKHL 55; [2005] 2 A.C. 1 at [19].
[156] *R. (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18; [2005] 1 A.C. 1 at [38].
[157] *R. v Secretary of State for the Home Department Ex p. Ahmed (Mohammed Hussain)* [1999] Imm. A.R. 22, 33 (Lord Woolf M.R.).
[158] *Horvath* [2001] 1 A.C. 489 at 494–495.
[159] *R. (on the application of Adan (Lul Omar)) v Secretary of State for the Home Department* [2001] 2 A.C. 477 at 515–516; *Mullen* [2004] UKHL 18; [2005] 1 A.C. 1 at [36].
[160] *Forthergill v Monarch Airlines* [1981] A.C. 251 at 284.

Unincorporated treaties

5–046 The dualist principles that underpin the British constitution—which require a divide between ratifying treaties (an action of the executive branch of government) and law-making (the province of Parliament and the courts)—has the consequence of limiting the scope for utilising unincorporated treaties as part of a judicial review claim.[161] Unincorporated treaties have no direct effect in the courts of England and Wales and the courts accordingly generally lack jurisdiction to interpret them (on which point see Chapter 3).[162] That is not to say, however, that they have no effect. First, circumstances may arise in which a minister, by ratifying a treaty, creates a legitimate expectation that government decision-making and policy will follow the terms of that treaty; we consider this possibility in Chapter 12.[163] Secondly, unincorporated treaties may be used as an aid to interpretation of domestic legislation (and in interpreting the treaty, the approach described above in relation to incorporated treaties applies). Where an ambiguity in domestic legislation arises, the English courts will—in the absence of clear statutory words to the contrary—presume that Parliament intended to legislate in conformity with the international law obligations of the United Kingdom on the same subject matter.[164] The courts adopt a similar approach in relation to developing the common law.[165]

Customary international law

5–047 Customary international law is a source of English common law;[166] none of the issues relating to incorporation are therefore relevant. Customary international law consists of those norms about which there is clear consensus among States, which are based on general and consistent practice and a sense of legal obligation.[167]*Jus cogens* (peremptory norms) is that body of customary international law comprising of fundamental principles which cannot be derogated from by States.[168]

[161] Whether this constitutional principle ought to continue to apply to human rights treaties has been questioned: Dame Rosalind Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law" (1992) 18 *Commonwealth Law Bulletin* 1268; *Re McKerr's Application for Judicial Review* [2004] UKHL 12; [2004] 1 W.L.R. 807 at [49]–[50] (Lord Steyn).

[162] *R. v Lyons (Isidore Jack) (No.3)* [2002] UKHL 44; [2003] 1 A.C. 976 at [27]; see further 3–021.

[163] See 12–025.

[164] A.V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th edn. (1959), pp.62–63; *R. v Secretary of State for the Home Department Ex p. Brind* [1991] 1 A.C. 696 at 747, 760.

[165] Sir John Laws, "Is the High Court the Guardian of Fundamental Human Rights? [1993] P.L. 59, 66–67; *Lyons* [2002] UKHL 44; [2003] 1 A.C. 976 at [27]; *Reynolds v Times Newspapers Ltd* [2001] 2 A.C. 127 at 223.

[166] R. Jennings and A. Watts (eds), *Oppenheim's International Law*, 9th edn (1992), p.57; *R. v Jones (Margaret)* [2006] UKHL 16; [2007] 1 A.C. 136 at [11] (Lord Bingham, citing "old and high authority").

[167] *European Roma Rights Centre* [2004] UKHL 55; [2005] 2 A.C. 1 at [23].

[168] See, e.g. prohibition of torture *(A v Secretary of State for the Home Department* [2005] UKHL 71; [2006] 2 A.C. 221).

5–048 It falls outside the scope of this book to give a comprehensive account of this field, but the following are illustrations of how customary international law may be used. Principles of customary international law were recognised in relation to: the immunity from criminal process of a head of state;[169] the right to admit, exclude and expel aliens;[170] and prohibition of torture.[171] But the courts have held that: there is no right of conscientious objection to military service;[172] no duty on governments to provide diplomatic assistance to protect citizens from actions of foreign states;[173] and maintenance of nuclear weapons is not contrary to international law.[174]

Mandatory and directory duties and powers

5–049 When Parliament prescribes the manner or form in which a duty is to be performed or a power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts have therefore formulated their own criteria for determining whether the prescriptions are to be regarded as mandatory, in which case disobedience will normally render invalid what has been done, or as directory, in which case disobedience may be treated as an irregularity not affecting the validity of what has been done.[175]

5–050 These terms, like others we have been considering in this chapter, often cause more problems than they solve. The law relating to the effect of failure to comply with statutory requirements thus resembles an inextricable tangle of loose ends and judges have often stressed the impracticability of specifying exact rules for the assignment of a provision to the appropri-

[169] *R. v Bow Street Metropolitan Stipendiary Magistrate Ex p. Pinochet Ugarte (No.3)* [2000] 1 A.C. 147 at 201, 265, 268.

[170] *European Roma Rights Centre* [2004] UKHL 55; [2005] 2 A.C. 1 at [11].

[171] *A* [2005] UKHL 71; [2006] 2 A.C. 221 at [34].

[172] *R. (on the application of Septet) v Secretary of State for the Home Department* [2003] UKHL 15; [2003] 1 W.L.R. 856.

[173] *R. (on the application of Abassi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598; [2003] U.K.H.R.R. 76.

[174] *R. (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3; [2002] Eu. L.R. 225.

[175] In some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity, e.g. *Coney v Choyce* [1975] 1 W.L.R. 222 (where the attempt bona fide to comply and the absence of prejudice from the non-compliance are also emphasised). *Grunwick Processing Laboratories Ltd v ACAS* [1978] A.C. 655 at 691–692 (where mandatory duties in absolute form were contrasted with duties to be performed "as far as reasonably practicable"); *Donnelly v Marrickville Municipal Council* [1973] 2 N.S.W.L.R. 390 at 398. Authorities are reviewed in *Cullimore v Lyme Regis Corp* [1962] 1 Q.B. 718; *Graham v Attorney General* [1966] N.Z.L.R. 937 at 953–961; *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 C.L.R. 369; *Scurr v Brisbane City Council* (1973) 133 C.L.R. 242 (an approach that still applies where the Act specifies that substantial compliance suffices); *Queensland v Queensland Land Council Aboriginal Corp* (2002) 195 A.L.R. 106 at 169. For further comment on the Australian approach see See 12–080 et seq. and M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action*, 3rd edn. (2004), pp.323–325.

ate category. Nevertheless, it is possible to state the main principles that the courts have generally followed and to illustrate their application in a few settings. In brief, the principles are as follows:

(a) A decision or action is in general to be treated as valid until struck down by a court of competent jurisdiction. This issue has been discussed above[176] and need not be repeated now.

(b) Statutory words requiring things to be done as a condition of making a decision, especially when the form of words requires that something "shall" be done, raise an inference that the requirement is "mandatory" or "imperative" and therefore that failure to do the required act renders the decision unlawful.

(c) The above inference does not arise when the statutory context indicates that the failure to do the required act is of insufficient importance, in the circumstances of the particular decision, to render the decision unlawful.

(d) The courts, in appropriate cases and on accepted grounds may, in their discretion refuse to strike down a decision or action or to award any other remedy.

5–051 One of the causes of the loose ends entangling this area of the law is the failure to distinguish factors that rebut the presumption that a requirement is legally required (proposition (c) above) from factors that justify the court's exercise of discretion to excuse the breach of a legal requirement (proposition (d) above). The first set of factors raises questions about the lawful consequence of the requirement, which is not dependent upon the exercise of judicial discretion. The second set of factors raises questions about the appropriate use of judicial discretion in relation to the grant of a remedy.

5–052 A second reason for the tangle in this area is the use of the terms "mandatory" and "directory"; the latter term is especially misleading. All statutory requirements are prima facie mandatory. However, in some situations the violation of a provision will, in the context of the statute as a whole and the circumstances of the particular decision, not violate the objects and purpose of the statute. Condoning such a breach does not, however, render the statutory provision directory or discretionary. The breach of the particular provision is treated in the circumstances as not involving a breach of the statute taken as a whole. Furthermore, logically, a provision cannot be mandatory if a court has discretion not to enforce it.

5–053 Lord Hailsham expressed this point well in *London and Clydeside Estates v Aberdeen District Council* where he distinguished two ends of a spectrum. At the one end are cases "where a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject

[176] See 4–061 et seq.

may safely ignore what has been done and treat it as having no legal consequence". At the other end of the spectrum the defect may be "so nugatory or trivial" that the authority can proceed on the assumption that "if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint". Lord Hailsham considered that language like "mandatory", "directory", "void", "voidable" and "nullity" only served to confuse the situation and stretch or cramp the facts of a case into rigid legal categories or "on a bed of Procrustes invented by lawyers for convenient exposition".[177]

5–054 In order to decide whether a presumption that a provision is "mandatory" is in fact rebutted, the whole scope and purpose of the enactment must be considered, and one must assess "the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act".[178] In Assessing the importance of the provision, particular regard should be given to its significance as a protection of individual rights; the relative value that is normally attached to the rights that may be adversely affected by the decision, and the importance of the procedural requirement in the overall administrative scheme established by the statute. Breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature,[179] or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced.[180] But the requirement will be treated as "fundamental" and "of central

[177] [1980] 1 W.L.R. 182 at 189–90 (the issue was whether under the Town and Country Planning legislation it was a mandatory requirement that a certificate issued by a local authority include a statement setting out the applicant's right of appeal to the Secretary of State—it was). See also *R. v Tower Hamlets LBC Ex p. Tower Hamlets Combined Traders Association* [1994] C.O.D. 325 (Sedley J. analyses the *obiter* remark of Lord Hailsham in *Clydeside* and concludes that two points were being made: first, that the consequences of non-compliance are variable, and secondly, that the grant of relief is discretionary). On discretion to withhold remedies, see 18–048.

[178] *Howard v Bodington* (1877) 2 P.D. 203 at 211; *Spicer v Holt* [1977] A.C. 987 (compliance with procedure for administering breath-tests, a condition precedent for valid conviction); *Grunwick Processing* [1978] A.C. 655; *Sheffield City Council v Graingers Wines Ltd* [1978] 2 All E.R. 70; *Tower Combined Traders Association [1994] C.O.D. 325; Wang v Commissioner of Inland Revenue* [1994] 1 W.L.R. 1286, PC.

[179] *R. v Dacorum Gaming Licensing Committee Ex p. EMI Cinemas and Leisure Ltd* [1971] 3 All E.R. 666 (minor typographical error in notice of application for licence could be disregarded, despite general strictness of statutory requirements); *R. v Inner London Betting Licensing Committee Ex p. Pearcy* [1972] 1 W.L.R. 421 (unimportant additional words added to advertisement and notice of application).

[180] See, e.g. *R. v Liverpool City Council* [1975] 1 W.L.R. 701; *Coney v Choyce* [1975] 1 W.L.R. 222; *George v Secretary of State for the Environment* (1979) 250 E.G. 339; *Main v* (1985) 49 P. & C.R. 26, CA; cf. *London and Clydeside Estates* [1980] 1 W.L.R. 182 at 195 (Lord Fraser: "The validity of a certificate is not in my opinion dependent on whether the appellants were actually prejudiced by it or not").

importance" if members of the public might suffer from its breach.[181] Another factor influencing the categorisation is whether there may be another opportunity to rectify the situation; of putting right the failure to observe the requirement.[182]

5–055 The principle that the whole scope and purpose of the Act must be looked at is illustrated by a decision of the Court of Appeal in which the validity of a reference to a rent tribunal was challenged on the ground that the tenant had given the name of the wrong landlord. The minister, who had power to make regulations with regard to proceedings before these tribunals, had made regulations requiring (among other things) that the name of the landlord be specified in an application. The court held that the regulations were directory only and that the reference was therefore valid; the minister had no power to impose conditions of validity when Parliament itself had not done so, and it could be assumed to have omitted to do so because it had contemplated that applications would often be made by tenants who had "no lawyers to advise them and no regulations by their side".[183] If, on the other hand, the primary purpose is to promote the public interest rather than the interests of individuals,[184] the courts are likely to take a strict view of minor deviations from a statutory code of procedure on the part of persons seeking to obtain exemption from the prescribed system of regulation.[185]

5–056 Some classes of procedural requirements are so important that they will nearly always be held to be "mandatory". For example, an authority which fails to comply with a statutory duty to give prior notice or hold a hearing or make due inquiry or consider objections in the course of exercising discretionary powers affecting individual rights will seldom find the courts casting an indulgent eye upon its omissions.[186] Non-compliance or

[181] *R. v Lambeth LBC Ex p. Sharp* (1988) 55 P. & C.R. 232 (notice published by local authority failed to specify the period within which representation should be made to a planning application. The CA held that these requirements were "fundamental" and "strict").
[182] *Brayhead (Ascot) Ltd v Berkshire CC* [1964] 2 Q.B. 303; *London & Clydeside Estates* [1980] 1 W.L.R. 182.
[183] *Francis Jackson Development Ltd v Hall* [1951] 2 K.B. 488 at 493; distinguished in *Chapman v Earl* [1968] 1 W.L.R. 1315 where, on somewhat similar facts, a different intent was attributed to the provisions of a subsequent Rent Act; *cf. R. v Devon and Cornwall Rent Tribunal Ex p. West* (1975) 29 P. & C.R. 316.
[184] *cf. Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850; *Mercantile and General Reinsurance Co Ltd v Groves* [1974] Q.B. 43 (time limit imposed for the benefit of one party waivable by him); *cf. Meah v Sector Properties Ltd* [1974] 1 W.L.R. 547, *Gyle-Thompson v Wall Street (Properties) Ltd* [1974] 1 W.L.R. 123; *Dedman v British Building etc. Ltd* [1974] 1 W.L.R. 171.
[185] See, e.g. *R. v Pontypool Gaming Licensing Committee Ex p. Risca Cinemas Ltd* [1970] 1 W.L.R. 1299 (time limit for submitting advertisement of bingo licence application exceeded). *cf. Howard v Secretary of State for the Environment* [1975] Q.B. 235 (only the filing of the notice but not the statement of the grounds of appeal to the minister against an enforcement notice was held to be mandatory); *Button v Jenkins* [1975] 3 All E.R. 585; *R. v Urbanowski* [1976] 1 W.L.R. 455 (time limitations within which magistrates must state a case and accused person be tried only directory: judge of Crown Court may extend time).
[186] *Grunwick* [1978] A.C. 655 (statutory duty was to ascertain the opinions of affected workers; the means by which this was to be done, however, were entrusted to the discretion

inadequate compliance with an express duty to give particulars of rights of appeal may render an administrative determination invalid.[187] A provision requiring consultation with named bodies before a statutory power is exercised is also likely to be construed as mandatory.[188]

5–057 The practical effects of the exercise of a power upon the rights of individuals will often determine whether the relevant formal and procedural rules are to be classified as mandatory. Thus, where powers are conferred to issue orders or certificates that affect civil liberties or rights to compensation, the courts have insisted that the decision-maker must closely observe all material requirements as to form.[189] For many years the formalities surrounding the issue, service and content of enforcement notices (preliminary to taking measures to secure compliance with planning controls) were construed rigorously and literally by the courts; later they tended to consider whether disregard of a formal or procedural requirement by the local planning authority might have substantially prejudiced the developer.[190] The principle that failure to observe formal or procedural rules in the administrative process may be venial if no substantial prejudice

of the authority); *Donnelly v Marrickville Municipal Council* [1973] 2 N.S.W.L.R. 390. However, substantial compliance with statutory provisions prescribing the method of giving notice may suffice: *Smith v East Sussex CC* (1977) 76 L.G.R. 332. For an illustration of the vitiating effect of failure to give sufficient notice where this entailed a breach of a statutory duty to afford interested parties a genuine opportunity of making representations against a proposed scheme for comprehensive schools, see *Lee v Department of Education and Science* (1967) 66 L.G.R. 211; *Lee v Enfield LBC* (1967) 66 L.G.R. 195; *Legg v ILEA* [1972] 1 W.L.R. 1245; cf. *Coney v Choyce* [1975] 1 W.L.R. 422; *R. v Southwark Juvenile Court Ex p. J* [1973] 1 W.L.R. 1300 (provision for attendance at hearing by a non-party directory, but decision quashed for lacking appearance of fairness).

[187] See, e.g. *London and Clydeside Estates* [1980] 1 W.L.R. 182; *Agricultural, Horticultural and Forestry Industry Training Board v Kent* [1970] 2 Q.B. 19; *Rayner v Stepney Corp* [1911] 2 Ch. 312; *cf. Jones v Lewis* (1973) 25 P. & C.R. 375; *George v Secretary of State for the Environment* (1979) 250 E.G. 339; *Skinner and King v Secretary of State for the Environment* [1978] J.P.L. 842 (statutory duty to serve notice on both joint tenants not discharged by service on one, although relief may not be granted in the absence of substantial prejudice); *R. v Chief Immigration Officer, Manchester Airport Ex p. Insah Begum* [1973] 1 W.L.R. 141 (statutory duty to give notice of refusal of entry to immigrant discharged by delivery to agent); *Re Bowman* [1932] 2 K.B. 621.

[188] *May v Beattie* [1927] 2 K.B. 353; *R. v Minister of Transport Ex p. Skylark Motor Coach Co* (1931) 47 T.L.R. 325; *Agricultural etc. Industry Training Board v Aylesbury Mushrooms Ltd* [1972] 1 W.L.R. 190; *Hamilton City v Electricity Distribution Commission* [1972] N.Z.L.R. 605.

[189] *Hill v Ladyshore Coal Co* (1930) Ltd [1936] 3 All E.R. 299; Enraght v Lord Penzance (1881) 6 Q.B.D. 376 at 461, 463, 471–472; *R. v Secretary of State for the Home Department Ex p. Budd* [1942] 2 K.B. 14.

[190] Town and Country Planning Act 1990 s.174(2) empowering the Secretary of State on an appeal against an enforcement notice to correct immaterial informalities, defects and errors. For the scope of this amending power, see *Miller-Mead v Minister of Housing and Local Government* [1963] 2 Q.B. 196; *R. v Endersby Properties Ltd* (1976) 32 P. & C.R. 399 (distinguishing *East Riding CC v Park Estate (Bridlington) Ltd* [1957] A.C. 223); *Graddage v Haringey LBC* [1975] 1 W.L.R. 241 (omission of official's signature invalidated notice demanding payment for work done to make houses fit for human habitation—an example of an application of the strict approach to formal irregularities).

has been caused to those immediately affected now appears in a number of statutory contexts.[191]

5–058 In *Wang v The Commissioner of Inland Revenue*,[192] the Privy Council held that the breach of a time provision by the Inland Revenue of Hong Kong would not "deprive the decision-maker of jurisdiction and render any decision which he purported to make null and void". It is noteworthy that although the terms "mandatory" and "directory" were used in argument, they were nowhere employed in the judgment. Two principal reasons were given for the Board's decision. The first was that the Inland Revenue's decision resulted in "no real prejudice for the taxpayer in question by reason of the delay". The second reason was that to invalidate the decision "would not only deprive the Government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of Government expenditure"[193] (a more dubious reason, as we shall presently suggest).

5–059 In a number of more recent cases our highest courts have displayed flexibility in the face of breaches of imperative language. In *R. v Immigration Appeal Tribunal Ex p. Jeyeanthan*[194] the Court of Appeal considered the consequence of the Secretary of State failing to use a prescribed form for applying for leave from the Special Adjudicator to the Immigration Appeals Tribunal. The only difference between the form used and the prescribed form was the absence of a declaration of truth. Lord Woolf, for the Court, adopted the dictum of Lord Hailsham in *London & Clydesdale Estates*.[195] Eschewing a rigid adherence to the language of "mandatory" and "directory" (although it was to be regarded as a "first step"),[196] it was held that the matter should be judged upon the overall intent of the legislation, and the interests of justice In particular, if there had been "substantial compliance" with the requirement, and if the irregularity was capable of being waived, then whether the non-compliance could be justified depended upon the consequences of non-compliance which, in the circumstances of that case, did not materially prejudice the appellants.

[191] See, e.g. Town and Country Planning Act 1990 s.288(1). For an illustration of non-compliance with minor formal statutory requirements being held not to have caused substantial prejudice, see *Gordondale Investments Ltd v Secretary of State for the Environment* (1971) 70 L.G.R. 15; *cf. McCowan v Secretary of State for Scotland*, 1972 S.L.T. 163 (property-owner deprived of opportunity to object to compulsory purchase order through failure to serve notice on him).

[192] [1994] 1 W.L.R. 1286.

[193] *cf. London & Clydesdale Estates* [1980] 1 W.L.R. 182 at 195 (Lord Fraser): "the validity of the certificate is not in my opinion dependent on whether the appellants were actually prejudiced by it or not". See also: *Devan Nair v Yong Kuan Teik* [1967] 2 A.C. 31; *James v Minister of Housing and Local Government* [1966] 1 W.L.R. 171, C.A; *R. v Inspector of Taxes Ex p. Clarke* [1974] Q.B. 220; *cf. R. v Liverpool City Council Ex p. Liverpool Taxi Fleet Operators' Association* [1975] 1 W.L.R. 701 at 706 (requirement to state reasons directory only, but decision could be set aside if applicant showed that he had been thereby prejudiced); *R. v Fairford Justices Ex p. Brewster* [1976] Q.B. 600 (magistrates may lose jurisdiction by a delay in issuing a summons that prejudices the accused, despite the absence of a statutory time limitation).

[194] [2000] 1 W.L.R. 354; also *Credit Suisse v Allerdale BC* [1997] Q.B. 306.

[195] [1980] 1 W.L.R. 182.

[196] At [16].

5–060 A similar approach was taken by the Privy Council in *Charles*,[197] where the Board upheld a failure to observe time limits laid down by regulations dealing with discipline in the public service in Trinidad and Tobago. In *Attorney General's Reference (No.3 of 1999*),[198] the House of Lords considered a breach of a duty to destroy the fingerprints and DNA samples of a defendant cleared of an offence. The DNA samples then led to his subsequent conviction for rape. Again the mandatory/directory distinction was ignored in favour of a test based upon the intent of Parliament and the consequence of non-compliance. A unanimous House held that the prosecution was valid[199] and this approach was repeated in *R v Soneji* where the House of Lords, again unanimously, refused to quash two confiscation orders despite a clear defect in the procedure,[200] Lord Steyn considering that the mandatory/directory distinction had "outlived its usefulness".[201]

5–061 A similar approach has been adopted in the courts of Australia, New Zealand and Canada. The Australian High Court has criticised the "elusive distinction between directory and mandatory" as well as the division of directory acts into those which have substantially been complied with and those which have not. The Court considers the test for determining the issue of validity is "to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid".[202] In New Zealand Cooke J. said that whether non-compliance with a procedural requirement is fatal depends upon "its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance".[203] In Canada too the mandatory/directory distinction has been departed from and the question asked: "would it be seriously inconvenient to regard the performance of some statutory direction as an imperative?"[204]

5–062 The breakdown of inappropriate technical distinctions is obviously to be applauded, as is the need to concentrate upon legislative purpose and the requirements of justice, but there is danger in the courts readily arrogating to themselves the power to dispense with procedural or other duties. In the mind of the public, law-breaking should not be condoned, especially by courts of law. On the other hand, excessive legalism serves no useful purpose. In the result, the circumstances in which a flawed decision should be held valid should be narrowly drawn. The criteria suggested by Tipping J. in *Charles* would seem acceptable: endorsing the validity of a breach of a time limit, he noted that "in the present case the delays were in good faith,

[197] *Charles v Judicial and Legal Services Commission* [2002] UKPC 34; [2003] 1 L.R.C. 422.
[198] [2001] 2 A.C. 91.
[199] Lord Steyn (at 117–118); Lord Cooke (at 120–121); Lord Clyde (at 121).
[200] [2005] UKHL 49; [2006] 1 A.C. 340 (the statute provided that the orders could be postponed only where there were established exceptional circumstances. Since these had not been established, the CA had held that the postponement rendered the orders invalid).
[201] At [23].
[202] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 C.L.R. 355 at para.93.
[203] *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 N.Z.L.R. 630 at 636.
[204] *British Columbia (Attorney General) v Canada (Attorney-General): An Act respecting the Vancouver Island Railway (Re)* [1994] 2 S.C.R. 41 (Iacobucci J.).

they were not lengthy and they were entirely understandable. The appellant suffered no material prejudice; no fair trial considerations were or could have been raised, and no fundamental human rights are in issue".[205]

5–063 Evans J.A. approached the criteria from a different perspective in the Canadian Federal Court of Appeal: "the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including frustrating the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity".[206] This statement is helpful except perhaps in the value it places upon "inconvenience" and "expense" as a factor to be taken into account on the question of validity. As we noted,[207] these utilitarian considerations were also raised by Lord Slynn in the Privy Council to justify the validity of a breach of a time limit in *Wang*.[208] Is administrative inconvenience a proper reason for rebutting the presumption that a decision which violates a statutory provision is unlawful? Administrative inconvenience is an accepted criterion in relation to remedies provided by the courts in judicial review. For example, where a series of commercial transactions have been undertaken in reliance upon the impugned decision the court may, in its discretion, fail to quash that decision in view of the administrative chaos that would result from such a remedy.[209] Judicial discretion is employed here to balance fairness to the individual against the general public interest. The task, however, of deciding the force of a statutory provision does not involve judicial discretion. It involves the faithful construction of the objects and purposes of an Act of Parliament in the context of the particular decision. Although aspects of public policy may play a part in this exercise,[210] it would be wrong of the courts to impute any general implication that Parliament may intend administrative inconvenience, or indeed expense,[211] to excuse in advance the violation of its statutes. Such an implication invites careless administration and assumes that the legislature would too easily excuse a breach of its statutes.

[205] [2002] UKPC 34; [2003] 1 L.R.C. 422 at [12].
[206] *Society Promoting Environmental Conservation v Candada (Attorney General)* (2003) 228 D.L.R. (4th) 693 at 710.
[207] See 5–054.
[208] [1994] 1.W.L.R. 1286. See also the celebrated New Zealand case where the Governor-General had issued his warrant for the holding of a general election later than the date specified by statute. A challenge directed against the validity of the election failed on the ground that a contrary decision would have had the catastrophic effect of nullifying a number of Acts of Parliament, together with all actions already taken under them. *Simpson v Attorney General* [1955] N.Z.L.R. 271. *cf. Transport Ministry v Hamill* [1973] 2 N.Z.L.R. 663.
[209] See 18–053.
[210] See 5–068.
[211] On financial considerations, see 5–124.

Target duties: "directory" rather than "mandatory"?

5–064 In some cases where what appears to be a clear (mandatory) duty is imposed upon an authority, the courts have held that is not directly enforceable by any individual.[212] Such a duty was called a "target duty" by Woolf L.J. in *R. v Inner London Education Authority Ex p. Ali*.[213] Such a duty seeks to achieve more an aspiration than an obligation. The authority is simply required to "do its best"[214] and failure to achieve the duty does not result in illegality. Examples include:

- Education Act 1996, s.14 ("A local education authority shall secure that sufficient schools for providing—(a) primary education, and (b) education that is secondary education . . . , are available for their area . . . ").
- National Assistance Act 1948, s.21 ("a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—(a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them").
- Children Act 1989, s.17 ("It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—(a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs".

5–065 Courts allow great flexibility to authorities to achieve this kind of duty, as long as they are not "outside the tolerance" of the statutory provision.[215] And since these duties normally require the decision to allocate scarce resources among competing needs, the courts will not interfere readily,[216] although a target duty may "crystallise" into an enforceable duty in certain

[212] C. Callaghan, "What is a Target Duty?" [2000] J.R. 184; L. Clements, *Community Care and the Law* (2004), pp.11–13; J. King, "The Justiciability of Resource Allocation" (2007) 70 M.L.R. 197, 214–216.
[213] (1990) 2 Admin. L.R. 822.
[214] *R. v Islington LBC Ex p. Rixon* [1997] E.L.R. 66 at 69; *R. v Radio Authority Ex p. Bull* [1998] Q.B. 294 at 309.
[215] *Ali* (n.213 above).
[216] On resource allocation see 1–025 and 5–124.

circumstances.[217] At the other extreme is what has been called a "proactive duty".[218]

5–066 While it is clear that not all duties phrased in general terms are intended to be readily enforceable, there is a danger that target duties will devalue the notion of a duty and permit Parliament to reassure the public with empty gestures and the executive to sit back and take no further notice. Duties incorporated in a statute ought not to be treated the way some constitutions (such as the Indian and Irish) treat certain rights (normally the "socio-economic rights" such as the right to "an adequate means of livelihood").[219] Unlike the fundamental rights enumerated in the Constitution, these are regarded simply as "Directive Principles of State Policy"—aspirations, rather than directly enforceable duties, although they may, like a preamble to a statute, inform the interpretation of the constitution.[220]

5–067 Is the duty imposed upon all ministers of the Crown under the Constitutional Reform Act 2005 to "uphold the continued independence of the judiciary"[221] a mere target duty? The same Act imposes "particular duties" for the purpose of upholding that independence. One of those duties requires the Lord Chancellor to "have regard to the need for the judiciary to have the support necessary for them to exercise their functions".[222] Are these target or enforceable duties? As with all powers framed in terms that are mandatory, the courts should presume that they mean what they say and are intended to be implemented. There will of course be cases where limited resources might (depending on the scheme) excuse some degree of implementation. However, the courts ought to examine each case in its context and rigorously apply the standards of public law.[223] They ought not therefore permit the decision-maker simply to sleep on the

[217] See, e.g. *R. (on the application of G) v Barnet LBC* [2003] UKHL 57; [2004] 2 A.C. 208, where Lord Hope (for the majority) at [80] held that a target duty to promote the welfare of children in need under Children Act 1989 s.17(1) was concerned with general principles and not designed to confer rights upon individuals. Nor could it easily crystallise in into an enforceable duty, [88].

[218] M. Fordham, *Judicial Review Handbook*, 4th edn (2004), pp.753–754. Such duty requires an authority under a duty, e.g. to reassess periodically the chronically sick and disabled, even in the absence of a request to do so. *R. v Bexley LBC Ex p. B* (2000) 3 C.C.L.R. 15 at 22; *R v Gloucester CC Ex p. RADAR* (1998) 1 C.C.L.R. 476 (duty to reassess needs for community care requires more than a letter inviting a request for an assessment).

[219] Art.39(a) of the Constitution of India.

[220] A. Datar, *Commentary on the Constitution of India* (2001), Pt IV, p.339. Under the South African Constitution most of the socio-economic rights are qualified to the extent that there is a right only to "access" to the right (such as health care) and its "progressive realisation", "within available resources".

[221] Constitutional Reform Act 2005 s.3(1).

[222] ss.3(4) and 3(6)(b).

[223] See, e.g. the South African case *Minister of Works v Kyalami Ridge Environmental Assoc* 2001 (3) S.A. 1151, CC where it was held that it was a constitutional duty to provide relief to victims of natural disasters even in the absence of authorising legislation. However, the majority decision in the recent case of *Constitutional Court Doctors for Life International v Speaker of the National Assembly* 2006 (6) S.A. 416, CC suggests that the court will defer to the legislature's decision on how to meet a duty.

target duty and fail to put his mind to its implementation;[224] or fail to take relevant considerations into account, or to take irrelevant considerations into account.[225] Nor should the courts excuse the pursuit of the purpose of the relevant scheme, or the cogent justification of its non-implementation.[226] However, this approach does not mean that non observance of a requirement will mean that the failure results inevitably in a non conforming action being necessarily void. This is more likely to be true in circumstances where the consequences of the failure to comply with the requirement does not cause injustice, or where any injustice can be remedied by other means.

Public policy

5–068 A related question to that of administrative inconvenience is the extent to which public policy might be employed to rebut the presumption that a statutory provision is mandatory. Public policy is employed here as the public law equivalent of private law equitable principles, such as that which states that no person may benefit from his own wrong. Thus the courts will presume that Parliament did not intend to imperil the welfare of the state or its inhabitants.

5–069 This question arose in the case of *R. v Registrar General Ex p. Smith*.[227] Charlie Smith, the appellant, was detained in a secure mental hospital following his conviction for murder and the manslaughter of a cellmate during a psychotic bout under a belief that he was killing his adoptive mother. He had no knowledge of his natural mother's identity and applied under s.51 of the Adoption Act 1976 to the Registrar General for a copy of his birth certificate. The application was refused on the ground that the Registrar General, after receiving medical advice, believed that Smith's natural mother might be in danger if he were ever released and her identity known to him. Under the statute the duty of the Registrar General to supply the information was in terms absolute.[228] Nevertheless, the Court of Appeal held that this duty may be vitiated by public policy. In this case the public policy involved the prevention of crime. Parliament is thus presumed not to have intended that a statutory duty should be enforced either

[224] *R. v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 A.C. 513 (requiring the minister to implement an *ex gratia* scheme for compensating victims of crime).
[225] On the notion of relevancy, see See 5–110.
[226] For example, the enforcement of the right to housing (South African Constitution s.26) on the basis of familiar public law principles in *Government of South Africa v Grootboom* 2001 (1) S.A .46, CC. On justification, see 11–098 et seq.
[227] [1991] 2 Q.B. 393; A. Le Sueur, "Public Policies and the Adoption Act" [1991] P.L. 326.
[228] ". . . the Registrar-General shall on an application made in the prescribed manner by an adopted person a record of whose birth is kept by the Registrar-General and who has attained the age of 18 years supply to that person on payment of the prescribed fee (if any) such information as is necessary to enable that person to obtain a certified copy of the record of his birth".

to reward serious crime in the past, or to promote serious crime in the future.[229] Nor should the duty be enforced if there is "a significant risk"[230] or "current and justified apprehension" that to do so would facilitate "crime resulting in danger to life".[231]

5–070 In *Smith* it was made clear that the decision of the Court of Appeal was "in no way connected with the discretion of the court to refuse relief in judicial review cases".[232] Nor was the language of a directory (as opposed to a mandatory) statutory provision employed. In effect, the court held that a mandatory provision may simply be vitiated by the dictates of public policy[233] and rightly emphasised that such a result is founded upon the interpretation of statutory purpose, rather than upon any strained distinction between mandatory and directory statutory provisions. Today, under the terms of the Human Rights Act 1998, Convention rights might have been specifically invoked in a such a case, as public policy is an "unruly horse"[234] which must be ridden with care, as policy is within the proper realm of the legislature and not the courts. Such care was taken in a subsequent case where the Court of Appeal would not employ public policy to enable the Registrar General to refuse to provide a marriage certificate to a prisoner to enable him to marry his long-term girlfriend on the ground that that girlfriend would no longer be a compellable witness at the prisoner's forthcoming murder trial.[235]

Discretionary power in the context of law enforcement

5–071 When a public officer has discretion to prosecute an unlawful act, should that power be interpreted to be mandatory rather than directory? The rule of law suggests the law ought to be enforced and the power therefore

[229] *R. v National Insurance Commissioner Ex p. Connor* [1981] Q.B. 758 (applicant unable to recover the widow's allowance under the Social Security Act 1975 because she had unlawfully killed her husband); *R. v Secretary of State for the Home Department Ex p. Puttick* [1981] Q.B. 767 (applicant denied the benefit of registration of the United Kingdom and Colonies under the British Nationality Act 1948 although she was lawfully married to a citizen, because she had committed perjury and forgery in the course of procuring the marriage). For a summary of the private law principle that the courts will not enforce a contract if to do so would enable the plaintiff to benefit from his own crime see *Euro-Diam Ltd v Bathhurst* [1990] 1 Q.B. 1 at 35 (Kerr L.J.).

[230] Staughton and McCowan L.JJ.

[231] McCowan L.J.

[232] Staughton L J.

[233] For earlier cases where public policy has been engaged, see *Nagle v Feilden* [1966] 2 Q.B. 633 (Jockey Club's refusal of horse trainer's licence to woman held against public policy); *Edwards v SOGAT* [1971] Ch. 354 (unfair discrimination in withdrawal of collective bargaining rights).

[234] *Enderby Town Football Club v Football Association* [1971] Ch. 591 (Lord Denning M.R.: "I know that over 300 years ago Hobart C.J. said that "Public policy is an unruly horse". It has often been repeated since. So unruly is the horse, it is said [Burrough J. in *Richardson v Mellish* (1824) 2 Bing 229 at 252], that no judge should ever try to mount it lest it run away with him. I disagree. With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice, as indeed was done in *Nagle v Feilden* [1966] 2 Q.B. 633. It can hold a rule to be invalid even though it is contained in a contract").

[235] *R. (on the application of the Crown Prosecution Service) v Registrar General of Births, Deaths and Marriages* [2002] EWCA Civ 1661; [2003] Q.B. 1222.

interpreted as mandatory rather than directory. On the other hand, there are many reasons why prosecutors should be able to engage in "selective enforcement", in the public interest. The reasons include the fact that the authority may only possess limited resources and therefore need to concentrate on prosecutions of strategic importance.[236] There are also questions of public interest which the prosecutor is uniquely qualified to judge; such as the need to avoid defendants espousing unpopular causes having a hearing in the court, with the resultant elevation of the defendant to the status of a martyr.[237] Furthermore, full enforcement of a law may not fulfil its ultimate purpose (for example, the purpose of road safety will not be served by requiring the prosecution of a doctor who narrowly exceeded the speed limit while driving to the scene of an accident in the early hours of the morning). Political, rather than legal accountability is therefore generally thought to be the better method of controlling discretion in these cases, and the courts have generally refrained from intervening to require the discretion of a prosecutor[238] or other law enforcement officer to be exercised, outside of cases of bad faith or manifest unreasonableness.[239]

5–072 Enforcement decisions are not, however, entirely immune from attack on the ground of illegality. If enforcement of a particular law were simply abandoned, the rule of law could be offended.[240] And where guidelines as to prosecution have been made, it has been held that judicial review may lie where the guidelines themselves are based upon an unlawful policy, or where the prosecutor fails to follow his own guidelines.[241]

[236] *R. v Chief Constable of Sussex Ex p. International Traders' Ferry Ltd* [1999] 2 A.C. 418 (decision partially to withdraw police protection from protestors against the export of animals upheld as lawful and not disproportionate or irrational). On limited resources, see 5–124; on justiciability, see 1–025.

[237] *Gouriet v Union of Post Office Workers* [1978] A.C. 435 (refusal of the Attorney-General to support a private action to restrain breach of the law by the Union held not justiciable on that ground).

[238] *R. v Director of Public Prosecutions Ex p. Kebilene* [2000] 2 A.C. 326 (in the absence of "dishonesty or mala fide or an exceptional circumstance" decisions by the DPP to consent to a prosecution are not amenable to judicial review").

[239] Y. Dotan, "Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review? A Comparative Analysis of the Law in England and Israel" [1997] P.L. 513; *Raymond v Attorney-General* [1982] Q.B. 839; and *R. (on the application of UMBS Online Ltd) v Serious Organised Crime Agency* [2007] EWCA Civ 406 at [58] (see 3–00).

[240] *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] A.C. 295 at 364 (Lord Diplock: "The Crown does owe a duty to the public at large to initiate proceedings to secure that the law is not flouted"); *R. v Coventry Airport Ex p. Phoenix Aviation* [1995] 3 All E.R. 37 (failure to provide any police protection to secure safety of exporters affected by animal rights protests a breach of the rule of law).

[241] *R. v Chief Constable of Kent Ex p. L* [1993] All E.R. 756; *R. v DPP Ex p. C* [1995] Cr. App. R. 136 at 141 (Kennedy L.J.). It appears too that a decision to prosecute an accused for an offence in circumstances in which an alternative and more serious offence could have been charged is also susceptible to judicial review: G. Dingwall, "Judicial Review of Public Prosecutions" [1995] C.L.J. 265.

THE INTERPRETATION OF POLICIES

5–073 We shall below consider to what extent policies or guidance, promulgated by ministers, departments and other public authorities must or may be taken into account as "relevant considerations".[242] What should the approach of the courts be to the interpretation of policy? Clearly the policy must not fall outside the terms and purpose of the relevant power. Nor will policies be subjected to the fine analysis of a statute.[243] But to whom does it fall to interpret the meaning of the policy? Is it for the courts to pronounce upon the natural meaning of the language used, or for the decision-maker, subject only to the constraints of rationality?[244] In other words, should the courts defer to the decision-maker's own interpretation of his policy or should the court apply its plain meaning?

5–074 In *R. (on the application of Springhall) v Richmond on Thames LBC*, it was said that the decision-maker's "approach to policy will only be interfered with by the court if it goes beyond the range of reasonable meanings that can be given to the language used".[245] The opposite view was expressed in *R. v Derbyshire CC Ex p. Woods* where it was said that it is for the court, as a matter of law, to determine a policy's meaning and that if the decision-maker failed properly to understand that meaning then it will have made an error of law.[246] The approach of *Woods* was accepted in *First Secretary of State v Sainsbury's Supermarkets Ltd* where Sedley L.J. made clear that "the interpretation of policy is not a matter for the Secretary of State. What a policy says, it is".[247] This approach is surely correct. Although, as Sedley L.J. said, a policy is "a rule not a guide" and thus may be balanced against countervailing principles, policies do have legal consequences. Decision-makers take them into account as "relevant considerations".[248] And, as we shall later see, they may not lightly abandon policies that have created legitimate expectations or that breach the principle of consistency.[249] For that reason, when they fall to be interpreted in the courts, their ordinary meaning should prevail.[250]

[242] See 5–110–134
[243] *R. v Secretary of State for the Home Department Ex p. Urmaza* [1996] C.O.D. 479.
[244] On policy see 12–023, 031, 037 *et seq*; and 9–008–013. N. Blake, "Judicial Interpretation of Policies Promulgated by the Executive" [2006] J.R. 298.
[245] [2006] EWCA Civ 19; [2006] B.L.G.R. 419 at [7] (Auld L.J.).
[246] [1997] J.P.L. 958 at 967–968 (Brooke L.J.).
[247] [2005] EWCA Civ 520; [2005] N.P.C. 60. *cf. R. v Director of Passenger Rail Franchising Ex p. Save Our Railways* (1996) C.L.C. 589 at 610 (Sir Thomas Bingham M.R. said of the Secretary of State's directions: "the Court cannot . . . abdicate its responsibility to give the document its proper meaning. It means what it means, not what anyone would like it to mean").
[248] See 5–120–122.
[249] See Ch.12 and 11–059–061.
[250] On policies as "relevant considerations", see 5–120–122.

EXERCISE OF A DISCRETIONARY POWER FOR EXTRANEOUS PURPOSE

5–075 If a power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. In administrative law[251] this elementary proposition was first laid down in cases concerning the exercise of powers of compulsory acquisition. These cases held that when persons were authorised by Parliament to take compulsorily the lands of others, paying to the latter proper compensation, they cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers.[252]

5–076 An expression of judicial solicitude for private property rights[253] was thus enlarged into a fundamental principle of English administrative law, possibly even based upon an implied constitutional principle. Most of the reported cases deal with the misapplication of powers by local authorities, though the same general principle governed the exercise of subordinate legislative power by the executive.[254]

5–077 When a decision-maker pursues a purpose outside of the four corners of his powers, he may do so by taking an "irrelevant consideration" into account (the term "relevant" referring to the purpose of the statute). The interpretation of purpose, and the relevance of considerations taken into account in pursuing that purpose, are therefore often inextricably linked. However, in some cases neither the motive for the decision, nor the considerations taken into account in reaching that decision, are apparent. In such a case the purpose pursued is judged alone, without reference to the considerations by which it was influenced. The definition of purpose and the relevance of considerations must therefore be considered as separate aspects of the illegal decision.[255]

5–078 The abandonment of purpose has been expressed in different ways. Sometimes it is said that decision-makers should not pursue "collateral objects", or that they should not pursue ends which are outside the "objects and purposes of the statute". On other occasions it is said that power should not be "exceeded" or that the purposes pursued by the

[251] The doctrine of a fraud upon a power is well known in equity.

[252] *Galloway v London Corp* (1866) L.R. 1 HL 34 at 43.

[253] For other early dicta, see *Webb v Manchester & Leeds Ry* (1839) 4 Myl. & Cr. 116 at 118; *Dodd v Salisbury & Yeovil Ry* (1859) 1 Giff. 158; *Stockton & Darlington Ry v Brown* (1860) 9 H.L.C. 246 at 254, 256; *Biddulph v St George's, Hanover Square, Vestry* (1863) 33 L.J.Ch. 411 at 417; *Hawley v Steele* (1877) 6 Ch.D. 521 at 527–529. See also *Marshall Shipping Co v R.* (1925) 41 T.L.R. 285: 'You can never beat into the heads of people exercising bureaucratic authority that they must exercise their powers singly, and not for collateral objects".

[254] For byelaws, see e.g. *Scott v Glasgow Corp* [1899] A.C. 470 at 492; *Baird (Robert) Ltd v Glasgow Corp* [1936] A.C. 32, 42; *Boyd Builders Ltd v City of Ottawa* (1964) 45 D.L.R. (2nd) 211; *Re Burns and Township of Haldimand* (1965) 52 D.L.R. (2nd) 101; *Prince George (City of) v Payne* [1978] S.C.R. 458; *R. v Toohey Ex p. Northern Land Council* (1981) I.S.I. C.L.R. 170, where the majority of the court regarded legislative and administrative powers as equally susceptible to judicial review.

[255] On irrelevant considerations, see 5–110–134.

decision-maker should not be "improper", "ulterior", or "extraneous" to those required by the statute in question. It is also said that "irrelevant considerations" should not be taken into account in reaching a decision. All these terms of course "run into each other" and "overlap".[256]

5–079 However, the designation of a purpose as "improper" is distinct because of its connotation of *moral* impropriety. In most cases where the term "improper" has been employed the decision-maker either knowingly pursues a purpose that is different from the one that is ostensibly being pursued, or the motive behind the decision is illicit (based for example on personal factors such as financial gain, revenge or prejudice). Because, therefore, of its adverse moral imputation, the notion of improper purposes is more akin to that of bad faith, which will now be considered separately.

Bad faith and improper motive

5–080 Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

5–081 A power is exercised *fraudulently* if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised *maliciously* if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

5–082 Bad faith[257] is a serious allegation which attracts a heavy burden of proof.[258] Examples of cases involving fraudulent or dishonest motives include those where a local authority acquired property for the ostensible purpose of widening a street or redeveloping an urban area but in reality for the purpose of reselling it at a profit;[259] or preventing the owner from

[256] *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 K.B. 223 at 228 (Lord Greene M.R.).

[257] Bad faith has been defined rarely, but an Australian case defined it as "a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker": *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19]. Recklessness was held not to involve bad faith (*NAFK v Minister of Immigration* (2003) 130 F.C. 210, [24]).

[258] *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587).

[259] *Gard v Commissioners of Sewers for the City of London* (1885) 28 Ch.D. 486; *Donaldson v South Shields Corp* [1899] W.N. 6; *Fernley v Limehouse Board of Works* (1899) 68 L.J. Ch. 344; *Denman & Co v Westminster Corp* [1906] 1 Ch. 464 at 475; *R. v Minister of Health Ex p. Davis [1929] 1 K.B. 619 at 624. Contrast CC Auto Port Pty Ltd v Minister for Works* (1966)

reaping the benefit of the expected increment in land values;[260] or giving an advantage to a third party.[261] Licensing powers cannot be used to augment public funds.[262] An authority, purporting to exercise powers of compulsory acquisition for the purpose of widening streets, proposed to widen a street only to a minute extent, its true purpose being to alter the street level.[263] A local authority empowered to acquire unfit houses purported to do so in order to provide temporary accommodation pending their demolition, but in reality intended to render them fit for habitation and add them to its permanent housing stock.[264] An authority purporting to dismiss school teachers on educational grounds, in reality dismissed them for reasons of economy.[265] An authority claiming to raise the salaries of its employees to reflect an increase in their duties, in reality did so in order to grant an employee a salary increase unrelated to the changes in his duties.[266] A police authority which called its former chief constable, who was living abroad, ostensibly for medical examination (and cancelled his pension when he failed to appear) in reality called him so as to facilitate the execution of a warrant of arrest issued against him by the Bankruptcy Court.[267] A local authority sought to acquire land for its benefit, when its true motive was to remove gypsies from the land.[268]

113 C.L.R. 365. But see the puzzling decision, *Robins (E) & Son Ltd v Minister of Health* [1939] 1 K.B. 520 (CA held the local authority had an unfettered discretion in its choice of method (clearance or demolition) of dealing with compulsorily acquired land. Mackinnon L.J. (at 537–538) also observed that, even had the property owners succeeded in establishing that the local authority had adopted the method of compulsory purchase in order to be able to resell the land to the owners (who wished to develop it) at a high price, that would not have affected the validity of the decision). *cf. Merrick v Liverpool Corp* [1910] 2 Ch. 449 at 463.

[260] *Sydney Municipal Council v Campbell* [1925] A.C. 338; *Grice v Dudley Corp* [1958] Ch. 329 and other authorities there cited at 341–342.

[261] *Bartrum v Manurewa Borough* [1962] N.Z.L.R. 21.

[262] *R. v Bowman* [1898] 1 Q.B. 663; *R. v Birmingham Licensing Planning Committee Ex p. Kennedy* [1972] 2 Q.B. 140: *R. v Shann* [1910] 2 K.B. 418 at 434.

[263] *Lynch v Commissioners of Sewers for the City of London* (1886) 32 Ch.D. 72. Attempts to impugn compulsory purchase orders in the English courts for improper purpose were successful in *Grice v Dudley Corp* [1958] Ch.329, London & *Westcliff Properties Ltd v Minister of Housing and Local Government* [1961] 1 W.L.R. 519, *Webb v Minister of Housing and Local Government* [1965] 1 W.L.R. 755, *Meravale Builders Ltd v Secretary of the Environment* (1978) 36 P. & C.R. 87; *Victoria Square Property Co Ltd v Southwark LBC* [1978] 1 W.L.R. 463; and unsuccessful in *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999; *Simpsons Motor Sales (London) Ltd v Hendon Corp* [1964] A.C. 1088; *Moore v Minister of Housing and Local Government* [1966] 2 Q.B. 602. See also *Birmingham & Midland Motor Omnibus Co v Worcestershire CC* [1967] 1 W.L.R. 409 (diversion of traffic for unauthorised purpose).

[264] *Victoria Square Property Co Ltd v Southwark LBC* [1972] 1 W.L.R. 463; *R. v Birmingham City Council Ex p. Sale* (1983) 9 H.L.R. 33.

[265] *Hanson v Radcliffe UDC* [1922] 2 Ch. 490; *Sadler v Sheffield Corp* [1924] 1 Ch. 483. See also *Smith v McNally* [1912] 1 Ch. 816 at 825–826; *Martin v Eccles Corp* [1919] 1 Ch. 387 at 400 ("grounds connected with the giving of religious instruction"). Contrast *Price v Rhondda UDC* [1923] 2 Ch. 377; *Short v Poole Corp* [1926] Ch. 66.

[266] *R. (Wexford CC) v Local Government Board* [1902] 2 I.R. 349. See also the leading Australian case *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 C.L.R. 108 at 120, 130 (wages board fixed high overtime rates in reality to bring about closure of shops at hours different from those required by statute).

[267] *R. v Leigh (Lord)* [1987] 1 Q.B. 582; *R. v Brixton Prison Governor Ex p. Soblen* [1963] 2 Q.B. 243 (where it was unsuccessfully alleged that the true purpose of deportation was to

5–083 A decision based on *malice* is usually one that is directed to the person, e.g. where a byelaw or order has been made especially to thwart an individual application for a permit.[269] The malice may arise out of personal or political animosity built up over a series of past dealings.[270] For instance, in a Canadian case the cancellation of a liquor licence was held to be an abuse of power where the decision was prompted by the proprietor's support of a religious sect which was considered a nuisance by the police.[271] In another Canadian case the court inferred mala fides from the fact that a byelaw was made for the compulsory purchase of land which was the subject of pending litigation between the owner and the local authority.[272] And in a third it was held that a local authority cannot use its licensing power to prohibit lawful businesses of which it disapproves.[273] In an English case the decision of Derbyshire County Council to cease advertising in journals controlled by Times Newspapers which had written articles critical of its councillors was explicitly held to have been motivated by bad faith and therefore declared invalid for that reason alone.[274] In a

comply with a request for extradition); *R. v Secretary of State for the Environment Ex p. Ostler* [1977] Q.B. 122 (applicant was issued with false information which misled him not to appear at a public inquiry. But judicial review was excluded by an ouster clause. In other cases it has been said that where bad faith is established, the courts will be prepared to set aside a decision procured or made fraudulently, despite the existence of a formula purporting to exclude judicial review); *Lazarus Estates Ltd v Beasley* [1956] 1 Q.B. 702 at 712, 713 (Denning L.J.), 722 (Parker L.J.: fraud "vitiates all transactions known to the law of however high a degree of solemnity"); cases cited by counsel in *Smith v East Elloe RDC* [1956] A.C. 736 at 740 where it was held that the statutory language was sufficiently clear to exclude challenge for bad faith to a compulsory purchase order outside the short statutory limitation period. See further 4–00.

[268] *Costello v Dacorum DC* (1980) 79 L.G.R. 133.

[269] *Lubrizol Corp Pty Ltd v Leichhardt Municipal Council* [1961] N.S.W.R. 111; *Boyd Builders Ltd v City of Ottawa* (1964) 45 D.L.R. (2nd) 211.

[270] The allegation by Mrs Smith in *Smith v East Elloe RDC* [1986] A.C. 736. Personal animosity towards a party may also disqualify an adjudicator: *R. (Donoghue) v Cork County Justices* [1910] 2 I.R. 271; *R. (Kingston) v Cork County Justicesm* [1910] 2 I.R. 658; *R. (Harrington) v Clare County Justices* [1918] 2 I.R. 116; *Law v Chartered Institute of Patent Agents* [1919] 2 Ch. 276; *R. v Handley* (1921) 61 D.L.R. 656; *Re "Catalina" and "Norma"* (1938) 61 Ll. Rep. 360.

[271] *Roncarelli v Duplessis* (1959) 16 D.L.R. (2nd) 689 at 705. For further proceedings see [1959] S.C.R. 121.

[272] *Re Burns and Township of Haldimand* (1966) 52 D.L.R. (2nd) 101.

[273] *Prince George (City of) v Payne* [1978] 1 S.C.R. 458. In any event a power to regulate will not normally be constructed to allow total prohibition: *Tarr v Tarr* [1973] A.C. 254 at 265–268. For another interesting Canadian case, see *Re Doctors Hospital and Minister of Health* (1976) 68 D.L.R. (3rd) 220 (power to revoke approval as public hospital wrongfully exercised in the interests of economy). More recently, see *Canadian Union of Public Employees v Ontario (Minister of Labour)* [2003] 1 S.C.R. 539 (the use of a ministerial appointment power for an improper purpose).

[274] *R. v Derbyshire CC Ex p. The Times Supplement Ltd* [1991] C.O.D. 129. In *R. v Ealing LBC Ex p. Times Newspaper Ltd* (1986) 85 L.G.R. 316, councils imposed a ban on purchasing the publications of the Times Newspapers in their libraries. Watkins L.J., without going so far as to label the "shadowy" reasons for imposing the ban (to punish a "tyrannical employer") as bad faith—he called them "a transparent piece of camouflage"—did hold the decision both irrational and an abuse of power (as well as illegal, as discussed at 5–086). *Cf. R. v Lewisham LBC Ex p. Shell UK Ltd* [1988] 1 All E.R. 938 (ban on purchasing Shell's products to pressure

case concerning hijackers from Afghanistan, the Home Secretary refused any form of leave to enter to the claimants (to which they were entitled) but had instead granted them "temporary admission". Since his motive was, according to Sullivan J., to thwart a decision of the Immigration Appellate Authority by giving himself time "in the hope that something would turn up", his decision was void and an abuse of power.[275]

Specified purposes

5–084 Even when purposes are specified in a statute, it is often difficult to determine their scope, as the following examples show. The case of *Spath Holme* typifies the search for purpose and also demonstrates how difficult it is to draw general rules from individual statutory powers.[276] In 1999 the Secretary of State made Orders to cap the rents of regulated tenants who, as a result of judicial decisions, faced increases in their rents. The Order was made under a consolidated statute which had originally conferred temporary powers on the Secretary of State directed to preventing inflation in the economy. The landlord challenged the Order on the ground that it was outwith the power of the statute which had at its purpose the countering of general inflation in the economy and not the alleviation of hardship. Having first decided (by majority) that it was not appropriate to seek the general purpose of the statute by reference to the parliamentary record,[277] the House of Lords held that the earlier legislation was not confined to the specific anti-inflationary purpose.

5–085 Where a statute conferred power upon local authorities to incur expenditure for the "publication within their area of information on matters relating to local government", an expensive media and poster campaign mounted by the Inner London Education Authority was invalidated on the ground that it was made with the dual purpose both of informing the public of the detail of the education service and also of persuading the public to support the authority's opposition to the government's "rate-capping" policy. The first objective of the campaign (information) was lawful, but the second objective (persuasion) was held to be an unlawful purpose, which materially influenced the decision.[278]

5–086 The legality of sanctions imposed by local authorities for various motives has arisen in a number of cases. Where a statute imposed a duty upon every Library authority to provide a comprehensive and efficient library service",[279] the action of three London local authorities in banning from

parent company to sever links with South African subsidiary illegal but not unreasonable, although "very near the line").

[275] *R. (on the application of S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157; [2006] I.N.L.R. 575 at [102].

[276] *R. (on the application of Spath Holme Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 A.C. 349.

[277] See 5–026–031.

[278] *R. v ILEA Ex p. Westminster CC* [19861 1 W.L.R. 28. On plurality purposes, see 5–099.

[279] Public Libraries and Museums Act 1964 s.7(1).

their libraries all publications of the Times Newspaper Group was held unlawful.[280] The ban was imposed to demonstrate support for the trade unions involved in a long and bitter dispute with the newspaper's proprietors. It was held that the ban pursued an "ulterior purpose" which was "set by a political attitude to a so-called workers' struggle against a tyrannical employer with the object of punishing the employer".[281] In an earlier case Lord Denning indicated that the closure of schools during a prolonged labour dispute could, if influenced by trade union pressure, amount to an unlawful extraneous purpose.[282]

5–087 Where local authorities have sought to impose conditions upon the use of their land, the courts have required them to further the purposes authorised by the statutes under which the land was acquired. A London authority attached a condition to permission for the holding of a community festival in a park.[283] The condition required the banning at the festival of "any political party or organisation seeking to promote or oppose any political party or cause". It was held that those restrictions were extraneous to the purpose of the statute under which the authority had purchased the park, namely "for the purpose of being used as public walks or a pleasure ground".[284]

5–088 Prior to the Hunting Act 2004, which banned the hunting of various mammals with dogs, the Somerset County Council had passed a resolution to ban hunting on their (council-owned) land on the Quantock Hills. The ban was motivated by the "moral repugnance" of the majority of the council towards hunting. The land had been acquired under a statute generally authorising acquisition of land for "the benefit, improvement or development of their area".[285] That purpose was interpreted as permitting the council to pursue objects which would "conduce to the better management of the estate". Had the ban been introduced to protect rare flora damaged by the hunt, or to eliminate physical interference with the enjoyment of others of the amenities offered on the land, it might have been lawful. However, since the ban was fuelled by the "ethical perceptions of the councillors about the rights and wrongs of hunting", the purposes it sought were outwith that of the governing statute.[286]

5–089 The power of the Foreign Secretary to grant assistance to overseas countries was subjected to judicial scrutiny in relation to the funding of the Pergau dam hydro-electric project in Malaysia. The Overseas Development and Co-operation Act 1980 confers such power on the Secretary of State

[280] *R. v Ealing LBC Ex p. Times Newspapers Ltd* (1986) 85 L.G.R. 316.
[281] The ban was also held to be unreasonable: see 11–072, n.250.
[282] *Meade v Haringey LBC* [1979] 1 W.L.R. 637.
[283] *R. v Barnet LBC Ex p. Johnson* [1989] C.O.D. 538.
[284] Public Health Act 1865 s.164. The ban was also held to be an unreasonable infringement of the right of association.
[285] Local Government Act 1972 s.120(1).
[286] *R. v Somerset CC Ex p. Fewings* [1995] 1 All E.R. 513 (Laws J.). The CA upheld this decision, although on different grounds [1995] 1 W.L.R. 1037. See D. Cooper, "For the Sake of the Deer: Land, Local Government and the Hunt (1997) 45 *Sociological Review* 668.

"for the purpose of promoting the economy of a country or territory outside the United Kingdom, or the welfare of its people".[287] It was clear that the Pergau project was not economically "sound" and was a "very bad buy". However, it was contended for the Secretary of State that wider political and economic interest were and could have been taken into account, including an alleged undertaking by the Prime Minister to provide the assistance (perhaps, as alleged in the press—although not directly alluded to in the judgments—as part of a wider arrangement involving an agreement to purchase defence items in the United Kingdom). The court, however, held that these wider purposes were not sufficient in themselves to qualify as a project for assistance under the statute. Although the statute did not specifically require an assisted project to be economically "sound", so much had to be implied. Had there been a "developmental promotion purpose" within s.1 of the Act, only then would it have been proper to take into account the wider political and economic considerations, including the impact which withdrawing from the offer would have had on commercial relations with Malaysia. In the circumstances, however, there was, at the time when assistance was provided, "no such purpose within the section".[288]

5–090 In a number of recent South African cases the courts have impugned decisions because they pursued extraneous purposes. In *Minister of Home Affairs v Watchenuka*[289] it was held that the power to regulate the granting of asylum did not include a power to prevent asylum seekers from taking up employment or studying.[290]

Incidental powers

5–091 Even when purposes are clearly specified in a statute, the law permits authorities to undertake tasks that are "reasonably incidental" to the achievement of those purposes,[291] provided that they do not contradict any statutory power. We have seen[292] how the common law under the Ram doctrine may apply in respect of the powers of the executive and the problems associated with this for the rule of law. In respect of the activities of local authorities, statutory recognition is given to the rule of common

[287] Overseas Development and Co-operation Act 1980 s.1(1).
[288] *R. v Secretary of State for Foreign Affairs Ex p. World Development Movement Ltd* [1995] 1 W.L.R. 386.
[289] 2004 (4) S.A. 326, SCA.
[290] See also *Minister of Correctional Services v Kwakwa* 2002 (4) S.A. 455, SCA; *Vorster v Dep. of Economic Development, Environment and Tourism* 2006 (5) S.A. 291 (T) (conditions attached to hunting permit beyond the scope of the power); *Chairperson: Standing Tender Committee v JFE Sapela Electronics (Pty) Ltd* [2005] 4 All SA 487 (unacceptable tender invalid act).
[291] *Ashbury Railway Carriage and Iron Co Ltd v Riche* (1875) L.R. 7 HL 653; *Attorney General v Great Eastern Railway Company* (1880) 5 App. Cas. 473; *Attorney General v Fulham Corp* [1912] 1 Ch. 440.
[292] See 5–022.

law, authorising them to do any thing which is "calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions".[293] This phrase has itself been the subject of statutory construction in cases where, for example, local authorities have attempted to raise revenue by charging fees or speculating on the financial markets. When a local education authority decided to charge fees for individual and group music tuition, that decision was held unlawful as the duty under the statute to provide "education" without charge[294] included the duty to provide music tuition.[295] Similarly, a local authority was held not entitled to charge for consultations with developers prior to applications for planning permission being lodged. The House of Lords held that, although pre-application advice was not a duty or a discretionary power, but an incidental power authorised by the statute, the power to charge for that incidental power was not authorised.[296] The courts also struck down the power of a local authority to enter into interest rate swap transaction, which involved speculation as to future interest trends, with the object of making a profit to increase the available resources of the authority. That activity was held inconsistent with the borrowing powers of local authorities and not "conducive or incidental' to the discharge of those limited powers.[297]

5–092 In *Stennett*[298] the question before the House of Lords was whether a duty to provide after-care services for those discharged from compulsory detention under the Mental Health Act 1983 also authorised the authority to charge for those services. Despite the huge cost to local authorities of providing this service free of charge (estimated at between £30 million and £80 million), the House of Lords agreed with the Court of Appeal[299] that that a public authority could not charge for services unless it was explicitly authorised to do so and it was held that s.117 of the 1983 Act did not so authorise any charge as it was a "free-standing" section, and did not act as

[293] Local Government Act 1972 s.111; Local Government Act 2003 s.93(7); see also Local Government Act 2003 s.92 (charges for provision of services for local authorities' powers, though not duties); Police Act 1996 ss.18, 25, 26 (powers to police to charge for services and goods).

[294] Education Act 1949 s.61.

[295] *R. v Hereford and Worcester Local Education Authority Ex p. Jones* [1981] 1 W.L.R. 768. In general authorities require specific authorisation to raise revenue. *Attorney General v Wilts United Dairies Ltd* (1921) 37 T.L.R. 884.

[296] *McCarthy and Stone (Developments) Ltd v Richmond-upon-Thames LBC* [1992] 2 A.C. 48.

[297] *Hazell v Hammersmith & Fulham LBC* [1992] 2 A.C. 1. See also: *Credit Suisse v Allerdale* BC [1997] Q.B. 306; *Credit Suisse v Waltham Forest LBC* [1997] Q.B. 362; *Sutton London LBC v Morgan Grenfell and Co Ltd* (1997) 9 Admin. L.R. 145. *cf. R. v Greater Manchester Police Authority Ex p. Century Motors (Farnworth) Ltd*, *The Times* May 31, 1996 (necessary implication that power to levy charges for vehicle recovery operation); *R. v Powys CC Ex p. Hambidge*, *The Times*, November 5, 1997 (Local authority may charge for services under Chronically Sick and Disabled Persons Act 1970, s.2).

[298] *R. (on the application of Stennett) v Manchester City Council* [2002] UKHL 34; [2002] 2 A.C. 1127.

[299] [2001] Q.B. 370.

a "gateway" to the incorporation of provisions of other legislation which did authorise charging.[300]

Unspecified purposes

5–093 If a discretionary power is conferred without express reference to purpose, it must still be exercised in accordance with such implied purposes as the courts attribute to the legislation.[301] We have seen that the minister who, in reliance upon an ostensibly unfettered discretionary power, refused to refer a complaint by milk producers to a committee of investigation because this might lead him into economic and political difficulties, was held to have violated the unexpressed purpose, or the "policy and objects" of the Act, for which the power of reference had been conferred[302] and (according to a somewhat hyperbolical interpretation of their Lordships' comments) was "roundly rebuked by the House of Lords for his impudence".[303] In order to avoid paying an announced (but not yet enacted) increase in the fee for a television licence, some licence-holders obtained another licence at the old rate before their existing licence expired. The Court of Appeal held that the minister could not use his power to revoke the licences, despite the lack of apparent limits on that power, in order to deprive licensees of the advantage that they had secured from the gap between the Government's announcement and parliamentary authorisation of the change in fees.[304]

5–094 In the case of *Magill v Porter*,[305] the Conservative leaders of Westminster City Council had used their powers to increase the number of owner-occupiers in marginal wards for the purpose of encouraging them to vote for the Conservative Party in future elections. The District Auditor held that this was an unlawful purpose and, through wilful conduct, had lost the Council money which the leaders of the Council should pay by way of

[300] National Assistance Act 1948 s.21; see A. Scully, "Scarce Resources Again" [2003] C.L.J. 1, 2 who makes the point that the result of charging could mean delay in releasing a person from detention, as if no after-care has been arranged detention may be continued under the authority of *R. (on the application of J) v Ashworth Hospital Authority* [2002] EWCA Civ 923.
[301] See, e.g. *Liversidge v Anderson* [1942] A.C. 206 at 220, 248, 261, 278; *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181 at 193; *Potato Marketing Board v Merricks* [1958] 2 Q.B. 316 at 331; *Smith v East Elloe RDC* [1956] A.C. 736 at 740. The proposition stated in the text has nevertheless been doubted or contradicted (see *Yates (Arthur) & Co Pty Ltd v Vegetable Seeds Committee* (1945) 72 C.L.R. 37 at 68 (Latham C.J.) by some authorities. The decision in *R. v Paddington & St Marylebone Rent Tribunal Ex p. Bell London & Provincial Properties Ltd* [1949] 1 K.B. 666 (block reference of 555 tenancies by local authority to rent tribunal without considering wishes of tenants or circumstances of particular cases; reference held invalid in that council was using tribunal as a general rent-fixing agency) has generally been regarded as a good illustration of the proposition in the text, but the case has now been explained as an example of a merely capricious reference: *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342, CA. See also *Rowling v Takaro Properties Ltd* [1975] 2 N.Z.L.R. 62, NZCA; and [1988] A.C. 473, PC where the NZCA and PC took different views as to the implied purposes of the regulations.
[302] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; see 5–009.
[303] *Breen v Amalgamated Engineering Union* [1971] 2 Q.B. 175 at 191 (Lord Denning M.R.).
[304] *Congreve v Home Office* [1976] Q.B. 629.
[305] [2001] UKHL 67; [2002] 2 A.C. 357.

surcharge. The House of Lords upheld the District Auditor's decision. It was held that although the powers under which the Council could dispose of the land was very broad,[306] and although elected politicians were entitled to act in a manner which would earn the gratitude and support of their electorate,[307] they could only act to pursue a "public purpose for which the power was conferred". The purpose of securing electoral advantage for the Conservative Party was, it was held, no such "public purpose".[308]

5–095 When an authority which is clothed with powers to regulate an activity and accompanies its regulations with a sanction or penalty, the courts look carefully at the restrictions and penalties to ensure that they are within the policy and objects of the empowering statute. This is true even where the power permits conditions to be attached to the regulations or licences. Thus where conditions in an ice-cream vendors' licence restricted their right to open shops at times of their choosing, the conditions were held to be unlawful.[309] A local authority was not entitled to lay down conditions relating to the customers of a licensee of a caravan site as it interfered with the licensee's freedom to contract with his customers and to matters that did not relate to the manner of the use of the site.[310] A similar approach was taken in a recent case where the House of Lords held that a Scottish local authority which had power to regulate second-hand car dealing acted unlawfully when it failed to renew a licence to a dealer who had failed to provide pre-sales information and inspection reports to his customers. Lord Hope held that the principal mischief to which the power was directed was the handling of stolen property and that the conditions imposed pursued a policy of consumer protection, which was not one of the objects and purposes of the statute.[311]

5–096 Another case concerned Afghans fleeing from the Taliban regime by means of a hijacked plane which landed in England and where they requested asylum. Criminal convictions against them for hijacking were quashed because of misdirection by the judge. The Home Secretary had rejected their claim for asylum and this was upheld by a panel of adjudicators. The Home Secretary was unable to deport them as their lives

[306] Housing Act 1985 s.32.

[307] [2001] UKHL 67; [2002] 2 A.C. 357 at [20](Lord Bingham).

[308] *R. v Tower Hamlets LBC Ex p. Chetnick Developments Ltd* [1988] A.C. 858 at 872 (Lord Bridge: "Statutory power conferred for public purposes is conferred . . . upon trust, not absolutely—that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended"); *Credit Suisse v Allerdale BC* [1997] Q.B. 306 at 333 (Neill L.J. described that principle as "a general principle of public law").

[309] *Rossi v Magistrates of Edinburgh* (1904) 7 F 85, HL *Spook Erection Ltd v City of Edinburgh DC*, 1995 S.L.T. 107, Sh Ct.

[310] *Mixnam's Properties Ltd v Chertsey UDC* [1965] A.C. 735 at 763 (Lord Upjohn), 755 (Lord Reid).

[311] *Stewart v Perth and Kinross Council* [2004] UKHL 16; 2004 S.C. 71, HL. It was held too that the conditions were not intended to interfere with the relationship between the dealer and his contractors, and that consumer legislation of this could kind should preferably be introduced through national legislation, in order to be consistently applied.

would be at risk on their return to Afghanistan. The Home Secretary then decided not to allow the claimants discretionary leave, which he was entitled to do under his policy on "humanitarian grounds" and granted them instead "temporary admission". The Court of Appeal held that the purpose of temporary admission had not been sanctioned by Parliament. There had been ample time for the Home Secretary to obtain parliamentary authority for this new measure, but he had not done so and therefore his policy was unlawful.[312]

5–097 Other cases made it clear that the imposition of a penalty in the absence of a legal wrong pursues an extraneous purpose. Purporting to be acting under the general duty under s.61 of the Race Relations Act 1976 to "promote good race relations", and also purporting to act under its broad powers to manage its own land, Leicester City Council withdrew the licence of a local rugby club to use the council-owned recreation ground. The council did this as a mark of their disapproval that the club had been unable to persuade some of its members to withdraw from the English rugby footballers' tour of South Africa, at the time of apartheid and as a demonstration of their effort to promote good relations between persons of different racial or ethnic groups. The House of Lords held the council's action unlawful, Lord Templeman considering it to be a "misuse of power . . . punishing the club where it had done no wrong".[313] Similar reasons (the opposition to apartheid and the promotion of good race relations) motivated the London Borough of Lewisham which decided to boycott the products of Shell UK Ltd so as to put pressure on the parent companies of the group to withdraw their interests from South Africa. It was held that the dominant purpose of the boycott was to penalise the applicant for the fact that the group to which it belonged had trading links with South Africa. These links were not unlawful and the council's decision had therefore been influenced by an "extraneous and impermissible purpose".[314] Another boycott was considered by the courts when Liverpool City Council threatened to withdraw grant aid from organisations which might consider joining a (voluntary) employment training scheme

[312] *R. (on the application of S) v Secretary of State for the Home Department* [2006] EWCA Civ 1157; [2006] I.N.L.R. 575.

[313] *Wheeler v Leicester City Council* [1985] A.C. 1954. Cf. the approach of Lord Browne-Wilkinson in his dissenting judgment in the CA (at 1064–1065), where he raised the conflict between "two basic principles of a democratic society", one that allowed a "democratically elected body to conduct its affairs in accordance with its own views" and the other "the right to freedom of speech and conscience enjoyed by each individual". Basing his decision on illegality rather than on unreasonableness (the council having taken a "legally irrelevant factor" into account), he came close to deciding the matter on the ground of the council's acting inconsistently with "fundamental freedoms of speech and conscience". cf. the New Zealand decision of *Ashby v Minister of Immigration* [1981] 1 N.Z.L.R. 222 (refusal of Minister to bar the entry of the South African rugby football team into New Zealand upheld on the ground that the public interest, a relevant consideration in the context of the Minister's power, allowed the decision—although it was not the role of the court to second-guess the minister on that question in the context of foreign relation).

[314] *R. v Lewisham LBC Ex p. Shell UK Ltd* [1988] 1 All E.R. 938.

introduced by the Government. The Court of Appeal held the purpose (punishment or coercion) to be unlawful.[315]

5–098 When two school governors were removed by the Inner London Education Authority because they had opposed the Authority's educational policy, the House of Lords considered whether the broad discretion conferred on the authority permitted this action. The statute simply provided that a governor "shall be removable by the authority by whom he was appointed".[316] It was held that the power could not be exercised in a way that usurped the governor's independent function and that such a usurpation was in effect extraneous to the power conferred.[317]

Plurality of purposes

5–099 We now take hold of a legal porcupine which bristles with difficulties as soon as it is touched. In a case where the actor has sought to achieve unauthorised as well as authorised purposes, what test should be applied to determine the validity of his act? At least six separate tests have been applied where plural purposes or motives are present. The choice of one test in preference to another can materially affect the decision. Despite this, it is not uncommon to find two or more of the tests applied in the course of a single judgment.[318] The following tests, none of which is entirely satisfactory, have been formulated.

Test 1: What was the true purpose for which the power was exercised

5–100 If the actor has in truth used his power for the purpose for which it was conferred, it is immaterial that he achieved as well a subsidiary object. Thus, if a power to construct an underground public convenience is exercised in such a way as to provide a subway leading to the convenience that can also be used by pedestrians who do not wish to take advantage of its facilities, the power has been validly exercised. The position would have been different if the construction of the conveniences was a colourable device adopted in order to enable a subway to be built.[319] A local authority

[315] *R. v Liverpool CC Ex p. Secretary of State for Employment* [1988] C.O.D. 404.

[316] Education Act 1944 s.21(1) (now Education Act 1986 ss.56,67).

[317] *Brunyate v Inner London Education Authority* [1989] 1 W.L.R. 542. But when eight recalcitrant councillors were removed from a local authority housing committee ostensibly to reduce the size of that committee (and not to punish their behaviour), the decision was not held unlawful. *R. v Greenwich LBC Ex p. Lovelace* [1990] 1 W.L.R. 18; affirmed [1991] 1 W.L.R. 506. See also *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 W.L.R. 1 (refusal of membership of school appointments committee to police constable governor held unlawful as it was not "likely" to give the appearance of partiality); *R. v Warwickshire CC Ex p. Dill-Russell* (1991) 3 Admin. L.R. 415; affirmed (1991) 3 Admin. L.R. 415 (lawful for all governors of school to resign simultaneously so as to achieve proportionality with political representation on reappointment).

[318] See, e.g. *Webb v Minister of Housing and Local Government* [1965] 1 W.L.R. 755 at 773–774, 777H (test (5)), 778G (test (2)); *Grieve v Douglas-Home* 1965 S.C. 313 (tests (1) and (2)); *R. v Inner London Education Authority Ex p. Westminster CC* [1986] 1 W.L.R. 28 (tests (1) and (5)).

[319] *Westminster Corp v L & NW Ry* [1905] A.C. 426.

empowered to spend money upon altering and repairing streets "as and when required" acts lawfully in resurfacing a road that is in fact in need of repair, although the immediate occasion for carrying out the work is the hope of attracting an automobile club to use it for racing trials.[320] If the Home Secretary is honestly satisfied that the deportation of an alien is conducive to the public good and there is some basis for his belief, his deportation order is valid although the practical effect (and perhaps a secondary desired effect) of the order is to secure the extradition of the alien to another country seeking his rendition for a non-extraditable offence.[321]

Test 2: What was the dominant purpose for which the power was exercised

5–101 If the actor pursues two or more purposes where only one is expressly or impliedly permitted, the legality of the act is determined by reference to the dominant purpose. This test, based on an analogy with the law of tortious conspiracy,[322] has been applied in several cases.[323] In substance it may often prove to be nothing more than a different verbal formulation of the "true purpose" test. Where several purposes coexist, attempts to single out the "true" purpose have an air of unreality. If, of course, the avowed purpose is shown to be a mere sham, the "true purpose" test can readily be applied. It is of some interest that in *Soblen* the courts concentrated their analysis on the question of whether the deportation order was a sham, or a pretext for procuring an unlawful extradition; they abstained from asking themselves what was the Home Secretary's dominant purpose in making the order, though this would not appear to have been an irrelevant question.[324]

5–102 In the Pergau dam case[325] it was held that the minister's dominant purpose in funding the uneconomic project was not the authorised one of furthering the "economy" or "welfare" of the people of Malaysia. In the stag hunting ban case[326] it was held that the dominant purpose of fulfilling the "ethical perceptions" of the councillors did not fulfil the statute's

[320] *R. v Brighton Corp Ex p. Shoosmith* (1907) 96 L.T. 762.
[321] *R. v Brixton Prison Governor Ex p. Soblen* [1963] 2 Q.B. 243. It is to be noted that the Home Secretary's discretion was couched in subjective terms and was exercisable on "policy" grounds.
[322] *Crofter Hand Woven Harris Tweed Co v Veitch* [1942] A.C. 435.
[323] *Earl Fitzwilliam's Wentworth Estates Co v Minister of Town and Country Planning* [1951] 2 K.B. 284 at 307 (Denning L.J., dissenting). The HL did not give any ruling on this point on appeal ([1952] A.C. 362). For subsequent formulations of a similar test, *Webb* [1965] 1 W.L.R.755 at 778; *Grieve v Douglas-Home* 1965 S.C. 313 *R. v Immigration Appeals Adjudicator Ex p. Khan* [1972] 1 W.L.R. 1058 (whether primary purpose of entering UK as full-time student was to take up permanent residence); *R. v Ealing LBC Ex p. Times Newspapers Ltd* (1986) 85 L.G.R. 316 (dominant purpose in imposing ban on purchase of publications for library was to interfere in industrial dispute).
[324] See n.321.
[325] *R. v Secretary of State for Foreign Affairs Ex p. World Development Movement* [1995] 1 W.L.R. 386.
[326] *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037.

authorised purpose that of improvement of the amenity of the area. Perhaps in both these cases the sole purpose was unauthorised.

5–103 The House of Lords adopted a combination of the "true" and "dominant" purpose tests in a case where an accountant challenged an application by the police to produce documents relating to her dealings with a client. The statute under which the police made the application provided that it could be made for purposes of investigation into whether a person has "benefited from any criminal conduct".[327] However, the accountant submitted that the predominant reason for seeking the documents was to investigate, under a power provided in different legislation,[328] whether "the conduct from which the person had benefited was criminal". It was held that since "true and dominant purpose" of the application was to investigate the proceeds of criminal conduct in order to obtain evidence for the prosecution, the application should therefore be granted. Furthermore, the application should be granted even if an incidental consequence might be that the police would obtain evidence relating to the commission of an offence.[329]

5–104 In the New Zealand case *Attorney General v Ireland*[330] it was held that when a power was exercised for two purposes, one of which was authorised and the other not, the exercise of the one purpose is valid if the statute does not limit the power to "only" the explicitly authorised purpose and the additional purpose does not thwart or frustrate the purpose of the Act. However, in South Africa it was held that a minister's exercise of a power to regulate the granting of asylum did not extend to preventing asylum seekers from taking up employment or studying.[331]

Test 3: Would the power still have been exercised if the actor had not desired concurrently to achieve an unauthorised purpose?

5–105 This test was applied by the High Court of Australia.[332]

Test 4: Was any of the purposes pursued an authorised purpose?

5–106 If so, the presence of concurrent illicit purposes does not affect the validity of the act. This test appears to have been applied in only one English case, and even then somewhat equivocally.[333] It is submitted that in English law

[327] Criminal Justice Act 1988 s.93H.
[328] Police and Criminal Evidence Act 1984 s.9(1).
[329] *R. v Southwark Crown Court Ex p. Bowles* [1998] A.C. 641.
[330] [2002] 2 N.Z.L.R. 220, CA—citing this para. in the 5th edition of this work, at [38].
[331] *Minister of Home Affairs v Watchenukam* 2004 (4) SA 326.
[332] *Thompson v Randwick Municipal Council* (1950) 81 C.L.R. 87 at 106. It may have the disadvantage of requiring the courts to speculate about motives for which it is ill-equipped, but it is not very different from test (6) below. The leading Australian text suggests that Australian cases now suggest a "substantial purpose' test, "in the sense that the decision would not have been made without the illegitimate purpose": M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action*, 3rd edn. (2004), pp.298–299.
[333] *Earl Fitzwilliam* [1951] 1 K.B. 203 at 217–219 (Birkett J.); see also Lord MacDermott's observations in the HL [1952] A.C. 362 at 385.

the existence of one legitimate purpose among illegitimate purposes will only save the validity of an act if the purpose for which the power was granted has been substantially fulfilled.

Test 5: Were any of the purposes pursued an unauthorised purpose?

5–107 If so, and if the unauthorised purpose has materially influenced the actor's conduct, the power has been invalidly exercised because irrelevant considerations have been taken into account. The effect of applying such a test may be directly opposed to that produced by the preceding test.[334] This is a curious state of affairs, for the concepts of improper purpose and irrelevancy are intimately related and are often analytically indistinguishable.[335] That the possibility of a sharp conflict between them exists has seldom been recognised. The question was considered in a case where the validity of a compulsory purchase order was impugned and the court preferred the test of irrelevancy: had the making of the order been significantly or substantially influenced by irrelevant considerations.[336]

5–108 Cases have affirmed this approach. When irrelevant considerations have been taken into account, the courts have invalidated the decision if those considerations have had a substantial" or "material" influence upon the decision.[337]

Test 6: Would the decision-maker have reached the same decision if regard had only been had to the relevant considerations or to the authorised purposes?

5–109 This is a subtle variation of the previous (material influence) test. It was applied when the Broadcasting Complaints Commission refused to investigate a complaint for a number of reasons, only one of which was bad (that the investigation would impose too great a burden on the Commission's limited staff). It was held that where the bad reason was not mixed and

[334] Thus, in *Sadler v Sheffield Corp* [1924] Ch. 483, where notices of dismissal served on teachers were held to be invalid because they have been served not on "educational grounds" (as was required by the Act) but in reality on financial grounds, Lawrence J. said obiter (at 504–505) that even if bona fide educational grounds for dismissal had coexisted with the financial grounds, it would have been wrong to try to separate them, and that mixed educational and financial grounds were not educational grounds within the meaning of the Act, which were the only grounds that could lawfully be taken into account (applying dictum in *R. v St Pancras Vestry* (1890) 24 Q.B.D. 375.

[335] As In *Padfield* [1968] A.C. 997.

[336] *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020 (Megaw J.); cf. *Meravale Builders Ltd v Secretary of State for the Environment* (1978) 36 P. & C.R. 87. In practice the result of analysing a situation by reference to the effect of irrelevant considerations will often be the same as that produced by applying the "dominant purpose" test; cf. *Fawcett Properties Ltd v Buckingham CC* [1958] 1 W.L.R. 1161 at 1167–1168.

[337] See e.g. *R. v Inner London Education Authority Ex p. Westminster CC* [1986] 1 W.L.R. 28 (advertising campaign for the purposes of: (a) information about rate-capping and (b) persuasion against it. Persuasion held an extraneous purpose which materially influenced the decision); *R. v Lewisham LBC Ex p. Shell UK Ltd* [1983] 1 All E.R. 938 (boycott in order to induce Shell to sever its trading links with South Africa held "substantial influence" on decision); and *R. v Ealing LBC Ex p. Times Newspapers Ltd* (1986) 85 L.G.R. 316.

could be disentangled from the good, then the decision could stand if the Commission would have reached precisely the same decision on the other valid reasons".[338]

Decisions Based Upon Irrelevant Considerations or Failure to Take Account of Relevant Considerations

5–110 When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account.[339] If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.

5–111 It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters [340] and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision.[341] However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.[342]

5–112 In cases where the reasons for the decision are not available, and there is no material either way to show by what considerations the authority was influenced, the court may determine whether their influence is to be

[338] *R. v Broadcasting Complaints Commission* Ex p. Owen [1985] Q.B. 1153; *R. v Rochdale MBC. Ex p. Cromer Ring Mill Ltd* [1982] 3 All E.R. 761 (misconceived guidelines "substantially influenced" decision not to refund rates, despite good reasons which could not be disentangled).

[339] These three considerations were set out by Simon Brown L.J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037, at 1049.

[340] *R. v London (Bishop)* (1890) 24 Q.B.D. 213 at 226–227 (affd. on grounds not identical, *sub nom. Allcroft v Bishop of London* [1891] A.C. 666); *Ex p. Rice; Re Hawkins* (1957) 74 W.N. (N.S.W) 7, 14; *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020; *Re Hurle-Hobbs' Decision* [1944] 1 All E.R. 249.

[341] *Hounslow LBC v Twickenham Garden Developments* Ltd [1971] Ch. 233, 271; *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 at 1449–1450 (Lawton L.J.); *Asher v Secretary of State for the Environment* [1974] Ch. 208 at 221, 227.

[342] *Marshall v Blackpool Corp* [1935) A.C. 16; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1992] 2 All E.R. 761.

inferred from the surrounding circumstances. In such cases the courts may infer that an extraneous purpose was being pursued.[343]

5–113 If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked,[344] even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard.[345] If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?

5–114 This question arose in a case where members of the Labour Party challenged the recommendations of the Boundary Commission.[346] The Commission was under a duty to make recommendations to the Home Secretary about the boundaries of parliamentary constituencies (though the final decision rested with Parliament). The statute set out a series of rules to which the Commission were required to give effect. These included the requirements (a) that "so far as practicable" the constituencies are not to cross London borough boundaries and (b) that the electorate shall be as near to the electoral quota" as possible.[347] If it appeared, however, that it was desirable to avoid an "excessive disparity" between the electoral quota and the actual electorate of any constituency, the Commission had a discretion to take (c) "geographical considerations" into account. The Commission were also permitted to take account, in so far as they reasonably could, of (d) "inconvenience attendant on alterations of constituencies and of any local ties broken by such alterations". The applicants considered that the Commission had laid undue emphasis on the

[343] Or that the exercise of discretion was unreasonable: *Lonrho Plc v Secretary of State for Trade and Industry* [1989] 1 W.L.R. 525 at 539 (Lord Keith said that where reasons for a decision were absent "and if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker . . . cannot complain if the court draws the inference that he had no rational reason for his decision"); *R. v Civil Service Appeal Board Ex p. Cunningham* [1991] 4 All E.R. 310 (absence of reasons for low compensation award and no reasons given inference made that decision irrational); *Padfield* [1968] A.C. 997 at 1032–1033, 1049, 1053–1054, 1061–1062 (Lords Reid, Hodson, Pearce and Upjohn).

[344] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.

[345] On mandatory and directory considerations, see 5–049; e.g. *Yorkshire Copper Works Ltd v Registrar of Trade Marks* [1954] 1 W.L.R. 554 (HL held that the Registrar was bound to have regard to specific factors to which he was prima facie empowered to have regard); *R. v Shadow Education Committee of Greenwich BC Ex p. Governors of John Ball Primary School* (1989) 88 L.G.R. 589 (failure to have regard to parental preferences).

[346] *R. v Boundary Commission for England Ex p. Foot* [1983] 1 Q.B. 600, CA.

[347] House of Commons (Redistribution of Seats) Act 1949 s.2(1)(a) Sch.2 rr.4, 5.

requirement of not crossing local boundaries and insufficient emphasis on the requirement of achieving equality of numbers in the electorates of their constituents. It was held that although the Acts set out requirements to which the Commission had to have regard, the burden on the applicants of showing that the commission had exercised their powers wrongly was heavy as the rules themselves were no more than guidelines. Despite the wide disparity in some constituency boundaries, there was no evidence that the Commission had misunderstood or ignored Parliament's instructions.

5–115 If the relevant factors are not specified (e.g. if the power is merely to grant or refuse a licence, or to attach such conditions as the competent authority thinks fit), it is for the courts to determine whether the permissible considerations are impliedly restricted, and, if so, to what extent,[348] although when the courts conclude that a wide range of factors may properly be considered, they will be reluctant to lay down a list with which the authority will be required to comply in every case.[349] In *R. v Secretary of State for Transport Ex p. Richmond LBC,*[350] Laws J. said that where relevant considerations are not specified in a statute the decision-maker's consideration of what is a relevant consideration can only be subject to review on the ground of unreasonableness. With respect, this ignores the fact that the (non-specified) considerations adopted by the decision-maker may be matters that are extraneous to the purpose of the statute, and therefore reviewable for illegality.

5–116 The question of relevancy may relate not to specified factors that need to be taken into account by the decision-maker, but to the decision-maker's approach to the evidence before him. In *R. (on the application of National Association of Health Stores) v Department of Health*[351] the minister decided to accept the view of the Medicines Commission that a herbal remedy ought to be banned. The Commission, unusually, informed the minister that one of its members was opposed to the ban, but failed to inform him that that member was especially qualified in psychomarmacology and had recently completed a meta-analysis of the scientific evidence of the remedy. Nor was the minister informed of the conclusions of the review. Were these factors "relevant considerations" which the minister had ignored? In the circumstances of this case it was held that the minister must know, or be told "enough" to ensure that no relevant considerations are ignored, but need not know "everything that is relevant". The court followed Lord Cooke's distinction in *CREEDNZ Inc v Governor General*[352] between "matters which are so relevant that they must be taken into

[348] 5–084.
[349] See e.g. *Elliott v Southwark* LBC [1976] 1 W.L.R. 499 at 507; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 (the court looked for guidance on the factors relevant to the exercise of a statutory discretion to a departmental circular issued after the enactment of the legislation).
[350] [1994] 1 W.L.R. 74 at 95.
[351] [2005] EWCA Civ 154; *The Times*, March 9, 2005; I. Steele, "Note on *R. (National Association of Health Stores) v Department of Health*" [2005] J.R. 232.
[352] [1981] 1 N.Z.L.R. 172. *CREEDNZ* was endorsed by Lord Scarman in *Re Findlay* [1985] A.C. 318. See also *Minister of Aboriginal Affairs v Peko-Wallsend* (1986) 162 C.L.R. 24.

account" (which included the Commission's report and the matters about which he was informed) and "matters which are not irrelevant and therefore may legitimately be taken into account" (which included the matters about which he was not informed). Sedley L.J. held that "only a failure to take into account something in the former class would vitiate a public law decision",[353] and the minister had sufficient information to make a decision. The second category surely begs the question of whether the "not irrelevant" matter ought to have been taken into account so as to give the minister a complete picture of the weight he ought to have accorded to the dissenting expert's view.[354]

5–117 Examples of discretionary powers having been unlawfully exercised on legally irrelevant grounds are multitudinous. Many of the earlier cases are concerned with magistrates refusing to issue summonses for extraneous reasons,[355] or failing to consider relevant factors before ordering a surety to forfeit a recognisance,[356] or with tribunals improperly refusing or agreeing to adjourn proceedings before them,[357] and with licensing justices refusing applications,[358] granting them subject to irrelevant conditions,[359] or even granting them unconditionally on irrelevant grounds.[360] There are decisions on the unlawful expenditure of public funds by local authorities,[361] and a

[353] *National Association of Health Stores* [2005] EWCA Civ 154; *The Times*, March 9, 2005 at [63] and [75] (Keene L.J.); and see the approach of Gibbs C.J. in *Peko-Wallsend Ltd* [2005] EWCA Civ 154; *The Times*, March 9, 2005 at 31 (distinction made between "insignificant or insubstantial matters" which are not brought to the attention of the minister, and "material facts which he is bound to consider"), and Brennan J. at 61 (makes the distinction between "minutiae", which the minister need not consider, and "salient facts which give shape and substance to the matter"). For a discussion of the *weight* to be attached to relevant considerations, see 11–033–036.

[354] On mandatory and discretionary requirements, see 5–059–072.

[355] *R. v Adamson* (1875) 1 Q.B.D. 201; *R. v Boteler* (1864) 33 L.J.M.C. 101; *R. v Mead Ex p. National Health Insurance Commrs* (1916) 85 W.K.B. 1065 (refusals based on disapproval of conduct of complainants or of the policy or application of the legislation concerned); *R. v Bennett and Bond* (1908) 72 J.P 362; *R. v Nuneaton Borough Justices* [1954] 1 W.L.R. 1318 (refusal on ground that other proceedings more appropriate).

[356] See e.g. *R. v Southampton Justices Ex p. Green* [1976] Q.B. 11; *R. v Horseferry Road Stipendiary Magistrate Ex p. Pearson* [1976] 1 W.L.R. 511.

[357] On the question whether a tribunal is entitled to adjourn a matter because a change in the law is pending, see *R. v Whiteway Ex p. Stephenson* [1961] V.R. 168, 171; *Boyd Builders Ltd v Ottawa* (1964–45 D.L.R. (2nd) 211 (adjournment improper); but the position may be different if the change in the law is imminent and reasonably certain; *cf. Clifford Sabey (Contractors) Ltd v Long* [1959] 2 Q.B. 290 at 298–300. For non-judicial exercise of discretion to postpone operation of demolition order, see *Pocklington v Melksham UDC* [1964] 2 Q.B. 673. See also *Royal v Prescott-Clarke* [196611 W.L.R. 788; *Walker v Walker* [1967] 11 W.L.R. 327.

[358] See e.g. *R. v de Rutzen* (1875) 1 Q.B.D. 55.

[359] e.g. R. v Bowman [1898] 1 Q.B. 663; *R. v Birmingham Licensing Planning Committee Ex p. Kennedy* [1972] 2 Q.B. 140 (refusal to allow application to proceed unless irrelevant condition complied with); see too *Fletcher v London (Metropolis) Licensing Committee* [1976] A.C. 150.

[360] See e.g. *R. v Cotham* [1898] 1 Q.B. 802.

[361] *Attorney General v Tynemouth Poor Law Union Guardians* [1930] 1 Ch. 616; *Roberts v Hopwood* [1925] A.C. 578; *Prescott v Birmingham Corp* [1955] Ch. 210; *Taylor v Munrow* [1960] 1 W.L.R. 151.

miscellany of decisions which illustrate the general rule in a wide range of contexts.[362]

5–118 As we have seen, the interpretation of statutory purpose and that of the relevancy of considerations are closely related, since the question in regard to the considerations taken into account in reaching a decision is normally whether that consideration is relevant to the statutory purpose. This is seen in respect of the considerations taken into account by planning authorities as a basis of a refusal of planning permission. Is it relevant to refuse an application for permission to change the use on the site from use A to use B on the ground that the authority wishes to preserve the use of site as A (and have no inherent objection to use B)? It has been held that the preservation of an existing use may be a material planning consideration, but only if, on the balance of probabilities, there is a fair chance of use A being continued.[363] Where, however, the authority wished to retain the existing use so that it could be kept in their own occupation, it was held that that consideration was not a legitimate planning consideration.[364] Other disputed considerations in the area of planning law involve the regard that has been had to factors such as precedent (it has been held that permission may be refused because it would be difficult to resist similar applications in the future);[365] to the fact that alternative sites would be more appropriate for the development, or to the personal circumstances of the applicant.

5–119 Where a university, after consultation with the police, refused to permit a meeting on its premises addressed by members of the South African Embassy during the apartheid regime, it did so in the belief that the meeting would provoke public violence in the neighbouring area. The statute required universities to ensure that freedom of speech was secured and that the use of university premises was not denied to any individual body on the ground of their beliefs, policy or objectives. It was held that in taking into account the likelihood of violence outside of their premises the decision had been influenced by an irrelevant consideration and was therefore ultra vires.[366] The action of a local trading standards officer was held to have been unlawful when, three days after a children's toy was found to have been dangerous, he suspended the manufacturer from supplying the toy for six months. He claimed to have had regard to a regulation which would have permitted the suspension, but which was not

[362] See e.g. *Padfield* [1968] A.C. 997; and many of the cases on improper purpose.

[363] *Westminster CC v British Waterways Board* [1985] A.C. 676: *London Residuary Body v Lambeth LBC* [1990] 1 W.L.R. 744; *Clyde & Co v Secretary of State for the Environment* [1977] 1 W.L.R. 926 (desirability of maintaining the possibility that land would be used to relieve housing shortage a material consideration); cf. *Granada Theatres Ltd v Secretary of State for the Environment* [1976] J.P.L. 96.

[364] *Westminster CC v British Waterways Board* [1985] A.C. 676 (Lord Bridge).

[365] *Collis Radio Ltd v Secretary of State for the Environment* (1975) 29 P. & C.R. 390.

[366] *R. v Liverpool University Ex p. Caesar Gordon* [1991] 1 Q.B. 124; *R. v Coventry Airport Ex p. Phoenix Aviation* [1995] 3 All E.R. 37, DC (unlawful surrender to the dictates of pressure groups opposed to the export of live animals). *cf. R. v Chief Constable of Sussex Ex p. International Traders Ferry* [1999] 2 A.C. 418.

yet in force. The court held that consideration to be irrelevant.[367] Where a statute gave the power to the minister to licence medicines for importation into the United Kingdom when it was "expedient" to do so, it was held that his taking into account of trade mark (private) rights was a consideration irrelevant to the public law powers in the circumstances of that case.[368]

Government policy as a relevant consideration

5–120 In a number of cases the question has arisen of whether regard may or must be had to various forms of government advice or indication of government policy. Normally such policy will be expressed through a government circular or a code of practice which lacks binding effect.[369] A number of questions may arise in respect of non-statutory guidance which are addressed elsewhere in this work, such as the method of their interpretation,[370] possible effect in creating legitimate expectations,[371] or whether their effect is to fetter the decision-maker's discretion.[372] The question has also arisen as to whether or not a circular may amount to an authoritative account of the law at all, and thus be subject to judicial review.[373]

5–121 The House of Lords considered the status of a code of practice which the Secretary of State for Health was required to prepare under the terms of the Mental Health Act 1983 in order to guide the treatment of patients in hospitals dealing with mental disorders.[374] The code then required hospitals to produce their own codes, and the question was whether a local hospital trust's code was unlawful because it was not in conformity with the Secretary of State's code.[375] The House of Lords held that although the Secretary of State's code did not have the binding effect of a statutory provision, and purported to be "guidance", not "instruction", it was

[367] *R. v Birmingham CC Ex p. Ferrero Ltd* (1991) 3 Admin. L.R. 613.
[368] *R. v Secretary of State for Social Services Ex p. Wellcome Foundation* [1987] 2 All E.R. 1025.
[369] R. Baldwin and J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" [1986] P.L. 239; G. Ganz, *Quasi-legislation* (1986). For the distinction between direction and guidance see *Laker Airways v Department of Trade* [1977] Q.B. 643, 714. See also *R. v Secretary of State for Social Services and the Social Fund Inspector Ex p. Stilt* (1992) 4 Admin. L.R. 713. On what constitutes "policy", see 5–073–074.
[370] See 5–075 et seq.
[371] See 12–023; 031; 037 et seq.
[372] See 9–013.
[373] *Gillick v West Norfolk & Wisbech AHA* [1986] A.C. 112. Lord Bridge, doubting the correctness of the decision: in appropriate circumstances a misleading or manifestly inaccurate circular may be reviewed. But see *R. v Secretary of State for the Environment Ex p. Greenwich LBC* [1989] C.O.D. 530, where the applicants sought judicial review to prohibit the distribution by the Secretary of State for the Environment of a leaflet on the community charge. The application was refused on the ground that the document, although perhaps misleading by omission, was not literally inaccurate.
[374] *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 A.C. 148.
[375] See 9–120–122.

guidance which should be given "great weight" from which the hospital could only depart with "great care".[376] Similarly, circulars or "Planning Policy Guidance" issued by the Department, although only advisory in nature, have been held to be material planning considerations to which regard must be had by both local authorities and the Secretary of State in making decisions about development control.[377]

5–122 To what extent can a failure to have regard to a government non-statutory policy invalidate a decision for disregard of a material consideration? An authority is entitled to ignore or act contrary to a policy circular which misstates the law.[378] A policy cannot make a matter that is an irrelevant consideration, or outside the purpose of the statute, relevant or lawful. If the decision-maker attaches a meaning to the words of the policy which they are not capable of bearing, he will have made an error of law.[379] If there has been a change in the policy, it has been held that the decision must relate to the new policy, even if it has not been published and is not known to the parties.[380] However, this proposition may be subject to any legitimate expectation on their part.[381] If the decision-maker departs from the policy, clear reasons for doing so must be provided, in order that the recipient of the decision will know why the decision is made as an exception to the policy and the grounds upon which the decision is taken.[382] In *Munjaz,* the House of Lords held that the hospital could only depart from the Secretary of State's code if it had provided "cogent

[376] Lord Bingham at [21]; and see *R. (on the application of Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] Q.B. 37 at [47] (Laws L.J.).

[377] A policy need not normally have been promulgated in any particular way, but after-dinner speeches do not qualify: *Dinsdale Developments Ltd v Secretary of State for the Environment* [1986] J.P.L. 276. Draft policy statements may qualify: *Richmond-upon-Thames LBC v Secretary of State for the Environment* [1984] J.P.L. 24; but may not: *Pye JA (Oxford) Estates Ltd v Secretary of State for the Environment* [1982] J.P.L. 577.

[378] *R. v Secretary of State for the Environment Ex p. Tower Hamlets LBC* [1993] Q.B. 632 (Code of Guidance to Local Authorities on Homelessness by Department of the Environment held to misstate the law); *R. v Secretary of State for the Environment Ex p. Lancashire CC* [1994] 4 All E.R. 165 (policy guidance issued to local government Commissioners to replace their authorities with unitary authorities held more in the nature of directions than guidance and therefore unlawful).

[379] *Horsham DC v Secretary of State for the Environment* [1992] 1 P.L.R. 81; *Virgin Cinema Properties Ltd v Secretary of State for the Environment* [1998] 2 P.L.R. 24; and *R. (on the application of Howard League for Penal Reform) v Secretary of State for the Home Department (No.2)* [2002] EWHC 2497; [2003] 1 F.L.R. 484; *R. (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003; [2006] Q.B. 273 at [21] (review of guidance on the withdrawal of artificial feeding. Noting that "the court should not be used as a general advice centre"); Cf. *R. (on the application of Lambeth LBC) v Secretary of State for Work and Pensions* [2005] EWHC 637; [2005] B.L.G.R. 764 (change in government policy will not in general justify treating a refusal to alter a previous decision).

[380] *Newham LBC v Secretary of State for the Environment* (1986) 53 P. & C.R. 98.

[381] On legitimate expectations, see Ch.12.

[382] *EC Gransden & Co Ltd v Secretary of State for the Environment* (1987) 54 P. & C.R. 86; *Carpets of Worth Ltd v Wye Forest DC* (1991) 62 P. & C.R. 334. For application of these principles outside of planning law, in relation to police negotiating machinery, see *R. v Secretary of State for the Home Department Ex p. Lancashire Police Authority* [1992] C.O.D. 161.

reasoned justification" for so doing, which the court "should scrutinize with the intensity which the importance and sensitivity of the subject matter requires".[383]

International law and relevancy

5–123 We have already drawn a distinction between (a) incorporated treaty provisions, (b) unincorporated treaty provisions and (c) customary international law.[384] The question whether a public authority has acted unlawfully in the exercise of its discretion by failing to take into account international law relates to (b). The concern of the courts has often been that if such an argument is accepted, it is tantamount to incorporation of the treaty "through the back door"—in other words, it would in practice be giving effect to a treaty provision (the making of which is an executive action) which Parliament has not expressly provided should be part of domestic law. The high water mark for such an approach is the House of Lords' decision in *Brind*,[385] in which—before the Human Rights Act 1998— their Lordships rejected an argument that a minister should exercise his discretion within the limitations imposed by the ECHR. Lord Bridge said that the contrary conclusion "would be a judicial usurpation of the legislative function".[386] This approach has been softened in recent years. While it still remains the case that a decision will not be held unlawful just because a public authority has failed to take into account an unincorporated treaty provision, in such situations the courts will now subject the decision to "anxious scrutiny" in testing its reasoning and calling for a justification from the public authority.[387]

Financial considerations and relevancy

5–124 There are three ways in which the relevance of financial considerations may be engaged: (a) whether the cost of a project may be taken into account as a factor relevant to the decision; (b) whether the expenditure of public funds is simply too extravagant, and (c) whether the authority's lack

[383] *R. (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 A.C. 148 at [21] (Lord Bingham); see also *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135 (Competition Act 1998 s.38(1) required the OFT to prepare and publish guidance and s.38(8) required it to "have regard" to the guidance in setting penalties. It was held that the OFT must give reasons for departing from the guidance); *Royal Mail Group Plc v The Postal Services Commission* [2007] EWHC 1205 (Admin) (PSC unlawfully departed from its policy on penalties).

[384] See 5–043–048.

[385] *R. v Secretary of State for the Home Department Ex p. Brind* [1991] A.C. 696; and *R. (on the application of Hurst) v HM Coroner for Northern District London* [2007] UKHL 13; [2007] 2 W.L.R. 726 at [53]–[59] (Lord Browne.

[386] *Brind* [1991] A.C. 696 at 748; also *R. v Ministry of Defence Ex p. Smith* [1996] Q.B. 517 at 558 (Sir Thomas Bingham M.R.).

[387] See 11–086–102.

of resources may justify the non-implementation of a power or duty. Under (b) and (c) particularly, the question of the amenability of the courts to pronounce on the matter of resource allocation comes into sharp focus.[388]

Cost as a relevant consideration

5–125 In the area of planning, the question of cost has been raised in different contexts. It has been held that the likelihood that a development would, because of its excessive cost, never be implemented, may be a material consideration in refusing planning permission.[389] Yet the question of whether a development was a good investment proposition for the developer was held not to be material.[390] The refusal of planning permission because of the absence in the proposal of any "planning gain" (a benefit by means of a voluntary material contribution to the authority) has also been held to be a non-material consideration.[391] Westminster City Council granted planning permission to the Directors of the Covent Garden Opera House for an office development near (but not on) its site, on the ground that the profits from the development would be devoted to improving the facilities of the opera house. Although the office development would not have been given planning permission on its own, the fact that it enabled an otherwise unaffordable development was held by the Court of Appeal to be a material consideration which justified the permission.[392]

Excessive expenditure

5–126 At the other extreme are cases where an authority's expenditure has been challenged for being excessive.[393] The attempt of the Poplar Borough Council in 1925 to raise the wages and salaries of its employees, and to pay

[388] On justiciability, see 1–025–043.
[389] *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] A.C. 144.
[390] *Murphy (J) & Sons Ltd v Secretary of State for the Environment* [1973] 1 W.L.R. 560; *Walters v Secretary of State for Wales* [1979] J.P.L. 171 (cost of development not a material planning consideration); *cf. Sovmots Investments Ltd v Secretary of State for the Environment* [1977] Q.B. 411 at 422–425; *Hambledon and Chiddingfold PC v Secretary of State for the Environment* [1976] J.P.L. 502; *Niarches (London) Ltd v Secretary of State for the Environment* (1978) 35 P. & C.R. 259).
[391] *Westminster Renslade Ltd v Secretary of State for the Environment* [1983] J.P.L. 454.
[392] *R. v Westminster City Council Ex p. Monahan* [1990] 1 Q.B. 87, although it was doubted whether such a consideration would be material or relevant if the benefit was not in physical proximity to the development (e.g. if the benefit was in the form of a swimming pool at the other end of the town). On the use of planning obligations (formerly planning agreements) to achieve this kind of benefit, see 5–00. *cf. R. v Camden LBC Ex p. Cram, The Times*, January 25, 1995 (relevant for Council to seek to make a profit from a car parking scheme).
[393] See e.g. *R v. Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC* [1991] A.C. 521 at 593, 597 (Lord Bridge: local authorities' claim that the Secretary of State's determination of their expenditure as "excessive" was not capable of resolution by the courts as it admitted of no objective justification); *R. v Secretary of State for Health Ex p. Keen* (1991) 3 Admin. L.R. 180 (lawful for resources to be allocated in anticipation of a new scheme proposed in a parliamentary Bill, provided the authority's discretion was not fettered).

women employees rates equal to that of men, was held contrary to law. The House of Lords in that case came close to holding that expenditure unreasonable,[394] but the ratio of the case was based upon the view that the amounts paid were at a time of falling cost of living, more in the nature of a gratuity than the wages and salaries which the authority was authorised to pay.[395] In 1983 the question of local authority expenditure arose again in respect of the decision of the Greater London Council to reduce transport fares by 25 per cent.[396] The fare cuts would have lost the council approximately £50 million of the rate support grant which they would otherwise have been entitled to receive from the central government sources. Although the governing statute gave wide discretion to promote the provision of "integrated, efficient and economic transport facilities",[397] it also required the authorities to make up any deficit incurred in one accounting period in the next such period.[398] This provision was held to limit the authorities' discretion and subject them to a duty to run the system on ordinary business principles, which the drastic reductions in the fares contravened.[399]

5–127 The courts have, from time to time, invoked the principle that local authorities owe an implied "fiduciary duty" to their ratepayers. The breach of such a duty has rarely formed the ratio of a decision to strike down the expenditure concerned.[400] The fiduciary duty could be interpreted in two ways: first, it could imply a duty to act on ordinary business principles and not to be "thriftless"[401] with ratepayers" money. Such a meaning of the fiduciary duty comes close to permitting the courts themselves to decide the levels of expenditure which meet those standards. As the House of Lords has reminded us in a different context, courts are not, in judicial review, equipped to make such decisions.[402] A second interpretation views the fiduciary duty as a duty to take into account, in reaching a decision on expenditure, the interests of the ratepayers.[403] Since the ratepayers' inter-

[394] *Roberts v Hopwood* [1925] A.C. 578.
[395] A point made by Ormrod L.J. in *Pickwell v Camden LBC* [1983] Q.B. 962. See also Sir David Williams, "Law and Administrative Discretion" (1994) Indiana J. of Global Legal Studies 191. For a consideration of the "fiduciary principle" raised in *Roberts v Hopwood* and other cases, see 11–00; *Prescott v Birmingham Corp* [1955] Ch. 210; *Taylor v Monrow* [1960] 1 W.L.R. 151.
[396] *Bromley LBC v Greater London Council* [1983] 1 A.C. 768.
[397] Transport (London) Act 1969 s.1.
[398] Transport (London) Act 1969 s.7(3)(b).
[399] A subsequent scheme, known as the "balanced fare scheme", was held to be lawful: *R. v London Transport Executive Ex p. Greater London Council* [1983] Q.B. 484.
[400] For example, in *Roberts v Hopwood* [1925] A.C. 578, or *Bromley LBC v GLC* [1983] 1 A.C. 768. Both these cases were decided on the basis of "illegality". See also *Re Westminster CC* [1986] A.C. 668 (grants by GLC unlawful but not unreasonable). *cf. Prescott v Birmingham* [1995] Ch. 210.
[401] *Bromley LBC v GLC* [1983] 1 A.C. 768 at 899 (Lord Diplock); cf. *Hazell v Hammersmith and Fulham LBC* [1992] 2 A.C. 1 at 37 (Lord Templeman referred to the duty of the local authority to be "prudent" with ratepayers' money.
[402] *R. v Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC* [1991] 1 A.C. 521 at 593, 597 (Lord Bridge), at least in relation to unreasonableness. On justiciability, see 1–025–043.
[403] Today, commercial ratepayers and domestic council taxpayers.

ests are likely to be adversely affected by a decision to increase expenditure, it is surely right that those interests should be considered by the local authority (although not necessarily slavishly followed). This second meaning of the fiduciary duty does not involve the courts in a function to which, in judicial review, they are unsuited. It merely involves them in requiring that considerations which are relevant to the local authority's powers, namely, the interests of the local taxpayers, be taken into account. This function is perfectly suited to judicial review. It is noteworthy that in *Magill v Porter*,[404] a case in which members of Westminster Council were held to have incurred unlawful expenditure on behalf of the Council, the fiduciary concept was not employed and the House of Lords were content to find simply that the councillors' actions failed to pursue a "public purpose" in seeking to obtain party-political gain at the expense of the ratepayers.[405]

Limited resources

5–128 Public authorities have frequently pleaded lack of resources as an excuse for not fulfilling their duties or powers. Whether this excuse is lawful, as we have seen, depends in the first instance on whether the duty is a mere "target duty", or whether it is, or has crystallised into, an enforceable duty.[406] In *Barnett*,[407] considering whether a local authority owed a duty to provide resources to children "in need", the majority of the House of Lords held that the duty was a mere "target duty" and therefore the Lords could not require the expenditure of additional resources. A similar view was taken in *R v Gloucestershire CC Ex p. Barry*[408], where the House of Lords held that the authority was entitled to take into account its limited resources when it considered whether it could fulfill the "needs" of disabled persons. Later, the House of Lords refused to interfere in a decision of a chief constable to deploy his resources by withdrawing full-time protection from animal exporters threatened by demonstrations by

[404] *Magill v Porter* [2001] UKHL 67; [2002] 2 A.C. 357.

[405] In *Bromley* [1983] 1 A.C. 768 a further question concerned the relevance to the decision of the council's so-called "mandate". It was argued that the promise to reduce transport fares was the major part of the manifesto on which the new ruling party had fought the recent election. The House of Lords clearly held, however, that a so-called mandate from the electorate can have no influence on the *legality* of a decision, which must fulfil the purposes authorised by the statute which governs the power in question. Compare the influence of the mandate upon the reasonableness of a decision, discussed at 11–00; *cf. R. v Merseyside CC Ex p. Great Universal Stores Ltd* (1982) 80 L.G.R. 639. In New Zealand there is a line of cases in which the fiduciary concept has been applied: *Lovelock v Waitakere CC* [1996] 3 N.Z.L.R. 310; *Waitakere CC v Lovelock* [1997] 2 N.Z.L.R. 385, CA.

[406] See 5–064–67.

[407] *R. (on the application of G) v Barnet LBC* [2003] UKHL 57; [2004] 2 A.C. 208.

[408] [1997] A.C. 206; see E. Palmer, "Resource Allocation, Welfare Rights—Mapping the Boundaries of Resource Allocation in Public Administrative Law" (2000) O.J.L.S. 63; *R. v Southwark LBC Ex p. Udu* (1996) 8 Admin. L.R. 25 (policy of refusing grants to courses at private colleges, including the College of Law; held, local authority was a political body with limited funds, and it was entitled to have policies and to decide how to allocate those funds).

animal welfare groups.[409] However, in *R. v Sussex CC Ex p. Tandy*[410] the House of Lords took the opposite view in holding that the authority could not take its limited resources into account in considering whether it could provide "suitable education" to children in need. In that case the council did have the resources to perform the duty but preferred to expend it in different ways. Lord Browne-Wilkinson said that permitting the authority to follow that preference would, wrongly, "downgrade a statutory duty to a discretionary power. . . . over which the court would have very little control".[411] More recent cases under the Human Rights Act, where "positive duties" are increasingly recognised, have also held irrelevant the excuse of lack of resources.[412]

5–129 The statement of Lord Nicholls in *Barnet*,[413] that the existence of an "absolute duty" (as opposed to a "target duty") always "precludes the . . . authority from ordering its expenditure priorities for itself"[414] is, however, only a starting point, for three further factors need to be considered.

(a) Even if the duty is strictly enforceable, it is not always clear whether, or to what extent, the courts may disallow, amend or reorder the allocation of the authority's budgetary decisions and allocation of resources.

(b) Even if the authority possesses a discretionary power, there is a question as to what extent it possesses the discretion to ignore or

[409] *R. v Chief Constable of Sussex Ex p. International Traders Ferry Ltd* [1999] 2 A.C. 418; also *R. (on the application of Pfizer Ltd) v Secretary of State for Health* [2002] EWCA Civ 1566; [2003] 1 C.M.L.R. 19 (CA upheld decision to provide the drug Viagra to a limited category of patients); K. Syrett, "Impotence or Importance?" Judicial Review in an Era of Explicit NHS Rationing" (2004) 67 M.L.R. 289. *cf. R. (on the application of Rogers) v Swindon NHS Primary Care Trust* [2006] EWCA Civ 392; [2006] 1 W.L.R. 2649 (policy on funding breast cancer treatment with an unlicensed drug called Herceptin was irrational); K. Syrett, "Opening Eyes to the Reality of Scarce Health Care Resources? *R. (on the application of Rogers) v Swindon PCT and Secretary of State for Health*" [2006] P.L. 664.

[410] [1998] A.C. 714; and *R. v Sefton MBC Ex p. Help the Aged* [1997] 4 All E.R. 532, CA (lack of financial resources does not entitle a local authority to defer compliance with their duty under Chronically Sick and Disabled Persons Act 1970 s.2); *R. v Cheshire CC Ex p. C* [1998] E.L.R. 66 (decision about special educational needs should be made on purely educational grounds without reference to financial considerations); Case C–44/95 *R. v Secretary of State for the Environment Ex p. RSPB* [1997] Q.B. 206 (ECJ held that economic considerations are not relevant to determining wild bird protection areas under Directive 79/409); *R. v Secretary of State for the Environment Ex p. Kingston-Upon-Hull City Council* [1996] Env. L.R. 248 (cost of the treatment of waste water was not a relevant consideration); *Cf. R. v National Rivers Authority Ex p. Moreton* [1996] Env. L.R. D17 (investment budget relevant to decision of NRA to allow discharge); *R. v Hillingdon LBC Ex p. Governing Body of Queensmead School* [1997] E.L.R. 331 (budgetary constraints and lack of funds could play no part in the assessment of a child's special educational needs);

[411] *Tandy* [1998] A.C. 714 at 749.

[412] J. King, "The Justiciability of Resource Allocation" (2007) 70 M.L.R. 197; S. Fredman, "Positive Rights and Transformed: Positive Duties and Positive Rights" [2006] P.L. 498; see e.g. *R. v Secretary of State for the Home Department Ex p. Limbuela* [2005] UKHL 66; [2006] 1 A.C. 396.

[413] *Barnet LBC* [2003] UKHL 57; [2004] 2 A.C. 208. Lord Nicholls and Lord Steyn dissented, regarding the duty as an "absolute" and not "target duty".

[414] *Barnet LBC* [2003] UKHL 57; [2004] 2 A.C. 208 at [13].

neglect the sufficient allocation of its scarce resources in pursuit of that power.

(c) A further (and somewhat separate question) is the extent to which the courts ought to avoid making judgments or imposing remedies which cause the expenditure of public funds.[415]

5–130 In Chapter 1, we saw that the allocation of resources is regarded as a matter which is not normally amenable to judicial review for one or more of four reasons.[416] First, the question of expenditure often goes hand in hand with a "policy" question (e.g. whether to devote additional resources to a space or nuclear programme rather than university education), which lies squarely within the constitutional competence of the legislature or executive and not the courts. Secondly, the decision of the court to increase or reduce expenditure may not be able to be made by reference to any objective standards. Thirdly, the courts may not have the expertise to decide the question. Fourthly, the decision may be "polycentric" in character, namely, it will require a series of adjustments in the decision-maker's other budgetary allocations (in the context of finite resources) which the courts are not competent either to set in motion or to decide.[417] Examples of polycentric situations are discussed in Chapter 1, and reflected in the approach in *R. v Cambridge DHA Ex p. B (No.1)*, where the decision of a hospital not to provide expensive treatment to a child with cancer was upheld by the Court of Appeal. Acknowledging that in the "real world . . . difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients" (for example making decisions as to whether kidney dialysis over a period of months should be sacrificed to the urgent cancer operation in that case), Sir Thomas Bingham M.R. held "that is not a judgment which a court can make".[418]

5–131 Nevertheless, there are a number of different situations where the courts have required the allocation of resources, even where no particular duty was engaged. Parliament had enacted a statute to implement a new criminal injuries compensation scheme. The statute conferred upon the Home Secretary discretion as to when to bring the new scheme into effect. Before implementing the new scheme, the Home Secretary sought to introduce, under his prerogative powers (by means of which the previous scheme had been administered), a scheme different from that envisaged by the legislation. The House of Lords held that the courts should "hesitate long" before holding the Home Secretary under a duty to implement the scheme contemplated by the statute. However, he did not have absolute and

[415] The first two questions (which he considers as one) are referred to by King as questions of "discretionary allocative decision-making" and the third as a question of "allocative impact": King (2007) M.L.R. 197.

[416] See 1–025 *et seq.*

[417] See 1–033–036.

[418] [1995] 1 W.L.R. 898; and see the South African case *T. Soobramoney v Minister of Health Kwazula Natal* 1997 (12) BCL.R. 1696 CCSA.

unfettered discretion not to do so. The cost of implementing the statutory scheme was a factor relevant to his decision as to when the new scheme might be implemented. But the cost was not decisive, and would not justify the frustration of the statutory purpose by a scheme inconsistent with that approved by Parliament.[419] Another case where a power rather than duty was in issue involved the Broadcasting Complaints Commission, which decided not to investigate a complaint on the ground that to do so would be burdensome and perhaps require the employment of additional staff. These reasons were held not to excuse the failure to investigate the complaint.[420]

5–132 In addition, the issue of allocation of resources presents itself in different guises. It by no means always rests on the distinction between target duties and enforceable duties. General principles of public law may be engaged, as was the case where a company had overpaid rates to a local authority. The local authority claimed unfettered discretion whether or not to refund the rates, which it was reluctant to do because of its own poor financial situation and the adverse effect of the expenditure on the situation of the ratepayers. It was held that, in the circumstances, the authority should, as a prime consideration, have had regard to the unfairness to the company.[421] In some cases the issue may rest upon the interpretation of a particular statutory provision rather than the category of duty (target or enforceable). For example the Court of Appeal considered whether a local authority had given the applicant a "reasonable opportunity" to secure accommodation. It was held that the expression "reasonable opportunity" referred to what was reasonable from the standpoint of the applicant, and did not permit the authority to take into account its own lack of resources.[422] And even when a duty is clearly engaged, such as the duty to award social security benefit, the courts have held that delay in processing claims for the benefit could be excused by the lack of sufficient funds or resources.[423]

5–133 The lack of resources has sometimes been pleaded to excuse a delay particularly (but not confined to) situations concerning the right under Art.5(4) of the ECHR to a "speedy" decision and under Art 6(1) ECHR to a hearing "within a reasonable time". The court will not "shut their eyes to the practicalities of litigious life",[424] nor to the fact that in general the court

[419] *R. v Secretary of State for the Home Department Ex p. Fire Brigades Union* [1995] 2 A.C. 583. *cf. R. v Blackledge* (1995) 92 L.S.G. 32 (prosecutions made under orders made pursuant to a statute contemplating their existence only for the period of the "emergency" (following the declaration of war in 1939) not ultra vires). See also *Willcock v Muckle* [1951] 2 K.B. 844.

[420] *R. v Broadcasting Complaints Commission Ex p. Owen* [1985] Q.B. 1153.

[421] *Tower Hamlets LBC v Chetnik Developments Ltd* [1988] A.C. 858; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1982] 3 All E.R. 761.

[422] *R. (on the application of Conville) v Richmond upon Thames LBC* [2006] EWCA Civ 718; [2006] 1 W.L.R. 2808.

[423] *R. v Secretary of State for Social Services Ex p. Child Poverty Action Group* [1990] 2 Q.B. 570, CA.

[424] *Procurator Fiscal v Watson and Burrows* [2002] UKPC D1; [2004] 1 A.C. 379 at [52] (Lord Bingham). Lord Bingham was there summarising the jurisprudence of the ECtHR on the matter, but also endorsed, at [29], the approach of the PC in *Darmalingum v The State* [2002] 1 W.L.R. 2303; see also *Dyer v Watson* [2002] UKPC DI [2004] 1 A.C. 379 at [55] (Lord Bingham).

is not well equipped to consider the adequacy of resources. However, adequacy of resources or "administrative necessity" will not automatically excuse delay. Therefore, if it has been established that the delays were inconsistent with the standard of "speed" or "reasonable time", then the onus of justifying the delay will be on the authority,[425] and the court will carry out a careful analysis of the reasons underlying the justification,[426] if necessary requiring that "further resources must be found".[427]

5–134 In general, therefore, public authorities are limited in the circumstances in which they can plead lack of resources as an excuse to judicial intervention. However, the courts too are limited in the circumstances in which they can order the re-allocation of an authority's finite resources. The issue is fundamental to the separation of powers and the rule of law and requires delicate handling for the following reasons:

- In the real world, limited resources must play a part in the exercise of powers and duties.
- However, in the interest of the rule of law the courts should not hesitate to require public duties to be implemented, even where that requires additional expenditure.[428]
- Courts should, however, be sensitive to their constitutional limitations to make policy decisions involving allocation of resources and to their institutional limitations in themselves deciding how (rather than whether) additional expenditure is required. The courts can order additional expenditure but should be wary of reordering the detail of an authority's budget.
- Even when the authority possesses a mere power, or target duty (rather than an enforceable or crystallised duty), the authority should not be able simply to sit on its hands and ignore the implementation of that power or target duty, whether or not that implementation requires expenditure.

[425] *Procurator Fisal* [2002] UKPC D1; [2004] 1 A.C. 379 at [52] (Lord Bingham: "a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter"); see further S. Lambert and A. Strugo, "Delay as a Ground of Review" [2005] J.R. 253; 11–072.

[426] *R. (on the application of KB) v Mental Health Review Tribunal* [2002] EWHC 639; (2002) 5 C.C.L. Rep. 458 at [47] (Stanley Burnton J.); and *R. (on the application of Murray) v Parole Board* [2003] EWCA Civ 1561; (2004) 101(1) L.S.G. 21.

[427] *R. (on the application of Noorkoiv) v Secretary of State for the Home Department* [2002] EWCA Civ 770; [2002] 1 W.L.R. 3284 at [58] (Simon Brown L.J.).

[428] Or, as King rightly points out (2007) M.L.R. 197 courts ought not to refuse to award remedies such as damages or compensation on the ground of expense to the authority. In *R. (on the application of Stennett) v Manchester City Council* [2002] UKHL 34; [2002] 2 A.C. 1127, it was held that, despite a burden of between £30 million and £80 million on local authorities of providing after-care services to those released from detention under the Mental Health Act 1983, charging for those services was not authorised under that Act. The case also underlined the point that the existence of a duty does not inevitably mean that the authority has the (incidental) power to implement that duty by charging for it (see 5–019).

Partial Illegality and Severance

5–135 What if an act or decision is partly legal and partly illegal? Suppose that an authority has power to revoke a person's licence? It revokes X's licence, and proceeds to order that he shall be disqualified from applying for a new licence for five years. It has no power to impose such a disqualification. In this case, X will be able to obtain a quashing order in respect of the five-year disqualification, or a declaration that the disqualification is void; but the court can still hold that the revocation of his licence is valid, for the two limbs of the tribunal's order are severable from one another.

5–136 Cases of partial invalidity are often more complicated than this because the good and the bad elements are not clearly distinct. The typical problem in this area of the law arises where a permit or licence has been granted subject to void conditions. Three approaches may be followed by the court, assuming that the jurisdiction of the court (e.g. to enter in an appeal against the conditions alone) has not been demarcated by statute. First, it may set aside the entire decision because the competent authority might well have been unwilling to grant unconditional permission; the applicant must therefore start again.[429] Secondly, it may simply sever the bad from the good. In such a case the effect will be to give unconditional permission if all the conditions are struck down, and this may frustrate the intentions of the competent authority.[430] Thirdly, the court may adopt an intermediate position, and sever the invalid condition only if it is trivial, or if it is quite extraneous to the subject matter of the grant, or perhaps if there are other reasons for supposing that the authority would still have granted permission had it believed that the conditions might be invalid. This approach has recommended itself to the House of Lords in a case involving the validity of planning conditions.[431] But it involves the courts in a speculative attribution of intent to an administrative body.

Until recently, it was difficult to elicit any clear principle from the cases on partly invalid byelaws, though the courts had less compunction about striking out only the invalid words if the character of what remained was

[429] *Hall & Co v Shoreham-by-Sea UDC* [1964] 1 W.L.R. 240; *Pyx Granite Co v Ministry of Housing and Local Government* [1958] 1 Q.B. 554 at 578–579 (Hodson L.J); *R. v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] Q.B. 720.

[430] Nevertheless, this course has been adopted in a number of cases, e.g. *Ellis v Dubowski* [1921] 3 K.B. 621 (though this was a prosecution for breach of a invalid condition and the question of severability did not directly arise); *Mixnam's Properties Ltd v Chertsey UDC* [1965] A.C. 735; *Hartnell v Minister of Housing and Local Government* [1965] A.C. 1134; *Lowe (David) & Sons Ltd v Provost, etc. of Burgh of Musselburgh* 1974 S.L.T. 5.

[431] *Kingsway Investments (Kent) Ltd v Kent CC* [1971] A.C. 72 at 90–91, 102–103, 112–114; though cf. [1971] A.C. 106–107 (Guest L.J.); *Allnatt London Properties Ltd v Middlesex CC* (1964) 62 L.G.R. 304. See also *Transport Ministry v Alexander* [1978] 1 N.Z.L.R. 306 at 311–312 (invalid part severable because it was "not fundamental or part of the structure of the regulation").

unaltered by a decision to sever the bad from the good.[432] In *DPP v Hutchinson*,[433] the House of Lords considered the validity of byelaws prohibiting entry onto the Greenham Common where there were military installations. The enabling legislation permitted such byelaws to be made, provided that rights of common were not interfered with. The appellants claimed that the byelaws did interfere with the rights of common and this contention was upheld. Could the bad parts of the byelaw be severed from the good? The House of Lords considered whether, in order to be severable, the test was that of "textual severability" or "substantial severability" If textual severability was the correct test, then the bad part of the instrument could be disregarded as exceeding the lawmaker's power, provided what remained was still "grammatical and coherent".[434] If, however, the proper test was that of substantial severability, then what remained after severance could survive as lawful provided that is was "essentially unchanged in its legislative purpose, operation and effect".[435] The majority of their Lordships accepted the test of "substantial severability" and it was held that this could be achieved in the following two situations:

(a) Where the text could be severed so that the valid part could operate independently of the invalid part, then the test of substantial severability would be satisfied when the valid part is unaffected by, and independent of, the invalid part.

(b) Where severance could only be effected by modifying the text, this can only be done "when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision".[436]

[432] *Potato Marketing Board v Merricks* [1958] 2 Q.B. 316 at 333 (Devlin J.) (a case of a partly unauthorised demand for information under the threat of a penalty). The cases on byelaws are generally unhelpful, e.g. *R. v Lundie* (1862) 31 L.J.M.C. 157; *Reay v Gateshead Corp* (1886) 55 L.T. 92 at 103; *Strickland v Hayes* [1896] 1 Q.B. 290 at 292; *Rossi v Edinburgh Corp* [1905] A.C., 21.
[433] [1990] 2 A.C. 783; A. Bradley, "Judicial Enforcement of Ultra Vires Byelaws: The Proper Scope of Severance" [1990] P.L. 293.
[434] Sometimes called the "blue pencil test": *R. v Company of Fisherman of Faversham* (1799) 8 Dwrn & E. 352 at 356.
[435] *Dunkley v Evans* [1981] 1 W.L.R. 1522; *Daymond v Plymouth CC* [1976] A.C. 609. See also the Australian approach followed in *R. v Commonwealth Court of Conciliation and Arbitration Ex p. Whybrow and Co* (1910) 11 C.L.R. 1; *Owners of SS Kalibav Wilson* (1910) 11 C.L.R. 689. In Australia severability is governed by legislation; Interpretation Act 1901 s.46(1)(b) and s.15(a) which expressly recognise severability in the context of judicial review of administration and constitutional review respectively.
[436] Lord Bridge at 811; cf. Lord Lowry, dissenting, at 819: "To liberalise the [severance] test would be anarchic, not progressive". For an example of the severance of an invalid part of a statutory instrument (void for unreasonableness) under situation (a) above, *R. v Immigration Appeal. Tribunal Ex p. Begum Manshoora* [1986] Imm. A.R. 385. *cf. R. v Inland Revenue Commissioners Ex p. Woolwich Equitable Building Society* [1990] 1 W.L.R. 1400, HL (alteration of substance by textual severance too great); *R. v North Hertfordshire DC Ex p. Cobbold* [1985] 3 All E.R. 486 (unreasonable conditions attached to license for pop concert. Severance would alter whole character of licence). See also *Mouchell Superannuation Fund Trustees v Oxfordshire CC* [1992] 1 P.L.R. 97, CA.

Omissions

5–137 The corollary of severance by "blue pencilling" arises when some required provision is omitted from a regulation. Is it open to the court to supply that omission? Can the court write in an exemption? The Court of Appeal held that an omission was curable in a case where it "appears to have affected nobody" and therefore, "however cogent the case in legal theory" for striking down the regulation, to do so "would represent a triumph of logic over reason".[437] The omission related to the failure in the regulation (which banned a herbal medicine) to exempt goods in transit. Sedley L.J. recognised that there may be occasions where it is simply too late, or simply insufficient, to allow the rule-maker to supply the omission. In such a case, the test would be the same as that in *Hutchinson*, namely, would the new provision be "totally different in character" from the impugned one? However, if the omission can be made good without doing harm, or disrupting the existing, lawful text, then the court could permit the rule-maker to "insert the missing brick", rather than pull down the entire structure.[438] This new doctrine of "innocuous amendment"[439] is a pragmatic response to a difficult situation. However, care must be exercised lest it encourage lax drafting and encourages litigation in order to fill in the gap.

Delegation Of Powers

The rule against delegation

5–138 A discretionary power must, in general, be exercised only by the public authority to which it has been committed. It is a well-known principle of law that when a power has been conferred to a person in circumstances indicating that trust is being placed in his individual judgment and discretion, he must exercise that power personally unless he has been expressly empowered to delegate it to another.[440] This principle has been applied in the law of agency, trusts and arbitration as well as in public law. The former

[437] *R. (on the application of National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154.
[438] At [18]–[20].
[439] I. Steele, "Note on R.(National Association of Health Stores) v Department of Health" [2005] J.R. 232.
[440] Sometimes expressed in the form of the maxim *delegatus non potest delegare* (or *delegan)*, a maxim which, it has been suggested, "owes its origin to medieval commentators on the Digest and the Decretals, and its vogue in the common law to the carelessness of a sixteenth-century printer": P. Duff and H. Whiteside, "The Maxim in American Constitutional Law: A Study in Delegation of Legislative Power" (1929) 14 Cornell L.Q. 168, 173. The authors suggest that the maxim, recited by Coke in his Institutes (ii, 597), was probably taken from an incorrect rendering in a passage in an early printed edition of Bracton. But see H. Ehmke, "'Delegatus Potestas Non Potest Delegare: A Maxim of American Constitutional Law" (1961) 47 Cornell L.Q. 50, 54–55, pointing out that Bracton was indeed addressing himself to the impropriety of sub-delegating judicial power delegated by the King.

assumption that the principle applies only to the sub-delegation of delegated *legislative* powers and to the sub-delegation of other powers delegated by a superior *administrative* authority, is unfounded. It applies to the delegation of *all* classes of powers, and it was indeed originally invoked in the context of delegation of judicial powers. It is therefore convenient to travel beyond the delegation of discretionary powers in the strict sense and to view the problem as a whole.

5–139 The cases on delegation have arisen in diverse contexts, and many of them turn upon unique points of statutory interpretation. The judgments are not always consistent. The principle does not amount to a rule that knows no exception; it is a rule of construction which makes the presumption that "a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this presumption may be rebutted by any contrary indications found in the language, scope or object of the statute".[441] Courts have sometimes wrongly assumed that the principle lays down a rule of rigid application, so that devolution of power cannot (in the absence of express statutory authority) be valid unless it falls short of delegation. This has resulted in an unreasonably restricted meaning often being given to the concept of delegation.[442]

Delegation of "Judicial" Powers

5–140 The principle has been applied most rigorously to proceedings of courts,[443] requiring a judge to act personally throughout a case except in so far as he is expressly absolved from this duty by statute.[444] Special tribunals and public bodies exercising functions broadly analogous to the judicial are also precluded from delegating their powers of decision unless there is express authority to that effect.[445] This may be the case where judicial functions are

[441] J. Willis, "Delegatus non potest delegare" (1943) 21 Can. B.R. 257, 259.

[442] See cases cited by Willis (1943) 21 Can. B.R. 257, 257–258.

[443] *Caudle v Seymour* (1841) 1 Q.B. 889 (depositions taken by justices' clerk). cf. *Hunt v Allied Bakeries Ltd (No.2)* [1959] 1 W.L.R. 50 at 56; *R. v Brentford Justices Ex p. Catlin* [1975] Q.B. 455; *R. v Majewski* [1977] A.C. 443 at 449–451 (registrar's power to refer criminal appeals for summary dismissal); *R. v Gateshead Justices Ex p. Tesco* [1981] Q.B. 470 (power of single justice or justices' clerk to issue summonses could not be delegated to court official); approved in *Hill v Alderton* (1982) 75 Cr. App. R. 346, HL; *Olympia Press Ltd v Hollis* [1973] 1 W.L.R. 1520 where it was held that each magistrate did not have to read all the books that were the subject of forfeiture proceedings provided that they collectively discussed them before making a decision (*Burke v Copper* [1962] 1 W.L.R. 700 distinguished).

[444] On implied power to sub-delegate ministerial functions: *Allam & Co v Europa Poster Services Ltd* [1968] 1 W.L.R. 638 (where the sub-delegated function, though not the decisions culminating in it, was merely "ministerial").

[445] *GMC v UK Dental Board* [1936] Ch. 41; *Barnard v National Dock Labour Board* [1953] 2 Q.B. 18; *Vine v National Dock Labour Board* [1957] A.C. 488; *Labour Relation Board of Saskatchewan v Speers* [1948] 1 D.L.R. 340; *Turner v Allison* [1971] N.Z.L.R. 833. *cf. Re S. (a Barrister)* [1970] 1 Q.B. 160 (jurisdiction to disbar, though ostensibly delegated, was in truth original); *Re Schabas and Caput of University of Toronto* (1975) 52 D.L.R. (3rd) 495; *Re Bortolotti and Ministry of Housing* (1977) 76 D.L.R. (3rd) 408 (chairman of tribunals has no inherent power to make rulings on points of law that bind the other members). Legislation may be construed to define the tribunal as those members who sit in a particular case. See *Howard v Borneman (No.2)* [1976] A.C. 301.

expressly "privatised" or "contracted out". In countries with written constitutions the question has arisen as to whether certain disciplinary or quasi-judicial functions can ever be devolved. For example, is prison discipline involving the imposition of penalties a core state function, or can it be devolved to private companies running prisons?[446] Generally, in spite of the retreat from a rigid conceptual distinction between administrative, judicial, and quasi-judicial functions, it is still the case that the courts will be more ready to find a necessary implication of delegation in respect of a body that does not exercise strictly "judicial" functions.[447]

5–141 But, as we shall see in the discussion on procedural propriety,[448] the courts will sometimes concede that a public body has an implied power to entrust a group of its own members with authority to investigate, to hear evidence and submissions and to make recommendations in a report, provided that (a) it retains the power of decision in its own hands and receives a report full enough to enable it to comply with its duty to "hear" before deciding,[449] and (b) the context does not indicate that it must perform the entire "adjudica-

[446] This issue was discussed in the South African Constitutional Court in *AAA Investments Ltd v The Micro Finance Regulatory Council and the Minister of Trade and Industry* [2006] C.C.T. 51/05 (July 26, 2006), where it was held that such delegation of governmental functions was not "overbroad" provided that responsibility for the functions lay ultimately with the government.

[447] *Young v Fife Regional Council*, 1986 S.L.T. 331 (Scottish Teachers Salaries Committee and no power to delegate decision regarding teachers' pay to sub-committee, because since functions was "at least" quasi judicial, there was no implied power of delegation); *R. v Gateshead Justices Ex p. Tesco* [1981] Q.B. 470 (court officials could lawfully carry out non-judicial duties of justices' clerk, but no judicial duties). South African courts allowed implied delegation of "purely administrative" or "ministerial" functions but not of "legislative" or "judicial" functions: *United Democratic Front v Staatspresident*, 1987 (4) S.A. 649 (W).

[448] *cf. Osgood v Nelson* (1872) L.R. 5 H.L. 636 (council could validly empower one of its committees to investigate charges against an official, the council itself retaining the power of decision); *Devlin v Barnett* [1958] N.Z.L.R. 828 (promotions board entitled to entrust another body with conduct of tests); *Attorney General (ex rel. McWhirter) v Independent Broadcasting Authority* [1973] Q.B. 629 at 651, 657–658 (Authority normally able to rely on staff reports except when credible evidence contradicting a report is received): *R. v Commission for Racial Equality Ex p. Cottrell and Rothon* [1980] 1 W.L.R. 1580 (CRE allowed to delegate formal investigation into alleged discrimination and hence could rely and act on evidence received in reports); *Vine* [1957] A.C. 488, 512; *cf. Re Sarran* (1969) 14 W.L.R. 361.

[449] It seems that if a public authority is required to be satisfied of the existence of certain facts before exercising a power but is not obliged to afford any hearing beforehand, its satisfaction may be sufficiently expressed by formally adopting findings made by its committees even though these findings do not fully record the materials on which they were based: *Goddard v Minister of Housing and Local Government* [1958] 1 W.L.R. 1151; *Savoury v Secretary of State for Wales* (1976) 31 P. & C.R. 344 (also illustrates the difficulty of reviewing the validity of the resolution for lack of evidence when the applicant is unable to discover upon what evidence the council acted); *cf. Electronic Industries Ltd v Oakleigh Corp* [1973] V.R. 177 (court prepared to infer that the council had not considered a particular matter). But in some contexts (e.g. where bodies making decisions significantly affecting individual rights perfunctorily adopt findings by officials) the courts may hold that failure to exercise independent judgment or discretion constitutes an unlawful abdication of authority; *R. v Chester CC Ex p. Quietlynn Ltd* (1984) 83 L.G.R. 308; *R. v Birmingham CC Ex p. Quietlynn Ltd* (1985) 83 L.G.R. 461.

tory" process itself.[450] Determinations by ministers, however, stand in a special class;[451] not only may the hearing be conducted by a person authorised on their behalf, but the decision may be made by an authorised official in the minister's name.[452]

Delegation of "Legislative" Powers

5–142 There is a strong presumption against construing a grant of delegated legislative power as empowering the delegate to sub-delegate the whole or any substantial part of the law-making power entrusted to it.[453] In New Zealand cases this presumption was invoked as a ground for holding regulations and orders made by the sub-delegate to be invalid.[454] But the presumption is not irrebuttable, and in a Canadian wartime case the power of the Governor General in Council to make such regulations as he might by reason of the existence of war deem necessary or advisable for the defence of Canada was held to be wide enough to enable him to sub-delegate to the Controller of Chemicals power to make regulations.[455] There seems to be no English authority directly in point in constitutional or administrative law. In the First World War the sweeping legislative powers vested by the Defence of the Realm Acts in the King in Council were extensively sub-delegated to ministers and others; the validity of such sub-delegation was not, apparently, challenged in the courts. In the Second World War the King in Council was

[450] Delegation of purely investigatory or fact-finding functions may therefore be lawfully delegated, e.g *R. v North Thames RHA Ex p. L (An Infant)* [1996] Med. L.R. 385; *R. v Hertsmere BC Ex p. Woolgar* (1995) 27 H.L.R. 703.
[451] On the *Carltona* principle.
[452] *Doody v Secretary of State for the Home Department* [1994] 1 A.C. 531, HL (a decision required to be taken by the Home Secretary on the period which a life sentence prisoner should serve for the purposes of retribution and deterrence may be taken by a Minister of state at the Home Office on his behalf. However, any advice on that question given by the Lord Chief justice must be given by the holder of that office, as his function cannot be delegated. The Home Secretary no longer has this function but has power not to release prisoners after the minimum term has been served: Criminal Justice Act 2003 ss.224–236).
[453] *King-Emperor v Benoari Lal Sarma* [1945] A.C. 14 at 24; *R. v Lampe Ex p. Maddolozzo* [1966] A.L.R. 144 (dicta); B. Fox and O. Davies, "Sub-Delegated Legislation" (1955) 28 A.L.J. 486.
[454] *Geraghty v Porter* [1917] N.Z.L.R. 554 (distinguished in *Hookings v Director of Civil Aviation* [1957] N.Z.L.R. 929); *Godkin v Newman* [1928] N.Z.L.R. 593; *Jackson (FE) & Co v Collector of Customs* [1939] N.Z.L.R. 682 at 732–734; *Hawke's Bay Raw Milk Producers' Co-operative Co v New Zealand Milk Board* [1961] N.Z.L.R. 218 (distinguished in *Van Gorkom v Attorney-General* [1977] 1 N.Z.L.R. 535). See C. Aikman, "Subdelegation of the Legislative Power" (1960) 3 Victoria Uni. of Wellington L. Rev 69 for an authoritative analysis of these still relevant cases. More recently, see *Videbeck v Auckland City Council* [2002] 3 N.Z.L.R. 842 (court would not permit 'rubber stamping' by decision-maker of recommendations by officials, nor de facto delegation contrary to statutory requirements).
[455] *Reference Re Chemicals Regulations* [1943] S.C.R. 1; but see *Attorney General of Canada v Brent* [1956] S.C.R. 318 (powers of Governor-General in Council to make regulations with respect to immigration restrictions not validly exercised by making of regulations which in substance transferred to public officers the effective power to make the necessary rules); with which contrast *Hookings v Director of Civil Aviation* [1957] N.Z.L.R. 929 (delegation of dispensing power); and *Arnold v Hunt* (1943) 67 C.L.R. 429; *cf. Croft v Rose* [1957] A.L.R. 148; J. Merralls, "Note" (1957) 1 Melbourne Univ. L.R. 105.

expressly empowered by s.1(3) of the Emergency Powers (Defence) Act 1939 to sub-delegate his legislative powers under the Act. It is doubtful whether implied authority to subdelegate legislative powers would ever be conceded by the English courts save in time of grave emergency.[456] For when Parliament has specifically appointed an authority to discharge a legislative function, a function normally exercised by Parliament itself, it cannot readily be presumed to have intended that its delegate should be free to empower another person or body to act in its place. Nevertheless, one can envisage circumstances in which a carefully delimited sub-delegation of rule-making power could more reasonably be upheld than a sub-delegation of uncontrolled administrative discretion to be exercised in relation to individual cases.[457]

Delegation of "Administrative" Powers

5–143 Most of the practical problems concerned with sub-delegation have been related to the exercise of powers of a discretionary character—to regulate, to grant licences and permits, to requisition, to require the abatement of nuisances and to institute legal proceedings.

Delegation and Agency

5–144 In this context, sharp differences of opinion have been expressed on the relationship between the concepts of delegation and agency. They have sometimes been treated as being virtually indistinguishable[458] but in many cases a distinction has been drawn between them, particularly where the court is acting on the assumption that an authority can validly employ an agent but cannot delegate its powers

5–145 The correct view seems to be that the distinctions drawn between delegation and agency are frequently misconceived in so far as they are based on the erroneous assumption that there is never an implied power to delegate. However, some relationships that are properly included within the concept of delegation are substantially different from those which typify the relationship of principal and agent. There are three main characteristics of agency. First, the agent acts on behalf of his principal, he does so in his name, and the acts done by the agent within the scope of his authority are attributable to the principal. These principles are broadly applicable to delegation in administrative law, and it would generally be held to be unlawful for an authority to invest a delegate with powers exercisable in his

[456] Reference to extrinsic documents in delegated legislation is common, and is not considered to involve sub-delegation unless the document is not in existence when the instrument is approved, and its content is beyond the control of the minister; see criticisms of the Joint Committee on Statutory Instruments. HC Paper No. 21–XI (Session 1974/75); *cf.* R. v Secretary of State for Social Services Ex p. Camden LBC [1987] 1 W.L.R. 819.
[457] *Aikman* (1960) 3 Victoria Uni. of Wellington L. Rev. 69 82–83.
[458] See, e.g. *Huth v Clarke* (1890) 25 Q.B.D. 391; *Lewisham Borough v Roberts* [1949] 2 K.B. 608, 622; *Gordon, Dadds & Co v Morris* [1945] 2 All E.R. 616.

own name. But where legislative powers are delegated by Parliament, or validly sub-delegated by Parliament's delegate, the delegate or subdelegate exercises his powers in his own name. And in the schemes of administrative delegation drawn up in local government law, the relationships between the local authorities concerned have often been far removed from those connoted by the relationship of principal and agent.[459]

Secondly, the agent can be—given detailed directions by his principal and does not usually have a wide area of discretion. On the other hand one to whom statutory discretionary powers are delegated often has a substantial measure of freedom from control in exercising them. But the degree of freedom from control with which he is vested may be a decisive factor in determining the validity of the delegation made to him.

5–146 The more significant are the effective powers of control retained by the delegating authority, the more readily will the courts uphold the validity of the delegation; and they may choose to uphold its validity by denying that there has been any delegation at all, on the ground that in substance the authority in which the discretion has been vested by statute continues to address its own mind to the exercise of the powers.[460]

Thirdly, in agency the principal retains concurrent powers. This principle was generally applicable to delegation by a local authority to its committees. Thus, the local authority retained power to make decisions in relation to matters comprised within the delegation[461]—a rule now expressly restated by statute[462]—and it could (and presumably still can) revoke the authority of a delegate.[463] Nevertheless, it has sometimes been stated that delegation implies a denudation of authority.[464] Such a statement was made by the Employment Appeal Tribunal in *Robertson v Department for the Environment, Food and Rural Affairs*.[465] This cannot be accepted as an accurate general proposition.[466] On the contrary, the general rule is that an authority which delegates its powers does not divest itself of them indeed, if it purports to abdicate it may be imposing a legally ineffective fetter on its own discretion[467]—and can resume them. But if it has validly delegated an

[459] Inter-delegation between local authorities was considerably diminished by the Local Government Act 1972.

[460] As in *Devlin v Barnett* [1958] N.Z.L.R. 828; cf. *Winder v Cambridgeshire CC* (1978) 76 L.G.R. 549.

[461] *Huth v Clarke* (1890) 25 Q.B.D. 391; *Gordon, Dadds & Co v Morris* [1945] 2 All E.R. 616 at 621; *Winder v Cambridgeshire CC* (1978) 76 L.G.R. 549 (local authority retained residual discretion to exercise a power that it had delegated under a statutorily required instrument of college government, when the refusal of the delegate to act would otherwise frustrate the discharge of the authority's overall educational responsibilities).

[462] Local Government Act 1972 s.101(4) as amended by Local Government Act 2003 s.99.

[463] *Manton v Brighton Corp* [1951] 2 K.B. 393 (power of council to revoke authority of member of sub-committee).

[464] *Blackpool Corp v Locker* [1948] 1 K.B. 349 at 377–378 (Scott and Asquith L.JJ.).

[465] [2005] EWCA Civ 138; [2005] I.C.R. 750.

[466] Strong support for the position here, and criticism of *Robertson and Blackpool Corp* is provided by S. Bailey, "Delegation and Concurrent Exercises of Power" [2005] J.R. 84.

[467] On the general rule that a public authority cannot fetter itself in the exercise of discretionary powers, see Ch.9.

executive power to make decisions, it will normally be bound by a particular decision, conferring rights on individuals (and possibly one derogating from those rights), made in pursuance of the delegated power and will be incapable of rescinding or varying it;[468] nor will it be competent to "ratify" with retroactive effect a decision made by the delegate in excess of the powers so delegated, even though the delegating authority could validly have made the decision itself in the first place.[469]

5–147 It must be explained that in local government law there may be delegation either of executive power[470] (in which case the delegating-authority may be bound by the delegate's decisions and the degree of supervision exercisable over the delegate may sometimes be minimal) or of power to make recommendations or decisions subject to the approval of the delegating authority. In the latter class of case (which is not always categorised as true delegation) difficult marginal problems of interpretation have arisen where a delegate or subdelegate has taken action e.g. to require the execution of works on private property or to institute legal proceedings), without antecedent approval and the authority whose approval is required has purported to ratify the action already taken.[471] Other difficult problems, peripheral to the general question of delegation, have arisen in cases where it has been contended that a local government officer, acting without a formal grant of authority, has imposed legally binding obligations on his employers by virtue of undertakings, assurances or other conduct.[472]

[468] *Battelley v Finsbury BC* (1958) 56 L.G.R. 165; *Morris v Shire of Morwell* [1948] V.L.R. 83. *cf.* the unsettled question of whether the Home Secretary may disregard a decision by an immigration officer to grant leave to enter that is not consistent with the immigration rules: *R. v Secretary of State for the Home Department Ex p. Choudhary* [1978] 1 W.L.R. 1177; *R. v Secretary of State for the Home Department Ex p. Ram* [1979] 1 W.L.R. 148.
[469] This appears to be the best explanation of the decision in *Blackpool Corp v Locker* [1948] 1 K.B. 349. A minister delegated requisitioning powers, subject to restrictive conditions, to local authorities or their clerks by a departmental circular. A town clerk requisitioned L's house without complying with certain conditions. It was unsuccessfully contended that a subsequent letter from the minister had cured the invalidity by ratification. It was doubtful, moreover, whether the purported ratification was to be construed as anything more than an act of affirmance, or whether the local authority or its clerk was to be regarded as an agent of the minister, who was himself acting "on behalf of His Majesty". But the assertion (at 379) that the minister was incompetent to requisition the house anew because he had not reserved powers to himself in the instrument of delegation cannot be supported. See also *Attorney General Ex rel. Co-operative Retail Services Ltd v Taff-Ely BC* (1979) 39 P. & C.R. 223, CA, affirmed 42 P. & C.R. 1, HL (council could not ratify purported grant of planning permission by district clerk, since ultra vires act could not be ratified; *quaere* whether in any case council had power to grant planning permission). And see the discussion on estoppel, 12–063 et seq.
[470] The power of local authorities to delegate to committees, sub-committees and officers, and of committees to sub-delegate was greatly extended by the Local Government Act 1972 Pt VI, esp. s.101.
[471] On the one hand, *Firth v Staines* [1897] 2 Q.B. 70; *R. v Chapman Ex p. Arlidge* [1918] 2 K.B. 298; and *Warwick RDC v Miller-Mead* [1962] Ch. 441 applied by the CA in *Stoke on Trent CC v B & Q Retail Ltd* [1984] Ch. 1; on the other hand, St Leonard's Vestry v Holmes (1885) 50 J.P 132 and Bowyer, *Philpott & Payne Ltd v Mather* [1919] 1 K.B. 419. *cf. Attorney General Ex rel. Co-operative Retail Services Ltd v Taff-Ely BC* (1979) 39 P. & C.R. 223.
[472] M. Freedland, "The Rule Against Delegation and the Carltona doctrine in an Agency Context" [1996] P.L. 19.

General Principles of Delegation

5–148 The following are some of the principles elicited from the cases in which devolution of statutory discretions has been considered.

Vesting Authority Without Supervisory Control

5–149 Where an authority vested with discretionary powers empowers one of its committees or subcommittees, members or officers to exercise those powers independently without any supervisory control by the authority itself, the exercise of the powers is likely to be held invalid. Thus, where the Minister of Agriculture had validly delegated to a war agricultural executive committee power to give directions with respect to the cultivation, management or use of land, and the committee sub-delegated to its officer power to determine in which fields a specified crop should be grown and to issue a direction to the farmer without reference to the committee, a direction issued by the officer was held to be invalid.[473] A byelaw by which a local authority hands over its own regulatory powers to an official by vesting him with virtually unrestricted discretion may be held to be void.[474] A delegation of power to review prosecutions to decide whether there was sufficient evidence to proceed, from the Director of Public Prosecutions to non-lawyers, was held unlawful since the statute by giving the power to the DPP clearly contemplated that it would only be delegated to a member of the Crown Prosecution Service, who would be a lawyer.[475] The powers to determine the state of health of a child, in relation to the question of whether free transport to school should be provided, could not be delegated to the school medical officer but had to be exercised by the education committee as a whole.[476]

Degree of control maintained may be material

5–150 The degree of control (before or afterwards) maintained by the delegating authority over the acts of the delegate or subdelegate may be a material factor in determining the validity of the delegation. In general the control preserved (e.g. by a power to refuse to ratify an act or to reject a recommendation) must be close enough for the decision to be identifiable as that of the delegating authority.[477] That the decision of the delegate is not

[473] *Allingham v Minister of Agriculture and Fisheries* [19481] All E.R. 780; *High v Billings* (1903) 67 J.P 388.

[474] *Madoc Township v Quinlan* (1972) 21 D.L.R. (3rd) 136; *R. v Sandler*, 286.

[475] *R. v DPP Ex p. Association of First Division Civil Servants*, *The Times*, May 24, 1988. However, the HL did not hold invalid power exercised by a subordinate officer of a rating authority when the power was conferred on the authority itself: *Provident Mutual Life Assurance Association v Derby CC* [1981] 1 W.L.R. 173, HL.

[476] *R. v Devon CC Ex p. G* [1989] A.C. 573. On the *Carltona* principle and whether delegation or devolution may not be permitted if the function requires particular competence or qualifications, see 5–00.

[477] *Hall v Manchester Corp*. (1915) 84 L.J. Ch. 734 at 741 and *Cohen v West Ham Corp* [1933] Ch. 814 at 826–827 on the duty of local authorities to exercise independent discretion before acting on reports by their officers; *R. v Board of Assessment, etc*. (1965) 49 D.L.R. (2nd) 156 (tax assessment board, by simply adopting valuations made by official, failed to perform statutory duties).

final or conclusive because of control exerted by a third party, in the form of an appeal or review from the decision of the delegating authority and/or delegate, may also be an important factor in determining the validity of the delegation.[478]

Amplitude, impact and importance

5–151 How far, if at all, delegation of discretionary power is impliedly authorised may also depend on the amplitude of the power, the impact of its exercise upon individual interests and the importance to be attached to the efficient transaction of public business by informal delegation of responsibility.[479] If authorisation is permitted, the choice of one officer over another for the exercise of the delegated power is a matter for the holder of the power, within the limits of rationality, and the choice of the level of the delegated office-holder will depend not primarily on rank, but on matters such as "resources, availability, skills, contacts, experience, knowledge and so forth".[480]

Generally improper to delegate wide powers

5–152 It is improper for an authority to delegate wide discretionary powers to another authority over which it is incapable of exercising direct control, unless it is expressly empowered so to delegate.[481] Thus, the Minister of Works could not allocate to the Minister of Health part of his functions in the system of building licensing.[482] A Canadian provincial marketing board, exercising delegated authority, could not sub-delegate part of it regulatory

[478] *Provident Mutual Life Assurance Assn v Derby CC* [1981] 1 W.L.R. 173, 181, HL (principal rating assistant could serve completion notice without consulting borough treasurer; right of appeal to county court existed).

[479] *Ex p. Forster, re University of Sydney* (1963) 63 S.R. (N.S.W) 723 at 733–734; Willis; *R. v Monopolies and Mergers Commission Ex p. Argyll Group Plc* [1986] 1 W.L.R. 763, CA held that the Chairman of the MMC did not have authority to act on his own to request the Secretary of State to lay the reference about the company aside. However, a properly constituted group of MMC members would have reached the same conclusion and therefore the act was valid. But where a chairman of a local education committee designated the date for the closure of a school, that was held an unlawful delegation: *R. v Secretary of State for Education and Science Ex p. Birmingham CC* (1984) 83 L.G.R. 79.

[480] *R. (on the application of Chief Constable of the West Midlands Police) v Gonzales* [2002] EWHC 1087 (Admin) at [18] (Sedley L.J.).

[481] *cf. Kyle v Barbor* (1888) 58 L.T. 229.

[482] *Jackson, Stansfield & Sons v Butterworth* [1948] 2 All E.R. 558 at 564–566 (dicta); but is it true that the Minister of Works in that case had done anything more than use the Minister of Health as a convenient channel of communication with local authorities? And see *Lavender (H) & Son Ltd v Minister of Housing and Local Government* [1970] 1 W.L.R. 1231 (Minister X determining planning appeal by mechanically applying policy of Minister Y; decision in effect that of Minister Y, and therefore ultra vires). *cf. Kent CC v Secretary of State for the Environment* (1977) 75 L.G.R. 452, where the minister was held to have decided a planning appeal himself although he had had regard to the opinion of another minister on an important issue in the appeal. If a minister delays the making or implementation of a discretionary decision till the matter has been debated in Parliament he is not, of course, delegating his power of decision at all: *R. v Brixton Prison Governor Ex p. Enaharo* [1963] 2 Q.B. 455.

powers to an inter-provincial authority.[483] Nor could a local authority, empowered to issue cinematograph licences subject to conditions, attach a condition that no film shall be shown which had not been certified for public exhibition by the British Board of Film Censors,[484] unless the authority has expressly reserved to itself power to dispense with that requirement in any individual case.[485] It is doubtful how far a minister would be held to have an implied power to devolve discretionary functions upon local authorities and their officers, over whom he is constitutionally enabled to exercise indirect control. One may surmise that the courts would not readily uphold the validity of a devolution of very wide discretionary powers, but that if the devolution of discretion covered a relatively narrow field they might characterise the relationship as agency rather than delegation and hold that it had been validly created.[486]

Named officers

5–153 Where the exercise of a discretionary power is entrusted to a named officer—e.g. a chief officer of police, a medical officer of health or an inspector—another officer cannot exercise his powers in his stead unless express statutory provision has been made for the appointment of a deputy or unless in the circumstances the administrative convenience of allowing a deputy or other subordinate to act as an authorised agent very clearly outweighs the desirability of maintaining the principle that the officer designated by statute should act personally.[487] But where statute permitted discharge of disciplinary functions of the Law Society Council to "an individual (whether or not a member of the Society's staff)", there was nothing which required the Council to familiarise itself with the name of the delegatee; the Council could delegate to the holder from time to time of an office.[488] The presumption of deliberate selection is not an independent normative principle, but is merely a principle of statutory construction which will readily give way to legislative indications to the contrary.[489]

[483] *Prince Edward Island Potato Marketing Board v Willis* (HB) Inc [1952] 2 S.C.R. 391.
[484] *Ellis v Dubowski* [1921] 3 K.B. 621. See also *R. v Burnley Justices* (1916) 85 L.J.K.B. 1565.
[485] *Mills v LCC* [1925] 1 K.B. 213; *R. v Greater London Council Ex p. Blackburn* [1976] 1 W.L.R. 550.
[486] *Jackson, Stansfield & Sons v Butterworth* [1948] 2 All E.R. 558 564–565.
[487] *Nelms v Roe* [1970] 1 W.L.R. 4, 8; *Mason v Pearce*, *The Times*, October 7, 1981; *R. v Majewski* [1977] A.C. 443 at 449–451. This passage was cited with approval in *R. (on the application of WH Smith Ltd) v Croydon Justices* [2001] E.H.L.R. 12 at [15] (Elias J.); and in *R. v Chief Constable of Greater Manchester Police Ex p. Lainton*, *The Times*, April 4, 2000. Sedley L.J. in *Chief Constable of West Midlands Police* [2002] EWHC 1087 (Admin) overruled *Nelms v Roe* insofar as Parker C.J. said in that case that the power in question was not subject to the *Carltona* principle, but had to be expressly or impliedly delegated.
[488] *R. v The Law Society Ex p. Curtin* (1994) 6 Admin. L.R. 657.
[489] *R v Law Society Exp. Curtin* (1994) 6 Admin L.R. 657 (Steyn L.J.).

Further sub delegation

5–154 The restrictions on the power to delegate have on the whole been applied more strictly to the further sub-delegation of sub-delegated powers than to the sub-delegation of primary delegated powers.[490] This is in accordance with the maxim that the expression of one excludes the other:[491] where Parliament has expressly authorised sub-delegation of a specific character, it can generally be presumed to have intended that no further sub-delegation shall be permissible.

Exercise of deliberate judgment

5–155 Again, it may generally be presumed that express authority to sub-delegate powers is to be construed as impliedly excluding authority to sub-delegate the performance of duties involving the exercise of deliberate judgment, unless the performance of the duty is inextricably interwoven with the exercise of the power.[492]

Delegation in accordance with statute

5–156 Where power to sub-delegate prescribed functions has been conferred by statute, strict requirements to the form of delegation must normally be observed.[493] Delegation must therefore be conveyed in an authorised form[494] to the designated authority,[495] and must identify sufficiently what are the functions thus delegated instead of leaving the sub-delegate to decide the ambit of his own authority.[496]

Comparative perspectives on delegation

5–157 In Australia it has been held that delegation to an office-holder does not require renewal each time there is a change in the holder of that office; it has also held that revocation of a delegation does not affect the validity of

[490] See e.g. *Cook v Ward* (1877) 2 C.P.D. 255. Powers of sub-delegation are greatly extended by the Local Government Act 1972 at s.101.
[491] *Expressio unius est exclusio alterius*.
[492] *Mungoni v Attorney General of Northern Rhodesia* [1960] A.C. 336; *R. v DPP Ex p. Association of First Division Civil Servants*, *The Times*, May 24, 1988.
[493] *B (A Solicitor) v Victorian Lawyers RPA Ltd* (2000) 6 V.R. 642.
[494] For the manner of conveying such authorisation within a police force: *Nelms v Roe* [1970] 1 W.L.R. 4; *Pamplin v Gorman* [1980] R.T.R. 54; *cf. Record Tower Cranes Ltd v Gisbey* [1969] 1 W.L.R. 148.
[495] *cf. Esmonds Motors Pty Ltd v Commonwealth* (1970) 120 C.L.R. 463 (minister acted ultra vires by designating himself); *R. v Secretary of State for the Environment Ex p. Hillingdon LBC* [1986] 1 W.L.R. 192, aff'd [1986] 1 W.L.R. 807 (power under s.101(1) of the Local Government Act 1972 to delegate to a committee does not give the power to delegate to a committee of one); *cf. R. v Secretary of State for Education and Science Ex p. Birmingham CC* (1984) 83 L.G.R. 79 (no power to delegate to a member of an authority).
[496] *Ratnagopal v Attorney General* [1970] A.C. 972 (Governor-General, empowered to appoint a commissioner of inquiry, left terms of reference excessively vague). *cf. R. v Law Society Ex p. Curtin* (1994) 6 Admin. L.R. 657; delegation to a named official may not be required. See also the situations in which the authority may be estopped from denying the authority of an officer to whom power has not been officially delegated: See 12–063 et seq.

the delegate's acts until the moment of revocation.[497] In addition, the delegation by an office holder does not require renewal each time there is a change in the holder of that office.[498]

5–158 Canadian courts have in the past taken a restrictive view of the competence of local authorities to confer a free discretion on their members or officials to dispense with prohibitions embodied in byelaws. Thus, Montreal could not make a byelaw providing that nobody was to run a business in the city without an official permit; this was analysed as an invalid sub-delegation.[499] And in another case,[500] a marketing board (itself a sub-delegate) was empowered to make regulations on certain matters; the regulations that it made were held invalid on the ground that they contained no standards, but reserved to the board the power to exercise its discretion case by case. The board was said not to have exercised the legislative function delegated to it but to have sub-delegated to itself an administrative function.[501]

5–159 The New Zealand decisions are conflicting; sometimes such provisions have been construed as valid conditional prohibitions, and sometimes as sub-delegations the validity of which may be dependent on the prescription of standards governing the exercise of the dispensing power.[502] Issues such

[497] *Fyfe v Bordoni* [1998] SACS 6860.

[498] *Johnson v Veteran's Review Board* (2002) 71 A.L.D. 16.

[499] *Vic Restaurant Inc v Montreal* [1959] S.C.R. 58 (distinguished in *Lamoureux v City of Beaconsfield* [1978] 1 S.C.R. 134).

[500] *Brant Dairy Co Ltd v Milk Commission of Ontario* [1973] S.C.R. 131; *Re Canadian Institute of Public Real Estate Companies and City of Toronto* (1979) 25 N.R. 108, SCC. *Cf.*, however, *Re Bedesky and Farm Products Marketing Board of Ontario* (1976) 58 D.L.R. (3rd) 484 at 502–504.

[501] This reasoning reflects to a limited degree the argument advanced in K.C. Davis, *Discretionary Justice: a Preliminary Inquiry* (1969), pp.57–59, that bodies and officials in whom discretion is vested should be under an obligation to confine and structure it by the promulgation of decisional criteria so as to strike the best balance in the context between rules and discretion. This is a variation on the non-delegation doctrine at one time used by the Supreme Court of the United States to render invalid statutes that delegated legislative power without setting sufficiently precise limits upon its exercise, e.g. *Field v Clark* 143 U.S. 649 (1892). See Jaffe, "An Essay on Delegation of Legislative Power" (1947) 47 Colum. L. Rev. 359, 561. It later reappeared in other contexts, e.g. *Shuttlesworth v Birmingham* 394 U.S. 147 (1969) (byelaw requiring that permit be obtained before holding public demonstration, invalid because of the broad discretion entrusted to an official); *Furman v Georgia* 408 U.S. 238 (1972); *Profitt v Florida* 428 U.S. 242(1976), where the constitutionality of capital punishment was attacked in part because of the broad discretion "delegated" to the judge and jury in imposing it. *Cf. Francis v Chief of Police* [1973] A.C. 761 at 773, where the PC held that a statutory requirement that the permission of the Chief of Police be obtained before "noisy instruments" could lawfully be used at public meetings did not delegate so much discretion as to infringe the freedom of speech and assembly provisions of a constitution of St Christopher, Nevis and Anguilla.

[502] *Mackay v Adams* [1926] N.Z.L.R. 518; *Jackson (FE) & Co v Collector of Customs* [1939] N.Z.L.R. 682; *Hazeldon v McAra* [1948] N.Z.L.R. 1087; *Ideal Laundry Ltd v Petone Borough* [1957] N.Z.L.R. 1038; *Hookings v Director of Civil Aviation*, *ibid.*, 929. See also *Hanna v Auckland City Corp* [1945] N.Z.L.R. 622 (unfettered dispensing power). For a review of these and other Commonwealth decisions, see C. Aikman, (1960) 3 Victoria Univ of Wellington L. Rev. 85–95. See also *Attorney General v Mount Roskill Borough* [1971] N.Z.L.R. 1030. For a penetrating analysis of the New Zealand approach which does not permit delegation of unfettered or overbroad discretion see P. Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd edn (2001), paras 24.6.3, 24.6.4 and 21.3.6(2).

as these have seldom arisen in the English courts.[503] If an absolute prohibition would be valid, then prima facie a conditional prohibition should be upheld;[504] but it may be relevant in some cases to consider the context, the persons to whom the dispensing or regulatory power are delegated and the scope of the authority "delegated" to them.

5–160 In India the principle of non-delegation has also been upheld,[505] however "due to the enormous rise in the nature of activities to be handled by statutory authorities, the maxim *delegates non potest delegare* is not being applied especially when there is a question of exercise of administrative discretionary power".[506]

5–161 In South Africa, the principle of non-delegation is more strictly applied, although "it is not every delegation of power that is [prohibited] but only such delegations as are not, either expressly or by necessary implication, authorised by delegated powers".[507]

The Carltona principle

5–162 Special considerations arise where a statutory power vested in a minister or a department of state is exercised by a departmental official. The official is not usually spoken of as a delegate, but rather as the *alter ego* of the minister or the department;[508] power is devolved rather than delegated.[509] (A different analysis must, of course, be adopted where powers are explicitly conferred upon or delegated to an official by a law-making instrument.[510]) Under the "*Carltona* principle the courts have recognised that "the duties imposed on ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that

[503] See, the decision of the PC in *Francis v Chief of Police* [1993] A.C. 761 In England licensing powers are nearly always conferred directly by statute or under explicit statutory authority.
[504] *Williams v Weston-super-Mare UDC* (1907) 98 L.T. 537 at 540.
[505] *Sahni Silk Mills (P) Ltd v ESI Corp* [1994] 5 S.C.C. 346 at 352.
[506] Ibid at 350.
[507] *Attorney General OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A), 639–D); *AAA Investments* [2006] C.C.T. 51/05 (july 26, 2006).
[508] See e.g. *Lewisham Borough v Roberts* [1949] 2 K.B. 608, 629 at *R. v Skinner* [1968] 2 Q.B. 700; *Re Golden Chemical Products Ltd* [1976] Ch. 300 at 307; cf. *Woollett v Minister of Agriculture and Fisheries* [1955] 1 Q.B. 103. The harmless fiction of the "alter ego principle" (D. Lanham, "Delegation and the Alter Ego Principle" (1984) 100 L.Q.R. 587) does, however, have its limits. Admissions by a civil servant will not necessarily be treated as admissions by his minister, *Williams v Home Office* [1981] 1 All E.R. 1121. Similarly, evidence of receipt of a letter by a minister's department will not satisfy a requirement that advice be received by a minister of the Crown, although evidence of receipt by an official with responsibility for the matter in question will suffice: *Air 2000 Ltd v Secretary of State for Transport* (No.2) 1990 S.L.T. 335.
[509] *R. v Secretary of State Ex p. Oladehinde* [1991] 1 A.C. 254 at 283–284, CA.
[510] As where power to decide certain classes of planning appeals have been vested in inspectors by legislation.

were not the case".[511] In general, therefore, a minister is not obliged to bring his own mind to bear upon a matter entrusted to him by statute but may act through a duly authorised officer[512] of his department.[513] The officer's authority need not be conferred upon him by the minister personally;[514] it may be conveyed generally and informally by the officer's hierarchical superiors in accordance with departmental practice.[515] Whether it is necessary for the authorised officer explicitly to profess to act on behalf of the minister is not certain, but it is suggested that this will not usually be required.[516]

5–163 In *R. (on the application of National Association of Health Stores) v Department of Health*, the Court of Appeal considered whether the knowledge within the department should in law be imputed to the minister (who made the decision to prohibit the use of a herbal remedy in foodstuffs in ignorance of the special expertise of a particular adviser). Sedley L.J. held that to impute the knowledge would be "antithetical to good government".[517] and result in a situation where "the person with knowledge decides nothing and the person without knowledge decides everything". Modern departmental government, he felt, required ministers to be properly briefed about the decisions they must take. He was not willing to accept that the collective knowledge of the civil servants in his department or their collective expertise would necessarily be treated as the minister's own knowledge and expertise.[518]

[511] *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560 at 563 (Lord Greene M.R.); *West Riding CC v Wilson* [1941] 2 All E.R. 827 at 831 (Viscount Caldecote C.J.); *Re Golden Chemical Products Ltd* [1976] Ch. 300. Cf. *R. v Secretary of State for the Home Department Ex p. Phansopkar* [1976] Q.B. 606 where the minister was held to have no power to require applicants for certificates of partiality to obtain them from British Government officials in the applicant's country of origin rather than from the Home Office in London.

[512] *Cf Customs and Excise Commissioners v Cure & Deeley Ltd* [1962] 1 Q.B. 340 (manner of authorization prescribed by statute held, not complied with).

[513] *West Riding* [1941] 2 All E.R. 827 , *Point of Ayr Collieries Ltd v Lloyd-George* [1943] 2 All E.R. 546; *Carltona* [1943]2 All E.R. 560 ; *Lewisham* [1949] 2 K.B. 608 ; *Woollett* [1955]1 Q.B. 103.

[514] *Lewisham* [1949] 2 K.B. 608 ; *Woollett* [1995] 1 Q.B. 103; *R. v Skinner* [1968] 2 Q.B. 700 *Cf. Horton v St Thomas Elgin General Hospital* (1982) 140 D.L.R. (3rd) 274.

[515] ibid.; see esp. *Woollett* [1955] 1 Q.B. 103 at 124–126 (Jenkins L.J.); *Golden Chemical* [1996] Ch. 300, 305.

[516] *Cf. Woollett* [1955] 1 Q.B. 103 at 120–121, 132, 134 (Denning and Morris L.JJ.); *Re Reference Under Section 11 of the Ombudsman Act* (1979) 2 A.L.D. 86, 94. In *Golden Chemical* [1976] Ch. 300 at 311, it was said to be preferable for the departmental officer who had in fact taken the decision to state that he had been satisfied that the statutory criterion for exercising the power had been met. It has been suggested for Australia that the officer may possess ostensible authority. M. Aronson, B. Dyer and M. Groves, *Judicial Review of Administrative Action*, 3rd edn (2004), p.311; E. Campbell, "Ostensible Authority in Public Law" (1999) 27 F.L.Rev 1.

[517] [2005] EWCA Civ 154 at [26].

[518] Thus distinguishing Lord Diplock's assertion to the contrary in *Bushell v Secretary of State for the Environment* [1981] A.C. 75 at 95. It was held that the considerations of which the minister had no knowledge were not "relevant". See also M.Freedland, "The Rule Against Delegation and the *Carltona* Doctrine in an Agency Context" [1996] P.L. 19 (who argues that in conferring a discretionary power on a minister, the parliamentary draftsmen are in effect

5–164 It may be that there are, however, some matters of such importance that the minister is legally required to address himself to them personally,[519] despite the fact that many dicta that appear to support the existence of such an obligation are at best equivocal.[520] It is, however, possible that orders drastically affecting the liberty of the person—e.g. deportation orders,[521] detention orders made under wartime security regulations[522] and perhaps discretionary orders for the rendition of fugitive offenders[523] require the personal attention of the minister.[524]

5–165 On the other hand, the minister was not required personally to approve breath-testing equipment, despite its importance to the liberty of motorists suspected of driving after consuming alcohol,[525] and a decision on the question of a life sentence prisoner's tariff period may be taken on behalf of the Home Secretary by a Minister of State at the Home Office.[526] Objection to the production of documentary evidence in legal proceedings on the ground that its production would be injurious to the public interest must be taken by the minister or the permanent head of the department, certifying that personal consideration has been given to the documents in

employing a formula that the discretion is conferred upon the government department). Sedley L.J. considered that such a proposition would have the effect that "ministers need to know nothing before reaching a decision so long as those advising them know the facts" at [37]—which he called "the law according to Sir Humphrey Appleby" (an illusion to the permanent secretary in the television comedy "Yes Minister"); I. Steele, "Note on R. (National Association of Health Stores) v Department of Health" [2005] J.R. 232.

[519] *In Golden Chemical* [1976] Ch. 300 the judge denied that such a category existed. But see *Ramawad v Minister of Manpower and Immigration* [1978] 2 S.C.R. 375 and *R. (on the application of Tamil Information Centre) v Secretary of State for the Home Department* [2002] EWHC 2155; (2002) 99 L.S.G. 32 where it was held that ministerial authorisation was an impermissible delegation as the statute required the minister personally to exercise his judgment.

[520] *In Golden Chemical* [1946] Ch. 300 at 309–310, Brightman J. concluded that the dicta in *Liversidge Anderson* [1942] A.C. 206 should be understood as referring to political expediency and to the minister's personal responsibility to Parliament, rather than to his legal obligation.

[521] *R. v Chiswick Police Station Superintendent Ex p. Sacksteder* [1918] 1 K.B. 578 at 585–586, 591–592 (dicta). The decision has in fact been taken by the Home Secretary personally (Cmnd 3387 (1967), 16). In *Oladehinde v Secretary of State for the Home Department* [1991] 1 A.C. 254, which concerned the provisional decision to deport, the HL appeared to accept that the final decision to deport had to be taken by the Secretary of State personally or by a junior Home Office minister if he was unavailable. *R. v Secretary of State for the Home Department Ex p. Mensah* [1996] Imm. A.R. 223.

[522] *Liversidge v Anderson* [1942] A.C. 206 at 223–224, 265, 281; *Point of Ayr* [1943] 2 All E.R. 546 at 548 (dicta).

[523] *R. v Brixton Prison Governor Ex p. Enahoro* [1963] 2 Q.B. 455 at 466.

[524] Had he believed that such a category existed, the judge in Re Golden Chemicals might well have included in it the power to present a petition for the compulsory winding up of a company (Companies Act 1967 s.10). See D. Lanham, "Delegation and the Alter Ego Principle" (1984) 100 L.Q.R. 587, 592–594 (who argues that where life or personal liberty are at stake, the *alter ego* principle may not apply).

[525] *R. v Skinner* [1968] 2 Q.B. 700: it might, of course, be argued that the reliability of the equipment raises technical questions to which the minister will normally bring no special expertise.

[526] *Doody v Secretary of State for the Home Department* [1994] 1 A.C. 531.

question.[527] Statutory instruments are signed by senior officials acting under a general grant of authority from the minister.[528]

5–166 Similarly, it is uncertain whether the courts will examine the suitability of the official who performs the work. The *Carltona* case emphasised that Parliament, not the courts, was the forum for scrutiny of the minister's decision,[529] but more recently it has been accepted that the courts may also examine the devolvement of authority, by way of judicial review.[530] At the very least, it would seem that the official must satisfy the test of *Wednesbury* unreasonableness: he must not be so junior that no reasonable minister would allow him to exercise the power.[531] There may be some tasks which by their nature ought not to allow of delegation or devolution, such as some disciplinary powers.[532] And different tasks conferred on a decision-maker may be delegable to different levels within the organisation.[533]

5–167 The *Carltona* principle may be expressly excluded by legislation,[534] but whether it may in addition be excluded by statutory implication remains uncertain. Two situations should be distinguished. Where a power of delegation is expressly conferred by Parliament on a minister, it may compel the inference that Parliament intended to restrict devolution of power to the statutory method, thus impliedly excluding the *Carltona* principle.[535] Commonwealth authority, however, suggests that such an

[527] *Duncan v Cammell, Laird & Co* [1942] A.C. 624, 638.

[528] E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy-Making* (2001). Departmental practice varies; in some departments all or nearly all statutory instruments are signed by the minister personally (Report of the Joint Committee on Delegated Legislation. HC Paper No. 475 (Session 1971/72), Minutes of Evidence, 196–203). In *Lewisham Borough v Roberts* [1949] 2 K.B. 608 at 621–622 Denning L.J. indicated that legislative functions had to be performed by the minister personally; but Bucknill and Jenkins L.JJ. at 619, 629–630) were of the contrary opinion.

[529] *Oladehinde*, 281–282, CA.

[530] *Oladehinde* QBD at 260; CA at 282.

[531] In the HL, Lord Griffiths perhaps went further in stating that development of authority to officials under the *Carltona* principle was permissible "providing . . . that the decisions are suitable to their grading and experience" at 303); *R. (on the application of Chief Constable of the West Midlands Police) v Birmingham Magistrate's Court* [2002] EWHC 1087; [2003] Crim. L.R. at 37 [10] (Sedley L.J. considered that delegation had to be to "somebody suitable" but that question was for the official subject to the test of irrationality).

[532] *R. v North Thames Regional Health Authority and Chelsea and Westminster NHS Trust Ex p. L* [1996] Med L.R. 385 (Sedley J., although the Trust had no express power to delegate disciplinary powers to the Regional Health Authority, certain stages of the disciplinary process might be delegated, although the Trust alone had the duty to evaluate the findings of the inquiry).

[533] For example, the application task and the consultation task in *Chief Constable of the West Midlands Police* [2002] EWHC 1087,[2003] Crim. L.R. 37 and the different tasks involved in the disciplinary functions in *North Thames RHA* [1996] Med. L.R. 385 ; *E v Hertsmere BC Ex p. Woolgar* [1996] 2 F.C.R. 69 (powers of investigation, but not ultimate decision, may be delegated).

[534] See e.g. Immigration Act 1971, ss.13(5), 14(3) and 15(4), which referred to action by the minister "and not by a person acting under his authority".

[535] *Customs and Excise Cmrs v Cure and Deeley Ltd* [1962] 1 Q.B. 340 (conferment by Parliament of express power of delegation on Commissioners deprived them of previously existing benefit of Carltona principle): but compare *Carltona* itself.

implication will not readily be drawn.[536] It has also been suggested that the principle may be impliedly excluded where it appears inconsistent with the intention of Parliament as evinced by a statutory framework of powers and responsibilities.[537] However, where the Immigration Act 1971 apparently clearly divided responsibilities between immigration officers and the Secretary of State, the Court of Appeal and House of Lords held that the *Carltona* principle enabled powers of the Secretary of State to be exercised by immigration officers. In the Court of Appeal it was said that the *Carltona* principle was not merely an implication which would be read into a statute in the absence of any clear contrary indication, but was a common law constitutional principle, which could not be excluded by implication unless "a challenge could be mounted on the possibly broader basis that the decision to devolve authority was *Wednesbury* unreasonable".[538] The House of Lords allowed the devolution of power on the narrower ground that the implication to exclude could not be drawn; the devolution did "not conflict with or embarrass [the officers] in the discharge of their specific statutory duties under the Act".[539] Although their statutory analysis may be questioned,[540] the approach of the House of Lords accorded greater weight than the Court of Appeal to Parliament's intent.

5–168 Does the *Carltona* principle apply to public authorities or officers besides ministers?[541] Powers of the Queen or Governor in Council may be exercised by a minister or official in his department, although any formal decision necessarily will be made by the Queen in Council.[542] Powers conferred on senior departmental officers may be devolved to more junior officials in the department.[543] In *Nelms v Roe*[544] the Divisional Court

[536] *O'Reilly v Commissioner of State Bank of Victoria* (1982) 44 A.L.R. 27; (1983) 153 C.L.R. 1. *Cf. Re Reference Under s.11 of the Ombudsman Act* (1979) 2 A.L.D. 86; cf. *Lanham* 600–603.

[537] *Ramawad v Minister of Manpower and Immigration* (1978) 81 D.L.R. (3rd) 687; *Sean Investments v MacKellar* (1981) 38 A.L.R. 363.

[538] *Oladehinde* CA, 282 (Lord Donaldson M.R.).For unreasonableness, see Ch.11.

[539] *Oladehinde* HL, 303 (Lord Griffiths). This conclusion was influenced by the fact that the minister retained a personal role in reviewing and signing each deportation order.

[540] Weight was placed on several explicit limitations of the minister's powers to him personally, as excluding further implicit limitations; yet it was surely consistent of Parliament to intend some powers to be exercised by the minister personally, some to be exercised by the minister or his civil servants in the department, and others to be exercised by immigration officers as the statutory scheme appeared to require.

[541] See e.g. *Lanham* 604 *et seq*.

[542] *FAI Insurances Ltd v Winneke* (1982) 41 A.L.R. 1; (1982) 151 C.L.R. 342; *South Australia v O'Shea* (1987) 163 C.L.R. 378; *Cf. Attorney-General v Brent* [1956] 2 D.L.R. (2nd) 503.

[543] *Commissioners of Customs and Excise v Cure and Deeley* [1962] 1 Q.B. 340; *O'Reilly v Commissioners of State Bank of Victoria* (1982) 44 A.L.R. 27; (1983) 153 C.L.R. 1; *R. v Secretary of State for the Home Department Ex p. Sherwin* (1996) 32 B.M.L.R. 1. (*Carltona* applied to the Benefits Agency which was held to be part of the Department of Social Security and the agency staff belonged to the Civil Service). See also *R. v Greater Manchester Police Authority Ex p. Century Motors (Farnworth) Ltd, The Times*, May 31, 1996; *Cf.* R. v *Oxfordshire CC Ex p. Pittick* [1995] C.O.D. 397 (Education Act 1981 s.7(2)—council had not improperly delegated its duty to provide special needs education to the school); *R. v Harrow LBC Ex p. M* [1997] 3 F.C.R.. 761 (obligations on a local education authority under

upheld a decision of a police inspector acting on behalf of the Metropolitan Police Commissioner, on whom the power had been conferred. However, Lord Parker did not think that the inspector could be considered the alter ego of the Commissioner and preferred to base the case on implied delegated authority.

5–169 However, the Court of Appeal has held that the *Carltona* principle is transferable to non-ministerial bodies and that applications for antisocial behaviour orders (ASBOs) could be made by junior police officers despite the fact that the power was conferred upon a local council or chief officer of police. Sedley L.J. stressed that *Carltona* was based not only on convenience (the alter ego aspect) but also upon the fact that the minister continued to be responsible for the decision taken by the official in his department. Provided that (a) the power is delegable, and (b) is not required to be performed by a particularly qualified individual (such as a medical officer of health or a statutory inspector), it may be exercised at different levels. The delegation or devolution of powers was, in those circumstances, for the Chief Constable to decide, and the court could not second-guess him unless his choice was irrational or beyond his powers.[545]

Acting under dictation

5–170 An authority entrusted with a discretion must not, in the purported exercise of its discretion, act under the dictation of another body or person. In at least two Commonwealth cases, licensing bodies were found to have taken decisions on the instructions of the heads of government who were prompted by extraneous motives.[546] But, as less colourful cases illustrate, it is enough to show that a decision which ought to have been based on the exercise of independent judgment was dictated by those not entrusted with the power to decide,[547] although it remains a question of fact whether the repository of discretion abdicated it in the face of external pressure.[548] And it is immaterial that the external authority has not sought to impose its policy. For instance, where a local authority, in assessing compensation for loss of office, erroneously made certain deductions because it thought it was obliged to do so, having regard to the practice

Education Act 1993 s.168 to arrange that special educational provision be made for a child was not delegable); *MFI Furniture Centre Ltd v Hibbert* (1996) 160 J.P. 178 (validity of council's Minutes of Delegation).

[544] [1970] 1 W.L.R. 4 at 8 (Lord Parker C.J.).

[545] *R. (on the application of Chief Constable of the west Midlands) v Birminghan Magistrates Court* [2002] EWHC 1087(Admin); [2003] Gin L.R. 37, [16].

[546] *Roncarelli v Duplessis* [1959] S.C.R. 121: *Rowjee v State of Andhra Pradesh*, AIr 1964 S.C. 962. And see *Ellis-Don Ltd v Ontario (Labour Relations Board)* [2001] 1 S.C.R. 221; *Canada (Minister of Citizenship and Immigration) v Thamotharem*, 2007 F.C.A. 198 (cases involving the interference with the decision-making independence of adjudicators).

[547] *McLoughlin v Minister for Social Welfare* [1958] I.R. 1 at 27.

[548] *Hlookoff v City of Vancouver* (1968) 65 D.L.R. (2nd) 71; 63 W.W.R. 129; *Malloch v Aberdeen Corp (No.2)* 1974 S.L.T. 253 at 264.

followed in such cases by the Treasury (to which an appeal lay from its decisions), mandamus issued to compel it to determine the claim according to law.[549] Where a minister entertaining a planning appeal dismissed the appeal purely on the strength of policy objections entered by another minister, it was held that his decision had to be quashed because he had, in effect, surrendered his discretion to the other minister.[550] Authorities directly entrusted with statutory discretions, be they executive officers or members of distinct tribunals, are usually entitled and are often obliged to take into account considerations of public policy, and in some contexts the policy of a minister or of the Government as a whole may be a relevant factor in weighing those considerations;[551] but this will not absolve them from their duty to exercise their personal judgment in individual cases,[552] unless explicit statutory provision has been made for them to be given binding instructions by a superior,[553] or (possibly) unless the cumulative effect of the subject-matter and their hierarchical subordination[554] (in the case of civil servants and local government officers)[555] make it clear that it is constitutionally proper for them to receive and obey instructions conveyed in the proper manner and form.[556]

[549] *R. v Stepney Corp* [1902] 1 K.B. 317; *Buttle v Buttle* [1953] 1 W.L.R. 1217.

[550] *Lavender (H) & Son Ltd v Minister of Housing and Local Government* [1970] 1 W.L.R. 1231 (where the other minister might be said to have imposed his policy); *Cf. Kent CC v Secretary of State for the Environment* (1977) 75 L.G.R. 452. See also *R. v Secretary of State for Trade and Industry Ex p. Lonrho Plc* [1989] 1 W.L.R. 525 at 583 (Lord Keith said that "the discretion . . . must be exercised by him and not at the dictation of another minister or body"); *Ainooson v Secretary of State for the Home Department* [1973] Imm.A.R. 43.

[551] *Cf. R. v Mahony Ex p. Johnson* (1931) 46 C.L.R. 131 at 145; *R. v Anderson Ex p. Ipec-Air Pty Ltd* (1965) 113 C.L.R. 177; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 17 A.L.R. 513; *Re Innisfi (Township of) and Barrie (City of)* (1977) 80 D.L.R. (3rd) 85. See also *Roberts v Dorset CC* (1977) 75 L.G.R. 462 (adoption by local authority of central government circular). *Cf. Re Multi-Malls Inc and Minister of Transportation and Communications* (1977) 73 D.L.R. (3rd) 18 (minister's refusal of permit for proposed development invalid because he had regard to general government planning policy, rather than limiting his decision to road traffic matters).

[552] See *Ipec-Air* (1965) 113 C.L.R. 177 for divergent expressions of opinion on the question of how far a decision of the Director-General of Civil Aviation (a public officer) to refuse permission to import aircraft and to refuse a charter licence to operate an inter-state air service could properly be predetermined by current government policy. On government policy as a "relevant consideration", *R. v Parole Board Ex p. Watson* [1996] 1 W.L.R. 906 (Parole Board must make up its own mind and not simply review Secretary of State's reasons for revocation of parole); *Cf. R. (on the application of S (A Child)) v Brent LBC* [2002] EWCA Civ 693; [2002] E.L.R. 556 (a view that statutory guidance re pupil exclusion should "normally" be upheld was not an unlawful exercise of discretion).

[553] *Laker Airways Ltd v Department of Trade* [1977] Q.B. 643 at 698–700, 713, 714, 724–725, considering the Civil Aviation Act 1971 at s.4(3) (power of Secretary of State to give specific directions to licensing authority for certain purposes); and s.3(2) authorising the Secretary of State to issue guidance to the authority on the performance of its statutory functions which it must perform "as it considers is in accordance with the guidance".

[554] I. Zamir, "Administrative Control of Administrative Action" (1969) 57 California L.R. 866.

[555] But in local government, treasurers have been obliged to obey the law and to disobey the council's instructions if contrary to law.

[556] *Cf. Simms Motor Units Ltd v Minister of Labour and National Service* [1946] 2 All E.R. 201 (where instructions were communicated to the officers in an unauthorised form).

5–171 The rule against acting under dictation—as a "puppet" of another authority does not however mean that authority X cannot, if it possesses the power, authorise a decision by authority Y , so long as authority X maintains control of the ultimate decision. In *Audit Commission for England and Wales v Ealing LBC*[557] the Audit Commission, in carrying out its performance assessment of local authorities, relied on the Commission for Social Care Inspection to conduct an assessment of performance in the social services. The Court of Appeal held that the Audit Commission had maintained control over the assessment principles and the ultimate decision, to which it had applied its mind, and therefore had not acted under the dictation of the Social Care Commission.[558]

5–172 Needless to say, a duty not to comply with executive instructions[559] to decide individual cases in a particular way is always strictly cast upon courts.[560]

[557] [2005] EWCA Civ 556; (2005) 8 C.C.L. Rep. 317.
[558] J. Brair, "When is a Fetter not a Fetter?" [2005] J.R. 217.
[559] Or advice: *Sankey v Whitlam* [1977] 1 N.S.W.L.R. 333.
[560] *Evans v Donaldson* (1909) 9 C.L.R. 140; *Ex p. Duncan* (1904) 4 S.R. (N.S.W) 217; *R. (Courtney) v Emerson*.[1913] 2 I.R. 377. See also *Buttle v Buttle* [1953] 1 W.L.R. 1217.