THE ENGLISH PROCEDURE FOR JUDICIAL REVIEW – ITS EVOLVEMENT

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Prior to 1977 the machinery for invoking the courts' supervisory jurisdiction was in many respects unsatisfactory. Judicial control over the legality of administrative acts or omissions could be invoked at the instance of an individual by five different methods. Firstly, an application could be made for the prerogative order of certiorari to quash a decision which had already been made by an inferior court or administrative tribunal or other public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice. It also lay where there was an error of law on the face of the record of the decision of such a tribunal. Secondly, the prerogative order of prohibition lay to prevent such bodies from acting or continuing to act in excess or abuse of jurisdiction or contrary to the rules of natural justice. Mandamus lay to compel the performance of a public duty.

In addition to the prerogative orders, the remedies of declaration and injunction came to be used, largely to circumvent the time limit in applications for certiorari and to obtain discovery of documents from the defendant. The resort to the ordinary action for a declaration was encouraged by the courts. *Barnard v. National Dock Labour Board*[1] concerned dock workers in London, who had been dismissed for refusing to operate a new system. There was a very long strike and then subsequently actions were begun for declarations that the dismissals were illegal. This enabled the plaintiff to obtain discovery of documents as a result of which he was

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1. [1953] 2 Q.B. 18.

able to establish the order was made by the wrong authority. A declaration was sought that its suspensions were unlawful and therefore a nullity. Denning, L.J., as he then was, said in his judgment[2]:

> I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself; and the court should not, I think tie its hands in this matter of statutory tribunals. It is axiomatic that when a statutory tribunal sits to administer justice, it must act in accordance with the law. Parliament clearly so intended. If the tribunal does not observe the law what is to be done? The remedy by certiorari is hedged round by limitations and may not be available. Why then should not the court intervene by declaration and injunction? If it cannot so intervene, it would mean that the tribunal could disregard the law, which is a thing no one can do in this country.

Further encouragement was given by the House of Lords in *Vine v. The National Dock Labour Board*[3] and *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government.*[4] Indeed, a declaration was sought and granted in *Ridge v. Bladwin* that the Chief Constable had been unlawfully removed from his office.

However, there were certain limitations on the use of declarations as a method of controlling the acts or omissions of public authorities. The criteria to be applied in deciding whether a party had a sufficient interest entitling him to ask for a declaration were somewhat stricter than those applicable to prerogative orders, and in particular to certiorari. Further, a declaration only states the legal position; it does not order or prohibit any action; and it cannot quash a decision which a body has made within its jurisdiction. Although an injunction avoids some of the disadvantages of the declaration since it orders or prohibits action on the part of the public authority, it did not lie against the Crown. Another matter which gave rise to considerable concern was that an application for a prerogative order could not be made in conjunction with an application for any other remedy, namely an injunction, a declaration or damages.

The Law Commission in its report on "Remedies in Administrative Law", made at the request of the Lord Chancellor,[5]

2. Ibid., 41.
3. [1957] A.C. 488.
4. [1960] A.C. 260.
5. [1976] Cmnd. 6407.

in relation to the unsatisfactory nature of the position quoted the late Professor S. A. de Smith's evidence to the Franks Committee:

> Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against usurpation or abuse of power by administrative tribunals — remedies which overlap but do not coincide, must be sought in wholly distinct forms of proceedings which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedeviled by the old forms of the action.

The basic recommendation of the Law Commission was that there should be a new form of procedure to be entitled an "application for judicial review". Under the cover of the application for judicial review, a litigant should be able to obtain any of the prerogative orders, or, in appropriate circumstances, a declaration or injunction. The litigant would have to specify in his application for judicial review which particular remedy or remedies he was seeking, but if he later desired to apply for a remedy for which he had not initially asked he would be able with the leave of the court to amend his application. The litigant's choice of remedies would no longer be limited to the prerogative orders but would also include, in appropriate circumstances, a declaration or an injunction, but the essential characteristics of the remedies would remain.

The Law Commission acknowledged that an "application for judicial review" of a somewhat similar kind to their recommendation was introduced in Ontario by the *Judicial Review Procedure Act, 1971*. The Commission pointed out, however, that the Ontario Act limited the procedure of review by way of declarations and injunctions to the "exercise, refusal to exercise or proposed or purported exercise of a statutory power." This approach is inappropriate to English administrative law, where it is clear that judicial review is not limited to bodies exercising statutory powers.

The Commission was anxious that the procedure should provide an expeditious method whereby the court could sift out the cases with no chance of success at relatively little cost to the applicant and no cost to any prospective respondent. It therefore proposed that the requirement of leave to proceed which had characterized applications for the prerogative orders should be retained. They recommended that the hearing for leave should be before a single judge and that the Divisional Court, once leave has been granted, should have power to order that the hearing and

determination of the application should be by a single judge. As to the "standing" required to bring an application for judicial review, which had given rise to many problems, in order to avoid undesirable rigidity they proposed that the applicants should have such interest as the court considers sufficient in the matter to which the application relates. It further recommended that discovery should be available, although not automatic, and specific provision to enable the court in appropriate circumstances to order interrogatories or the attendance for cross-examination of persons making affidavits. Before leaving the Commission's report it is significant, in view of the decision of the House of Lords, to be referred to at some length hereafter namely *O'Reilly v. Mackman,*[6] to note that in paragraph 34 of their report the Commission said:

> Public law issues concerning the legality of acts or omissions of persons or bodies do not arise only in relation to applications to the Divisional Court for prerogative orders. They may be the indirect subject of an ordinary action for a declaration or an injunction; and they may also arise collaterally in ordinary actions, or indeed in criminal proceedings. In Working Paper No. 40 we tentatively proposed that where, for example, in an action for damages in respect of trespass to land the defence is raised that the defendant was a public authority exercising its legal powers, the issue of public law involved should be referred to the Divisional Court. In the light of our consultation we are clearly of the opinion that the new procedure we envisage in respect of applications to the Divisional Court should not be exclusive in the sense that it will become the only way which issues relating to the acts or omissions of public authorities could come before the courts.

In 1977 there was introduced into the rules of the Supreme Court a new Order 53 "application for judicial review." This gave effect to the principal recommendations of the Law Commission although in rule 4 it made specific provision for the application to be made "promptly" and in any event within three months from the date when grounds for the application first arose unless the court considers there is good reason for extending the period within which the application should be made.

The first of the landmark decisions in relation to the new Order 53, in particular rule 3(7)[7] focused upon the standing to sue, which the applicant has to establish; namely, "a sufficient interest in the matter to which the application relates." *The National Federation of Self-Employed v. Small Businesses Limited*[8] concerned tax eva-

6. [1983] 2 A.C. 237.
7. Given statutory force by section 31(3) of the *Supreme Court Act, 1981.*
8. [1982] A.C. 617.

sion which had been rife in Fleet Street for many years, casual workers signing pay sheets with pseudonyms like "Mickey Mouse". The applicant Federation sought to challenge arrangements between the unions and employers and the Revenue providing for a species of amnesty against back tax claims. In his speech, Lord Diplock expressed agreement with the observation made by Lord Denning, M.R., in *Regina v. Greater London Council, Ex parte Blackburn*[9] where he had said:

> I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate.

Lord Diplock expressed himself thus[10]:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the Federation, or even a single public-spirited tax payer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The Attorney-General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.

Thus, a more liberal approach to the standing of an applicant for judicial review was adopted than would apply in an ordinary action at law for a declaration. In practice it is not until after the application has been heard on its merits that the decision can be made whether the applicant has sufficient interest. It would only be in a rare and simple case which disclosed no merits in the legal and/or factual context that leave would be refused on grounds of lack of standing.

In *O'Reilly v. Mackman,*[11] there occurred what I might respectfully call a highly significant example of judicial legislation. I have

9. [1976] 1 W.L.R. 550, at 559.
10. [1982] A.C. 617, at 644.
11. Supra, n. 6

already pointed out that the Law Commission in terms recommended the remedy by way of judicial review should not be treated as an exclusive one. Neither the Rule Committee nor even Parliament when enacting the *Supreme Court Act, 1981* made any such provision. This did not, however, inhibit the courts from inventing it. The four plaintiffs in the proceedings were all at some date prisoners in Hull prison. The first three took part in a major riot in that prison in the summer of 1976. The fourth took part in a riot in April 1979. In due course all four men were charged with offences before the Board of Visitors of Hull prison and various penalties were imposed. In 1980 they began proceedings, the first three by writs, the fourth by originating summons, claiming declarations that the adjudications of the visitors were null and void by reason of breaches of natural justice. The visitor applied to have the proceedings struck out as an abuse of the process of the court. This was refused at first instance but granted by the Court of Appeal and the House of Lords.

In his judgment, Lord Denning, M.R., said[12]:

> ... wherever there is available a remedy by judicial review under section 31 of the Supreme Court Act 1981 that remedy should be the normal remedy to be taken by an applicant. If a plaintiff should bring an action — instead of judicial review — and the defendant feels that leave would never have been granted under R.S.C. Order 53 then he can apply to the court to strike it out as being an abuse of the process of the courts. It is an abuse to go back to the old machinery instead of using the new streamlined machinery. It is an abuse to go by action when he would never have been granted leave to go for judicial review.

Lord Diplock agreed. He said[13]:

> So Order 53 since 1977 has provided a procedure by which every type of remedy for infringement of the rights of individuals that are entitled to protection in public law can be obtained in one and the same proceeding by way of an application for judicial review, and whichever remedy is found to be the most appropriate in the light of what has emerged upon the hearing of the application can be granted to him. If what should emerge is that his complaint is not an infringement of any of his rights that are entitled to protection in public law, but may be an infringement of his rights in private law and thus not a proper subject for judicial review, the court has power under rule 9(5) instead of refusing the application, to order the proceedings to continue as if they had begun by writ.

12. Ibid., 258.
13. Ibid., 283.

He then dealt with the question of exclusivity in these terms:

> My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law; nor does section 31 of the Supreme Court Act 1981.
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> There is great variation between individual cases that fall within Order 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse....

The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under Order 53) despite the fact that this procedure had the effect of depriving the defendant of the protection available to statutory tribunals and public authorities which for public policy reasons Order 53 provided.

Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.

Professor Sir William Wade, Q.C., in the fifth Child & Co. Oxford Lecture,[14] while protesting that he was "far from criticising the decision" blamed the Law Commission for failing to recommend the removal of the illogicalities inherent in the dual system of remedies. He accepted that the force of Lord Denning's and Lord

14. Delivered on 28 February 1985; see 101 L.Q. Rev. 180.

Diplock's arguments were in the circumstances irresistible. What he criticized is the resulting state of the law saying,

> For now we have a dichotomy and a formulary system under which a complainant may lose his case, not because it has no merits, but simply because he has chosen the wrong form of action. This runs counter to the whole spirit of modern procedure reform as I have already said. It is, to quote a learned friend and colleague, 'a singularly unfortunate step back to the technicalities of a bygone age.'[15]

More critical are the views expressed in a lecture given about the same time by Sir Patrick Neill, Q.C., Vice-Chancellor of the University of Oxford. He compared the progress of the courts as being like a game of snakes and ladders and he categorized the decision in *O'Reilly v. Mackman* as the longest and most fearsome of the snakes. However, Lord Justice Woolf giving the second Harry Street Lecture at the University of Manchester in February 1986 strongly joined issue with the academics, contending that so far from being a snake, the *O'Reilly* decision was a ladder which (so far as procedure is concerned) reaches almost to the winning post. For Lord Justice Woolf, the snake is the decision of the House of Lords, *Wandsworth London Borough Council v. Winder*, where it was held that it was permissible to raise as a defence in an ordinary action an allegation that a decision of a public body was unlawful, without having to comply with any of the restrictions applicable to judicial review. I am bound to say that the views of the learned Lord Justice provides me with a small consolation, since I presided in the Court of Appeal when *Winder's* case was heard and it was my dissenting judgment which the appellant, Wandsworth Borough Council, sought to uphold. Perhaps I may be, in these circumstances, forgiven for quoting a part of Lord Justice Woolf's article:

> In my role as Treasury Devil before the introduction of the new Order 53, I was regularly engaged in taking technical points in relation to applications for prerogative orders against Government departments before a Divisional Court presided over by the then Lord Chief Justice, by whom normally all such applications were heard. By 1977, that court was sinking under an increasing workload and, in an attempt to survive it was disposing of a material number of applications on arguments based on these technical points. It was this state of affairs that drove applicants to seek declarations usually in the Chancery Division and this essentially private law procedure proved capable of providing a valuable public law remedy, but it did have the disadvantage that the applicant had to show that his

15. Quoting J.A. Jolowicz, [1983] Camb.L.J. 18.

> private rights had been affected or that at least that he had suffered special damage. Then, as a result of the recommendation of the Law Commission in 1977, Order 53 was amended and the new flexible procedure of an application for judicial review was introduced. It became possible to obtain in the one application in the Divisional Court prerogative orders and declarations as well as injunctions and damages. However, this was only the first stage of the reform. The second stage in 1980 involved removing the hearing of civil applications from the overcrowded Divisional Court to a limited number of single judges. They were nominated to deal with the applications so as to promote consistency and speed in their disposal.

Woolf, L.J., then refers to the special features of Order 53 and points out that it is essential to bear in mind that an application for judicial review is designed to enforce public law duties and that, therefore, it is not only the interests of the parties to the application who have to be considered. The position of the public in general must be taken into account, since public law is designed to protect the public as a whole as well as any individual applicant. He continues:

> The public has a very real interest in seeing that litigation does not necessarily and unduly interfere with the process of Government both at national and local level. The courts have a very delicate task to perform. If the extent of the intervention becomes intolerable, then Parliament at any rate can ensure that the courts powers are curtailed. If the procedure is too expensive then the applicant may be deterred.

He then points out how the various characteristics of the new Order 53 assist the court in performing this balancing operation and that it is because the courts have this assistance that they have had the confidence to expand their supervisory role.

Although when comparing the ordinary period of limitation, a normal period for making an application for judicial review of three months may seem very short, yet in many applications delay can cause considerable uncertainty and inconvenience not only for the respondent authority but for members of the public as well.

Can the principle laid down in *O'Reilly v. Mackman*, even carried to its logical conclusion, cause difficulties in practice? Woolf, L.J., thought not. Order 53 has built within it a power to direct that an action started by way of judicial review should be able to be continued as though begun by writ. Although there is no reverse escape route this is to prevent bypassing the safeguards provided in the Order by commencing an action by writ when it should have been commenced by judicial review. In case of doubt the applicant should proceed initially by judicial review just in case leave is necessary.