

## **GOLDEN RULES FOR MAKING THE DECISION**

### **SAIRA KABIR SHEIKH**

1. The role of the courts in judicial review proceedings arising from administrative decisions made by public bodies exercising a discretion entrusted to them by Parliament was aptly summed up by Lawton L.J. in *Laker Airways Ltd v Department of Trade* [1977] QB 643, 724 D-E:

“In a case such as this I regard myself as a referee. I can blow my whistle when the ball goes out of play; but when the game restarts I must neither take part nor tell the players how to play.”

2. The case was in relation to the Civil Aviation Act 1971 and a licence granted to Laker Airways pursuant to its provisions. The Secretary of State sought to revoke the licence through issuing new policy guidance. The Court of Appeal upheld the challenge by Laker Airways that the 1971 Act fettered the Secretary of State’s power to do so. Therefore, the Secretary of State’s purported actions were unlawful.
3. In other words as Lawton LJ stated – the ball went out of play! Judicial review challenges are concerned with the decision making process and its legality. It is not a matter of whether the court agrees with the decision itself. Hence the question is not whether the decision is correct but whether it is legal. It is the lawfulness and not the wisdom of the decision that is susceptible to challenge.
4. Other formulations of the Court’s role on judicial review can be found in *Sutton London Borough Council v Davis* [1994] Fam 241 where the court made clear that a decision can be lawful without being correct. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 the court held:

“It is quite unacceptable...to proceed from wrong to unreasonable...History is replete with genuine accusations of unreasonableness when all that is involved is disagreement, perhaps passionate, between reasonable people”

In *R v Local Government Boundary Commission, ex p Somerset, Avon & Cleveland County Councils* [1994] COD 517 the court stated:

“ours not to reason why; we have to see whether there was a judicially reviewable error”

5. There are judicial review challenges where the correctness of the decision is under consideration. These are an exception to the rule against the substituting the court’s view for that of the public body. They are matters of objective judgement for the court where although they involve questions which the public body has to decide, the court is not permitted to get them wrong.

6. Such matters include issues relating to the correct meaning of the law. Therefore, in *R v Secretary of State for the Home Department, ex p Zeenat Bibi* [1994] Imm AR 326 the question of the legal status of marriage was one on which the court made up its own mind. Similarly, statutory interpretation is a matter of law for the courts. In *R v Director General of Water Services, ex p Oldham Metropolitan Borough Council* (1998) 96 LGR 396, 409 e-f the question of whether or not the water supply had been cut off was a question of interpretation and therefore a question of law for the Court to decide.
7. A “precedent fact” is regarded as a fundamental condition precedent to the proper exercise of a public body’s function such as that the body is not permitted to answer it incorrectly. For example, in *R v Oldham Metropolitan Borough Council, ex p Garlick* [1993] AC 509, 520E the court identified the question of jurisdiction as a precedent fact which therefore needed to be determined by the court.
8. The matter can be summed up thus per *R v Central Arbitration Committee, ex p BTP Tioxide Ltd* [1981] ICR 843, 856 B –D:

“A tribunal either misdirects itself in law or not according to whether it has got the law right or wrong, and that depends on what the law is and not on what a lay tribunal might reasonably think it was. In this field there are no marks for trying hard but getting the answer wrong”

9. Issues relating to procedural fairness are also subject to objective standards and determined by the courts. In *R (Mahfouz) v General Medical Council* [2004] EWCA Civ 233 Carnwath LJ held:

“Where it is alleged that a lower tribunal has acted in breach of the rules of fairness or natural justice, the court is not confined to reviewing the reasoning of the tribunal on Wednesbury principles. It must make its own independent judgement ... Furthermore, the question of whether there has been a breach of those principles is one of law, not fact”

10. Consequently, in *R (Medway Council) v Secretary of State for Transport* [2002] EWHC 2516 the Court robustly asserted its role by stating that:

“It is for the Court to decide what is or is not fair. If a consultation procedure is unfair, it does not lie in the mouth of the public authority to contend that it had a discretion to adopt such a procedure.”

11. The approach to challenges made on human rights grounds has its own place and in *R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26 it was stated that the doctrine of proportionality “may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions” and “may require attention to be directed to the relative weight accorded to interests and considerations”. However the court was quick to point out that “this does not mean that there has been a shift to merits review.”

12. Indeed, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and Regions* [2001] UKHL 23 held that proportionality “does not go so far as to provide for a complete rehearing on the merits of the decision.” Other speakers deal with the particular approach of the Court in human rights challenges and therefore I do not deal with this matter further.
13. However, it can be seen that there are two main types of judicial review challenge. These have been characterised as those relating to a “broad judgment whose outcome could be overturned only on the ground of irrationality” and “a hard –edged question where there is no room for legitimate disagreement (*R v Monopolies & Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] per Lord Mustill).
14. This paper deals mainly with the former challenge, in other words, decisions where public bodies are subject to review on the basis of the decision making process rather than the interpretation of law.

### **Decision making check list**

15. A public body can to a large extent insulate itself from a successful challenge to its decision making if it asks itself some key questions. The main areas are dealt with below but this list is by no means intended to be exhaustive. During the decision making process, the following questions should be asked:

#### **Is there power to make the decision?**

16. Before any decision making is embarked upon a public body must confirm that it has the requisite power to do so. This is a matter of particular importance where a public body intends to discharge its decision making functions through an officer or department. If the power to make the particular decision has not been delegated properly to the purported decision maker it will be of no legal effect and ultra vires.
17. Hence in *R( S & B) v Independent Appeal Panel of Birmingham City Council* [2006] EWHC 2369 the Court held that the Committee Services Department which had made certain listing decisions in relation to appeals by students against their exclusion from school had no power to do so as there had been no delegation by the Appeal Panel. In any event, the relevant regulations gave the power to combine appeals to the Appeal Panel and this matter could not be delegated to the Committee Service Department.

#### **Has there been sufficient inquiry into the facts?**

18. Before any decision making it is essential to be fully informed of all the material facts and circumstances. This does not mean that a public body must investigate every detail and every inconsistency. However, there must be sufficient inquiry in order to enable a fair decision making process. In *R v Secretary of State for the Home Department, ex p Gashi* [1999] INLR 276 it was held that there had been a failure to make sufficient inquiry where striking statistics called for an explanation. The question of the extent of the inquiry is a matter for the decision maker and will depend on the circumstances of the issue at hand. A court is unlikely to interfere with the decision making of a public body if they have:
- (i) Taken adequate steps to inform themselves of the position

- (ii) Properly considered the information which is available to them
  - (iii) Come to an opinion which is consistent with that information recognising that it is their responsibility to evaluate the material which is available to them (*R v Secretary of State for the Home Department, ex parte Lyadurai* [1998] Imm AR 470)
19. The key point is to be satisfied as a decision maker is that there is sufficient evidential basis for the decision. If the above steps are reasonably undertaken, it will be difficult for a claimant successfully to challenge the decision.

**Is the decision broadly consistent with other similar situations?**

20. Consistency is a principle of good administration. Inconsistency between persons in a similar position will indicate unreasonableness. For example, in *R(Ali) v Birmingham City Council* [2008] EWCA Civ 48 the housing policy was found to be unlawful as it created an unjustified distinction between categories of homeless person. In *R v Director General of Electricity Supply, ex p Scottish Power Plc*, 3<sup>rd</sup> February 1997 the Court found that there was no valid or rational basis for treating electricity supply companies differently.
21. If, however, it is necessary to reach a different decision to an earlier one then the decision maker must ensure that it has good and sound reasons for so doing. There is no embargo on departing from previous outcomes as long as it is justified. If the decision maker recognises the importance of fostering consistency but provides proper reasoning as to why it is necessary to depart from a previous decision in the circumstances of the particular matter it will usually be possible to insulate itself from a successful challenge based on unfairness or irrationality.
22. Successful challenges based on inconsistency are not usually due to the mere fact of the inconsistency but the lack of any rational explanation for taking a divergent course. Therefore, in *M v Secretary of State for the Home Department* [2003] EWCA Civ 146 the Secretary of State was obliged to explain why he was taking a different view from the criminal court which had declined to recommend deportation. The Court in *North Wiltshire District Council v Secretary of State for the Environment* [1992] PLR 113 made clear that where a planning inspector departed from a previous decision it must be made clear why he was taking this course.
23. If clear and rational reasons do not readily present themselves for departing from earlier decisions, it should sound a warning bell to the decision maker that its proposed course may be susceptible to a claim based on arbitrariness or unreasonableness.
24. Conversely, in some cases it is necessary for the decision maker to recognise that those in similar positions need to be treated differently, for example due to their differing needs. Where there are different requirements within a group of persons in a similar position it may be irrational to fail to distinguish between them.
25. An example of this situation is found in the case of *R v Tower Hamlets London Borough Council, ex p Uddin* (2000) 32 HLR 391 where the housing authority's housing transfer points scheme was found to be irrational for failing to discriminate in favour of those with greater needs. Tenants of the housing authority applied for transfers on the basis of medical needs and were awarded points by the housing

authority's medical officer, with priority given to those holding higher numbers of points. In essence the housing authority operated a scheme for allocating properties to tenants who applied to them for transfers. Applicants were assigned to one of five groups: Health, Decants, Under-occupiers, Management and General. Every six months, a proportion of the anticipated housing vacancies was allocated to each group.

26. The authority operated a points system for each group. Points for applicants within the Health group were awarded by the authority's medical officer. There were four categories representing different levels of illness or disability. The relevant category for an applicant was determined by whether his household included a person with a specific type of medical need. The points system did not, however, provide for additional points to be awarded if more than one member of the household had a medical need.
27. The claimant in this case sought judicial review of the authority's decision, refusing his transfer request. Three of his children were anaemic and one also suffered from leukaemia and he contended that it was irrational not to take account of the cumulative effect in cases of multiple medical need. The court allowed his challenge and granted a declaration that a household containing more than one person with medical needs had to be considered as being in greater need than a household with only one person with an equivalent need. The Court stated that a rational allocations policy ought properly to allow for such a contingency. Accordingly, the court held that the authority's policy was unlawful.

**Has all relevant policy guidance been taken into account?**

28. It is essential to be clear as to whether there is applicable policy guidance and whether it is statutory or non statutory. For the former the duty is to comply with it unless there is good reason for departure while with the latter the requirement is that it is conscientiously to be taken into account (*R v Islington London Borough Council, ex p Rixon* [1997]ELR 66).
29. Therefore, again, a decision maker can protect itself from a decision contrary to even statutory guidance as long as it is "given great weight"...complies with the duty to "consider with great care"...and to..."depart only if it has cogent reasons for doing so." These reasons must be spelt out "clearly, logically and convincingly" (*R (Munjaz) v Mersey Care NHS Trust* [ 2005] UKHL 58.
30. If cogent reasons for departing from policy guidance cannot be devised this should indicate a lack of sound justification for doing so and will be likely to render the decision susceptible to a claim for judicial review.

**Have all relevant and only legally relevant considerations been taken into account?**

31. The test here is whether all matters that could be material to the issue at hand have been taken into account in the decision making process. If sufficient inquiry has been undertaken it is likely that such factors have been identified and a decision maker will be secure on this ground.
32. In any challenge, Courts will generally consider whether or not the matter alleged to have been omitted from consideration might have caused the decision maker to reach a

different conclusion (see amongst others, *R V Secretary of State for the Environment, ex p Bolton MBC* (1991) 61 P&CR. Therefore, immaterial or trivial matters that are omitted from consideration will be unlikely to persuade the Court that the decision is unlawful.

33. The list of matters that may be “relevant” or “irrelevant” in any particular case cannot be prescribed. It will be necessary for the decision maker to undertake for himself the test of materiality. This can include matters as far reaching as legitimate expectation, consultation responses or personal circumstances or facts specific to the matter being determined. Matters that may be irrelevant will also need to be carefully assessed on a case by case basis. For example, financial resources of the public body may be relevant in one context but not in another depending on its statutory duties.
34. As long as the proper considerations have been put into the balance a court is most unlikely to interfere other than on traditional *Wednesbury* grounds. The well known formulation of this point is to be found in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 where the court held that the planning authority was entitled to ignore or give no weight to any consideration as long as the decision to do so was based on rational planning grounds.
35. This approach is subject to the caveat in respect of cases dealing with fundamental and human rights (and dealt with in another paper) where, as noted above, the House of Lords has held that the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations (*R v Secretary of State for the Home Department, ex p Daly* [2001] UKHL 26).

#### **Can the decision making process withstand scrutiny by the fair-minded and informed observer?**

36. It is prudent to ensure that any hint of bias in the decision making process is eliminated. Plainly all decisions must be made impartially. However, in cases that are controversial or give rise to public interest it would be prudent to close any potential avenue of challenge in this regard by ensuring that the decision making process is undertaken by those wholly unconnected with the matters at hand. Although the Court would apply a pragmatic approach to a challenge based on actual or apparent bias and not have regard to those “complacent nor unduly sensitive or suspicious” (*R (Port Regis School Ltd) v North Dorset District Council* [2006] EWHC 742) it is expedient to address the matter at the outset and potentially ward off a challenge however unmeritorious on this ground.

#### **Is the decision compatible with the Human Rights Act?**

37. Public bodies must not act incompatibly with the Human Rights Act 1998 and decision makers must ensure that rights under the 1998 Act are not breached. Again, this is dealt with in another paper.
38. Overall, in matters where a public body has been entrusted with the power to make decisions through the exercise of its discretion, if the decision making process is properly undertaken, it is highly unlikely that a challenge to the decision will be successful. Meeting the traditional tests of irrationality, unreasonableness and

perversity are high hurdles to overcome and the Court will be quick to identify differences of opinion as opposed to genuine errors of law.

39. If a public body finds itself unable to satisfy the check list above in any material aspect this ought to flag up a potential problem and possible flaw in the decision making process which should be addressed before a final outcome is reached.
40. A public body should continue to evaluate the process of decision making during the consideration of the matter at hand. In many cases, legitimate objections are received before the final decision is made but during the decision making process whether as a result of consultation or otherwise. A public body should, if the point made is well founded, revisit the element of the process that has given rise to complaint. In many cases, it is relatively straightforward to address the particular matter and ultimately may save time and costs in obviating a challenge to the final decision.

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