INTRODUCTION TO JUDICIAL REVIEW

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(a) Background

1. Today's Seminar deliberately has a defendant's perspective – because so many of our clients are local authorities whose decisions, in respect of a range of statutory functions, are from time to time challenged in the Courts or are developers who wish to support local planning authorities which have granted planning permission only to find the planning permission the subject of a judicial review application. Of course occasionally local authorities will themselves be applicants for judicial review, particularly where central government is considered to have exceeded its powers to the detriment of one or more individual local authorities – for example in relation to local government re-organisation or national policy statements, to give but two recent examples; and relatively frequently local planning authorities seek statutory review in cases where an Inspector (or sometimes the Secretary of State) has overturned their decision to refuse planning permission. But in judicial review a public authority – whether national or local government, or bodies such as the Environment Agency or Natural England, or just occasionally a private body exercising a public function[1] – will be the defendant.

2. This Seminar deliberately concentrates on the procedural "nuts and bolts" of avoiding, defending, and recovering costs in, judicial review, with papers on the more esoteric areas of EU Law and Human Rights at the end of the day. This Introduction has a different purpose: to summarise the substantive legal context within which applications for judicial review are determined.

3. As Lord Bingham has written extra-judicially[2], two key dates in the modern history of Judicial Review were 1977 and 1984. In the former year, quite modest changes in the procedure for seeking judicial review:

> "transformed judicial review from the part-time activity of the few to a mass sport for the many… In the process an old truth was demonstrated: that with courts, as with airlines, a demand only becomes evident when the means exist to meet it."

In the latter year, now 25 years ago, in *Council of Civil Service Unions v Minister for the Civil Service*[3], the House of Lords made clear that almost any exercise of public power, whatever the source of the power, is reviewable by the courts. In Lord Bingham's words:

> "There remain some no-go areas, such as review of the treaty-making power, but they are few."

So far as local authorities are concerned, the most obvious areas which remain beyond the scope of judicial review is when the function being exercised (although, by definition, statutory in origin – as are all local authority powers) is essentially of a private nature – for

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[1] See, for example, the majority decision of the Court of Appeal in *London and Quadrant Housing Trust v Weaver* [2009] EWCA Civ 587 that the act of a registered social landlord in evicting an assured tenant was susceptible to judicial review.

[2] The Business of Judging (2000). Both quotations are from p.208.

[3] [1985] AC 374

example employment of staff, contracting, and land acquisition and disposal[4]. Even in these areas, the line drawn is a fine one. Many disposals under s.123 of the Local Government Act 1972 can be challenged by judicial review; and much contracting is governed by tendering regulations, the breach of which is immediately susceptible to judicial review, the most recent example being the attempt of certain London local authorities to establish a mutual insurance company to reduce their insurance premiums [5]. This scheme failed not merely for reasons of *vires*, as discussed below, but also for failure to comply with public procurement regulations.

4. Though the wings of local authorities have been clipped by successive governments, both in the form of greater interference from the centre and the hiving off of traditional municipal functions to the private sector (or to hybrid private/public bodies, such as housing associations and care-providers, only some of which are subject to judicial review), the range of local authority functions remains extensive, causing all sorts of specialisms (and specialist law journals and reports) to develop in local government law. Nevertheless when an application for judicial review is made, and however many separate grounds are pleaded[6], they will always fall jurisprudentially under three (or at most four) heads, the classic categories of Judicial Review recognized in the *CCSU* case. Illegality, procedural impropriety and irrationality, and the latter's European refinement, proportionality. I need to say a few words about each.

(b) Defending alleged illegality

5. Procedural impropriety and irrationality (as well as absence of proportionality) all constitute errors of law. But the first head, illegality, applies to the very many cases where a public body has misconstrued or misapplied its statutory powers. The recent mutual insurance case, to which I have already referred, is a classic example of this, for, quite apart from the public procurement issue, Brent LBC had wrongly supposed that it had powers, whether under the ancillary power in s.111 of the Local Government Act 1972 or under the well-being power in s.2 of the Local Government Act 2000, to establish a mutual insurance company. Not so, said the Administrative Court last year, now robustly upheld by the Court of Appeal. In many cases where a challenge on grounds of illegality succeeds, the fault lies in not exploring in sufficient detail the elementary question of *vires* before pushing the boat out into novel seas. But it is clear from the judgments that Brent LBC *had* taken the advice of very experienced Leading Counsel (not I may add from these Chambers) who had:

> "considered that section 111 was a better power to rely on than the well-being power, but that both could be relied upon (though not clear cut)"[7].

This shows that not only can Leading Counsel turn out to be wrong, but also that prediction of which way the court will go on an issue of statutory vires is an uncertain business. There is no simple procedure by which a local authority can "test the waters" in cases of marginal legality, and it will be a sad day if local authorities never engage in any "fringe", but (so they are advised) probably legal, activities for fear of getting their fingers judicially burnt.

6. The whole question of taking into account relevant, and leaving out of account irrelevant, considerations is an integral part of lawful decision-making. Of course sometimes – but all too rarely – the statute spells out the matters which must be taken into account, and

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[4] see for example *R v Bolsover DC, ex p. Pepper*[2000] 3 LGLR 20 and the commentary to s.123 of the Local Government Act 1972 in vol.1 of the Encyclopedia of Local Government.
[5] *Brent LBC v Risk Management Partners Ltd* [2009] EWCA Civ 490.
[6] In *R (Sager House (Chelsea) Ltd) v First Secretary of State and Royal Borough of Kensington and Chelsea BC* [2006] EWHC 1251 (Admin) there were "almost 100 different sub-grounds" (see para 5).
[7] [2008] EWHC 692 (Admin) para 25, quoting from a report to Brent's Executive.

sometimes even prescribes that certain matters may not influence the decision. But those are the easy cases. The difficult task for the draftsman of reports to local authorities is to identify *all* the factors the omission of which could ground a challenge to the decision, whilst not referring to any factors consideration of which might invalidate the decision. It is sometimes said that a relevant factor is no more than a factor without the consideration of which the decision might have been different. But that is too inexact an approach. Some light has recently been thrown on this difficult area by the decision of Carnwath LJ, sitting as a judge of first instance, in a case concerning whether a planning inspector had erred in law by deciding that he need not consider alternative sites for a wind turbine development [8].

> "17…..It is one thing to say that consideration of a possible alternative site is a potentially relevant issue, so that a decision-maker does not err in law if he has regard to it. It is quite another to say that it is *necessarily* relevant, so that he errs in law if he fails to have regard to it.
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> 18. For the former category the underlying principles are obvious…..the range of potentially relevant planning issues is very wide….; and…, absent irrationality or illegality, the weight to be given to such issues in any case is a matter for the decision-maker……On the other hand, to hold that a decision-maker has erred in law by *failing* to have regard to alternative sites, it is necessary to find some legal principle which compelled him (not merely empowered) him [sic] to do so."

Thus if an Inspector chose to have regard to alternative sites, then this could not be criticized[9]. But if he chose, without irrationality, not to consider alternative sites, then equally there was no error of law.

7. In other words there are three categories of relevant factors:

1) those which the statute expressly requires shall be taken into account in all cases
2) those which the statute impliedly requires shall be taken into account in all cases
3) those which fall into neither of the first two categories, but which the decision-maker *may* take into account, and the omission of which will only be challengeable where on the facts of the case it was *Wednesbury* unreasonable not to have taken them into account.

It seems doubtful that the draftsman of s.70(2) of the Town and Country Planning Act 1990 appreciated this sophistication when providing that "the [local planning] authority shall have regard….to any other material considerations".

8. The problem which then arises is to identify the factors which, although not spelled out in the statute, are, as a matter of statutory implication, required to be taken into account in any particular case. Once the search moves from the *expressly* required factors, to those which are only *impliedly* required, the ball-game become more complicated. The cases suggest that government planning policy is something which *has* to be taken into account in planning decisions (though this is not spelled out anywhere in the Town and Country Planning Act 1990), and, so one would assume, are the local planning authority's other statutory duties, together with any significant impacts expressly drawn to the authority's attention. But virtually everything else appears to lie at the decision-maker's discretion. The importance of the line of cases which Carnwath LJ was following is that it greatly eases the task of a local authority defending itself against a challenge that it has failed to take into account something which those bringing the challenge assert to be a relevant consideration. For the mere fact that

[8] *Derbyshire Dales DC & Peak District National Park Authority v Secretary of State for CLG and Carsington Wind Energy Ltd* [2009] EWHC 1729 (Admin), following the approach in *Creed NZ v Governor General* [1981] 1 NZLR 172 and *Re Findlay* [1985] AC 318.

[9] As in *R (Bovale Ltd) v Secretary of State for CLG* [2008] EWHC (Admin).

it is *capable* of being a relevant consideration does not necessarily require it to be taken into account in the instant case, unless the decision-maker chooses to do so.

9. Even where something falling within category 2 has been unmentioned in the papers before the decision-maker, i.e. something which is plainly so relevant that, as a matter of statutory construction, it impliedly has to be taken into account in the taking the decision, sometimes the court will, if not cheat, be surprisingly benevolent to the public authority. An obvious example here is the grant of listed building consent for the new Supreme Court, where an indulgent Administrative Court held that the Westminster City Council's planning committee had been aware of, and applied, PPG15, notwithstanding that this key planning document was entirely unmentioned in the documentation before the committee[10].

10. Planning cases led the way in establishing that decisions taken on the basis of material errors of *fact* can be struck down as constituting error of *law*. This can be justified on the grounds that the material error is an irrelevant factor which has been improperly taken into account. The approach now generally applicable in judicial review is as follows. First, there must have been a mistake as to an existing fact. Second, the fact must be uncontentious and objectively verifiable. Third, the appellant or his advisors must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning[11].

11. Finally a word about "flawed logic". There is still (surprisingly) no implied duty in domestic law to give reasons for an administrative decision (whereas, by contrast, where the law in question derives from Brussels such a duty will normally be found to exist). Therefore the scope for a reasons challenge is limited. Where, however, reasons have been given– whether as a matter of statutory requirement or by grace – there is scope for a challenger to demonstrate that the reasoning strongly suggests, even if not necessarily definitively demonstrating, an error of approach by the decision-maker. As said in one case[12]:

> "Very often this ground was invoked in a last desperate effort to unseat a decision when all else failed. It was a basis of challenge which should be advanced sparingly, scrutinized critically and not readily acceded to."

Whilst "flawed logic" is sometimes regarded as an aspect of "irrationality", there is Court of Appeal authority for viewing cases of "flawed logic" as being:

> "equally well allocated to the intrusion of an irrelevant factor"[13],

which is why I am dealing with it under illegality. A simple test is this: do the so-called reasons tell you *why* the decision was reached. If so, then unless this discloses an error of law, the reasons challenge will fail. Therefore, the task for the defendant decision-maker in judicial review is to persuade the court that the words used in the reasons given for its decision are capable of a sensible and relevant meaning and thus explain the decision reached. In one of the most recent cases on reasons, where the subject matter was a decision of the Special Educational Needs and Disability Tribunal, the Court of Appeal has said:

[10] *R (Save Britain's Heritage) v Westminster City Council* [2007] EWHC 807 (Admin).
[11] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044.
[12] *London Residuary Body v Secretary of State for the Environment, Lambeth LBC and the Inner London Education Authority* [1988] JPL 737, 646-7 per Simon Brown J (whose decision in the case was not upheld on appeal).
[13] *R v North and East Devon Health Authority ex p. Coughlan* [2001] QB 213 para 65. The proper limits of a "reasons" challenge are rehearsed in *South Buckinghamshire DC v Porter (No.2)* [2004] UKHL 33; [2004] 1 WLR 1953.

"summary reasons should not contain a fully comprehensive analysis or spell out every step in the reasoning or deal with every conceivable point; their purpose …is to tell the parties in broad terms why they lost or won"[14].

In that case the Court of Appeal treated the requirement to give reasons as essentially concerned with fairness[15], which itself is the underlying element of procedural impropriety to which I next turn.

(c) Defending alleged procedural impropriety

12. Procedural impropriety can take many forms, ranging from failure to follow the procedures prescribed in the governing statute(s) and in regulations contained in statutory instruments (for example, failure to give reasons or adequate reasons where these are a statutory requirement, failure to display requisite notices, taking decisions too soon, or too late, and in either case outside the statutory perameters). In most such cases the resulting decision (whether properly described as void or voidable) will not be set aside in judicial review proceedings, unless the applicant can show that actual, as opposed to theoretical, injustice has flowed from the procedural error. The familiar phrase in ss.288(5)(b) of the Town and Country Planning Act 1990 is that the court will only quash an order or action if:

"satisfied…that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it".

Therefore the defending authority should direct its efforts to this end – though if the requirement flows from EU law, the scope for exercise of discretion to overlook procedural errors is much diminished, as shown by Lady Berkeley's heroic tryst with the Secretary of State on environmental impact assessment[16]. But if the statutory requirement is, say, to consult, and there has been no consultation, or no proper consultation (for example because of inadequate or inaccurate supply of information or the closed mind of the consultor) then the court will not exercise its discretion to refuse judicial review .

13. Much consultation takes place on a non-statutory basis. Here lies a trap for authorities. Because once it has gone down the consultation route, it is caught by precisely the same demanding requirements as apply to statutory consultation – timely supply of information when the proposals are still at a formative stage, time to respond, and preparedness to listen and change the proposals[17].

14. A major component of procedural propriety is what used to be termed "natural justice", with its own two sub-heads of *audi alteram partem* (a decision-maker's duty to act fairly usually has as its corollary the right of the person potentially affected by the decision to be heard before the decision is taken); and *nemo judex in causa sua* (the rule against bias).

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[14] *H v East Sussex County Council and ors* [2009] EWCA Civ 249 para 19. The decision itself, and the various background cases, are helpfully analysed in the August 2009 Bulletin of the Encyclopedia of Local Government Law.

[15] Ibid. para 16.

[16] *Berkeley v Secretary of State for E,T & R* (No.1) [201] 2 AC 603. The presiding judge in that case was Lord Bingham, who has written extra-judicially that even in domestic public law the scope for exercise of discretion "is strictly limited and the rules for its exercise [should be] clearly understood": *The Business of Judging* (2000) p.194.

[17] *Ex p. Coughlan*, supra, para 108.

15. Consultation is a process by which affected parties have their chance to proffer their views before the decision is taken, an aspect of the *audi alteram partem* rule. But the rule "kicks in" most acutely where rights are being interfered with. You will recall the immortal words of Lord Denning MR about the urinating street trader in Barnsley:

> "To some this may appear to be a small matter, but to Mr Harry Hook it is very important. He is a street trader in the Barnsley market. He has been trading there for some six years without any complaint being made against him; but, nevertheless, he has now been banned from trading in the market for life. All because of a trifling incident…",

and, I should add, because this was the ratio of the case, without being given the opportunity to present his case which was his entitlement at common law[18] .

16. To an ecclesiastical lawyer, it is satisfying to know that the *audi alteram partem* rule stretches back to the Garden of Eden where:

> "…even God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where are thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?' And the same question was out to Eve also"[19].

Even more satisfying is to find the same passage recalled, this time in the context of special advocates and control orders, by Lord Hoffmann in his opinion delivered on 10 June 2009, but with a contemporary twist, which is perhaps worth quoting in full[20] :

> "The particular procedures which have to be followed to make a hearing fair cannot in my opinion be stated in rigid rules. Ordinarily it is true that fairness requires that an accused person should be informed of all the allegations against him and the material tendered to the tribunal in support. The purpose of this rule is not merely to improve the chances of the tribunal reaching the right decision (by giving the accused an opportunity to explain or contradict any such allegation or material) but to avoid the subjective sense of injustice which an accused may feel if he knows that the tribunal relied upon material of which he was not told. Seventeenth century lawyers were fond of quoting the example of Genesis 3.11, in which God, though omniscient, said to Adam "Hast thou eaten of the tree, whereof I commanded thee that thou shouldest not eat?". In such a case, however, there is no cost in compliance with the general rule. God suffered no disadvantage in revealing to Adam what he knew. The same is true is most cases where there is a failure to disclose material. But when disclosure is contrary to the public interest, it is necessary to think more carefully and ask whether in all the circumstances it would really be unfair not to tell the applicant or accused".

17. In times past, public bodies either avoided non-statutory consultation altogether (a prime example would be the London Docklands Development Corporation, acting successfully on the advice of a former Silk in these Chambers) or, in effect, went through a charade of consultation in which there was not the slightest chance of the outcome changing. In today's climate of fairness, openness and transparency, this is no longer acceptable – whether as practical politics or in law. In the first major application for judicial review in which I was instructed, the mighty Michael Heseltine was stopped in his tracks by a consortium of (mainly) Inner London Boroughs because he had refused to meet them to discuss his proposed rate support grant penalty scheme – a classic affirmation of the *audi*

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[18] *R v Barnsley MBC ex p. Hook* [1976] 1 WLR 1052.

[19] *R v Chancellor of Cambridge* (1723) 1 Stra.557; *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.

[20] *Secretary of State for the Home Department v AF* [2009] UKHL 28; [2009] 3 WLR 74 para 72. No seventeenth century case, and only one eighteenth century case, was cited in argument.

alteram partem rule, where a Divisional Court refused to assume that the decision was a foregone conclusion[21] . Although in that case the local authorities were the victors, the relevant passage in Ackner LJ's judgment needs to be read and re-read every time a local authority is contemplating taking short-cuts in decision-making[22].

18. So far as the *nemo judex* rule, this too is no more than a manifestation of fairness to which bias is antipathetic. The rule extends beyond actual bias (whether pecuniary or other) to apparent or ostensible bias. Actual bias includes the concept of a fettered mind, where the decision has been reached before the argument has been made; and apparent or ostensible bias includes the appearance of a fettered mind. If it can be shown, by an examination of all the circumstances, that the actual decision was taken fairly, a challenge to an administrative decision based on apparent bias will fail (though the test is more demanding in respect of judicial decisions, notwithstanding various attempts to equate the two). Since *Porter v Magill*[23], there have been three important Court of Appeal decisions in relation to apparent bias, the *Condron* case in 2006, the *Redcar* case in 2008, and most recently the *Merchant Taylors School* case[24]. In the first two cases Administrative Court decisions quashing planning permissions on the ground of apparent local authority bias were overturned on appeal. Local authorities should be encouraged that the applicant's task in showing apparent bias has been made very much more difficult as a result of these decisions. But just as the dragon appeared to be slain, one had the "parting shot" – with apologies for my mixed metaphors - from Sullivan J (as he then was) in *R (Gardner) v Harrogate BC*[25]. Planning permission had been granted (contrary to the officer's recommendation to refuse) on the casting vote of the chairman. The facts were exceptional. The applicant was herself a councillor, who mixed socially with the chairman and was regularly driven to council meetings by him. The Ombudsman had already found that the involvement of the chairman amounted to maladministration, although the Ethical Standards Officer of the Standards Board had held that the chairman's relationship with the applicant did not amount to "friendship" so that he did not have a personal interest under the Code of Conduct. Sullivan J quashed the decision to grant planning permission on the ground that any fair-minded and informed bystander would have concluded that there was a real possibility of bias, even though "no one factor is decisive". In his new role in the Court of Appeal Sullivan LJ had no difficulty in rejecting a claim of apparent bias in the *Merchant Taylors School* case. A boy had been expelled from school by his headmaster, a decision confirmed by a review panel which included the headmaster of another independent school who was knew the boy's headmaster on a limited professional basis and attended the same church twice a month. Taking account of all the circumstances, including oral evidence from the review panel and its notes, there had clearly been an independent consideration of the matter and the case on apparent bias was not made out.

[21] *R v Secretary of State for the Environment ex p. Brent LBC* [1982] QB 593.

[22] This is despite the controversial comment by Lord Hoffmann in the *AF* case, supra, para 73 that "Usually, if evidence appears to an experienced tribunal to be irrefutable, it is not refuted".

[23] [2001] UKHL 67.

[24] *Condron v National Assembly for Wales* [2006] EWCA Civ 1573; *R (Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746; *Ellis & Anor v Merchant Taylors School*, 8 September 2009. See also, in relation to alleged bias in relation to contracted-out housing reviews, *Heald &ors v Brent LBC* [2009] EWCA Civ 930.

[25] [2008] EWHC 2942 (Admin); [2009] JPL 872, especially paras 23 and 39. There are valuable commentaries at [2009] JPL 551 and 885.

19. Finally, under procedural impropriety I need to mention legitimate expectation, successor in public law to various forms of private estoppels[26]. A helpful formulation of the underlying principle is that of Laws LJ in *R (Nadarajah and Abdi) v Secretary of State for the Home Department*[27]:

> "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area the law will require the promise or practice to be honoured unless there is good reason not to do so".

The legitimate expectation rarely gives rise to a *substantive* right, and more frequently gives rise to merely a *procedural* right to be consulted before any departure is made from the expected course of action. Whilst local authorities need to appreciate the danger that adopting (and then departing from) particular courses of action may prompt an application for judicial review, it will normally be possible to demonstrate that the fairly narrowly confined pre-conditions for legitimate expectation have not been met [28].

(d) Defending alleged irrationality

20. Whether acting for applicant or defendant in judicial review proceedings, I have only once been involved in a case where there was a finding of pure "red-headed" *Wednesbury* unreasonableness[29]. In *ex p. Coughlan*[30], and in the course of describing irrationality, the Court of Appeal referred to "the rarely known decision which simply defies comprehension", distinguishing it from the case of "flawed logic". When a defendant public authority sees irrationality pleaded, it can be reasonably confident that that particular ground will not succeed, unless the decision is a truly barmy one – and responsible officers should encounter little difficulty in demonstrating to their members the unviability of such truly barmy schemes; and, through careful report writing ensuring that what goes forward is readily comprehensible, and not offensively outrageous, however controversial it may be.

21. Sometimes the challenge may be, first, that the decision is irrational; second, if not, that it's flawed logic displays a potential error of law. The latter, already discussed above, is the more dangerous argument, though only likely to "run" where there is a statutory duty to give reasons. More often, the challenge will first be on the basis of particularized errors of law or procedural improprieties, with irrationality cited, as a parting-shot at the end. In such cases, if the challenge has failed on the earlier grounds, it is most unlikely to succeed on irrationality alone.

(e) Defending alleged lack of proportionality

22. The European variant of irrationality is proportionality, which comes into play in many cases based on EU law and in almost all cases where breaches of the European Convention on Human Rights are alleged. Whether proportionality is yet part of UK domestic law remains an intriguing, though largely academic, issue, to which the answer is probably neither "yes" nor "no", but "almost". So far as judicial review cases involving EU law or

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[26] See *CCSU* and *ex parte Coughlan*, both supra; also *R (Reprotech (Pebsham) Ltd) v East Sussex CC* [2002] UKHL 8; [2003] 1 WLR 348 and *R v Leicester City Council ex p. Powergen UK Ltd* [1999] 4 PLR 91. The principles have recently been conveniently summarised in *Rastrum Ltd and Benge v Secretary of State for CLG and Rother DC* [2009] JPL 1159 paras 43 and 48.
[27] [2005] EWCA Civ 1363 para 68, referred to as "the starting point" in *R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) para 47
[28] For example, *Cox v First Secretary of State* [2003] EWHC 1290 (Admin); *Corkteck v HMRC* [2009] EWHC 785 (Admin).
[29] *R v Secretary of State for Transport ex p. GLC* [1986] QB 556.
[30] Supra, para 65.

human rights, the "rules of the game" are in certain ways different from those involved in purely domestic challenges, which is why they are to be the subject of separate papers at this Seminar. The key matter for any public authority is to spot, as well in advance as possible, where its proposed decision may impact on EU law or human rights. Truly this is a case of "fore-warned is fore-armed", since in both cases it will be important to demonstrate that the decision serves an overriding public interest and is a proportionate response to the particular situation.

23. Human rights issues should be relatively simple to identify and guard against. EU points are more complex. When incoming New Labour resolved to ban most forms of hunting, no one foresaw the arguments on freedom of movement/ measures having equivalent effect to quantitative restrictions on imports (now Article 28 of the Treaty) which required deft (and, with respect, rather dubious) side-stepping by their Lordships in rejecting the challenge by the pro-hunt lobby[31] . When the idea of a sex offenders' register was devised, I very much doubt anyone ever anticipated that the notification requirements might constitute a prohibition on travel in breach of article 4(1) of Directive 2004/38, though this was argued (admittedly unsuccessfully) before the Court of Appeal this July[32]. This Europeanisation is not something to which local authorities themselves are immune. Take the celebrated case of the London night-time lorry ban[33], promoted by the London Boroughs Transport Committee, which was held unlawful by the Court of Appeal by reason of alleged breach of various EC Directives and only upheld by the House of Lords on the somewhat sweeping ground that measures to improve London's noise climate by-passed those restrictions. A key question for the lawyers ought always therefore to be: is there here, lurking somewhere, a potential issue of EU law, and if so, what is it and how should it be dealt with in the Council's decision-making processes? This is particularly important because, both where Human Rights and rights under EU law are concerned, judicial review procedures can be adapted to ensure that the rights are protected, including, where appropriate, by consideration of the merits of the case (something normally not permissible in judicial review)[34].

(f) Conclusion

24. Since I am merely scene-setting, I perhaps need not apologise for merely surface-skimming. In particular I have said nothing about CPR 54, and the procedural rules governing judicial review, nor about s.31 of the Supreme Court Act 1981, and in particular s.31(6) that:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –
> (a) leave for the making of the application; or
> (b) any relief sought on the application,

[31] *R (Countryside Alliance) v Attorney-General* [2007] UKHL 52; [2008] AC 719, especially paras 50-51; 87; 131 and 164-165.
[32] *R (F) v Secretary of State for Justice* Times Law Report, 20 August 2009 (the requirement was quashed on a separate ground as being incompatible with Article 8 of the ECHR.).
[33] *R v London Boroughs Transport Committee ex p. Freight Transport Association Ltd.* [1991] 1 WLR 828.
[34] See *T-Mobile (UK) Ltd and another v Office of Communications* [2008] EWCA Civ 1373 para 29. The case concerned the EU Framework Directive on electronic communications networks and services. In para 27, the Court of Appeal referred to two cases (*R (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 WLR 419 and *R (JB) v Haddock* [2006] HRLR 1237) for the proposition that in connection with Human Rights, "judicial review can provide a full merits investigation where this is necessary".

if it considers that the granting of the relief sought would be [i] likely to cause substantial hardship to, or [ii] substantially prejudice the rights of, any person or [iii] would be detrimental to good administration".

(The numbers in square-brackets have been added by me). It is surprising how often defendant local authorities fail to marshall their arguments on delay in terms of [i], [ii] and [iii] above, and put them forward at the earliest opportunity. But this is to move from from substantive law into procedure, and thus beyond the scope of this introductory paper.

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