ADMINISTRATIVE LAW

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In a comparable English case the revocation of television licences by the Home Office was condemned by the Court of Appeal.[98] The Home Secretary had a statutory power to revoke or vary any licence under the Wireless Telegraphy Act 1949, and he elected to use this power to cancel the licences of persons who took them out during the currency of their previous licences in order to avoid a sharp increase in the licence fee. The increase took effect on a fixed date and it was in no way unlawful for a licence-holder to obtain a new licence before that date at the lower fee. The Home Office had no power to prevent this, but they tried to enforce a policy of exacting the higher fee by resorting to their power to revoke licences. This was held to be a clear abuse of the power and also an illegal attempt to levy money for the use of the Crown contrary to the Bill of Rights 1688. Lord Denning MR said:

> But when the licensee has done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of the power conferred on him by Parliament: and these courts have the authority—and, I would add, the duty—to correct a misuse of power by a minister of his department, no matter how much he may resent it or warn us of the consequences if we do.

In effect, the Home Office had tried to use their licensing powers to obtain taxing powers which had not been conferred on them. Their handling of the affair was also strongly criticised by the Parliamentary Commissioner for Administration.[99]

Other examples of the legal limits to the discretion of licensing authorities are given below.[1]

The standard of reasonableness

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. When a Divisional Court yielded to that temptation by invalidating a Secretary of State's decision to postpone publication of a report by company inspectors, the House of Lords held that the judgments 'illustrate the

[98] *Congreve* v. *Home Office* [1976] QB 629. See (1976) 92 *LQR* 331. The Home Office had issued many thousands of demands and had to undertake a big operation to repay money unlawfully received.

[99] HC 680 (1974–5).

[1] Below, p. 401.

danger of judges wrongly though unconsciously substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion'.[2] The court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.[3] Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority.'[4] As Lord Hailsham LC has said, two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.[5]

This is not therefore the standard of 'the man on the Clapham omnibus'.[6] It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called '*Wednesbury* unreasonableness', after the now famous case in which Lord Greene MR expounded it as follows.[7]

> It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in *Short* v. *Poole Corporation*[8] gave the example of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

[2] *R.* v. *Secretary of State for Trade and Industry ex p. Lonrho Plc* [1989] 1 WLR 525 (Lord Keith).

[3] This passage in its former version was approved by the Court of Appeal in *R.* v. *Boundary Commission ex p. Foot* [1983] QB 600 (unsuccessful challenge to Commission's decisions fixing boundaries of parliamentary constituencies).

[4] *Short* v. *Poole Cpn.* [1926] Ch. 66 and 91 (Warrington LJ).

[5] *Re W. (An Infant)* [1971] AC 682 at 700.

[6] [1933] 1 KB 205 at 224.

[7] *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 KB 223 at 229, for which see below, p. 403.

[8] [1926] Ch. 66.

This has become the most frequently cited passage (though most commonly cited only by its nickname) in administrative law. It explains how 'unreasonableness', in its classic formulation, covers a multitude of sins. These various errors commonly result from paying too much attention to the mere words of the Act and too little to its general scheme and purpose, and from the fallacy that unrestricted language naturally confers unfettered discretion.

Unreasonableness has thus become a generalised rubric covering not only sheer absurdity or caprice, but merging into illegitimate motives and purposes, a wide category of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classed as self-misdirection,[9] or addressing oneself to the wrong question.[10] But the language used in the cases shows that, while the abuse of discretion has this variety of differing legal facets, in practice the courts often treat them as distinct. When several of them will fit the case, the court is often inclined to invoke them all. The one principle that unites them is that powers must be confined within the true scope and policy of the Act.

Taken by itself, the standard of unreasonableness is nominally pitched very high: 'so absurd that no sensible person could ever dream that it lay within the powers of the authority' (Lord Greene MR); 'so wrong that no reasonable person could sensibly take that view' (Lord Denning MR);[11] 'so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it' (Lord Diplock).[12] It might seem from such language that the deliberate decisions of ministers and other responsible public authorities could almost never be found wanting. But, as may be seen in the following pages, there are abundant instances of legally unreasonable decisions and actions at all levels. This is not because ministers and public authorities take leave of their senses,[13] but because the courts in deciding cases tend to lower the threshold of unreasonableness to fit their more exacting ideas of administrative good behaviour.[14]

There is ample room, within the legal boundaries, for radical differences of opinion in which neither side is unreasonable. A number of statements to this effect were made in the Court of Appeal and the House of Lords in the case of the

[9] An example of self-misdirection was where the minister was given misleading advice, misunderstood his default powers, and gave invalid directions to a local health authority: *Lambeth LBC* v. *Secretary of State for Social Services* (1980) 79 LGR 61. The mistake was rectified by National Health Service (Invalid Direction) Act 1980.

[10] Examples are *Niarchos* v. *Secretary of State for the Environment* (1977) 76 LGR 480; *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 AC 147 (above, p. 264).

[11] In the *Tameside* case [1977] AC at 1026.

[12] In *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC at 410. For context see Appendix 1.

[13] Lord Scarman used this phrase in *R.* v. *Secretary of State for the Environment ex p. Nottinghamshire CC* [1986] AC 240 at 247.

[14] See the discussion by Lord Lowry, approving the treatment in this book, in *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696 at 765. Cf. [1987] *PL* 368 at 372 (J. Jowell and A. Lester).

Tameside schools, discussed below.[15] Lord Denning MR pointed out the error of confusing differences of opinion, however strong, with unreasonableness on the part of one side or the other. One party may call the other 'quite unreasonable' when he is well within the legal limits of reasonableness. This was the distinction which the Secretary of State failed to make, as the House of Lords emphatically confirmed. Lord Diplock said:[16]

> The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred.

In the same vein Lord Hailsham LC has said that 'not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable'.[17]

Judges have sometimes given examples of what might be called pure unreasonableness. In a controversy which upheld a local authority's power to erect a urinal near Buckingham Palace, Turner LJ said that it would not be lawful to do so 'in front of any gentleman's house'.[18] Similarly the power to erect rails and fences in streets for the protection of pedestrians would not justify a high closeboarded fence which would interfere with light.[19] The authority 'is bound to have some regard to the interest of those who may suffer for the good of the community'.[20] As concrete instances of pure unreasonableness may be cited the case of the penny-a-year gratuity;[21] a case where a minister allowed only four days for objections to be made to a scheme for a comprehensive school;[22] and a case where a local authority, having lodged homeless persons temporarily in a hotel, then served notices requiring the hotel to conform to the Housing Act standards applicable to private houses.[23] More numerous are the cases which can be classified under particular sub-heads such as improper motives or irrelevant considerations, which are grouped separately below.

Reasonableness does not require reasons to be stated. The only significance of withholding reasons is that if the facts point overwhelmingly to one conclusion, the decision-maker cannot complain if he is held to have had no rational reason for deciding differently,[24] and that in the absence of reasons he is in danger of being held to have acted arbitrarily.[25]

[15] Below, p. 424.
[16] [1977] AC at 1064.
[17] *Re W. (An Infant)* [1971] AC 682 at 700.
[18] *Biddulph* v. *Vestry of St. George, Hanover Square* (1863) 33 LJ Ch. 411 at 417.
[19] *Dormer* v. *Newcastle upon Tyne Cpn.* [1940] 2 KB 204 at 217.
[20] *Westminster Cpn.* v. *London and North Western Railway* [1905] AC 426 at 433 (Lord Macnaghten).
[21] *Williams* v. *Giddy* [1911] AC 381 (above, p. 352).
[22] *Lee* v. *Department of Education and Science* (1967) 66 LGR 211.
[23] *R.* v. *Hackney LBC ex p. Evenbray Ltd.* (1987) 86 LGR 210.
[24] *R.* v. *Secretary of State for Trade and Industry ex p. Lonrho Plc* [1989] 1 WLR 525 at 539 (Lord Keith).
[25] See the *Padfield* case, below, p. 356.

but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power'.[10]

It is only the criterion of reasonableness that is restricted by this doctrine, and then only in special situations dominated by questions of political judgement. The normal rule is that parliamentary approval does not affect the operation of judicial review, whether for unreasonableness or otherwise. For this the decisions on delegated legislation, which is frequently approved by Parliament, afford ample illustration.[11]

Relevant and irrelevant considerations

There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void. It is impossible to separate these cleanly from other cases of unreasonableness and abuse of power, since the court may use a variety of interchangeable explanations, as was pointed out by Lord Greene.[12] Regarded collectively, these cases show the great importance of strictly correct motives and purposes. They show also how fallacious it is to suppose that powers conferred in unrestricted language confer unrestricted power.

Lord Esher MR stated the 'irrelevant considerations' doctrine in a case where a vestry had mistakenly fixed the pension of a retiring officer on the erroneous assumption that they had no discretion as to the amount:[13]

> But they must fairly consider the application and not take into account any reason for their decision which is not a legal one. If people who have to exercise a public duty by exercising their discretion take into account matters which the courts consider not to be proper for the exercise of their discretion, then in the eye of the law they have not exercised their discretion.

The doctrine applies equally to failure to take account of some consideration which is necessarily relevant, such as the respective costs of rival proposals[14] or the availability of more suitable land.[15] Cooke J explained in a New Zealand case that

[10] In the *Nottinghamshire* case (above) at 250.
[11] Below, p. 874.
[12] Above, p. 363. See [1976] *CLJ* 272 (G. D. S. Taylor).
[13] *R.* v. *St Pancras Vestry* (1890) 24 QBD 371 at 375.
[14] *Eckersley* v. *Secretary of State for the Environment* [1977] JPL 580; *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193; *R.* v. *Brent LBC ex p. Gunning* (1985) 84 LGR 168.
[15] *Brown* v. *Secretary of State for the Environment* (1978) 40 P & CR 285 (provision of land for gipsies). See also *City Cabs (Edinburgh) Ltd.* v. *Edinburgh DC* 1988 SLT 184.

'the more general and the more obviously important the consideration, the readier the court must be to hold that Parliament must have meant it to be taken into account'.[16]

Under many statutes the discretion conferred is extensive, and it is no concern of the court to restrict it artificially by limiting the considerations that are relevant. A minister may be entitled to take account of every factor that may affect the public interest,[17] but it does not follow that he is obliged to do so. In another New Zealand case Cooke J pointed out 'the difference between obligatory considerations (i.e. those which the Act expressly or impliedly requires the Minister to take into account) and permissible considerations (i.e. those which can properly be taken into account but do not have to be)'.[18] Where there is overlap between different areas of policy, for example housing and planning, the court may decline to make a rigid dichotomy between them so as to confine a housing authority to 'housing' considerations only.[19] The court will intervene in two situations. The first is where the authority has acted on grounds which the statute never intended to allow, for example where fees charged for street traders' licences were based upon what the market would bear rather than administration costs.[20] The second is where the authority has failed to take proper account of something that the statute expressly or impliedly required it to consider,[21] even though it may not have been known at the time.[22] But under this second head the implied requirement may be wide. In deciding whether to deport an immigrant the Secretary of State 'on classic *Wednesbury* principles . . . is bound to take account of all relevant considerations', so that an adjudicator misdirects himself in law if he refuses to take account of the immigrant's special value to his own community.[23] A threat by that community to instigate a strike, on the other hand, would be improper and therefore irrelevant.[24]

[16] *CREEDNZ* v. *Governor-General* [1981] 1 NZLR 172, applied in *R.* v. *Hillingdon Health Authority ex p. Goodwin* [1984] ICR 800 (decision to close hospital quashed for failure to take account of doctors' interests).

[17] See, e.g., *Rother Valley Railway Co. Ltd.* v. *Ministry of Transport* [1971] 1 Ch. 515.

[18] *Ashby* v. *Minister of Immigration* [1981] 1 NZLR 222 at 224 (admission of South African rugby football team unsuccessfully challenged).

[19] *Hanks* v. *Minister of Housing and Local Government* [1963] 1 QB 999; see below, p. 384, for this and contrasting cases.

[20] *R.* v. *Manchester CC ex p. King* [1991] COD 422.

[21] *CREEDNZ* v. *Governor-General* (above); and see *Ashby* v. *Minister of Immigration* (above).

[22] *R.* v. *Immigration Appeal Tribunal ex p. Hassanin* [1987] 1 WLR 1448 (cases remitted to appeal tribunals to consider all the relevant circumstances).

[23] *R.* v. *Immigration Appeal Tribunal ex p. Bakhtaur Singh* [1986] 1 WLR 910 (Lord Bridge). See also *R.* v. *Immigration Appeal Tribunal ex p. Bastiampillai* [1983] 2 All ER 844 (failure to take account of immigrant's circumstances); *R.* v. *Immigration Appeal Tribunal ex p. Kumar* [1987] 1 FLR 444 (disregard of husband's proved devotion in alleged marriage of convenience); *R.* v. *Home Secretary ex p. Bugdaycay* [1987] AC 514 (failure to consider danger to asylum-seeker).

[24] *Bakhtaur Singh*'s case (above).

Where discretion is conferred upon a minister of the Crown the range of legitimate considerations is likely to be wider than it would be in the case of a judge, who can consider legal relevance only. As Lord Scarman said of the position of the Home Secretary in deciding whether to release life-sentence prisoners on licence:[25]

> But neither the [Parole] Board nor the judiciary can be as close, or as sensitive, to public opinion as a minister responsible to Parliament and to the electorate. He has to judge the public acceptability of early release and to determine the policies needed to maintain public confidence in the system of criminal justice.

Nevertheless the House of Lords has held that the Home Secretary, in determining periods of imprisonment under his 'tariff' policy for life prisoners, is in a position analogous to that of a judge passing sentence, and may not therefore take account of public petitions or public opinion or campaigns organised by newspapers.[26] In the case of two boy murderers, for whom he had fixed a tariff of fifteen years, he was held to have misdirected himself in taking account of public demands for a whole-life tariff, and his decision was quashed. This was a majority decision and it was opposed by Lord Lloyd, who rejected the judicial analogy and accepted the relevance of public opinion—as seems natural when the discretion is given by Parliament to a politician rather than to a judge.[27]

Examples of the doctrine

A clear case of abuse of power prompted by an irrelevant consideration was where some local authorities refused to provide certain newspapers in their public libraries. Their reason for the ban was that they were politically hostile to the newspapers' proprietors, who had dismissed many of their workers when they went on strike. The ulterior political object of the local authorities was irrelevant to their statutory duty to provide 'a comprehensive and efficient library service'.[28] Another example was where the Secretary of State had power to prescribe 'the appropriate contribution' of local authorities to a fund for financing further education, and prescribed a formula based on the rateable resources of each area, so that the richer local authorities were made to subsidise the poorer. It was held that relative resources were an irrelevant consideration, since a local authority's rate fund should be used for the benefit of its own area and there was nothing in the empowering Act to justify the redistribution of resources.[29]

[25] *Re Findlay* [1985] AC 318 at 333.

[26] *R.* v. *Home Secretary ex p. Venables* [1998] AC 407; and see *R.* v. *Home Secretary ex p. Furber* [1998] 1 All ER 23.

[27] See similarly Lord Lloyd's dissenting speech in *R.* v. *Home Secretary ex p. Pierson* [1998] AC 539, noted above, p. 378.

[28] *R.* v. *Ealing LBC ex p. Times Newspapers Ltd.* (1986) 85 LGR 316.

[29] *R.* v. *Secretary of State for Education and Science ex p. Inner London Education Authority* [1985] 84 LGR 454.

Where the Home Secretary refused to release a discretionary life prisoner, despite repeated recommendations from the Parole Board, his decision was quashed because it should have been based solely on future danger to the public, but was influenced by the irrelevant consideration that the prisoner had attempted to escape.[30]

A group of cases concerns the dismissal of schoolteachers. Where education authorities had power to require the dismissal of teachers 'on educational grounds' they acted ultra vires in requiring dismissals in order to save expenditure[31] or because a teacher took an afternoon off in poignant circumstances.[32] But where they had an unrestricted power of dismissal themselves, they were held entitled to dismiss teachers who were married women on the grounds that housewives were less satisfactory and were less in need of employment than single women.[33] These grounds were not alien or irrelevant to the statutory purpose of maintaining efficient schools. But the dismissal of teachers was ultra vires where the sole ground for it was that the teachers refused to collect money for pupils' meals: for the Education Act 1944 expressly provided that the Minister could not impose this requirement, and it was not therefore a relevant and valid ground of dismissal.[34]

Incessant litigation over planning and compulsory purchase, illustrated more fully below,[35] has produced a meticulous style of review[36] in which the doctrine of relevant and irrelevant considerations is frequently employed. One case carried it to a new point in quashing a decision of the Secretary of State for paying too much regard to a relevant consideration and so misdirecting himself.[37] His error was to regard a long-expired planning permission as a 'vitally material consideration' requiring the granting of a new permission, when in fact that consideration was relevant but not dominant; and so he came to a perverse decision. With somewhat similar reasoning the Court of Appeal quashed a compulsory purchase order because the Secretary of State failed to take account of an offer by the landowner which would have made an alternative site less rather than more expensive.[38] It is in decisions such as these that the courts may be said to employ something like the

[30] *R.* v. *Home Secretary ex p. Benson*, The Times, 21 November 1988. Contrast *R.* v. *Home Secretary ex p. Stafford* [1999] 2 AC 38.

[31] *Hanson* v. *Radcliffe Urban Council* [1922] 2 Ch. 490; *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483; *R.* v. *Liverpool CC ex p. Ferguson*, [1985] IRLR 501.

[32] *Martin* v. *Eccles Cpn.* [1919] 1 Ch. 387.

[33] *Short* v. *Poole Cpn.* [1926] Ch. 66. Cf. *Price* v. *Rhondda Urban Council* [1923] 2 Ch. 372.

[34] *Price* v. *Sunderland Cpn.* [1956] 1 WLR 1253.

[35] Below, p. 404.

[36] Summarised in *Seddon Properties Ltd.* v. *Secretary of State for the Environment* (1978) 42 P & CR 26.

[37] *South Oxfordshire DC* v. *Secretary of State for the Environment* [1981] 1 WLR 1092. Cf. *Westminster Renslade Ltd.* v. *Secretary of State for the Environment* (1983) 48 P & CR 255; *Surrey Heath BC* v. *Secretary of State for the Environment* (1986) 85 LGR 767.

[38] *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193.

American doctrine of 'hard look review'.[39] But the House of Lords has softened the rigour of this policy by holding that ministerial decision letters may be construed with 'a measure of benevolence'.[40]

Another way of expressing the irrelevant considerations doctrine is to say that a wrong test has been applied. In refusing an application for political asylum on the ground that he was not persuaded that the applicant would be singled out for persecution in his own country the Home Secretary failed to apply the right test, which was whether the applicant had a well-founded fear of being persecuted for the reasons specified in the international convention on the status of refugees.[41] In the same category, perhaps, was the Home Secretary's 'unreasonable and perverse' decision to refuse concessionary television licences to residents in old people's homes, which the court quashed because he imposed a requirement which was irrelevant to the statutory qualifications.[42]

Qualifications and extensions

There are some situations in which the presence of irrelevant motives will not necessarily be fatal. The most obvious are where they do not in fact affect the action taken or where they operate in the complainant's favour,[43] or where they are merely redundant. Thus where the Broadcasting Complaints Commission declined to entertain a complaint by a party leader that his party was given too little broadcasting time, giving a number of good reasons but including the irrelevant reason that the task would be burdensome, their decision was within their lawful discretion.[44] Irrelevant considerations may also be innocuous if the action taken is reasonable in itself. In fixing the level of pay of its employees, which is required by the court to be reasonable, a local authority may act on entirely wrong grounds and yet its payments, if not in themselves excessive, are not unlawful. Of this situation Lord Sumner said:[45]

[39] The hard look doctrine was originally one of judicial restraint, restricting review of decisions of policy provided that the *agency* had taken a hard look at the whole matter, and decided rationally: *Greater Boston Television Corp.* v. *FCC* 444 F 2d 841 (1970). But the same title has been given to an intensive technique of review where the *court* investigates relevance of motives, adequacy of evidence and preparatory studies, and other such factors, as in *Sierra Club* v. *Costle* 657 F 2d 298 (1981) and *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.* 463 US 29 (1983). In the latter case the Supreme Court set aside the revocation of a government order about car seatbelts for failure to consider the available options and lack of rational connection between the facts and the decision.

[40] *Save Britain's Heritage* v. *No. 1 Poultry Ltd.* [1991] 1 WLR 153 at 165 (HL).

[41] *R.* v. *Home Secretary ex p. R.*, The Times, 8 June 1987 (Home Secretary's decision quashed). See similarly *R.* v. *Home Secretary ex p. Bugdaycay*, above, p. 381.

[42] *R.* v. *Home Secretary ex p. Kirklees BC*, The Times, 24 January 1987 (unjustified requirement of exclusive services of housing steward).

[43] *Hanks* v. *MHLG* (above) at 1020.

[44] *R.* v. *Broadcasting Complaints Commission ex p. Owen* [1985] QB 1153. See also *R.* v. *Secretary of State for Social Services ex p. Wellcome Foundation Ltd.* [1987] 1 WLR 1166.

[45] *Roberts* v. *Hopwood* [1925] AC 578 at 604; below, p. 398.

If, having examined the expenditure and found clear proof of bad faith, which admittedly would open the account, the auditor found that the councillors' evil minds had missed their mark, and the expenditure itself was right, then the expenditure would not be 'contrary to law' and could not be disallowed.

This therefore appears to be a case where objective and not subjective considerations may prevail. The reasoning was invoked in a later case to justify the payment of children's allowances by way of additional salary.[46]

Objective considerations prevailed also in the Pergau Dam case, where the British government's proposal to grant overseas aid of nearly £70 m. for the building of a dam in Malaysia was held to be unlawful as an abuse of power.[47] Under the relevant Act there was power to grant aid 'for the purpose of promoting the development or maintaining the economy' of another country, and it was held that political and economic considerations might legitimately be taken into account. But since on the evidence the whole project was uneconomic, it was held also that it could not have either of the necessary purposes, and on this strict construction it was invalidated.

In 1975 the government, wishing to enforce a policy of wage control but not wishing to seek legislation, decided to refuse discretionary assistance of various kinds to firms which paid higher wages than they approved.[48] Grants under the Industry Act 1972 and the Export Credits Guarantees Act 1975 and also payments of 'temporary employment subsidy' were among those to be refused. The government compiled a 'blacklist' of offending firms and called upon local authorities, nationalised industries and other bodies (including universities) not to place contracts with them. This policy provoked much political protest, but no litigation reached the courts before the policy collapsed in 1978. The question whether resort to these expedients was an abuse of discretion was therefore never tested. It seems unlikely that the courts would feel able to assert control over the government's freedom to place its contracts as it wishes. But the use of statutory powers for ulterior purposes not contemplated by Parliament might well have provided further material for this chapter.

Relevance of resources

A lack of resources, usually financial, often constrains public authorities in deciding how to exercise their duties and powers. As a general rule, impoverishment may not be treated as a relevant reason for failing to perform a statutory duty expressed

[46] *Re Walker's Decision* [1944] KB 644; below, p. 401.

[47] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs ex p. World Development Movement Ltd.* [1995] 1 WLR 386.

[48] The policy was announced in White Papers of 1975–8, Cmnd. 6151, 6507, 6882, 7293. For the whole affair see [1978] *PL* 333 (G. Ganz). As to the use of contracts for enforcing policies, see above, p. 349 and below, p. 793.

in objective terms which allow no discretion. The House of Lords made this very clear in a case where the statutory duty of a local authority was to arrange for 'suitable full-time or part-time education', defined as 'efficient education' suitable to the pupil's age, ability, aptitude and any special educational needs.[49] When a cut in government funding compelled the local authority to economise they reduced the home tuition for a handicapped girl from five to three hours a week. It was clear from the Act that the standard of suitability was to be determined purely by educational considerations, so that shortage of funds was irrelevant and a matter for Parliament only. Otherwise the court would have 'to downgrade a statutory duty to a discretionary power'.

In a contrasting decision, however, a divided House of Lords accepted under-funding as relevant even in the case of a duty.[50] The Act provided that where a local authority was satisfied that it was 'necessary, in order to meet the needs' of a poor person for (*inter alia*) home help, television or recreational facilities, games, outings, facilities for holidays, or meals, 'it shall be the duty' of the authority to make arrangements for them in accordance with the Act. When the local authority, because of lack of funds, withdrew a disabled person's laundry and cleaning services, its action was upheld on the grounds that, since the Act provided no criterion for 'necessary' and 'needs', and the extensive list of welfare benefits showed that those words bore flexible and relative meanings, it was legitimate to take account of resources in determining what was to be treated as necessary or as a need. The logic of this decision is difficult in view of the objective language of the Act; and the dissentient Lords, agreeing with the Court of Appeal, may be thought to have the better of the argument, desirable though it may be to release local authorities from such painful dilemmas.

Painful dilemmas can equally well arise where an authority has a discretionary power as opposed to a duty, and has to decide how to apportion limited funds in its budget. A local health authority had to decide whether to provide an 11-year-old girl, suffering from acute leukaemia, with very expensive medical treatment which was experimental and had a low chance of success. Concluding that the treatment was not in the girl's best interests, the authority declined to provide it, taking account of its limited resources. The Court of Appeal upheld that decision and Sir Thomas Bingham MR said:[51]

> 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 . . . it would be totally unrealistic to require the authority to come to the court with its accounts and seek to

[49] *R.* v. *East Sussex County Court ex p. Tandy* [1998] AC 714; and see *R.* v. *Sefton MBC ex p. Help the Aged* [1997] 4 All ER 532; *R.* v. *Birmingham CC ex p. Mohammed* [1998] 3 All ER 788; *B.* v. *Harrow LBC*, [2000] 1 WLR 223 (HC).

[50] *R.* v. *Gloucestershire CC ex p. Barry* [1997] AC 584. Contrast *R.* v. *Gloucestershire CC ex p. Mahfood* (1995) 8 Admin. LR 180.

[51] *R.* v. *Cambridge Health Authority ex p. B.* [1995] 1 WLR 898.

demonstrate that if this treatment were provided for B. there would be a patient C. who would have to go without treatment.

In these discretionary situations it is more likely to be unlawful to disregard financial considerations than to take account of them.

The police, likewise, must be allowed a wide margin of discretion in deciding how best to deploy their limited resources of manpower and finance. Where the loading of live animals for export was obstructed at the port by crowds of animal rights activists, necessitating a level of police protection which interfered with the efficient policing of the rest of the county, the chief constable felt compelled by lack of resources to reduce protection from five days a week to two, and to forbid shipments on other days in order to prevent breaches of the peace. The House of Lords upheld these decisions, despite the shippers' complaints of 'a surrender to mob rule' and the failure of the chief constable to seek a special grant (unlikely to be given).[52] Lord Slynn approved the comment that 'there may well be important and sound reasons for a chief constable's decision not to commit all his force's resources to, nor to exercise his full legal powers in, a given dispute or demonstration'.[53] The police had given due weight to all the relevant considerations, and the court should ask no more. This balancing exercise was what was lacking in a contrasting case where local airport and harbour authorities had banned altogether the shipment of live animals because of disruptive protests. A Divisional Court quashed the bans as being a surrender to the dictates of unlawful pressure groups.[54] The authorities had failed to give any thought to 'the awsome implications for the rule of law of doing what they propose', there was no issue of lack of resources, and no complaint of inaction by the police.

A flexible principle

The principle of relevance has a part to play in judicial as well as in administrative decisions. In the time before the enactment of the Human Rights Act 1998, when the European Convention on Human Rights and Fundamental Freedoms had the status of a treaty only and not the force of law, the court would take account of it as a relevant consideration in cases where the law was ambiguous or uncertain. But fundamental rights deserve a special title, which will be found below.

'Irrelevant considerations' as a technique of judicial review provides the court with a weapon of great range and flexibility, which may often approximate to

[52] *R.* v. *Chief Constable of Sussex ex p. International Trader's Ferry Ltd*, above, p. 366. The House also rejected the contention that the police action violated EU law as being measures equivalent to quantitative restrictions on exports, contrary to Article 34 (now 29) of the EU Treaty. It was held justified by the exception for acts of public policy in Article 36 (now 30).

[53] (1997) 60 *MLR* 394 at 409 (C. Barnard and I. Hare).

[54] *R.* v. *Coventry City Council ex p. Phoenix Aviation* [1995] 3 All ER 37 (the quotation is from Simon Brown LJ). See also *K.A. Feakins Ltd.* v. *Dover Harbour Board*, (1998) 10 Admin. LR 665 (similar facts, action for breach of statutory duty failed).

reviewing a decision merely on its merits, undermining the supposedly strict *Wednesbury* principle. Its potentiality is obvious, and equally obvious is the difficulty of reducing it to precise rules. Along with other varieties of unreasonableness it embraces a large area of the ultra vires rule and the decisions are numerous. Many of the best examples can be grouped according to their subject matter under the titles which follow. But these categories must not be regarded as rigid. The courts have many strings to their bow and many of their arguments are interchangeable.[55]

CATEGORIES OF UNREASONABLENESS

Opposition to the policy of Parliament

From time to time public authorities have set their faces against the policy of an Act, and either declined to implement it or else attempted to frustrate it. Needless to say, this is an unlawful motive. In a case under the old poor law, where justices of the peace had discretion to enforce parochial contributions if they 'shall think fit', the justices refused to make an order against one parish because they thought it unfair that, having no paupers, it should be made to contribute, and the justices' order was condemned as arbitrary and illegal.[56] An analogous modern case arose from a London borough council's hostility to the policy of the Rent Act 1957. Certain classes of houses, formerly under requisition, remained in the occupation of tenants whose rents could not be increased 'except so far as the local authority may from time to time determine'; and the local authority had to compensate the owners by paying them the difference between the rent so determined and the rent which would otherwise be payable. The object of the Rent Act 1957 was to allow rents to rise to more realistic levels. Therefore the compensation payable to the owners would be greatly increased unless the local authority approved higher rents for the tenants. The St Pancras borough council refused to do this, being opposed to higher rents generally and wishing to 'protect the tenants from the Rent Act'. Lord Parker CJ held that this policy rendered the council's decision 'purely arbitrary' and disregarded the council's duty to their ratepayers, on whom the cost of the compensation would fall.[57] Their legal duty therefore was to review the rents, taking account of the relevant consideration that rents had been allowed to rise. The district auditor had accordingly been right in disallowing the additional compensation which the council had unlawfully paid. In later proceedings it was held

[55] See e.g. *Wheeler* v. *Leicester City Council* [1985] AC 1054, where arguments based on unfairness, unreasonableness and abuse of power are intermingled. See also [1987] *PL* 368 (J. Jowell and A. Lester) for various facets of the *Wednesbury* doctrine.

[56] *R.* v. *Boteler* (1864) 4 B & S 959.

[57] *Taylor* v. *Munrow* [1960] 1 WLR 151.

that the councillors responsible had acted honestly but unreasonably, and ought not to be relieved from the auditor's surcharges.[58]

A simple and blatant device aimed at nullifying the effect of an Act of Parliament was where a housing authority, determined not to make a general increase of rents as required by the Act, charged the whole of the required increase on to a single vacant house, putting up its weekly rent from £7 to £18,000. The court had no difficulty in holding this an unlawful abuse.[59]

The *Padfield* case,[60] already discussed, shows the 'statutory policy' doctrine as applied to a minister of the Crown. The House of Lords held that in refusing to refer the milk producers' complaint to the statutory committee the minister had acted so as to frustrate the policy of the Act, despite the fact that its words were merely permissive; and that the political and other reasons given were irrelevant and indicative of unlawful motives. It is particularly important to notice how closely the House of Lords scrutinised the minister's reasons, as governing the validity of the action. One of the reasons given in a departmental letter was that the minister would have to consider whether, if he allowed the producers' complaint to be referred to the statutory committee and they upheld it, he would be expected to give effect to the committee's recommendations. Lord Upjohn said:

> This fear of parliamentary trouble (for, in my opinion, this must be the scarcely veiled meaning of this letter) if an inquiry were ordered and its possible results is alone sufficient to vitiate the Minister's decision which, as I have stated earlier, can never validly turn on purely political considerations; he must be prepared to face the music in Parliament. . . .

There could scarcely be a better example of the principle that statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.

The House of Lords also rejected the Crown's argument that the minister need have given no reasons and that therefore such reasons as he volunteered to give could not be criticised. Going still further, the House declared that if in such a case he refused to give any reasons, the court might have to assume that he had no good reasons and was acting arbitrarily.[61] In other words, the minister may not be able to disarm the court by taking refuge in silence. In this way the court would have power to impose, in effect, an obligation to give reasons for discretionary decisions. But the law has not yet reached that point, as explained in a later chapter.[62] Despite the general obligation to act reasonably, a local authority need not give reasons for

[58] *Annison* v. *District Auditor for St. Pancras* [1962] 1 QB 489.

[59] *Backhouse* v. *Lambeth London Borough Council*, The Times, 14 October 1972.

[60] *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] AC 997; above, p. 356.

[61] [1968] AC at 1032, 1053, 1061. See similarly *Secretary of State for Employment* v. *ASLEF* (No. 2) [1972] 2 QB 455 at 493 (Lord Denning MR) and *Minister of National Revenue* v. *Wright's Canadian Ropes Ltd.* [1947] AC 109 at 123 (below, p. 427); and compare *Fiordland Venison Ltd.* v. *Minister of Agriculture* [1978] 2 NZLR 341 (minister's reasons inferred from evidence and held improper; applicant held entitled to licence in the absence of good reasons for refusing it).

[62] Below, p. 522.

evicting a tenant,[63] nor need a minister do so for making orders and giving directions for the protection of trading interests.[64]

A determined ministerial attempt to frustrate the policy of an Act was condemned by the Court of Appeal in the *Laker Airways* case.[65] The company had been granted a licence for a low-cost transatlantic air service by the Civil Aviation Authority, one of whose statutory duties was to secure that at least one independent British airline had opportunities to compete with British Airways. In 1975 the government announced a policy of preventing competition and the Secretary of State issued 'guidance' to the CAA, in terms approved by both Houses of Parliament, requiring them to revoke the company's licence. Under the Civil Aviation Act 1971 the Secretary of State had power to give the CAA guidance in the performance of their functions and the CAA had to obey. But the guidance given in this case clearly conflicted with their functions since one of them was to give opportunities to independent airlines. The guidance was therefore ultra vires and invalid.[66] The Secretary of State had also announced that he would withdraw the company's designation as an approved airline under the agreement with the United States, so that it would not obtain landing rights in America. This step was likewise declared to be unlawful. For its object, again, was to frustrate the express provision of the Act about allowing competition and to render licences properly granted by the CAA worthless. The Act, it was held, by necessary implication prohibited the Crown from pursuing this unlawful object, even though the Crown was acting, as it claimed, under the royal prerogative in the sphere of foreign affairs. Lord Denning MR held further that the Crown was abusing the prerogative, as explained earlier.[67] The use of the doctrine of implied prohibition to restrain action which would normally be beyond the court's control is a particularly striking feature of this decision.

Failure to take account of the policy of Parliament caused the quashing of a local council's refusal to refund rates overpaid. The council had discretionary power under the Act to make repayments, but had refused to exercise it for various bad reasons, without regard to the Act's policy that injustice should be remedied.[68] And there have been other comparable decisions.[69]

In the most controversial of all these cases there was a radical cleavage of judicial

[63] *Cannock Chase DC* v. *Kelly* [1978] 1 WLR 1.

[64] *British Airways Board* v. *Laker Airways Ltd.* [1985] AC 58.

[65] *Laker Airways Ltd.* v. *Department of Trade* [1977] QB 643.

[66] For another mistake by a Secretary of State as to his powers of giving directions see *R.* v. *Secretary of State for Social Services ex p. Lewisham (etc.) LBC*, The Times, 26 February 1980 (default powers misunderstood).

[67] See above, p. 348.

[68] *R.* v. *Tower Hamlets LBC ex p. Chetnik Developments Ltd.* [1988] AC 858, for which see below, p. 800.

[69] See *R.* v. *Burnham Primary and Secondary Committee ex p. Professional Association of Teachers*, The Times, 30 March 1985 (exclusion of teachers' association frustrated policy of Act); *R. v. Haberdashers' Aske's Hatcham School Governors ex p. Brunyate and Hunt* [1989] 1 WLR 542 (HL) (policy of Education Acts thwarted).

opinion about the proper relationship between the courts and Parliament. The criminal injuries compensation scheme, operated administratively on a non-statutory basis and making payments from funds voted by Parliament, was to be made statutory by the Criminal Justice Act 1988, but its provisions were to come into force 'on such day as the Secretary of State may by order made by statutory instrument appoint'. Before making any such order the Secretary of State (the Home Secretary) decided to abandon the scheme provided for in the Act and to substitute a different scheme (the 'tariff scheme') with a scale of fixed payments and less generous compensation. The new scheme was to be put into force without legislation, in the same manner as the old scheme; and there would be no commencement order under the Act of 1988, which would be repealed *pro tanto* when convenient. There could hardly be a plainer case of administrative frustration of Parliamentary intention. But the question was, ought the court to intervene, or was it a matter for Parliament only? At the instance of the Fire Brigades Union and others the House of Lords by a bare majority, upholding a majority of the Court of Appeal, held that the Home Secretary had a duty to keep the activation of the statutory scheme under continuous consideration, that the introduction of an inconsistent scheme was unlawful frustration of the provision made by Parliament, that the matter was justiciable by judicial review, and that declaratory relief should be given to the firemen's union.[70] Lords Browne-Wilkinson and Nicholls, in the majority, held that the Secretary of State was attempting to pre-empt Parliament's decision whether to preserve the statutory scheme, and that by introducing the tariff scheme he debarred himself from exercising his power to make a commencement order for the purpose that Parliament intended; and that this was an abuse of power and unlawful. Lord Lloyd, assenting, held that the Home Secretary's power was to give effect to, rather than frustrate, the legislative policy enshrined in the Act and allowed him 'to say when, but not whether' that policy should be fulfilled. Lord Keith, in the minority, held that the decision was 'of a political and administrative character quite unsuitable to be the subject of review by a court of law', which 'would be a most improper intrusion into a field which lies peculiarly within the province of Parliament' and a 'usurpation of the function of Parliament'; and Lord Mustill agreed in substance, though less vehemently, with Lord Keith.[71]

Important constitutional issues underlie the conflicting opinions in this case. The Home Secretary was proceeding, realistically, on the footing that 'the intention of Parliament' was in fact the intention of the executive government, which could obtain from Parliament any authority or dispensation that it wanted at any time. The minority judges considered that the courts should not intrude into this

[70] *R.* v. *Home Secretary ex p. Fire Brigades Union* [1995] 2 AC 513. After this decision the government's preferred scheme was made statutory by the Criminal Injuries Compensation Act 1995.

[71] Compare the dissent of Neill LJ in *R.* v. *Criminal Injuries Compensation Board ex p. P* [1995] 1 WLR 845.

relationship. But a great deal of administrative action has a political character, and may affect proceedings in Parliament, for example when orders are approved by resolutions of both Houses and yet may be quashed.[72] To invalidate administrative action which conflicts with statute is essentially the task of the judiciary. As Lord Lloyd said, quoting this book, 'ministerial responsibility is no substitute for judicial review'.

Infringement of fundamental rights

Two classes of fundamental rights, closely similar and sometimes identical, have to be distinguished. The first class are rights regarded as of special importance by the common law, such as the right of access to the courts.[73] The second class are the rights protected by the European Convention on Human Rights and Fundamental Freedoms, now incorporated into the law by the Human Rights Act 1998. The common law rights affect the operation of the principle of reasonableness since they can be infringed only for especially compelling reasons. Rights under the European Convention, on the other hand, are now statutory rights by virtue of the Act of 1998, with their own independent force. But before the Act those Convention rights would sometimes be taken into account by the courts on the assumption that Parliament would not intend to infringe Convention obligations[74] and this indirect effect may still be important in cases falling outside the Act.

Basic rights such as the right to life, freedom of the person, freedom of speech and the right of access to the courts are protected in the common law by judicial review of special stringency. This may be seen from an important statement by Lord Bridge:[75]

> But I do not accept that this conclusion [the inapplicability of the Convention] means that the courts are powerless to prevent the exercise by the executive of administrative discretions, even when conferred, as in the instant case, in terms which are on their face unlimited,

[72] See the *Laker Airways* case, above.

[73] For this 'vital constitutional right' see *R.* v. *Lord Chancellor ex p. Witham* [1998] QB 575; below, p. 721.

[74] *Ex p. Brind* (below) at 721; *Rantzen* v. *Mirror Group Newspapers Ltd.* [1994] QB 670 at 691.

[75] *R.* v. *Home Secretary ex p. Brind* [1991] 1 AC 696 at 748. See also *R.* v. *Home Secretary ex p. Bugdaycay* [1987] AC 514 at 531. The resulting state of the law is summarised by Neill LJ in *R.* v. *Secretary of State for the Environment ex p. National and Local Government Officers Association* (1992) 5 Admin. LR 785 at 798. See also the discussion by Sir John Laws in Forsyth and Hare (eds.), *The Golden Metwand*, 185. And note the influential 'accurate distillation' of the principles laid down in *ex parte Bugdacay* and *ex parte Brind* put forward by David Pannick QC and adopted by Lord Bingham MR in *R.* v. *Ministry of Defence ex parte Smith* [1996] QB 517 at 554. The distillation notes that the human rights context is important in judging whether the decision-maker has exceeded the range of options open to him. The 'more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable . . .'

in a way which infringes fundamental human rights . . . But again, this surely does not mean that in deciding whether the Secretary of State, in the exercise of his discretion, could reasonably impose the restriction he has imposed on the broadcasting organisations, we are not perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it. The primary judgment as to whether the particular competing public interest justifies the particular restriction imposed falls to be made by the Secretary of State to whom Parliament has entrusted the discretion. But we are entitled to exercise a secondary judgment by asking whether a reasonable Secretary of State, on the material before him could reasonably make that primary judgment.

Fundamental rights, accordingly, will be guarded by the law with especial care. This guardianship, according to Lord Bridge, is exercised through the principle of reasonableness; and in the same vein the Court of Appeal has held that the threshold of unreasonableness is lowered and the standard of review becomes more stringent when the right to life is in question.[76] Wide general powers must make way for fundamental rights, for example where it is held that the Home Secretary's wide powers of administration over prisons do not empower prison governors to obstruct prisoners' correspondence with their legal advisers or their access to the courts of law[77] or their interviews with journalists for the purpose of challenging the justice of their convictions,[78] since it is part of their right of access to justice that they should have access to investigative journalism, by which miscarriages of justice have often been exposed. In the latter context Lord Steyn identified 'a fundamental or basic right' bringing into play 'a presumption of general application operating as a constitutional principle'.[79] And Lord Hoffmann said:[80]

Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process . . . In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.

The House of Lords is evidently laying the foundations of a more deep-seated doctrine than that of reasonableness,[81] giving effect in the common law to a culture of human rights independent of the Act of 1998.

[76] *R.* v. *Lord Saville of Newdigate ex p. A* [1999] 4 All ER 860 (order of statutory tribunal of inquiry denying anonymity to soldier witnesses who fired shots in 'Bloody Sunday' riots of 1972 quashed because identification would endanger their lives).

[77] *R.* v. *Home Secretary ex p. Leech* (No. 2) [1994] QB 198; *Raymond* v. *Honey* [1983] 1 AC 1.

[78] *R.* v. *Home Secretary ex p. Simms* [1999] 3 WLR 328. The House of Lords held that the right was restricted to that purpose only, invalidating (*pro tanto*) a Home Office policy that journalists must undertake not to use the information professionally.

[79] Ibid. at 390.

[80] Ibid. at 341.

[81] Lord Hobhouse however spoke in terms of reasonableness.

The statutory rights secured by the Human Rights Act 1998 have already been generally explained.[82] But there may be cases not covered by the Act, for example where the complainant is not a 'victim' within the Act or the Convention but nevertheless has a 'sufficient interest' to seek judicial review.[83] In such cases the court is likely to fall back upon its practice developed before the Act, whereby it would have regard to the Convention principles in cases where the common law was uncertain or a statute was obscure or ambiguous or merely general in its terms.[84]

In a leading example the Court of Appeal, faced with conflicting precedents, held that the right of free expression secured by the Convention entailed that a local authority could not sue for libel when vehemently criticised for bad government—although the House of Lords affirmed the decision on the common law alone, without needing to invoke the Convention.[85] In a case already cited in the context of proportionality the Home Secretary had issued directives forbidding the BBC and the IBA from broadcasting words spoken by members of organisations proscribed under emergency legislation in Northern Ireland. These directives were challenged by journalists as violating the Convention right of free speech (as well as being disproportionate) but the House of Lords upheld them, finding that the law was clear and that there was no room for the Convention.[86] Room was found for it, however, by the Court of Appeal while the Human Rights Bill was still before Parliament, when the Convention right of privacy was construed as if it were already part of English law, though without affecting the result.[87] But the House of Lords later gave a check to these tendencies, holding that the Act had shown a clear statutory intent to postpone the coming into operation of its central provisions.[88]

Penalising the innocent

One element in the abuse of power condemned by the Court of Appeal in the television licences case, already encountered, was the penalising of licence-holders for doing something quite lawful, namely taking out new licences at any time they

[82] Above, p. 161.

[83] See above, p. 169.

[84] For full discussion and survey of the pre-Act position see Murray Hunt, *Using Human Rights Law in English Courts.*

[85] *Derbyshire CC* v. *Times Newspapers Ltd.* [1993] AC 534.

[86] *Ex p. Brind* (above).

[87] *R.* v. *Home Secretary ex p. Hargreaves* [1997] 1 WLR 906; *R.* v. *Chief Constable of the North Wales Police ex p. AB* [1999] QB 396.

[88] See also *R.* v. *Director of Public Prosecutions ex p. Kebilene* [1999] 3 WLR 972 (HL), where the House reversed an imaginative decision of a Divisional Court based on an alleged violation of the presumption of innocence protected by Article 6 of the Convention. For this case see below, p. 633.

might wish.[89] The House of Lords emphasised the same point in a later case where a city council had refused, contrary to its previous practice, to allow a local rugby football club to use the city's sports ground because three of its members had played in South Africa.[90] The House held that it was unreasonable thus to punish the club for not conforming to the council's political attitudes, and Lord Templeman said:

> A private individual or a private organisation cannot be obliged to display zeal in the pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority. . . . The council could not properly seek to use its statutory powers of management or any other statutory powers for the purposes of punishing the club when the club had done no wrong.

The council's decision was therefore quashed, with provision for declaratory or injunctive relief if necessary, thus in effect compelling the council to allow the club to use its sports ground. In a similar case a London borough adopted a policy of boycotting the products of an oil company because it did business in South Africa, and since this was not an unlawful activity the council's resolution was quashed and its enforcement restrained by injunction.[91] The same occurred when, for purely vindictive reasons, a council withdrew all advertising from a newspaper with which it was in dispute.[92] A council's ban on political parties taking part in a community festival was likewise unlawful.[93]

Financial motives

A laudable desire to save public money has led many authorities into the error of using their powers for financial profit when that is not a legitimate purpose. This misdeed may be illustrated by the case of the planning condition which wrongfully required the applicant to provide a strip of roadway at his own expense.[94] Similarly a local authority was not entitled, as a condition of approving building plans, to stipulate that the applicant should provide and pay for sewers outside his own property: this, said Lord Russell CJ, was 'utterly unreasonable'.[95] An education authority which has power to require the dismissal of teachers on 'educational grounds' may not do so merely to save money.[96] Nor may a local authority for reasons of economy restrict the time to be spent on each case by guardians ad litem.[97]

[89] Above, p. 362. See likewise *Roncarelli* v. *Duplessis*, above, p. 361.
[90] *Wheeler* v. *Leicester City Council* [1985] AC 1054.
[91] *R.* v. *Lewisham LBC ex p. Shell UK Ltd.* [1988] 1 All ER 938.
[92] *R.* v. *Derbyshire CC ex p. Times Supplements Ltd.* (1990) 3 Admin. LR 241.
[93] *R.* v. *Barnet LBC ex p. Johnstone* (1989) 88 LGR 73.
[94] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240; below, p. 404.
[95] *R.* v. *Tynemouth District Council* [1896] 2 QB 219.
[96] *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483; above, p. 383.
[97] *R.* v. *Cornwall CC ex p. Cornwall Guardians Ad Litem Panel* [1992] 1 WLR 427.

The city of Sydney exceeded its powers of acquiring land for 'carrying out improvements in or remodelling any portion of the city' when it made a compulsory purchase order for land merely in order to obtain the rise in value which the extension of a street would bring about, without any intention of improving or remodelling.[98] In another Australian case a statutory committee was given wide wartime powers to ensure adequate supplies of vegetable seeds, and was also empowered to trade in seeds. It was held that orders prohibiting merchants from dealing in certain seeds would be ultra vires if made primarily for the purpose of improving the profitability of the committee's trading operations rather than for ensuring supplies.[99]

Two liquor licensing cases firmly underline the same point. In one, the licensing justices required the applicant to pay £1,000, which they intended to use to reduce the rates or for some other public purpose. The court had no difficulty in holding that the justices had taken illegitimate factors into account in a wholly unjustifiable way.[1] In the other case an elaborate system had been set up by the statutory licensing planning committee in Birmingham to deal with the licences relating to the many public houses destroyed in the Second World War. With Home Office approval and for some twenty years they had refused to approve applications unless the applicant purchased outstanding licences sufficient to cover his estimated sales. The main object of the policy was to relieve the city of the cost of compensating the holders of the outstanding licences. At the current market price of these licences the proprietors of a large new hotel would have had to pay over £14,000. At their instance the Court of Appeal condemned the whole system as unreasonable.[2] Lord Denning MR said:

> I think it is unreasonable for a licensing planning committee to tell an applicant: 'We know that your hotel is needed in Birmingham and that it is well placed to have an on-licence, but we will not allow you to have a licence unless you buy out the brewers.' They are taking into account a payment to the brewers which is a thing they ought not to take into account.

The condition was therefore 'bad because it is unreasonable'.

In this class also is to be included the television licence case, already recounted, in which the Court of Appeal held that the Home Secretary could not lawfully exercise his power to revoke a licence for the purpose of compelling the licensee to

[98] *Sydney Municipal Council* v. *Campbell* [1925] AC 338. Compare *Denman & Co. Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464 at 476.

[99] *Yates (Arthur) & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (1945) 72 CLR 37. Cf. *Bailey* v. *Conole* (1931) 34 WALR 18 (regulations prescribing bus routes invalid since object was to protect state-owned trains from competition).

[1] *R.* v. *Bowman* [1898] 1 QB 663. See similarly *R.* v. *Sheffield Justices ex p. Rawson* (1927) 44 TLR 43 (offer to pay £1,250 to compensation fund). Cf. *Marshall Shipping Co.* v. *R.* (1925) 41 TLR 285; *R.* v. *LCC* [1931] 2 KB 215 at 232. Contrast *Becker* v. *Home Office* [1972] 2 QB 407 (above, p. 222).

[2] *R.* v. *Birmingham Licensing Planning Committee ex p. Kennedy* [1972] 2 QB 140.

pay an additional fee which had not been authorised by Parliament.[3] The revocation was invalid not only on general grounds of unreasonableness but also because it was an attempt to levy money for the use of the Crown without the authority of Parliament, contrary to the Bill of Rights 1688.

The Crown is not subject to this branch of the doctrine of unreasonableness when using its ordinary powers as an owner of land. Accordingly there can be no objection to the demand by an official in Hong Kong, acting as land agent for the Crown, for the payment of a high premium as the price of waiving restrictions in a lease of Crown land.[4]

Indiscriminate action

The indiscriminate or excessive use of power is illustrated by the case of a London borough council which made it a rule to refer to the rent tribunal all the tenancies in any block of flats where two or more reductions of rent had been awarded.[5] Although the Act contained no express restriction on the council's power to refer tenancies, it was held that it was an abuse to make a single block reference of over three hundred tenancies without any consideration of the individual cases and without any specific complaint against the landlord. The disputed reference in fact contained so many inaccuracies that it was not a genuine exercise of the power, and furthermore the council had taken account of the irrelevant consideration that the flats were allegedly below the highest building standards. This decision was distinguished in a later case where another London council had considered each case with care in a reference of twenty-two tenancies, and where the only complaint was that most of the tenants themselves did not wish the reference to be made.[6] The council here was plainly acting responsibly and intra vires, within the bounds of its discretion. But the Court of Appeal went out of their way to say that the doctrine of relevant and irrelevant considerations ought not to apply at all to a decision which does not itself infringe rights and merely causes something to be investigated. This novel proposition was probably not intended to make a breach in the long-settled rules of judicial review, since the court appears to have assumed that the 'relevant considerations' doctrine was violated whenever anything which might be thought relevant was not considered or any sort of mistake was made. In reality that doctrine applies only where the relevant considerations neglected or the irrelevant considerations adopted are so serious as to put the decision outside the powers of the statute.[7] The problem disappears if it is understood that the

[3] *Congreve* v. *Home Office* [1976] QB 629; above, p. 362.

[4] *Hang Wah Chong Investment Co. Ltd.* v. *A.-G. of Hong Kong* [1981] 1 WLR 1141.

[5] *R.* v. *Paddington etc. Rent Tribunal ex p. Bell London and Provincial Properties Ltd.* [1949] 1 KB 666. Compare *R.* v. *British Coal Corporation ex p. Vardy* [1993] ICR 720 (pit closures unreasonable for lack of independent scrutiny).

[6] *R.* v. *Barnet etc. Rent Tribunal ex p. Frey Investments Ltd.* [1972] 2 QB 342.

[7] See *R.* v. *St Pancras Vestry* (1890) 24 QBD 371.

'relevant considerations' doctrine is necessarily a species of the genus 'ultra vires', and cannot be used to impugn a proper and reasonable decision.

Misplaced philanthropy

Statutory authorities have sometimes made use of their wide general powers in order to confer social or economic benefits on particular sections of the community. In several such cases they have gone beyond the true limits of their powers. The policy of the courts is in general hostile to the use of public funds, such as rates, for new social experiments. Local authorities are subject to a fiduciary duty to use their revenues with due restraint.

A classic case in this group is *Roberts* v. *Hopwood*.[8] A minimum weekly wage of £4 for men and women equally was established in 1920 by the Poplar Borough Council, representing themselves as 'model socialist employers'. This in itself was very substantially above the previous rates, and soon became relatively higher still due to a sharp fall in the cost of living and in wages. But the council insisted on continuing the £4 rate, maintaining that this was within their power to pay their servants 'such salaries and wages as (they) may think fit'. In due course the district auditor disallowed the wage payments, in so far as they exceeded current market rates, as being 'contrary to law', and surcharged the councillors personally. A long struggle over the surcharges began, in the course of which the auditor's ruling was unanimously upheld by the House of Lords, and an order of the Minister of Health, purporting to free the councillors from liability, was held invalid by the High Court. Ultimately, when the surcharges had accumulated far beyond the councillors' personal means, they were remitted by Act of Parliament.[9]

The basis of the decision of the House of Lords, as already noted, was that the wages paid were excessive and unreasonable in such a degree that they were beyond the council's powers. The council's philanthropic purposes were not in law relevant considerations: their duty was not to give their ratepayers' money away in what were in substance gifts, but to take due account of the relevant factor of current market rates. They had misled themselves by 'eccentric principles of socialistic philanthropy'.[10]

Despite remarks such as the last, and despite criticisms from literal-minded people, there is no doubt that this decision was fully in accord with the settled policy of limiting discretionary powers. It was followed where councillors of

[8] [1925] AC 578. Contrast *Pickwell* v. *Camden LBC* [1983] QB 962 (payment of wages above national level; auditor's challenge failed).

[9] Audit (Local Authorities) Act 1927, s. 2(6). For a good account of the whole contest and its political background, including the imprisonment of thirty councillors for failing to levy rates, see [1962] *PL* 52 (B. Keith-Lucas); N. Branson, *Poplarism*. See above, p. 122 for the current system of audit.

[10] At 594 (Lord Atkinson).

another London borough were surcharged for failing to increase rents in an attempt to resist the policy of the Rent Act 1957, as already explained.[11] It was also accepted by the Court of Appeal as supporting their decision in the *Birmingham* case, discussed below. It had also been foreshadowed earlier when Farwell LJ had said:[12]

> The auditor does not claim . . . to exercise any control over questions of policy; but he does claim the right to check and challenge all items of administration. It is not easy to draw the line between policy and administration, or to give a definition except by way of example, but in my opinion the establishment of a works committee would be a question of policy into which the auditor could not go, but the payment of abnormally high wages to the workmen employed by such committee would be a matter of administration.

Another restrictive decision comes from the general strike of 1926. After the strike, when the poor law guardians had been empowered to give relief to miners' families by way of loan, the Tynemouth guardians resolved to cancel the outstanding debts.[13] This was held to be ultra vires since the guardians, unlike a private creditor, had no power to remit debts,[14] and because, in any case, it was unreasonable to do so where there was no evidence of inability to repay. The idea that runs through these cases is that public money must be administered with responsibility and without extravagance. This appears to mean that it is not available for charity.

The generosity of local authorities, in particular, is restrained by the doctrine that they owe a fiduciary duty to their ratepayers analogous to that of trustees. This means that, in deciding upon their expenditure, they must hold a balance fairly between the recipients of the benefit and the ratepayers who have to bear the cost. The courts have given two notable illustrations of this doctrine. In the first, the Court of Appeal invalidated the Birmingham City Council's concession to old-age pensioners, by which if resident in the city they could travel free of charge on the corporation's buses and trams.[15] These services were operated under Acts of Parliament which empowered the corporation to impose 'such fares and charges as they may think fit'. They were already run at a loss, and the additional cost of the concession was some £90,000 a year. At the instance of a ratepayer the court granted a declaration that the concession was illegal. The corporation's fiduciary duty to its ratepayers meant that it was not free to saddle them with the cost of subsidising one particular class of the community. Philanthropy was no part of the management of a transport undertaking which the corporation ought to operate 'substantially on business lines'. This would not necessarily exclude free or cheap travel for children, which might well be commercially justifiable. But it did exclude

[11] *Taylor* v. *Munrow* [1960] 1 WLR 151; above, p. 388.

[12] *R.* v. *Roberts* [1908] 1 KB 407 at 435 (unsuccessful appeal by the same auditor who played a leading part in *Roberts* v. *Hopwood*).

[13] *A.-G.* v. *Tynemouth Union* [1930] 1 Ch. 616, also following *Roberts* v. *Hopwood*.

[14] See above, p. 355.

[15] *Prescott* v. *Birmingham Cpn.* [1955] Ch. 210.

concessions made merely 'on benevolent or philanthropic grounds'. Ultimately, however, local authorities were given power to allow free travel to certain specified classes of the community by the Travel Concessions Act 1964.[16]

The second illustration was the invalidation by the House of Lords of the supplementary rate levied by the Greater London Council for the purpose of financing a 25 per cent cut in the London bus and underground fares.[17] This cut was made in fulfilment of electoral promises. But it had to be paid for by all the ratepayers of Greater London, for whom it was exceptionally expensive since it involved a loss of government grant which approximately doubled the rate. In deciding to fulfil its election promises without regard to the exceptional burden thrown upon the ratepayers the GLC was held to have neglected its fiduciary duty to hold the balance fairly, as well as to have failed in its statutory duties. It had power to subsidise the transport services, but it also had a duty to encourage their economic operation rather than to drive them into loss deliberately, leaving the ratepayers to foot the bill.

A paternal concern for human welfare motivated a caravan site licensing authority's requirements that there should be rent control, security of tenure, and no restrictions on the tenants' liberty to shop where they wanted or to form tenants' associations. It will later be seen how the House of Lords invalidated these conditions as being unreasonably remote from the purposes of the Act controlling the use of land for caravan sites.[18]

Permissible philanthropy

One form of social assistance which the law has allowed is the charging of differential rents to tenants of local authorities.[19] This is held to be reasonably incidental to their managerial powers over their houses. They may therefore adjust rents according to the means of individual tenants, either by granting rebates or by adding surcharges to a low basic rent. This is clearly philanthropy, but it is philanthropy authorised by Parliament. For the underlying policy of the housing legislation, which empowers the authorities to make 'such reasonable charges . . . as they may determine', is to provide houses for those who cannot afford economic rents, but not to subsidise those who can afford them.[20] This policy was prayed in aid by one tenant of a council house who challenged the legality of a uniform increase of

[16] Concessions already in operation had been legitimated by the Public Service Vehicles (Travel Concessions) Act 1955.

[17] *Bromley LBC* v. *Greater London Council* [1983] 1 AC 768.

[18] *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] AC 735; below, p. 404.

[19] *Leeds Cpn.* v. *Jenkinson* [1935] 1 KB 168; *Smith* v. *Cardiff Cpn.* (No. 2) [1955] Ch. 159; *Summerfield* v. *Hampstead Borough Council* [1957] 1 WLR 167.

[20] See *Smith* v. *Cardiff Cpn.* (above) at 170.

rents on the ground that the council was *not* operating a differential scheme, and did not consider the means of each of its tenants. The court had no difficulty in upholding the council.[21] Here is one field where a wide range of differing social policies is within the bounds of the discretion conferred, and where the court will not (as elsewhere it may)[22] seize upon the word 'reasonable' as importing a rigid legal standard.

Children's allowances have also been held to be a legitimate element in wages paid by local authorities.[23] Following the lead of *Roberts* v. *Hopwood*, the district auditor for Birmingham disallowed the payments and surcharged the councillors, holding that the size of an employee's family was an irrelevant consideration in determining his salary. But the Court of Appeal quashed these orders, on the ground that children's allowances were a recognised benefit which many employers had reasonably paid, and which therefore were within the council's powers. The strength of the council's case was that, instead of increasing all salaries to the pre-war level in terms of real values, they were increasing them selectively in order to benefit the class which suffered most. Since all the salaries were therefore within the range of what the council might reasonably pay, the allowances for children were intra vires. In *Roberts* v. *Hopwood* Lord Sumner had said that even where the motive was improper the expenditure would be lawful if there was no excess over what was reasonable.[24] Here therefore the council's discretion was wide enough to allow some scope for philanthropy.

Improper licensing decisions

Miscellaneous licensing powers are very numerous, and are often conferred in widely permissive terms. The courts are vigilant to restrict the discretion of licensing authorities to the true purposes of the empowering Act, and to disallow arbitrary or oppressive refusals or revocations or improper conditions. In licensing there is naturally wide scope for the question of relevant and irrelevant considerations. A century ago, for example, a local authority might not withhold approval of building plans on the ground that the building was unsuitable for the neighbourhood.[25] Today this has become a highly relevant consideration for the refusal

[21] *Luby* v. *Newcastle-under-Lyme Cpn.* [1964] 2 QB 64.
[22] See below, p. 429.
[23] *Re Walker's Decision* [1944] KB 644.
[24] [1925] AC 578 at 604, quoted above, p. 384.
[25] *R.* v. *Newcastle on Tyne Cpn. ex p. Veitch* (1889) 60 LT 963. Cf. *Marshall* v. *Blackpool Cpn.* [1935] AC 16 (power to approve plans for access across footpaths to street does not empower refusal of approval of proper plans because access might impede traffic; Act not intended to restrict owner's right of access); *Davies* v. *Bromley Cpn.* [1908] 1 KB 170 (plans allegedly rejected out of spite).

of planning permission, although in both cases alike the Acts merely give power to grant or withhold consent.

Among the many examples of the abuse of licensing powers pride of place is claimed by the three cases, one Canadian and two English, in which ministers have attempted to procure the cancellation of licences for improper reasons. These have already been related.[26] The Court of Appeal quashed the revocation of a market trader's licence on the ground that to deprive him of his livelihood was an excessive penalty in relation to his offence, which was aggravated by abusive language.[27] The similarity with the principle of proportionality in European law has already been noticed.[28]

In the long history of liquor licensing the courts have quashed many decisions of licensing justices and examples have already been given.[29] It has been held irrelevant for the justices, when considering whether the applicant is a fit and proper person, to take account of the way he proposed to do business, the terms agreed between him and the brewery company, and the price of the beer to be supplied.[30] In considering an application for enlarging licensed premises it is an irrelevant ground of refusal that the licensee will obtain a valuable addition to his trade without paying the levy for monopoly value;[31] but this factor is relevant on an application for transfer of the licence to superior premises, since it is then reasonable to insist on a new application.[32] To require the surrender of some other licence as a condition of the grant of a licence is illegitimate.[33] And so is to require a payment.[34] Licensing justices must also pursue a consistent policy and may not refuse renewal of a licence unless their new policy is justified by a genuine change of circumstances.[35] Where a refreshment licence was refused to a theatre which had enjoyed it for over fifty years, on the ground that it should be treated equally with a new theatre where an application had been refused, and because there were other facilities nearby, the licensing committee were held to have given too little weight to the fifty years' enjoyment and too much to rigid consistency.[36] In this case the court was virtually acting as a court of appeal and reversing a decision with which it disagreed. It could not be said that the committee had failed to take into account the rival considerations, each of which was relevant: they had assessed

[26] Above, p. 361.
[27] *R.* v. *Barnsley MBC ex p. Hook* [1976] 1 WLR 1052.
[28] Above, p. 366.
[29] Above, p. 395.
[30] *R.* v. *Hyde Justices* [1912] 1 KB 645.
[31] *R.* v. *Wandsworth Licensing Justices ex p. Whitbread & Co. Ltd.* [1921] 3 KB 487 (this levy represents the difference in value between licensed and unlicensed premises and is payable to the exchequer).
[32] *R.* v. *Southampton County Confirming Committee ex p. Slade* [1929] 1 KB 645 (not citing the *Wandsworth* case, above).
[33] *R.* v. *Wandsworth Licensing Justices* (above).
[34] See above, p. 395.
[35] *R.* v. *Windsor Licensing Justices ex p. Hodes* [1983] 1 WLR 685.
[36] *R.* v. *Flintshire County Licensing Committee ex p. Barrett* [1957] 1 QB 350.

them carefully, but the court assessed them otherwise. Nor could it be said that the decision was so unreasonable as to be beyond the committee's powers.

In other cases the courts have allowed a considerable freedom of discretion to licensing justices, when satisfied that they were acting bona fide for the true purposes of the Licensing Acts.[37] But they abuse their discretion if they require a licensee to enter into a binding undertaking restricting his licence in a case where they are not themselves empowered to impose conditions.[38]

Complication has been caused by the introduction of licensing planning committees from whom a certificate of non-objection must be obtained before application for a justices' liquor licence may be made. The committees have to consider an area as a whole, with reference to the number, nature and distribution of licensed premises and the accommodation and facilities provided in them.[39] It has been held that they may not legitimately insist on a bingo club requiring membership for 24 rather than 48 hours before supplying liquor,[40] nor may they object to mobile trolley bars being used in cinemas,[41] since these are matters of detail for the licensing justices and irrelevant for the committee's purposes.

Cinema licensing is a field where the courts are reluctant to interfere, since the disputed questions are usually well within the range of the local authority's discretion. Conditions barring children, even when accompanied by adults, from cinemas on Sundays[42] or barring Sunday opening altogether,[43] have been upheld as not unreasonable. The general principles stated by Lord Greene MR in the leading case have already been quoted.[44] He criticised an earlier decision in which the court had disallowed conditions restricting children from attending cinemas after certain hours, and had held that concern for the health and welfare of children generally was not a relevant factor.[45] The 'irrelevant considerations' argument was also rejected in an earlier wartime case where a licence was refused because the cinema company was controlled by enemy aliens.[46] But the Court of Appeal upheld a complaint that the Greater London Council was using an unduly permissive test of obscenity and licensing indecent films, thereby misusing their licensing power.[47]

A good example of irrelevant grounds was where the commissioner of police

[37] e.g. *Sharp* v. *Wakefield* [1891] AC 173; *Leeds Corporation* v. *Ryder* [1907] AC 420.
[38] *R.* v. *Edmonton Licensing Justices ex p. Baker* [1983] 1 WLR 1000.
[39] Licensing Act 1964, s. 119, replacing earlier Acts.
[40] *Fletcher* v. *London (Metropolis) Licensing Planning Committee* [1976] AC 150.
[41] *R.* v. *London (Metropolis) Licensing Planning Committee ex p. Maynard*, The Times, 11 May 1976.
[42] *Harman* v. *Butt* [1944] KB 491; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Cpn.* [1948] 1 KB 223.
[43] *London County Council* v. *Bermondsey Bioscope Ltd.* [1911] 1 KB 445.
[44] Above, p. 363.
[45] *Theatre de Luxe (Halifax) Ltd.* v. *Gledhill* [1915] 2 KB 49.
[46] *R.* v. *London County Council ex p. London & Provincial Electric Theatres Ltd.* [1915] 1 KB 446.
[47] *R.* v. *Greater London Council ex p. Blackburn* [1976] 1 WLR 550.

refused cab licences to all proprietors whose vehicles were on hire-purchase.[48] Another was where a river authority refused to renew a salmon fishery licence because it was in dispute with the owner.[49] In New Zealand the court has condemned a refusal of foreign investment facilities when the motives of the authorities were outside the purposes of the Act.[50]

The planning cases discussed next might also be considered to illustrate illegitimate licensing decisions.

Unreasonable planning decisions

The importance of the statutory background and context is well illustrated by a group of planning cases. A local planning authority may grant permission 'subject to such conditions as they think fit',[51] and the court is disposed to construe such conditions benevolently.[52] But it has been repeatedly held that such conditions are invalid unless they 'fairly and reasonably relate to the permitted development'.[53] Many planning conditions have been condemned by the application of this test. The House of Lords similarly invalidated conditions imposed by a caravan site licensing authority, although it had power to grant licences 'subject to such conditions as the authority may think it necessary or desirable to impose'.[54] Among numerous conditions were: that site rents should be agreed with the authority, that there should be security of tenure comparable to that in rent-controlled houses, that no premium should be charged for a site, and that there should be no restrictions on commercial or political activity. These conditions, designed to benefit the tenants personally rather than to control the use made of the land, were held to be 'a gratuitous interference with the rights of the occupier' and 'wholly unnecessary for the good governance of the site', and therefore ultra vires. Lord Upjohn, who used these words, stressed the principle that conditions such as these must be reasonable.

Planning conditions are likewise unreasonable if, instead of relating to the

[48] *R.* v. *Metropolitan Police Commissioner ex p. Randall* (1911) 27 TLR 505; cf. *R.* v. *Brighton Cpn. ex p. Thomas Tilling Ltd.* (1916) 85 LJKB 1552.

[49] *R.* v. *National Rivers Authority ex p. Haughey* (1996) 8 Admin. LR 567.

[50] *Rowling* v. *Takaro Properties Ltd.* [1975] 2 NZLR 62 (doubted by the Privy Council in the sequel case: [1988] AC 473 at 510).

[51] Town and Country Planning Act 1990, s. 70(1) (repeating earlier Acts).

[52] *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] AC 636 at 679; *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240. A condition is not invalid because it depends on events beyond the applicant's control: *Grampian Regional Council* v. *Aberdeen DC* (1983) 47 P & CR 633 (House of Lords upheld condition requiring that a public road should first be closed).

[53] *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 QB 544 at 572 (Lord Denning), affirmed [1960] AC 260.

[54] *Mixnam's Properties Ltd.* v. *Chertsey Urban District Council* [1965] AC 735. Compare *Attorney-General's Reference (No. 2 of 1988)* [1990] 1 QB 77 (excessively wide anti-nuisance condition in waste disposal licence).

permitted development, they attempt to restrict the owner's existing use rights in his land; for it is the policy of the legislation to preserve these rights and to give compensation for restriction of them. The House of Lords therefore held a planning condition to be ultra vires and void because it allowed only six caravans to be stationed on the site:[55] for although there had been only six previously, the existing use right included the right to increase the number up to the point where there would be a material change of use. But the principle of this case is confined, it seems, to situations where the owner is given nothing in exchange. If he is given permission for some new development over and above his existing use rights, there may be valid conditions restricting his existing use rights on other land or requiring him to remove buildings on other land. So where British Railways were given permission to rebuild a station subject to a condition that part of the land should always be used as a car park, this condition was valid although it restricted existing use rights in the land in question.[56] A condition requiring the removal of buildings, however, is likely to be void if attached to a permission for their use in some particular way.

Planning conditions sometimes require new buildings to be used for particular purposes.[57] A condition restricting the occupants of new cottages to persons employed in agriculture or forestry was upheld by the House of Lords as being within the policy of the Act.[58] But a Divisional Court held it unreasonable and ultra vires to require a builder to let his houses to persons on the local authority's housing waiting list, for then he was being asked to undertake part of their own duties as housing authority.[59]

A striking example of an invalid planning condition was one which required the landowners to construct a strip of roadway along their entire frontage and to give public right of passage over it.[60] The Court of Appeal invalidated this as an attempt to secure a widening of the adjacent road at the landowners' expense, so as to avoid using the powers of the Highways Act 1959 (now 1980), which would require compensation to be paid. The object, i.e. to widen the road, was held to be

[55] *Hartnell* v. *Minister of Housing and Local Government* [1965] AC 1134, holding the minister's confirming order to be 'unreasonable and ultra vires' (Lord Wilberforce at 1173). See similarly *Allnat London Properties Ltd.* v. *Middlesex County Council* [1964] 62 LGR 304 (factory site wrongly restricted); *British Airports Authority* v. *Secretary of State for Scotland* 1979 SLT 197 (unreasonable restrictions on flying).

[56] *Kingston-upon-Thames Royal London Borough Council* v. *Secretary of State for the Environment* [1973] 1 WLR 1549. See also the *British Airports Authority* case, above.

[57] *Newbury District Council* v. *Secretary of State for the Environment* [1981] AC 578 (condition requiring removal of warehouses after ten years void).

[58] *Fawcett Properties Ltd.* v. *Buckingham County Council* [1961] AC 636.

[59] *R.* v. *Hillingdon London Borough Council ex p. Royco Homes Ltd.* [1974] QB 720. See similarly *Lowe (David) & Sons Ltd.* v. *Musselburgh Cpn.* 1974 SLT 5; *Westminster Renslade Ltd.* v. *Secretary of State for the Environment* (1983) 48 P & CR 255.

[60] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240. See similarly *Medina BC* v. *Proberun Ltd.* (1990) 61 P & CR 77 (condition required provision of access on land outside developer's control: held abuse of power and unlawful).

perfectly reasonable in itself, but the conditions which attempted to put the expense onto the landowner by the use of planning powers were 'so unreasonable that they must be held to be ultra vires'.[61] This decision has several times been approved,[62] though it must not be taken to establish a principle that, where there are two alternative procedures, the more expensive one must be followed.[63] It shows that on the question of reasonableness it is not enough to consider merely the context and purposes of the statute conferring the disputed power: there may be other statutes such as the Highways Act which lay down procedures or confer rights for specific purposes which merely general powers ought not to be capable of overriding, on the principle *generalia specialibus non derogant.* Interaction with other statutes thus imposes still further limits on the indefinite discretionary powers with which statutes are so freely strewn.

The Court may quash the Secretary of State's decision of a planning appeal if it is one which on the evidence he could not reasonably make, as where he refused permission for the continuance of office use in a residential area, when the only reasonable conclusion was that conversion of the premises for residential use was unjustifiably expensive.[64] Where his decision to reopen a planning inquiry can only be described as perverse, that will be quashed likewise.[65] So will be his order for stopping up a road if he fails to take account of the financial loss so inflicted on a restaurant.[66] A local planning authority's decision may be quashed as an abuse of power if it conceals relevant facts or documents.[67]

A way of escape from the strictness of judicial control in this area has been found by many local planning authorities in the device of planning agreements, which they have statutory power to make. An applicant for planning permission will often be willing to agree to give the local authority some benefit, such as land for street widening or office accommodation, if given to understand that he is unlikely to obtain permission otherwise. The legality of this evasive practice has however been questioned.[68]

[61] At 251 (Willmer LJ). See similarly *Bradford Metropolitan Council* v. *Secretary of State for the Environment* (1986) 53 P & CR 55 (Secretary of State rightly disallowed condition requiring road-widening as manifestly unreasonable).

[62] By Lord Wilberforce in *Hartnell's* case (above), where similar reasoning was used; by Lord Widgery CJ in the *Hillingdon* case (above); and see *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] 1 QB 754 (Orr LJ).

[63] See below (overlapping powers).

[64] *Niarchos* v. *Secretary of State for the Environment* (1977) 76 LGR 480; and see *Forkhurst* v. *Secretary of State for the Environment* (1982) 46 P & CR 89 (inspector's decision quashed as unreasonable); *R.* v. *Secretary of State for the Environment ex p. Fielder Estates (Canvey) Ltd.*, (1989) 57 P & CR 424 (order for new inquiry without consulting parties quashed as irrational).

[65] *Niarchos (London) Ltd.* v. *Secretary of State for the Environment* (1980) 79 LGR 264.

[66] *Vasiliou* v. *Secretary of State for Transport* [1991] 2 All ER 77.

[67] *R. v. Welwyn Hatfield DC ex p. Slough Estates Plc* [1991] COD 510.

[68] See below, p. 793.

Overlapping powers and compensation

Another feature of planning law is that the very wide powers of planning authorities may overlap more specific powers, and that the choice of power may affect the right to compensation. This problem arose where a borough council, as planning authority, persistently refused planning permission for building alongside a road, because, in its capacity of highway authority, it had nebulous plans for widening the road in the future. Meanwhile the land suffered prolonged 'planning blight'. As highway authority the council had power to prescribe an improvement line under the Highways Act 1959 (now 1980). But the council did not invoke that power, since the Highways Act required compensation to be paid for the blight inflicted, and the Ministry of Transport's policy was to refuse grants towards such compensation since the same result could be attained free of charge by the use of planning powers. Was it lawful for the council to use its general planning powers, which taken by themselves were sufficient, when Parliament had provided a different procedure for this specific purpose and had given a right to compensation? The House of Lords[69] found the solution in a provision that planning powers may be freely exercised despite any other legislation regulating development which was in force before the original planning Act of 1947,[70] which they interpreted so as to include provisions repealing and re-enacting such legislation (as did the Highways Act 1959 as regards improvement lines). But they also gave clear indications that there was no legal objection to the use of planning powers in preference to more specific powers requiring compensation.[71] In a later case Lord Denning MR said, perhaps too broadly, that the House of Lords had held that where there were two such alternative courses of action, a public authority might adopt the one which did not give rise to compensation.[72]

A local planning authority was similarly held to be entitled to grant permission for residential development in an industrial area, with the probability that existing industrial use would become impossible because of the nuisance to future residents, when it had the bona fide intention of making the area residential and at the same time was glad to save the compensation which it would have had to pay if it had made discontinuance orders against the industries.[73] Provided that the planning authority genuinely decided according to their judgment of the public interest, it was immaterial that a substantial part of their motivation was to avoid

[69] *Westminster Bank Ltd.* v. *Beverley Borough Council* [1971] AC 508, upholding the refusal of planning permission by the local authority and the minister.

[70] Town and Country Planning Act 1962, s. 220, now replaced by s. 335 of the Act of 1990. This provision was not cited in the courts below, nor in *Hall & Co.'s* case (above).

[71] See especially at 530 (Lord Reid). Similar is *Portion 675 Zandfontein CC* v. *Sandton CC* 1995 (4) SA 826.

[72] *Hoveringham Gravels Ltd.* v. *Secretary of State for the Environment* [1975] QB 754 at 763. Orr and Scarman LJJ confined their remarks to the planning legislation.

[73] *R.* v. *Exeter City Council ex p. J. L. Thomas & Co. Ltd.* [1991] 1 QB 471.

payment of compensation. The more economical course was justified, also, where the leader of the council sought judicial review of the council's own decision in a planning case, as being vitiated by bias, so saving the making of a revocation order and payment of compensation.[74]

It must be remembered that the planning legislation of 1947 introduced a new philosophy of uncompensated control, so that it may be logical to make this prevail over earlier legislation which paid more respect to rights of property.[75] This reasoning may not necessarily conflict with that adopted by the Court of Appeal in the *Shoreham* case.[76] The basis of the latter may be that a condition requiring a developer to present the public with a free roadway is something quite extraneous to the permitted development and also an unjustifiable demand that he should give up his existing rights of ownership.[77]

Compulsory purchase of land

Wrong or irrelevant purposes have often vitiated compulsory purchase orders or schemes depending upon them, as has already been shown in other contexts.[78] In several cases the illegal element was some bargain with the owner or a third party for putting the land to some use outside the powers of the Act[79] or some plan for disposing of it when the Act required it to be redeveloped.[80] The motives behind a compulsory purchase order made by the Central Land Board were canvassed in a case where, although the House of Lords ultimately upheld the order, a forceful dissenting judgment made out a strong case against it.[81] Under the law then in force persons granted planning permission had to pay a 'development charge', representing the value of the permission, so that development rights were in effect expropriated. Compulsory purchase for public purposes was accordingly effected at 'existing use value' and it was intended that land should change hands at this value. In fact it did not, since the Act did not impose price control, and demand drove up prices. The Central Land Board, empowered to acquire land compulsorily for permitted development, made an order for the acquisition of land which the intending developer was unable to obtain except at a high price. It was suspected that the Board's object was to make an example and to use its powers *in terrorem*

[74] *R.* v. *Bassetlaw DC ex p. Oxby*, [1998] PLCR 283.
[75] See the *Westminster Bank* case (above) at 529, 535.
[76] *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* (above).
[77] This distinction is taken by Orr LJ in the *Hoveringham Gravels* case (above) at 765.
[78] Above, p. 396.
[79] *Denman & Co. Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464; *London & Westcliff Properties Ltd.* v. *Minister of Housing and Local Government* [1961] 1 WLR 519.
[80] *R.* v. *Minister of Health ex p. Davis* [1929] 1 KB 619.
[81] *Fitzwilliam (Earl)'s Wentworth Estates Co.* v. *Minister of Town and Country Planning* [1952] AC 362.

for a purpose not authorised by the Act, i.e. to enforce price control.[82] Denning LJ held this to be a usurpation of the legislative powers of Parliament, having a purpose for which Parliament had deliberately refrained from legislating. He said:[83]

> But there is a principle at stake which is far more important than the stopping of one particular piece of profiteering. The principle is that the legislative power in this country resides in Parliament and not in the government departments. [Powers] must not be used for an ulterior object which is not authorised by law, however desirable that object may seem to them to be in the public interest.

But the House of Lords held that the powers conferred were wide enough to cover the Board's objectives.

In another compulsory purchase case the court declined to make a sharp distinction between 'housing' and 'planning' considerations, holding that a housing authority might legitimately take account of factors which were also relevant for the planning authority.[84] In these fields it is obvious that many relevant factors will overlap. On the other hand, a local authority may not use its housing powers merely for the purpose of obtaining a highway;[85] and a caravan site licensing authority, which is concerned with the use of the particular site, cannot lawfully take account of 'pure planning' considerations, such as that the site is in the green belt.[86] There are however numerous aspects such as amenity, transport, schools and shopping facilities which are relevant both to planning and to site licensing, so that here again there is a wide area of common ground.[87]

A compulsory purchase order, when confirmed by the minister, authorises the purchase for the particular purpose then specified. If later the purpose changes, the authority no longer holds good. Where, accordingly, a local authority obtained an order for the purpose of road widening and building a market hall, they were unable to enforce it for other purposes after abandoning their earlier plans.[88] But a mere change of circumstances rendering the attainment of the objective more remote will not necessarily have this effect.[89]

Powers of compulsory purchase, like other powers, must be exercised reasonably, and all the more so because they expropriate an owner against his will. An order

[82] [1951] 2 KB 284 at 300.
[83] [1951] 2 KB at 311.
[84] *Hanks* v. *Minister of Housing and Local Government* [1963] 1 QB 999.
[85] *Meravale Builders Ltd.* v. *Secretary of State for the Environment* (1978) 77 LGR 365.
[86] *Esdell Caravan Parks Ltd.* v. *Hemel Hempstead Rural District Council* [1966] 1 QB 895 (CA).
[87] Same case at 925 (Lord Denning MR).
[88] *Grice* v. *Dudley Cpn.* [1958] Ch. 329 (declarations that notice to treat and compulsory purchase order were no longer effective).
[89] *Simpsons Motor Sales Ltd.* v. *Hendon Cpn.* [1964] AC 1088 (Lord Evershed at 1126–27 curiously refers to the court's jurisdiction as if it were a branch of equity in the technical sense).

may be quashed as unreasonable if the authority making it already possesses, or can acquire by agreement, other land which is equally suitable for its purposes.[90]

The acquiring authority is usually empowered to take as much land as it judges to be necessary for the statutory purpose. But where it takes more than could reasonably be considered necessary, it acts ultra vires. It cannot therefore take the whole of the site where it requires no more than a few feet for street widening.[91] The Court of Appeal quashed a compulsory purchase order made ostensibly for a sea-wall but including a large piece of land said to be required for coast protection purposes but in fact intended for a paved access way which was to be a sort of promenade and was not in fact needed for coast protection at all.[92]

Tax concessions

Judges have often criticised the practice of the Commissioners of Inland Revenue in making extra-statutory concessions to taxpayers, thereby discriminating between them in their free discretion but without any legal basis.[93] Some of these concessions are made regularly according to published rules;[94] for example, money paid to coalminers in lieu of their entitlement of free coal is, by concession, not assessed to tax. One concession, strongly criticised in the House of Lords, was made under a statute which had been held to make each of a number of joint beneficiaries under a family settlement severally liable for the whole of the tax on the whole income of the fund. Instead of taking steps to amend the law, the tax authorities tempered its application by concession, assessing each taxpayer with his own proportion only. Lord Wilberforce stigmatised this state of affairs as arbitrary, unjust and unconstitutional; for, as Walton J had said at first instance, 'one should be taxed by law, and not be untaxed by concession'. Since the House of Lords held that the oppressive interpretation of the taxing Act was wrong, it was unnecessary to decide whether taxation by administrative discretion was unlawful.[95] But Lord Wilberforce said that unless it was expressly authorised by Act of Parliament 'the courts, acting on constitutional principles, not only should not but cannot validate it'.

[90] *Brown* v. *Secretary of State for the Environment* (1978) 40 P & CR 285; *Prest* v. *Secretary of State for Wales* (1982) 81 LGR 193.

[91] *Gard* v. *Commissioners of Sewers of City of London* (1885) 28 Ch. D 486; *Denman & Co. Ltd.* v. *Westminster Cpn.* [1906] 1 Ch. 464; *Bartrum* v. *Manurewa Borough* [1962] NZLR 21 (acquisition for benefit of neighbouring owner rather than for public benefit).

[92] *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755.

[93] See the opinions of Lord Wilberforce, Lord Edmund-Davies and Walton J in the *Vestey* case (below).

[94] The Inland Revenue publish a booklet on them with annual supplements. But they are not legally enforceable: *R.* v. *HM Inspector of Taxes, Hull, ex p. Brumfield* [1989] STC 151. See also *R.* v. *Customs & Excise Commissioners ex p. Cook* [1970] 1 WLR 450; below, p. 687.

[95] *Vestey* v. *Inland Revenue Commissioners* [1980] AC 1148.

In another case, however, the House upheld concessions by which workers in the printing industry were exonerated from liability for arrears of tax on casual earnings, which had been evaded on a large scale for some years. The tax authorities made a concession to the workers under which the arrears would be discharged if proper tax returns were made for the future. Despite evidence that the concession might have been motivated by fear of a printers' strike, it was held to have been made under an arrangement which was within the managerial powers and discretion of the authorities.[96] At the same time it was said that improper concessions might be the subject of intervention by the court. That indeed occurred in a later case where the tax authorities accepted a valuation 'which no reasonable authority properly directing itself could reach', so that it was declared unlawful by the Court of Appeal.[97]

Ultimately the wheel turned full circle when the Court of Appeal, so far from criticising an extra-legal tax concession, enforced it. For more than twenty years the Inland Revenue had accepted late applications by a large company, whose affairs were exceptionally complicated, for allowances for losses which by statute had to be claimed within two years. In 1992 the Revenue suddenly refused a claim for £17 m. made late in the customary manner, and insisted on the two-year time limit. This abrupt change of policy was held to be so unfair and unreasonable as to be an abuse of power—although no legal power was involved.[98] The case is a remarkable example of legitimate expectation enforced for the sake of fairness, as discussed earlier in this chapter,[99] and in defiance of an Act of Parliament.

Selective prosecution of tax offenders by the Inland Revenue has passed the test of reasonableness.[1]

Unreasonable regulations

The principle of reasonableness applies just as much to the making of rules and regulations as it does to other administrative action. This is explained in the chapter on delegated legislation, where some striking examples will be found.

Miscellaneous cases; aliens; prisoners; undue delay

No list of categories will cover all cases, since the possibilities of abuse are infinite.

[96] *R.* v. *Inland Revenue Commissioners ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617. See also *R.* v. *Inspector of Taxes, Reading, ex p. Fulford-Dobson* [1987] QB 978.

[97] *R.* v. *Attorney-General ex p. Imperial Chemical Industries Plc* (1986) 60 TC 1 (undervaluation of ethane gas).

[98] *R.* v. *Inland Revenue Commissioners ex p. Unilever* [1996] STC 681. See [1997] *PL* 375 (Forsyth).

[99] Above, p. 373.

[1] *R.* v. *Commissioners of Inland Revenue ex p. Mead* [1993] 1 All ER 772.

The courts are always disposed to intervene where the action is arbitrary or oppressive. If the Commission for Racial Equality uses its drastic powers to make a roving investigation without having reasonable grounds for suspecting racial discrimination, its proceedings may be condemned as unreasonable and vexatious.[2] If an investors' compensation scheme rules out claims on behalf of deceased investors, that rule must be quashed as absurd.[3]

The Home Secretary's formidable discretionary powers in respect of prison administration and immigration, deportation and extradition, are, as already illustrated from leading cases,[4] subject to strict judicial review. Where there had been a delay of ten years in an extradition case and other circumstances making an extradition order unjust and oppressive the court quashed it as one which no reasonable minister could make.[5] Where a convicted murderer, released on licence subject to good behaviour, was returned to prison with a postponed release date on account of minor offences the Home Secretary's decision was quashed as perverse and unreasonable.[6] His decisions refusing claims to asylum have been quashed for inadequate reasoning,[7] and for self-misdirection.[8]

The Lord Chancellor's selection of a judge to conduct a particular trial is reviewable for unreasonableness, but the only challenge so far reported has failed.[9]

Where a health authority was opposed to the policy of a ministerial circular about provision of drugs and refused to implement it, the court ordered it to change its policy.[10] This should perhaps be classed as a case of perversity.

A clear instance of 'collateral purpose' was where a chief constable had retired on pension because of infirmity and lived abroad to avoid his creditors. The police authority called him up for medical examination, and when he did not attend, cancelled his pension. It was proved that their object was not to obtain medical information but to bring him within reach of his creditors and he was granted mandamus to restore his pension.[11] An alien may challenge the legality of his deportation on the ground that its real purpose is to comply with a request from his country of origin, so that it is extradition in disguise.[12]

Delay in performing a legal duty may also amount to an abuse which the law will remedy. Where a British 'patrial' was entitled by statute to enter the country

[2] *R.* v. *Commission for Racial Equality ex p. Hillingdon LBC* [1982] QB 276.
[3] *R.* v. *Investor Compensation Scheme Ltd. ex p. Bowden* [1993] COD 278.
[4] See above, pp. 372, 377.
[5] *R.* v. *Home Secretary ex p. Sinclair* [1992] Imm. AR 293.
[6] *R.* v. *Home Secretary ex p. Cox* (1993) 5 Admin. LR 17.
[7] *R.* v. *Home Secretary ex p. Chahal* [1992] COD 214.
[8] *R.* v. *Home Secretary ex p. P.* [1992] COD 295.
[9] *R.* v. *Lord Chancellor ex p. Maxwell* [1997] 1 WLR 104.
[10] *R.* v. *North Derbyshire Health Authority ex p. Fisher,* (1998) 10 Admin. LR 27.
[11] *R.* v. *Leigh (Lord)* [1897] 1 QB 132. Similarly a local authority may not use its power to acquire land, even by agreement, where its real object is to remove gipsies from it: *Costello* v. *Dacorum DC* (1980) 79 LGR 133.
[12] *R.* v. *Brixton Prison Governor ex p. Soblen* [1963] 2 QB 243 at 302. For this case see below, p. 415.

'without let or hindrance', but the Home Office refused her the necessary certificate of patriality except by an administrative procedure which would have made her wait for over a year,[13] the Court of Appeal held that the certificate could not be arbitrarily refused or delayed and ordered its issue, citing Magna Carta 1215: 'to no one will we delay right or justice'.[14] Where police officers were not given the formal notice of complaints made against them for over two years, this excessive delay invalidated the disciplinary proceedings.[15] Where the Advisory, Conciliation and Arbitration Service deferred proceeding with inquiries into a recognition issue at the instance of a trade union, the House of Lords held that excessive deferment, amounting to abdication of the Service's functions, would be unlawful; but the majority also held that the deferment was not excessive in the circumstances.[16] Likewise the House has held that delay by the tax authorities may, if unfair, amount to abuse of power; but again the complaint failed on the facts.[17]

It may be possible for total inactivity to amount to abuse of discretion. The Privy Council has suggested that this would be the case if the Malaysian head of state failed to revoke a proclamation of emergency once he no longer considered it necessary for its proper purpose.[18] That is another way of saying that in those circumstances he would become subject to a legal duty to proclaim the end of the emergency.

MIXED MOTIVES

Duality of purpose

Sometimes an act may serve two or more purposes, some authorised and some not, and it may be a question whether the public authority may kill two birds with one stone. The general rule is that its action will be lawful provided that the permitted purpose is the true and dominant purpose behind the act, even though some secondary or incidental advantage may be gained for some purpose which is outside the authority's powers. There is a clear distinction between this situation and its opposite, where the permitted purpose is a mere pretext and a dominant purpose is ultra vires.

[13] *R.* v. *Home Secretary ex p. Phansopkar* [1976] QB 606. See also *R.* v. *Durham Prison Governor ex p. Hardial Singh* [1984] 1 WLR 704 (delay in effecting deportation).

[14] Magna Carta 1215, c. 29.

[15] *R.* v. *Merseyside Chief Constable ex p. Calveley* [1986] QB 424.

[16] *Engineers' and Managers' Association* v. *ACAS* [1980] 1 WLR 302.

[17] *R.* v. *Inland Revenue Cmrs. ex p. Preston* [1985] AC 835.

[18] *Teh Cheng Poh* v. *Public Prosecutor, Malaysia* [1980] AC 458 (suggesting that mandamus might lie against members of the cabinet on whose advice he would act).

A leading example is the decision of the House of Lords upholding the legality of the subway crossing the foot of Whitehall in London.[19] The Westminster Corporation had no power to construct subways, but they had power to construct public conveniences. They located the conveniences under the street with access from both sides, so that a subway naturally resulted. The House of Lords had no doubt that the 'primary object of the council was the construction of the conveniences with the requisite and proper means of approach thereto and exit therefrom'.[20] Accordingly 'that the public may use it for a purpose beyond what the statute contemplated is nothing to the purpose'.[21] Distinguishing the opposite situation, Lord Halsbury said:

> I quite agree that if the power to make one kind of building was fraudulently used for the purpose of making another kind of building, the power given by the Legislature for one purpose could not be used for another.

And Lord Macnaghten said:

> In order to make out a case of bad faith it must be shown that the corporation constructed this subway as a means of crossing the street under colour and pretence of providing public conveniences which were not really wanted at that particular place.

The Court of Appeal closely followed these statements in upholding the power of a city corporation to make and improve a roadway even though their immediate motive was to attract speed trials of motor cars.[22] The speed trials indeed provided the occasion for the work being done at the particular time; but that was no reason why the corporation could not use its road-making powers for an improvement which was shown to be genuine and desirable in its own right, and which could not be said to be a merely pretended purpose for the sake of a different and unlawful objective. By contrast, the Inner London Education Authority acted unlawfully in launching an expensive publicity campaign in protest against cuts in its expenditure imposed by the government. The ILEA had power to publish information on local government affairs, but 'a, if not the, major purpose' of their campaign was to persuade the public that they were being hardly treated, and this purpose was unauthorised.[23]

The same distinction was made by the Court of Appeal where an order for the deportation of an alien to the United States was challenged on the ground that the Home Secretary was in fact motivated by a request from the United States for the surrender of the alien. Since the offence with which the alien was charged was

[19] *Westminster Cpn.* v. *London and North Western Railway* [1905] AC 426.
[20] At 433 (Lord Macnaghten).
[21] At 428 (Lord Halsbury).
[22] *R.* v. *Brighton Cpn. ex p. Shoosmith* (1907) 96 LT 762.
[23] *R.* v. *Inner London Education Authority ex p. Westminster CC* [1986] 1 WLR 28. See similarly *R.* v. *Greater London Council ex p. Westminster CC*, The Times, 27 December 1984; *R.* v. *Lewisham LBC ex p. Shell UK Ltd.* [1988] 1 All ER 938.

not a legal ground of extradition, it was argued that the Home Secretary's real object was unlawful extradition, and that the deportation order was a mere disguise. Lord Denning MR said that everything depended upon the purpose with which the act was done.[24]

> If, therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence here to be not conducive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or an unlawful purpose. Was there a misuse of the power or not? The courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or no.

On the facts the court found that there was every reason to suppose that the Home Secretary was acting from proper 'deportation' motives. His power to deport, and his power to prescribe the country of destination, was in no way diminished by the fact that he was at the same time assisting the United States government, and might indeed be glad to do so.

Overlapping motives

Cases where the dominant motive is improper are, of course, cases of ultra vires, and a number of them have been cited in the context of wrong purposes and irrelevant considerations. Examples are the case of the caravan site licensing authority which wrongly attempted to act as a planning authority in order to protect the green belt,[25] and the case of the town council which compulsorily acquired land ostensibly for coast protection but in reality for public amenity.[26] Similarly the High Court of Australia invalidated a local authority's scheme for the resumption (acquisition) of land for road improvement, since a substantial part of the land was to be sold off and not therefore acquired for 'the improvement and embellishment of the area'.[27] The High Court said:[28]

> But the evidence establishes that one purpose at least of the Council in attempting to acquire the land now required to construct the new road is to appropriate the betterments

[24] *R.* v. *Brixton Prison Governor ex p. Soblen* [1963] 2 QB 302; and see *R.* v. *Bow Street Magistrates ex p. Mackeson* (1981) 75 Crim. App. R. 24, where the court quashed charges on account of 'disguised extradition' by way of deportation from Zimbabwe.

[25] *Esdell Caravan Parks Ltd.* v. *Hemel Hempstead Rural District Council* [1966] 1 QB 895; above, p. 409.

[26] *Webb* v. *Minister of Housing and Local Government* [1965] 1 WLR 755; above, p. 410.

[27] *Thompson* v. *Randwick Cpn.* (1950) 81 CLR 87; cf. *Hanks* v. *Minister of Housing and Local Government* [1963] 1 QB 999.

[28] At 106.

arising from its construction. In *Municipal Council of Sydney* v. *Campbell*[29] this was the sole purpose. But in our opinion it is still an abuse of the Council's powers if such a purpose is a substantial purpose in the sense that no attempt would have been made to resume this land if it had not been desired to reduce the cost of the new road by the profit arising from its re-sale.

Where schoolteachers can be dismissed only on 'educational grounds' it has been said that this means educational grounds only, so that if the grounds are both educational and non-educational, the power is not well exercised.[30] But if in fact there were sufficient educational grounds, and these supplied the true motive, it seems unlikely that additional non-educational grounds would vitiate the dismissal.

An alternative criterion may be found by invoking the doctrine of irrelevant considerations. If the decision has been materially influenced by an unauthorised purpose, it can be said that an irrelevant consideration has been taken into account, so that the decision cannot stand.[31]

GOOD FAITH

Bad faith not dishonesty

The judgments discussed in the last few pages are freely embellished with references to good and bad faith. These add very little to the true sense, and are hardly ever used to mean more than that some action is found to have a lawful or unlawful purpose. It is extremely rare for public authorities to be found guilty of intentional dishonesty: normally they are found to have erred, if at all, by ignorance or misunderstanding. Yet the courts constantly accuse them of bad faith merely because they have acted unreasonably or on improper grounds. Again and again it is laid down that powers must be exercised reasonably and in good faith. But in this context 'in good faith' means merely 'for legitimate reasons'. Contrary to the natural sense of the words, they impute no moral obliquity.

A pithy statement of Lord Macnaghten to this effect has already been quoted.[32] Lord Sumner made another in *Roberts* v. *Hopwood*,[33] dealing with the power of a local board to pay 'such wages as they think fit':

[29] [1925] AC 338; above, p. 396.

[30] *Sadler* v. *Sheffield Cpn.* [1924] 1 Ch. 483 at 504. For other such cases see above, p. 383.

[31] *Hanks* v. *Minister of Housing and Local Government* (above); *R.* v. *Inner London Education Authority ex p. Westminster CC* (above); and see *R.* v. *Home Secretary ex p. Yiadom*, [1998] INLR 489 (relevant reasons not vitiated by one irrelevant reason).

[32] Above, p. 352.

[33] [1925] AC 578 at 603.