

# Recent developments in public law – Part 1



**Kate Markus and Martin Westgate QC** continue their six-monthly series surveying recent developments in public law that may be of more general interest to *Legal Action* readers. They welcome short reports from practitioners about unreported cases, including those where permission has been granted or that have been settled. Part 2 of this article will be published in December 2010 *Legal Action*.

## PRACTICE AND PROCEDURE

### Administrative Court statistics and workload

In 2009/10, 17,065 cases were issued in the Administrative Court with 15,549 in London and the remainder in the four regional centres: Her Majesty's Courts Service annual report and accounts 2009–10.\* Just under 48,000 other civil claims were started and so Administrative Court cases now account for over one quarter of all civil claims in the High Court.

## CASE-LAW

### Amenability to judicial review

#### ■ **R (Kirk) v Middlesbrough BC and others**

[2010] EWHC 1035 (Admin), 10 May 2010

The claimant was a social worker who was employed by a charity through which she was placed to work on an agency basis for a local authority. The local authority for the area in which the claimant lived received a child protection complaint against her, relating to the claimant's husband. The complaint triggered an investigation during the course of which information about the complaint was passed to the charity and the authority where the claimant worked. The authority terminated the claimant's placement and the charity commenced disciplinary proceedings against her. The claimant issued judicial review proceedings against both local authorities in respect of the passing of information between them. She also sought an injunction preventing the charity from proceeding against her until the judicial review claim had been determined, and a declaration that article 6 of the European Convention on Human Rights ('the convention') entitled her to legal

representation at the disciplinary hearing.

HHJ SP Grenfell dismissed the application. In seeking to discipline her, the charity was not carrying out a public law function but rather a private law employment function. The outcome of the disciplinary process did not carry the severe consequences that engaged article 6 in *R (Wright) v Secretary of State for Health* [2009] UKHL 3, 21 January 2009; [2009] 1 AC 739 and *R (G) v X School Governors* [2010] EWCA Civ 1, 20 January 2010. Therefore the court had no jurisdiction to deal with the matter.

#### ■ **R (Cart) v The Upper Tribunal and others**

[2010] EWCA Civ 859, 23 July 2010

The appellant had been refused permission by the Upper Tribunal (UT) to appeal against a decision of the First-tier Tribunal (FTT). There was no appeal against the decision of the UT and the appellant sought judicial review. The Divisional Court held that judicial review only lay against the UT on the ground of outright excess of jurisdiction or denial of procedural justice (see [2009] EWHC 3052 (Admin), 1 December 2009; June 2010 *Legal Action* 23). The Court of Appeal agreed with the Divisional Court, although in part for different reasons.

The Court of Appeal agreed with Laws LJ that to treat the statutory designation of the UT as a 'superior court of record' as excluding judicial review would violate the rule of law, and that such designation is not a reliable guide, let alone a 'definiens' of courts which are immune to judicial review (para 17). However, the court disagreed with the conclusion of Laws LJ that the UT was the alter ego of the High Court. The UT does not stand in the shoes of the High Court but in the shoes of the tribunals it has replaced. Nor had parliament taken the decision to place the UT wholly beyond the reach of judicial

review. The supervisory jurisdiction of the High Court runs to all statutory tribunals unless ousted in the plainest possible statutory language of which there is none in the Tribunals, Courts and Enforcement Act (TCEA) 2007. The TCEA invests the UT with standing and powers precisely because it and the High Court are not courts of co-ordinate jurisdiction. The court recognised that this left further questions about the scope of the UT's conferred and inherent powers, but those were beyond the remit of these proceedings.

The appellant, and the Public Law Project as intervener, argued that there was no warrant for cutting down the scope of judicial review, although grant of permission and relief was discretionary and so not every grievance about the UT would secure judicial review. Sedley LJ, giving the judgment of the court, noted the constitutional importance of this submission, especially in view of the statement of the Court of Appeal in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738, 28 November 2002; [2003] 1 WLR 475 at paragraph 54, that the mechanism of control in judicial review lies in discretion, not law. However, the underlying substantive principles of judicial review are a matter of law, not discretion. The complete reordering of administrative justice brought about by the TCEA calls for reconsideration of the principles of law by which judicial review of the new tribunals is to be governed. The High Court is empowered to do this because its status as a court of unlimited jurisdiction makes it the sole arbiter concerning what matters fall within its jurisdiction. In that context, it is important to take into account that the tribunal system is designed to be so far as possible a self-sufficient regime, dealing internally with errors of law made at first instance and resorting to higher appellate authority only where a legal issue of difficulty or principle requires it. By this means, serious questions of law are channelled into the legal system without the need of post-*Anisminic* (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 17 December 1968) judicial review.

Although social security has been subject to judicial review notwithstanding the high legal expertise of the Commissioners, one of the principal purposes of the TCEA is to unify the procedures of the disparate tribunals gathered into its structure. It contains no space for historical exemptions of that kind. As Sedley LJ pointed out, this could call into question the exception of asylum decisions because of their unique subject-matter, acknowledged by the court in *Sivasubramaniam*, but this was not for the court in the present case to determine.

In deciding whether the full ambit of judicial review should be available as before across the board, the court had to reconcile two legal principles: the relative autonomy of the tribunals as a whole, and the UT, in particular, and the constitutional role of the High Court as the guardian of standards of legality and due process from which the UT is not exempt. There is a true jurisprudential difference between an error of law made in the course of an adjudication that a tribunal is authorised to conduct and the conducting of an adjudication without lawful authority. This division applies only to the UT, since it is the role of the UT itself to correct errors of every kind in the FTT. The new tribunal structure represents a newly coherent and comprehensive edifice designed, among other things, to complete the process of divorcing administrative justice from departmental policy, to ensure the application across the board of proper standards of adjudication and to provide for the correction of legal error within, rather than outside, the system with recourse on second-appeal criteria to the higher appellate courts.

### Access to justice

#### ■ **R (Medical Justice) v Secretary of State for the Home Department**

[2010] EWHC 1925 (Admin),  
26 July 2010

The claimant, a charity facilitating the provision of medical advice and representation to those detained in immigration removal centres, sought judicial review of the secretary of state's policy that certain categories of individuals who have made unsuccessful claims to enter or remain in the UK can be given little or no notice of their removal from the UK (the standard policy being to give a minimum of 72 hours' notice).

Silber J dealt with a number of preliminary points:

- The fact that the claimant has not challenged the standard policy does not mean that it is accepted as lawful.
- Where the challenge is to a policy rather than a claim on the facts of an individual case, the court will address the question of the intrinsic unfairness of the policy.
- A policy is not unlawful only if it necessarily gives rise to injustice, especially where once removed it would be too late and impractical for an individual to obtain redress. The proper question is whether there is an unacceptable risk or serious possibility that the right of access to justice of those subject to removal will be or is curtailed.
- A challenge can be brought before the policy has been applied. The unlawfulness of a policy can be shown in a number of ways, for instance, if it envisages conduct which

would breach a right of access to justice. In the present case, there is inevitability or at least a high probability that this right would be infringed in many cases under this policy.

### Rationality

#### ■ **Gibb v Maidstone and Tunbridge Wells NHS Trust**

[2010] EWCA Civ 678,  
23 June 2010

The appellant had been the chief executive of the respondent trust. Following criticism of her leadership by the Healthcare Commission in a report about the outbreak of the 'super bug', C. difficile, the appellant and respondent entered into a compromise agreement by which she would leave her post and be paid notice pay and compensation. The trust subsequently refused to pay the compensation on the ground that it was irrationally generous and therefore ultra vires.

The Court of Appeal allowed the appeal from a decision at first instance upholding the trust's decision. The court reiterated what was said in *Newbold and Smyth v Leicester City Council* [1999] EWHC Admin 670, 12 July 1999; [1999] ICR 1182, that no court is going to be astute to allow public authorities to escape too easily from their commercial commitments, particularly where legitimate expectations have been aroused in the other party, where the relationship between the parties is essentially of a private law character, where it is the authority itself which is seeking to assert its own lack of vires and where that is said to stem not from the true construction of its statutory powers but rather from its own *Wednesbury* irrationality.

In the present case, the judge at first instance had erred in the following ways:

- He had substituted his own view of what financial prudence required.
- It cannot be assumed that, absent the compromise agreement, the trust would have settled the appellant's unfair dismissal claim for the statutory maximum and would have admitted that the appellant's dismissal was unfair.
- It was relevant for the trust to have taken into account the appellant's many earlier years of good service and the time it might take her to find other employment. A reasonable employer is not limited to the replication of the statutory maximum available to an employee through legal redress.

### Procedural and substantive fairness

#### ■ **R (Technoprint PLC and Sneep) v Leeds City Council and Archbold Carshop Ltd (interested party)**

[2010] EWHC 581 (Admin),  
24 March 2010

The claimants had objected to an application

for planning permission. Their objections made no reference to the procedure by which the application would be determined.

However, the second claimant made enquiries about that matter before the application was considered and was told that he would receive a reply to his enquiries which, in fact, was never given. Planning permission was granted by a principal planning officer under a scheme of delegation rather than by a plans panel. The claimants applied for judicial review on various grounds, including that the authority should have answered the second claimant's enquiries.

Wyn Williams J rejected the procedural unfairness ground (although he allowed the application on the ground of irrationality). The claimants had not at any time made representations to the authority that the application should be determined by a panel rather than an officer. The authority had not acted unfairly in failing to treat the second claimant's enquiries as a request that the application be determined by a panel. As a matter of good administrative practice, the authority should have responded to the enquiries but it was not under a legal obligation to do so. The claimants had no right to make representations about whether or not the application should be dealt with by a panel. It was a matter for the authority to determine. No legitimate expectation had been raised that the decision would be made by a panel.

#### ■ **R (Shoesmith) v Ofsted and others**

[2010] EWHC 852 (Admin),  
23 April 2010

Following the death of 'Baby P' and the ensuing criminal trial, the Office for Standards in Education, Children's Services and Skills (Ofsted) produced a report into the child-safeguarding arrangements in Haringey in north London, as a result of which the then Secretary of State for Children, Schools and Families directed that the claimant be removed from her post as Director of Children and Young People's Services in the borough. The local authority dismissed her summarily. The claimant applied for judicial review, claiming that:

- the investigation by Ofsted was flawed by unfairness;
- the secretary of state's decision was in consequence unfair and/or unfairly arrived at for other reasons;
- Haringey adopted an unfair process in deciding to terminate her employment.

Foskett J dismissed the application. His judgment is lengthy and detailed. This case note is necessarily a truncated summary of the ground that the ruling covered.

Neither Ofsted nor the secretary of state were carrying out disciplinary functions. Their

true concern was the working of the agencies with responsibility for child protection. There was an urgency in finding out whether the agencies were operating effectively because there were other vulnerable children in Haringey whose interests demanded protection, and because what had happened raised concerns that in other places across the country, the relevant safeguards were not in place. These factors meant necessarily that corners would be cut, but the Ofsted inspectors did the best that they could in the circumstances. Ofsted had a duty of fairness which derived from a duty to carry out a bona fide and open-minded inspection and to report accordingly. It had to discuss its concerns with those who could illuminate the position and that would give the opportunity to influence the outcome of the inspection. The gist of most of Ofsted's concerns were raised in a way that enabled comment to be made. The claimant was well placed to pick up signs of matters of concern and to answer them. This kind of investigation cannot be equated with the process that the law envisages on terminating someone's contract of employment. No individual truly had a full, fair and considered opportunity to comment on his/her personal involvement. This did not invalidate the secretary of state's decision, but was relevant to considering the outcome of the dispute about dismissal.

With regard to the secretary of state's decision, the judge held that it was very difficult to envisage circumstances in which the right of an individual to be treated fairly should take precedence over, or should delay, an urgent decision concerning the interests of a large number of vulnerable children. However, if that leads to the individual being deprived of some ordinary notion of fairness in the process, it should not mean necessarily that s/he should be deprived of reputation or other rights. It is always possible for the decision-maker to make it clear that the decision had to be taken in the wider public interest and did not necessarily reflect anything adverse about the individual's competence or professionalism. It is also open to the individual to seek a declaration in relation to unfairness even if the clock cannot be put back. However, the process invoked by the secretary of state was appropriate in the circumstances. The secretary of state was entitled to conclude that those who might be affected by any decision he took had contributed to the investigation by Ofsted. It was not unfair for him to use the report in the way that he did. Once the judgment had been made by Ofsted that the child-safeguarding arrangements had been seriously wanting, it is difficult to see how the secretary of state could not take some action. What action

he chose to take was a matter for him. If fairness in the context of the case is judged by reference to someone having to 'carry the can' for the failings of a system, it would not necessarily be unfair that the claimant was replaced. In holding the claimant to be accountable for departmental failings, the normal concept of fairness to the individual does not apply. In any event, nothing that the claimant could have said would have made any difference.

Judicial review is available to challenge the fairness of the dismissal in such circumstances, but where the employee has the right to claim unfair dismissal, judicial review must be the route of last resort. If the claimant did not have the available remedy of unfair dismissal, there were features of her case which might have persuaded the judge that her judicial review claim would have succeeded:

■ Haringey overlooked the claimant's years of excellent service.

■ She was the first Director of Children and Young People's Services in Haringey since the relevant provisions of the Children Act 2004 were implemented and anyone taking the risk of the post would expect significant support if something went wrong.

■ Furthermore, the claimant's disciplinary appeal hearing was not procedurally fair: communications between Haringey and Ofsted over the evidence base for the report's findings were not disclosed, the statements of the chief executive gave the appearance of a predetermined outcome to the hearing and the claimant's unchallenged evidence at the hearing was rejected.

#### ■ **R (Buckinghamshire CC) v Kingston upon Thames RLBC and others**

[2010] EWHC 1703 (Admin),  
12 July 2010

The defendant local authority K was responsible for the provision of community care services to S. Following a community care assessment, she was moved to supported living in a bungalow in the area of the claimant authority B. K did not inform B of the move but, shortly afterwards, asked B to take over funding S's care on the ground that S was now ordinarily resident in its area. B refused to do so. This application for judicial review contended that K had breached its duty to act fairly by failing to notify B of the proposed move, failing to allow B to participate in that decision and on other grounds.

Wyn Williams J allowed B's claim that it was unreasonable for K to have moved S without making adequate enquiries into the availability of housing benefit, but dismissed the rest of the application. He held that there was no duty on K to act fairly to B. K's duty of fairness was owed to S. Although National

Health Service and Community Care Act 1990 s47 (by which community care assessments are carried out) does not expressly preclude such a duty, the express provisions in section 47 for participation of another authority in an assessment in specified circumstances and the reservation to the secretary of state of a power to make directions which can be used to impose a duty to notify or consult with other authorities in appropriate circumstances are powerful indicators that the courts should be slow to accept the existence of the duties for which B contended.

The particular financial consequences of the decision in this case were a material factor in deciding whether or not a duty of fairness arose, but the wider financial considerations attendant on other similar decisions were irrelevant. The significance of the impact of the particular decision depended on the factual circumstances. It would not be permissible for a local authority, in carrying out a community care assessment or deciding how to meet needs, to take into account the financial consequences for another authority nor, if it was consulted, would it be permissible for the other authority to take into account adverse financial consequences to it. Moreover, the Local Authority Circular (LAC (93)7) for establishing ordinary residence did not apply in the present case but, even if it did, it did not lead inevitably to the conclusion that there was a duty of fairness owed to B rather than it being a guide to good practice. Even if a duty did exist, it would extend to notifying the other authority that an assessment had been undertaken and a decision reached, and consultation between the authorities before completion of the assessment, but would not afford the other authority an opportunity to participate in the decision-making process.

#### **Proportionality and collateral challenge**

##### ■ **Salford City Council v Mullen and others**

[2010] EWC Civ 336,  
30 March 2010,  
[2010] HLR 35

##### ■ **Kay and others v UK**

App No 37341/06,  
21 September 2010

The Court of Appeal heard a group of cases in which the defendants had no statutory security of tenure, but sought to argue that their local authority landlords were acting unreasonably as a matter of public law in bringing claims for possession. This is what has become known as the 'gateway (b)' defence following the decisions of the House of Lords in *Kay v Lambeth LBC* [2006] UKHL 10, 8 March 2006; [2006] 2 AC 465 and

*Doherty and others v Birmingham City Council* [2008] UKHL 57, 30 July 2008; [2009] 1 AC 367. In those cases it was held that while the defendants could not rely directly on article 8 of the convention, they could defend proceedings by arguing that the decision was defective as a matter of public law, relying on conventional judicial review grounds. This raises two issues of wider general importance to public law practitioners.

First, in what circumstances can a public law challenge be raised as a defence in civil proceedings? In *Kay* and *Doherty* the House of Lords stated that a defence was available, relying on *Wandsworth LBC v Winder* [1985] AC 461. However, as the councils pointed out in *Mullen*, that case can be read as applying only where the defendant is asserting some pre-existing right that s/he says has been invalidly interfered with by the claimant's action (para 47). Thus, on this analysis, a trespasser could not defend a claim for possession because even if the decision to evict was unreasonable s/he would still not have any private law right to remain. For the time being this issue is resolved in this context by *Doherty*, which contemplates that any public law challenge can be raised by way of defence. This was taken further by the Court of Appeal, which held that the defendants were not confined to challenging the initial decision to seek possession but that the possession proceedings could also address any decision relevant to seeking possession, for example, a decision to continue the proceedings in the face of further material showing that the occupiers' behaviour had changed.

All of this is subject to the terms of the statutory scheme precluding a public law defence. The Court of Appeal held that in the case of an introductory tenancy, the county court cannot be an appropriate venue. A defendant in such a case will have to seek an adjournment and apply for judicial review.

The second issue is what is the scope of conventional judicial review and how far has it moved towards proportionality? In *Doherty*, Lord Hope said at paragraph 55 that it would be 'unduly formalistic' to confine the review to traditional *Wednesbury* grounds and that the considerations which can be brought into account are wider. However, he went on to say that the question was whether or not the decision to recover possession was one which 'no reasonable person would consider justifiable': in other words, the *Wednesbury* test. The Court of Appeal held at paragraph 61 that 'whilst conventional judicial review is increasingly informed by principles of fundamental rights, a public law, gateway (b) challenge to a decision by a local authority to seek possession does not permit a

proportionality review ...' It is not easy to know what this means and the position is not made any easier by the decision of the European Court of Human Rights (ECtHR) in *Kay v UK*. The ECtHR reviewed the domestic cases (not including *Mullen*) and at paragraph 73 said:

*The court welcomes the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds in the light of article 8. A number of their lordships in Doherty alluded to the possibility for challenges on conventional judicial review grounds in cases such as the applicants' to encompass more than just traditional Wednesbury grounds (see Lord Hope at paragraph 55; Lord Scott at paragraphs 70 and 84 to 85; and Lord Mance at paragraphs 133 to 135 of the House of Lords' judgment).*

However, it went on to hold that there had been a breach of the occupiers' article 8 rights because the law as it stood at the time did not permit a challenge to the decision of a local authority to seek a possession order on the basis of the alleged disproportionality of that decision in light of personal circumstances (para 74). This reflected the fact that the majority in *Kay* thought that a defence based only on personal circumstances could never succeed, although this has since been relaxed.

**Comment:** The implication of the ECtHR's decision is that conventional judicial review as it is now applied may well be sufficient to protect article 8 rights, but if this is what was meant then it is difficult to follow. The cases following *Kay* have allowed personal circumstances to be taken into account and have therefore removed a limitation on the factors that might be considered. However, as a matter of domestic law the standard of review has not gone as far as proportionality. It may be that, not for the first time, the ECtHR has misunderstood domestic law. An article on this important ECtHR judgment will appear in December 2010 *Legal Action*. See also page 16 of this issue.

### Material error of fact

#### ■ R (March) v Secretary of State for Health

[2010] EWHC 765 (Admin),  
16 April 2010

The claimant was one of the many people who were infected with HIV and/or hepatitis C following treatment with infected NHS blood products. An independent, non-statutory inquiry recommended that compensation be paid at a level equivalent to that paid under a scheme established in Ireland. In its response

the government said that it intended to increase funding to sufferers, but the amount fell far short of that paid in Ireland. The response made no express reference to the Irish system, but in a subsequent oral answer in the House of Commons a minister of state for health said that the comparison with Ireland could not be accepted because the Irish blood transfusion service was found to be at fault whereas the NHS was not. The minister repeated the point in a parliamentary debate on the subject and stated that the Irish government decided to make the level of payments as a result of the findings of fault.

Holman J held that the government had misunderstood the position in Ireland. The Irish scheme had not been established on the basis that the government was legally liable to sufferers. The judge did not attach weight to the oral answer of the minister. It was a spontaneous answer to an oral question put without advance notice. While accountability requires that account may be taken of what is said in parliament in oral answers, it should not be subject to the same textual analysis which may be applied to drafted written documents or in topic-specific debate.

Different considerations apply to what was said in debate, in which the minister can be presumed to have been briefed and to have prepared for the debate. Holman J said that although the allocation of resources is entirely a matter for the government, its reasoning was infected with a material error about the basis of the Irish scheme. It cannot be said that the error was not material because the government has agreed to pay the most that it considers it can afford, as the government had not given non-affordability for rejecting the recommendation of the inquiry.

### Consultation

#### ■ Devon CC and Norfolk CC v Secretary of State for Communities and Local Government and others

[2010] EWHC 1847 (Admin),  
5 July 2010

(See also [2010] EWHC 1456 (Admin), 21 June 2010)

The secretary of state had invited proposals for unitary councils in England, and provided a set of criteria against which proposals would be assessed. Exeter and Norwich City Councils proposed that they become unitary councils. The government then published proposals for consultation, as required by statute, stating that consultees should comment on the extent to which the proposals, if implemented, would achieve the outcomes specified by the criteria. During the course of consultation, the secretary of state also sought the advice of the Boundary Committee of the Electoral Commission about

the proposals, which recommended that the proposals by the city councils should not be implemented because of doubts about whether the councils could meet some of the criteria. It made alternative recommendations which were considered and adjudged against the criteria. Throughout a lengthy consultation exercise which included the claimant authorities, the secretary of state made it clear that the ability to meet the criteria was of fundamental importance. The secretary of state decided to accept the proposals by the two city councils, even though they were not likely to meet all the criteria because of the government's present priorities for jobs and economic growth, and more new policy for developing public service delivery. The claimants sought judicial review of the decision.

Ouseley J granted the application. The statutory consultation had to meet the criteria in *R v Brent LBC ex p Gunning* (1985) 84 LGR 168. The requirement to publish sufficient information to enable an intelligible response means that the consultee needs to know not just what is the proposal, but also the factors likely to be of substantial importance to the decision. Where the decision-maker sets out his/her crucial criteria and how s/he will use them in his/her decision-making, fairness may prevent departure from the criteria and their stated significance. A flawed consultation exercise is not always so procedurally unfair as to be unlawful. Yet the test set out in *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin), 15 February 2007; [2007] Env LR 29, that something must have gone 'clearly and radically' wrong, should not become a substitute for the true test which is whether the consultation process was so unfair that it was unlawful (para 70). Nor is it useful to say that it is only the most extreme examples of bad administration which can successfully attract judicial review.

In the present case, the basis on which the secretary of state consulted was clear. He chose to set specific criteria of his own devising, and to use them not as guides but as the keys to the gateway through which each proposal had to pass. At no time did he suggest, in the consultation process or elsewhere, that he might approve a proposal if it were to fail one criterion. He maintained his position throughout, although there were many opportunities to change it and to alert consultees to the possible importance of the new policy and to invite representations about its effect. There was no opportunity for consultees to anticipate and deal with the last-minute change of stance. Although the proposals themselves were unchanged and the factors which the secretary of state took

into account were legally relevant so that the decision was not irrational, that did not save the decision. An unlawful procedure can produce an otherwise lawful substantive decision. Furthermore, the judge rejected the secretary of state's submission that fresh consultation was not necessary because the new points were very closely related to the criteria and the extent of the proposals' failure against the criteria was marginal. The unfairness lay in the change to the role of the criteria without any opportunity to deal with that change or the merits of the new factors.

### Reviewability

#### ■ *R (Hillingdon LBC and others) v Secretary of State for Transport and Transport for London (interested party)*

[2010] EWHC 626 (Admin),  
26 March 2010

The claimants challenged decisions by the secretary of state to confirm policy support for a third runway at Heathrow. The statements had first been contained in a white paper on airport strategy in which the government said that its support was conditional on certain measures concerning climate change, noise and surface access. Following a consultation process, the secretary of state informed parliament of his support and that the conditions could be met. The claimants argued, among other things, that the aviation policy needed to be revised in the light of a report by the climate change committee. The secretary of state said that under the Planning Act 2008, he would issue a national policy statement (NPS) on airports and this would take all developments into account. When issued, an NPS would have legal effect.

An issue arose on the judicial review application about the status of the defendant's policy statements. They had no substantive effect and the defendant could not limit the factors to be taken into account in formulating the national airport strategy. Despite this Carnwath LJ held that such statements were in principle subject to judicial review. However, their preliminary nature and their 'high-level' strategic character meant that the grounds for review were limited. Any failure in the consultation process could be put right at a later stage as could a failure to take account of relevant considerations. The claimants would have not only to show an error of law but that it required the court's intervention at this stage. It would, though, be different if the policy was affected by 'a "show-stopper": that is, a policy or factual consideration which makes the proposal so obviously unacceptable that the only rational course would be to abort it altogether without further ado' (para 69).

Applying this approach, the arguments

based on climate change and economic justification did not merit judicial review. There were technical arguments but these could be dealt with in the course of the coming policy review. However, the same was not true of the defendant's decision on surface access. The defendant had determined that this condition would be satisfied, but it was not possible to say what he had actually decided about it or how he had dealt with objections. The application succeeded to that extent, but given that the defendant's decision had no substantive effect it was not appropriate to grant a quashing order. In the event, the case appears to have been dealt with by the secretary of state giving an undertaking that he would not seek to import the policy statements into the NPS.

\* Available at: [www.hmcourts-service.gov.uk/cms/files/HMCS\\_Annual\\_Report2009-2010\\_web.pdf](http://www.hmcourts-service.gov.uk/cms/files/HMCS_Annual_Report2009-2010_web.pdf).



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