Jersey & Guernsey Law Review – June 2009
Judicial review in England and Wales: the state of the art revisited

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Introduction

1 In 2003 I wrote an article for this journal entitled "*Judicial Review in England and Wales—The State of the Art*".[1] My present purpose is to update my survey. The pace of change in public law is swifter than that in private law; it is, after all, a more recent creation. Judicial review presents a continually moving target, and it would be uncharacteristic if, over a period of more than half a decade, there had not been developments of importance of which the educated practitioner should be aware. And this applies no less to the practitioner in the Bailiwicks than in England and Wales.[2]

The Jersey scene

2 In 1997, Sir Louis Blom-Cooper QC, a former judge of the Courts of Appeal of the Channel Islands, together with Charles Blake, wrote a case comment in *Public Law* entitled "*Judicial Review in Jersey*"[3] on the planning case of *Lesquende Ltd v Planning & Environment Cttee*,[4] in the Inferior Number of the Royal Court, which heralded the apparent introduction of this global phenomenon into the Jersey legal system. I delivered to the leading judgment in the Court of Appeal[5] and confirmed the authors' prophetic analysis, saying—

> "For our part, we endorse the existence of the remedy by way of judicial review in Jersey. The inherent jurisdiction of the courts to control excess or abuse of power by executive bodies seems to us to be intrinsic to the very judicial process and vital to the rule of law. To confer upon an administrative authority limited powers only, but to provide no means for confining them within those limits, would be paradoxical. There is nothing in the traditions of Norman French law, as developed in Jersey, which appears incompatible and much appears consistent with our conclusion. It would in principle be regrettable to deny to a citizen of Jersey a form of relief available to citizens in other parts of Her Majesty's dominions.

[1] 2003 Jersey Law Rev 29.

[2] The new (6th) edition of *de Smith*, now rebranded simply as *Judicial Review* ("*de Smith*"), will provide at any rate until the next edition of *Wade & Forsyth Administrative Law* (currently 9th ed) ("*Wade*") the most authoritative analysis, *Fordham Judicial Review Handbook* (5th ed) the most comprehensive.

[3] 1997 PL at 371.

[4] 1997 JLR 56.

[5] 1998 JLR 1.

Precedent points in the same direction as principle. In *Le Gros v Housing Cttee* Le Masurier, also in the context of a challenge to the decision of the Board of Arbitrators under the 1961 Law. Le Masurier, Bailiff stated—

> 'The first issue raised before us was whether the Court has a power to interfere with an arbitration award and, in our opinion, it undoubtedly has such a power if, for example, the arbitrators exceed their authority, are wrong in law, deny the parties justice, and reach a conclusion devoid of reason. In all such cases, the Court has an inherent jurisdiction to have put right that which is wrong. What the Court cannot do is to interfere with an award which has been regularly made. A power of discretion properly exercised by a person or body having the legal authority to exercise it is generally unassailable'.[6]

The case was remitted by the court to the Board with the direction as to the approach which it should adopt in relation to valuation.

In the present case the Royal Court approved *Le Gros* and noted that the Bailiff's description of the supervisory jurisdiction of the Royal Court was supported by earlier authority (*Le Masurier v Natural Beauties Cttee*[7] and *Scott v Island Dev Cttee.*[8] Further, as the Royal Court noted, *Le Gros* had never been challenged in a series of judicial review decisions which followed.

We also note that, on at least one previous occasion, in *Housing Cttee v Phantesie Invs Ltd*,[9] no issue was raised before this court as to the availability of the supervisory jurisdiction.

The fact that the procedural machinery in Jersey is not developed to the extent that it is in England and Wales is no argument against the existence of the remedy, although an obstacle to its efficient exercise. We are pleased to note that work is in progress to introduce in the Island a specific regulatory regime for the remedy (see *Idocare Properties Ltd v Planning & Environment Cttee*,[10] and Lewis *op. cit.*[11]).”

3 That work there in progress to which I referred has now been completed by the adoption of specific rules for applications for judicial review in civil proceedings in Part 16 of the Royal Court Rules 2000, modelled on the English Civil Procedure Rules 54. This then aligns the adjectival law of Jersey with that of England and Wales in the area of the supervisory jurisdiction of administrative action. There is overlap, if not identity.[12]

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[6]1974 JJ 77, at 86.
[7](1958) 13 CR 138.
[8]1966 JJ 634.
[9]1985–86 JLR 96.
[10]5 June 1997, unreported.
[11]Lewis, *Judicial Review in Jersey* (1997) 1 Jersey Law Rev. 28.
[12]For Guernsey see Practice Direction No.3 of 2004 JUDICIAL REVIEW. There are however no specific rules of court equivalent to those in Jersey.

4 It should be noted that in pursuing this route, a choice was being made between two rival judicial opinions of the merits of judicial review. In *States Greffier v Les Pas Holdings Ltd*,[13] Southwell JA said, at 206—

> "The equivalent of what in England would be called judicial review applications and orders have been made in Jersey for many years. I do not entirely share the enthusiasm of some members of this court, expressed in earlier cases, for the introduction in Jersey of a special body of rules dealing with judicial review applications, for, *inter alia*, these reasons: (a) the existence of a separate body of rules in England has on occasions caused serious injustice, when an applicant followed a path under the rules which was later held to have been a wrong path at a time when it was too late for him to embark on the right path. There is a large number of House of Lords and English Court of Appeal decisions concerning cases which straddle or appear to straddle the divide between judicial review and other applications. Even if injustice does not result, there is a risk in England of excessive costs and time being spent; (b) the procedure in Jersey by an ordinary representation or order of justice gives greater flexibility to the litigants and the courts in dealing with the almost infinite variety of 'judicial review' applications which may come before the courts.
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> In Jersey, there is not a single procedure by which judicial review applications must be conducted and, in my judgment, there is no need to have only one single procedure. In some cases it will be appropriate to order pleadings and discovery as in an ordinary action. In other cases affidavits and skeleton arguments will suffice. In yet other cases there will be no need even for affidavits, and only skeleton arguments will be necessary. Jersey jurisprudence is able to provide complete flexibility in dealing with different judicial review applications and, in my judgment, this is most desirable.
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> There is in Jersey no formal requirement to obtain leave to proceed by way of judicial review application. But the flexibility of the Jersey procedure enables the Royal Court to bring to an early end a judicial review application which has been too long delayed or which is misconceived. I emphasise the importance of ensuring that judicial review applications which are, having regard to the particular circumstances, too long delayed, are dismissed at an early stage, rather than allowed to proceed to a full hearing. Administrative decision or actions may involve immediate effects and delay in brining a judicial review application may stultify the administrative process.
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> The courts of Jersey have ample power to order discovery, when and where appropriate, in judicial review applications. But as a matter of common sense, such orders for discovery are likely to be rare and when ordered, related to limited and specific classes of documents or to individual documents. Except in the rarest cases there will be no room in judicial review applications for the kind of broad discovery available in ordinary actions. Furthermore, there will be no place for any discovery

[13] 1998 JLR 196.

order except when (a) a clear *prima facie* case of error by the administrative body has been made out; and (b) the document or documents are necessary to enable to clear the *prima facie* case to be fully established. What I have said about discovery applies with equal or perhaps greater force to interrogatories. [14]"

5 Judicial review was first recognised in Guernsey in 1998.

Overview

6 But while judicial review is in strict parlance a set of procedures, embracing in England and Wales (as in Jersey) the means of obtaining orders to prevent or quash unlawful activity by public authorities, to compel them to do their duty, and to give appropriate declaratory relief about the reach of their powers,[15] more generally it applies to the principles upon which such relief can be sought and it is those which I wish initially to address.

7 The conventional trilogy of illegality, irrationality and procedural impropriety still hold sway and the case law demonstrates application of tried principle to new circumstance—variations on a theme rather than a change in the theme itself: Lord Diplock's proposed adjunct to the quartet—proportionality[16]—has certainly influenced the courts where there is either a human rights element or a European Community element but in *R (Abcifer) v Defence Secy*[17] the Court of Appeal decided that it was for the House of Lords alone to cross the final frontier and substitute proportionality in all cases for irrationality.

8 Dyson LJ said, at para 34—

"It seems to us that the case for this is indeed a strong one. As Lord Slynn points out, trying to keep the Wednesbury principle and proportionality in separate compartments is unnecessary and confusing. The criteria of proportionality are more precise and sophisticated: see Lord Steyn in the *Daly* case, at 547–48, para 27. It is true that sometimes proportionality may require the reviewing court to assess for itself the balance that has been struck by the decision-maker, and that may produce a different result from one that would be arrived at on an application of the Wednesbury test. But the strictness of the Wednesbury test has been relaxed in recent years even in areas

[14] *Bassington v HM Procureur*, 26 GLJ 86: see *OGH v President of the Island Development Ltd* (Civil File 791 19, para 14 Royal Court): "To remove any doubt I can positively express the view, which I know is shared by my colleagues, that the remedy is unquestionably available in this jurisdiction". *Jersey Fishermen's Association v States*, 2007–08 GLR 36 (PC) at para 3 *per* Lord Mance and, generally, Dawes, *Laws of Guernsey* (2003) Ch 3.

[15] As in the possibilities of monetary awards in judicial review proceedings see Fordham, *Monetary Awards in Judicial Review*, 2009 PL 1–5.

[16] *Council of Civil Service Unions v Minister for Civil Service*, [1985] AC 374, at 410.

[17] 2003 QB 1397.

which have nothing to do with fundamental rights: see the discussion in Craig, *Administrative Law*, 4th ed (1999), pp 582–84. The Wednesbury test is closer to proportionality and in some cases it is not possible to see any daylight between the two tests: see Lord Hoffmann's Third John Maurice Kelly Memorial Lecture 1996 '*A Sense of Proportionality*', at p 13. Although we did not hear argument on the point, we have difficulty in seeing what justification there now is for retaining the Wednesbury test.

But we consider that it is not for this court to perform its burial rites. The continuing existence of the Wednesbury test has been acknowledged by the House of Lords on more than one occasion."

9 It must, however, be appreciated that one judge's lack of proportionality is another judge's irrationality, and coupled with the ever-increasing activism of the contemporary English judiciary, the notion that to have a decision successfully challenged for irrationality a public authority has to have lapsed into eccentricity, even insanity, is anachronistic.[18]

10 But one new principle which has certainly added to the weaponry of the claimant is mistake of fact. The context was—as is not infrequent in judicial review in England and Wales—an immigration one, a refusal of an application for asylum.[19]

11 Carnwath LJ said, at para 66—

"In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of the *Criminal Injuries Compensation Board* case. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been 'established', in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

12 The utility of describing mistake of fact as an aspect of unfairness is not immediately apparent. In one sense any decision vitiated by a public law flaw is unfair to the victim of it: and unfairness is better confined to forms of recognised procedural impropriety: indeed

[18]See *de Smith*, paras 11–028, 11–031, 11–036 – 11–038 for the variety of blooms in the irrationality garden.

[19]*E v Home Secy*, 2004 QB 4044.

Lord Slynn distinguished the two concepts in the case referred to in the passage quoted.[20] But the four criteria identified in Carnwath LJ's judgment sufficiently identify when the new ground is engaged without fairness being referred to: and are as appropriate in judicial review as in the *E* case, which was itself about statutory appeal.[21]

Illegality

13 Illegality as a principle elementarily required no development: the law may change, but the concept of breach of it does not. However in *R (Raissi) v Home Secy*[22] (concerning a compensation scheme for persons detained in custody following wrongful conviction or charge) the Court of Appeal resolved a division of view, touching upon illegality, as to whether a policy statement or guidance should be interpreted objectively (if purposively) or whether its author could rely upon his interpretation as long as it fell within a band of reasonable responses, in favour of the former.

14 Sir Anthony Clarke MR noted, in reaching that conclusion, at paras 122–24—

> "The issue of what is the proper test to be applied in interpreting ministerial policy statements has been considered in a very large number of cases: see Fordham, *Judicial Review Handbook*, 4th ed (2004), para 29.5.10, entitled 'Meaning of policy guidance: whether a hard-edged question'. The cases cited show a range of different approaches. For example, Mr Fordham quotes Sir Thomas Bingham MR in *R v Director of Rail Passenger Rail Franchising, ex p Save our Railways*:[23] 'The Court ... cannot, in case of dispute, abdicate its responsibility to give the document its proper meaning. It means what it means, not what anyone ... would like it to mean.'
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> We have some difficulty with the reasonable meaning approach. One presumes that, if the minister has applied a meaning to some part of the policy, then the minister, without announcing any change in the policy, could not in a later case adopt another meaning, arguing that both meanings are reasonable and it is up to him or her to choose which meaning to use in any particular case. If that is right, then the reasonable meaning approach would only benefit the minister when interpreting the meaning of a particular part of the policy for the first time."

Procedural impropriety

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[20][1999] 2 AC 330 at 345.

[21]*The Criminal Injuries Compensation Board* case was a judicial review.

[22][2008] 3 WLR 375.

[23][1996] CLC 589, 601 D.

15 The basic rules of natural justice or fairness remain unaltered: there is a flexible standard as to the opportunity to know the case against one, and to make representations to the decision-maker where one's rights or interests are affected by a public law decision-maker.[24] There is a right to have a decision taken by a decision-maker who is not only impartial and independent, but seen to be so.[25]

16 There has, however, been a development in the concept of legitimate expectation which has both substantive[26] and procedural dimensions. The latest statement on the latter is of Laws LJ in *R (Bhatt Murphy) v Home Secy*,[27] to the effect that a claimant who has enjoyed a benefit or advantage which is then withdrawn, may not have a substantive expectation that the benefit or advantage will continue, but will have an expectation of a procedural right:

> "the right to make representations in response to the decision which is identical to the right afforded in the paradigm case of procedural legitimate expectation, where there has been a promise or practice by which such an opportunity has been afforded".

17 The addition of an obligation to provide a reason as an adjunct to fairness (albeit not, as yet, divorced from it so as to enjoy an indignant identity) is well established. A succinct summary can be found in the speech of Lord Simon Brown in *South Bucks DC v Porter No 1*,[28]

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the 'principal important controversial issues' disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the notion of the issues falling for decision".

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[24] *De Smith*, *op. cit.*, paras 7–043 – 7–053 for a recent restatement see *R (Eisia) Ltd v NICE*, 2008 EWCA Civ 438. See also *In re the X Children*, [2009] JCA 083 at para 49 *et seq.*

[25] *De Smith*, *op. cit.*, Ch 10. For a recent restatement see *Lawal v Northern Sprint Ltd*, 2003 UKHL 35; [2004] 1 All ER 183, at para 19.

[26] See *e.g*. *R (Bapio) v Home Secy*, 2008 UKHL 27; [2008] 2 WLR 1073 (change of guidance about employment of overseas doctor); see generally Knight, 2009 PL Analysis, at 15–20. The author correctly points out that there is no clearly articulated basis for substantive legitimate expectations, which enjoy protection in public law alongside rights and interests.

[27] [2008] EWCA Civ 755; see again Knight, 2009 PL Analysis, at 15–20.

[28] 2004 UKHL 33; [2004] 1 WLR 1953, at para 36.

Although articulated in a planning context, the analysis can be, in my view, more broadly applied.

18 Outside the common law area the main engine of change has been the coming into effect of the Human Rights Act 1988 ("HRA"). In the *All England Reports Annual Review 2004*, in the chapter entitled "Administrative Law", Professor Keith Davies commented—"No leading case is complete nowadays without an advocate summoning up the Human Rights Act" (para 4.48).[29] The situations in which it has been applied are of course various; immigration, in particular asylum;[30] the procedures of local authorities dealing with children cases;[31] freedom of expression;[32] freedom of association;[33] housing;[34] welfare;[35] education;[36] planning;[37] inquests;[38] prisoner rights[39]—the very stuff of conventional public law.

19 But it has been deployed in yet more unusual areas not least because of its controversial extra-territorial effect, so that, for example, the treatment of detainees in Iraq,[40] or the detention,[41] or deportation of persons seen as threats to national security to

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[29]But it seems that resort to the HRA has peaked: *The Independent*, 20 April 2009, at 17. From my judicial vantage point I have detected as yet no similar appetite for Convention points although available in both jurisdictions. The case of the *Seneschal of Sark*, albeit decided in London and destined for the House of Lords, *R v Secretary of State for Justice ex p Sir David and Sir Frederick Barclay* EWCA 2008 C1/2008/1590 may sound a clarion call.

[30]*R (Limbuela) v Home Office*, [2005] 3 WLR 1014 (denial of support to asylum seekers can without more lead to breach of art 3: prohibition on inhuman or degrading treatment).

[31]*R v Barnet LBC* 2004 (art 8: respect for family life).

[32]*R (Pro Life Alliance) v BBC*, 2003 UKHL 23 (art 10: freedom of expression: abortion advertisement).

[33]*R (Laporte) v Chief Const of Gloucestershire*, 2006 UKHL 55 (art 11: freedom of association: detention of protesters'coach).

[34]*Huang v Home Secy*, 2007 UKHL 11 (art 8: respect for family life).

[35]*RJM v Work and Pensions Secy*, 2008 UKHL 63; [2008] 3 WLR 1023 (alleged discrimination in disability benefit contrary to APPI (property rights) and art 14: discrimination).

[36]*R(SB) v Gov of Denbigh High School*, 2006 UKHL15; [2006] 2 WLR 719 (A2PI: education rights: refusal of permission to Muslim girl to wear hijab).

[37]*R (Alconbury) v Environment Secy*, 2001 UKHL 23; [2003] 2 AC 295. (art 6: fair trial).

[38]*R (Middleton) v West Somerset*, 2004 UKHL 10; [2004] 2 AC 182. (art 2: right to life).

[39]*R (Smith) v Home Office*, [2006] 1 AC 159; *R (Hammond) v Home Office*, 2005 UKHL 69; [2006] 1 AC 603 (art 6: fair trial).

[40]*R (AL Skeini) v Defence Secy*, 2007 UKHL 28 (art 3: prohibition on inhuman or degrading treatment).

their country of origin, or even (albeit unsuccessfully) the need to set up an inquiry into the legality of the decision to go to war in Iraq.[42]

20 The courts have had to grapple with the extent to which Strasbourg jurisprudence must be taken into account. The established approach is that the principles laid down in Strasbourg are to be followed no less, but also no more. It is recognised in short that, even allowing for the margin of appreciation accorded to member states, the Convention is an international instrument which should receive a uniform interpretation in member states. Lord Bingham has said—

> "the duty of national courts is to keep place with the Strasbourg jurisprudence as it evolves overtime: no more, but certainly no less",[43]

to which, in a later case, Lord Simon Brown added, "no less, but certainly no more".[44]

21 The courts, drawn ineluctably into the political arena, have recognised that they cannot abstain from making a judgment merely because such judgment may have political consequences, noting—

> "while any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision".[45]

22 The most interesting sign post to the future was the suggestion by several members of the House of Lords in the challenge to the hunting ban that it was possible to envisage circumstances where primary legislation would be disapplied, even in the absence of paramount inconsistent community law (or where inconsistency with convention law required a declaration of incompatibility).[46] The thesis was that since sovereignty of Parliament was a concept founded on judicial recognition, so the judges could withhold that recognition in extreme circumstances.

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[41]*A v Home Secy*, [2005] 2 AC 68 (art 5: right to liberty: Annex 14: prohibition of discrimination).

[42]*R (Gentle) v Prime Minister*, 2008 UKHL 20; [2008] 1 AC 1356.

[43]*R (Ullah) v Special Adjudicator*, 2004 UKHL 26; [2004] 2 AC 323. Courts faced with an apparent collision between Strasbourg and House of Lords precedent should follow the latter: *Kay v Lambeth LBC*, [2006] 2 AC 465.

[44]*R (Al Skeini) v Defence Secy*, 2007 UKHL 28 at paras 105–7.

[45]*A v Home Secy*, [2005] 2 AC, Lord Bingham at para 39.

[46]Both of which Euro sources were prayed in aid (unsuccessfully) in the later hunting case: *R (Countryside Alliance) v Att Gen*, 2007 UKHL 52; [2008] 1 AC 719.

"It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances might arise where the court may have to qualify a principle established on a different hypothesis of constitutionalism."[47]

23 It is doubtful, in my view, first that such circumstances will ever occur, and secondly that if they did the courts would in fact take the ultimate step suggested—a judicial nuclear option—or that if they did, their judgments would be respected or enforced. If the legislature indeed acted in a manner blatantly in breach of fundamental precepts of the rule of law, governments which had pioneered such legislation would already have shown themselves not of a mind to give effect to judicial criticism. So the sign post merely leads into a cul-de-sac.

Public authority

24 A threshold issue in all judicial review is whether the decision or act which it is sought to challenge is one taken or carried out by a public authority. Regrettably, of the two cases which have reached the House of Lords, the first was on unusual facts—a case where modern judicial review collided with medieval common law; the object of inquiry was a parochial church council[48] and the issue was whether private individuals were liable to bear the costs of repair to the chancel of the parish church as an incident of ownership of glebe land; and the second,[49] it was held by a bare majority,[50] that in providing care and accommodation for residents placed with it by a local authority, a privately owned care home was not performing functions of a public nature within the meaning of the HRA.

25 The waters were further muddied because in both cases the House was concerned with a concept peculiar to the HRA, that is of a private body carrying out "functions of a public nature", and as Lord Bingham said in the latter case—"it will not ordinarily matter whether the body in question is amendable to judicial review". (See also Lord Mance at para 87 although noting that Lord Hope in *Aston Cantlow* at para 52 had confusingly found it "helpful".) Only indirect assistance is available from this tangled jurisprudence. I shall refrain from doing more than drawing attention to them as the starting point, if not the

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[47] *R (Jackson) v Att Gen*, 2005 UKHL 56; [2005] 1 AC 262, *per* Lord Steyn at para 102, Lord Hope at paras 104 and 107, Baroness Hale at para 159; see Jowell QC, *Parliamentary Sovereignty under the new Constitutional Hypothesis*, 2006 PL 562.

[48] *Aston Cantlow v Wallbank*, 2003 UKHL 37; [2004] 1 AC 546. I appeared for the respondent.

[49] *Y v Birmingham City Council*, [2007] UKHC 27; 2007 UKHL27; [2008] 1 AC 95.

[50] The minority consisting of the public lawyers.

finishing line of the quest.[51] The preface to *De Smith* rightly calls these questions "complex and controversial".[52]

Locus Standi

26 I turn to questions of procedure.

27 The first question in judicial review is whether the claimant has standing. This is an issue which goes to jurisdiction, not discretion. The English courts have continued to show little appetite for dismissing a claim on these grounds. In *R (Feakins) v Environment Secy*,[53] the decision under challenge was to remove unburied residue of cattle slaughtered in the wake of outbreak of foot and mouth disease to landfills. A preliminary point was taken that the claimant had no standing because his real motive was to extract the maximum compensation from the Secretary of State.

28 Lord Justice Dyson said, at para 24—

> "In my judgment, if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing merely because he raises an issue in which there is, objectively speaking, a public interest. As Sedley, J said in *R v Somerset County Council, ex p Dixon*, 1997 COD 303 when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill motive, and was not a mere busybody or a trouble maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing."

29 Since the court rejected the characterisation of the claimant's motive advanced by the Secretary of State, the claim was allowed to proceed. There is, in my view, a potential tension between the first and last sentences of the passage cited. It seems, on a fair reading that presence of ill motive, rather than absence of special interest, is the key factor for disqualification.

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[51]See now *BBC v Sugar*, 2009 UKHL 9; [2009] 1 WLR 430, as to whether the BBC was a public authority for the purpose of the Freedom of Information Act 2000 (another 3–2 decision).

[52]p iii.

[53][2004] 1 WLR 1761.

Arguability

30 A second question is whether a competent claimant has crossed the threshold of arguability. In *Sharma v Brown-Antoine*[54] leave had been granted by a judge at first instance to the Chief Justice of Trinidad and Tobago to apply for judicial review of a decision to prosecute him.

31 The Privy Council held by a majority that permission should not have been granted. Lord Bingham of Cornhill articulated the standard in a manner perceptibly, if modestly, less favourable to the claimant than previous case law might suggest, at para 4—

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see *R v Legal Aid Board, ex p Hughes*, (1992) 5 Admin LR 623, at 628; and Fordham, *Judicial Review Handbook*, 4th ed (2004), at 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R(N) v Mental Health Review Tribunal (Northern Region)*, [2006] QB 468, para 62, in a passage applicable, *mutatis mutandis*, to arguability:
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> > *'the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*
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> It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen': *Matalulu v DPP*, [2003] A LRC 712, 733."

Delay

32 A third question is whether the proceedings have been brought in sufficient time. The main case is *R (Burkett) v Hammersmith & Fulham LBC*[55] where it was held that the

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[54][2007] 1 WLR 780. There is no material distinction between the law of England and Wales and of Trinidad and Tobago in this context.

[55][2002] 1 WLR 1593.

grounds for determining when a challenge first arose in a planning context was where permission was granted, and not merely where a resolution to grant it was passed.

33 Lord Steyn said, at paras 38, 42, 45 and 46—

> "Leaving to one side for the moment the application of O 53, r 4(I) on the running of time against a judicial review applicant, it can readily be accepted that for substantive judicial review purposes the decision challenged does not have to be absolutely final. In a context where there is a statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. Town planning provides a classic case of this flexibility. Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even in advance of it: see generally Wade & Forsyth, *Administrative Law*, at 600; Craig, *Administrative Law*, at 724–25; Fordham, *Judicial Review Handbook*, 3rd ed (2001), para 4.8.2.
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> …
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> For my part the substantive position is straightforward. The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump in legal logic to say that he must apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort.
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> First, the context is a rule of court which by operation of a time limit may deprive a citizen of the right to challenge an undoubted abuse of power. And such a challenge may involve not only individual rights but also community interests, as in environmental cases. This is a contextual matter relevant to the interpretation of the rule of court. It weighs in favour of a clear and straightforward interpretation which will yield a readily ascertainable starting date. Entrusting judges with a broad discretionary task of retrospectively assessing when the complaint could first reasonably have been made (as a prelude to deciding whether the application is time barred) is antithetical to the context of a time limit barring judicial review.
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> Secondly, legal policy favours simplicity and certainty rather than complexity and uncertainty. In the interpretation of legislation this factor is a commonplace consideration. In choosing between competing constructions a court may presume, in the absence of contrary indications, that the legislature intended to legislate for a certain and predictable regime."

34 The courts, however, tend to give to a greater and greater extent, in my experience, emphasis to perceived merits and will not readily allow a good claim to go unrewarded because of lapse of time. Whether this is entirely consonant with the CPR or the underlying statutory provisions[56] may be questionable.

Disclosure

35 Evidential issues tend not to bulk large in judicial review because the outcome of public law cases rarely depends upon the resolution of factual issues. Hence, for example, disclosure is rarely controversial, not least because of the obligations of candour owed by public authorities once permission to apply for judicial review has been granted. But in *Tweed v Parades Commission for Northern Ireland*[57] where the claimant alleged disproportionate interference with his human rights in restrictions placed on a proposed Orange badge procession in a predominantly Catholic town, the House of Lords had unusually to consider what disclosure to order against the respondent body.

36 Lord Bingham said, at paras 2–4:

> "The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.
>
> In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.

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[56] See *O'Reilly v Mackman* 1983 2 AC 237, *per* Lord Diplock at pp 280–81:
"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of the decision-making powers for any longer than is absolutely necessary in fairness to the person affected by the decision."

[57] [2007] 1 AC 650.

> Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."

This can be regarded as authoritative guidance.

Fresh evidence

37 In *R (Lynch) v General Dental Council*,[58] Collins J had to consider whether fresh evidence, unavailable to the decision maker, should be admissible on judicial review, with particular emphasis on expert evidence. (The issue in the case was whether the claimant was entitled to be placed on a specialist register of orthodontists.)

38 In expounding his approach, Collins J first endorsed the earlier case of *Ex p Powis*[59] on the admissibility of fresh evidence generally, where Dunn LJ stated—

> "Finally there was an application on behalf of the tenant to admit fresh evidence which the Divisional Court had refused to admit. Like the Divisional Court we considered the evidence *de bene esse*. What are the principles on which fresh evidence should be admitted on judicial review? They are (1) that the court can receive evidence to show what material was before the minister or inferior Tribunal (see *per* Lord Denning MR in *Ashbridge Investments Ltd v Minister of Housing and Local Government*, [1965] 3 All ER 371, at 374; [1965] 1 WLR 1320, at 1327); (2) where the jurisdiction of the minister or inferior Tribunal depends on a question of fact, or where the question is whether essential procedural requirements were observed, the court may receive and consider additional evidence to determine the jurisdictional fact or procedural error (see de Smith's *Judicial Review of Administrative Action*, 4th ed (1980), at 140–41 and cases there cited); (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior Tribunal or the parties before it. Examples of such misconduct are bias by the decision-making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged

[58][2003] EWHC 2987 (Admin).

[59][1981] 1 WLR 584 at 595–97; [1981] 1 All ER 788. at 797–98; [1981] 1 WLR 584 at 595–96.

(see *R v West Sussex Quarter Sessions, ex p Albert & Maud Johnson Trust Ltd*, [1973] 3 All ER 289, at 298, 301; [1974] QB 24, at 39, 42 *per* Orr and Lawton (LJJ)."

39 On the particular point raised, Collins J stated that in order to carry out its function in judicial review proceedings the court must understand the material which is put before it. At para 22 he stated—

"I have no doubt that fresh evidence involving expert evidence should in general not be admitted unless it falls within the *Powis* guidelines. However, it is and has always been recognised that irrationality is an error of law which can lead to a decision being quashed. If the decision in question is made by an expert tribunal or indeed by anyone dealing in a field involving consideration of matters which would not obviously be fully understood by a layman without some assistance from an expert in that field, it may be necessary at the very least to have some explanation of any technical terms. Mr Garnham accepted that expert evidence could be adduced to provide such explanations. Without it, the Court might well be unable to consider properly any irrationality argument. When I use the word 'irrationality' I am intending to include not only perversity but also a failure to have regard to a material matter or a taking into account of an immaterial matter."

Costs

40 The funding of public law cases has produced different rules from those which obtain in private law, reflecting their different nature.

41 It was held in *R (Corner House Prosecutor) v DTI*[60] that costs orders can be made to allow claimants of limited means access to the Court in public law cases on issues of general public importance without the fear of substantial costs orders being made against them. The Court of Appeal held that the court will not generally make such orders unless the public interest challenges raised are ones of general public importance, the public interest requires that those issues should be resolved, and the claimant has no financial interest in the outcome of the case: it is fair and just to make the order having regard to the financial resources of the claimant and the defendant and the amount of costs that were likely to be involved, and the claimant would probably discontinue the proceedings and would be acting reasonably in so doing if such an order were refused.

Channel Islands

42 The Courts of Jersey and Guernsey are not, of course, bound to follow English precedent: only a decision on appeal from the Court of Appeal by the Privy Council

[60][2005] 1 WLR 2600. but see now *Morgan v Hinton Organics (Wessex)Ltd*, 2009 EWCA Civ 107 clarifying that absence of private interest is a consideration but not a dispositive one.

compels attention.[61] But it is important for any Channel Island advocate at least to be aware of the latest jurisprudence from the courts of England, Wales, and indeed Scotland. Law, even in an Island, is increasingly global: it is only virtuous in the primary, not secondary sense of the adjective, to be insular.

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[61]See the sophisticated reconciliation of two lines of English authority and previous Jersey laws in *JFSC v Black*, 2007 JLR 1, by Page Commr on the issue of the costs consequences to a public authority of unsuccessful proceedings brought in the public interest.