# Principles of Public Law

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# GROUNDS OF JUDICIAL REVIEW I: ILLEGALITY

## 12.1 Introduction

As we saw in the last chapter, the basic idea behind the ground of review called 'illegality' is very simple: a public authority must act within the 'four corners' of its powers or jurisdiction. It is the ground of review which most closely reflects the preoccupations of the traditional *ultra vires* view of judicial review, with its concentration upon ensuring that the exercise of power is confined within the limits prescribed by the empowering legislation or rules. Let us take a fictitious scenario, which we can follow throughout the chapter:

(a) Parliament decides to pass legislation to control local markets. It enacts a statute called the 'Market Stallholders (Control) Act 1998'. This Act provides that it is unlawful for anyone to trade from a market stall without a licence. The Act sets up a authority called the 'Market Traders Licensing Board' (MTLB) to issue licences;

(b) s 2 provides 'the MTLB shall have the power to issue or renew market stall licences to applicants as it sees fit';

(c) s 3 provides 'in considering whether or not to issue a licence to an applicant, the MTLB shall consider whether the applicant is a fit and proper person to hold a licence';

(d) s 4 provides 'the MTLB shall have power to prevent anyone from trading from a market stall without a licence, and can confiscate equipment used in market trading by any such person'.

## 12.2 Acting 'outside the four corners'

In this (fictitious) example, it is easy to imagine a straightforward case of illegality. The MTLB warns Marks & Spencer that it cannot continue trading without a licence, and threatens to confiscate its cash tills (pursuant to s 4 of the Act) if it opens its stores on the following day. Marks & Spencer could challenge this decision on the ground that the MTLB is acting outside its powers; that it is acting illegally. Parliament has not given the MTLB the power to regulate shops, but only to regulate market stalls. The MTLB is threatening to act *ultra vires* (or, in other words, outside its jurisdiction).

In practice, illegality is by far the most common ground of judicial review. The day to day work of a lawyer specialising in public law does not concern abstruse questions as to the meaning of the concept of legitimate expectation, or as to the existence of the doctrine of proportionality, but involves

examining and arguing over whether individual Acts of Parliament, statutory instruments and other sources of power (including EC sources) do, or do not, confer power on a decision maker to act as it did. This work is, first and foremost, an exercise of interpretation, not of knowledge of law or of precedent. Every statutory situation is different, and it is not usually very helpful to know what has happened in different situations. This fact is important to bear in mind in answering judicial review problem questions. One cannot prepare oneself by 'learning' cases in which illegality has been used as a ground of review. Rather, it is important to understand the 'logic' behind the idea of illegality: the different types of reasons that a court may give in concluding that a decision maker has acted outside its powers. Then, one can apply that reasoning to any problem situation with which one may be confronted. In other words, one must absorb the thinking processes which courts and lawyers typically follow.

## 12.3 'Incidental' powers

This is not to suggest that questions of illegality are necessarily straightforward or mechanical to resolve. It may be a finely balanced question as to whether a function or power conferred by statute upon a public authority carries with it other 'incidental' powers, which are not spelt out in the statute, but which may be necessary or helpful for the discharge of the primary function or power. On the other hand, a power which, on its face, appears to be extremely wide may, when construed in its context, be much more narrowly confined. Thus, for example, s 111 of the Local Government Act 1972, which confers upon local authorities the broad power to 'do any thing (whether or not involving the expenditure ... of money ...) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions', has been held, in a series of recent cases, to be impliedly limited by statutory controls on the borrowing and expenditure of local authorities, so that an authority could not rely upon s 111 to conduct interest rate 'swaps' (*Hazell v Hammersmith and Fulham LBC* (1992)) or to establish a limited company and guarantee its loans in order to facilitate a swimming pool and associated timeshare development in its area (*Credit Suisse v Allerdale BC* (1997)).

The next few sections (12.4–12.7) identify some of the 'thinking processes' which the courts follow in considering questions of illegality. Although each is often referred to as a separate subground of review (for example, a court will grant judicial review because the decision maker has been 'influenced by an irrelevant consideration'), you should be able to see how each is merely a 'working through' of the basic idea of illegality – that an authority is not allowed to exceed the powers which it has been given.

## 12.4 Relevant and irrelevant considerations

A decision maker acts illegally if it 'fails to take into account a relevant consideration' – that is, it does not consider something which it ought to consider. Let us go back to our example.

The MTLB grants a licence to trade to Albert, who has just been released from prison after serving time for running protection rackets and intimidation. The MTLB decides, in considering whether to grant Albert a licence, to ignore the question of whether he is fit and proper, because it feels that 'he has already been punished enough'.

This decision could be challenged for failure to take into account a relevant consideration. Section 3 of the Act requires that the MTLB shall, in considering whether or not to issue a licence, take into account whether it thinks the applicant is a fit and proper person to hold a licence. The MTLB has failed (indeed, refused) to do so; to ask whether he is a fit and proper person in the light of his convictions.

In this example, the relevant consideration which the MTLB ignored was actually spelt out in the statute ('shall consider' whether the applicant is fit and proper): it was 'an express consideration'. But the decision maker may also have to take into account relevant considerations which are not actually spelt out in the statute, but which are merely implied by the statutory context. For example: the MTLB's decision to grant Albert a licence is quashed, for the reason given above. It has to decide his application again (because he still wants a licence). This time, it does consider whether he is fit and proper, but, in doing so, it excludes the evidence of his past convictions, again on the basis that 'he has been punished enough for that'. It concludes that he is fit and proper.

This time, the MTLB has followed the letter of the statute: it has considered whether he is fit and proper. But the decision could still be challenged for failure to take into account a relevant consideration – namely, Albert's past convictions. This consideration is not 'express': the legislation does not actually state that the MTLB is required to take into account past convictions. But there is surely a very strong argument for saying that, in considering whether someone is fit and proper, it must be relevant to consider any recent convictions for serious offences. To ignore such an issue is to ignore an (implied) relevant consideration. Once again, the courts would be likely to quash the MTLB's decision to grant Albert a licence.

There are no clear rules for deciding whether a statute impliedly requires a decision maker to take a particular consideration into account. In every case, it is a matter of interpretation for the court, looking at the words of the statute, the context, and making certain assumptions or educated guesses about the intention of Parliament. Thus, for example, in *R v Gloucestershire CC ex p Barry* (1997), the House of Lords differed from the Court of Appeal in holding that a

local authority was entitled to take into account, in assessing the degree of need of the applicant and the necessity to make arrangements to meet it under the Chronically Sick and Disabled Persons Act 1970, the cost of making the arrangements and the availability of resources to the council.

As the obverse of the above, a decision maker also acts illegally if he or she takes into account an irrelevant consideration. Once again, irrelevant considerations may be either express in the statute, or implied. An example of an implied irrelevant consideration may be as follows: the MTLB refuses a licence to Belinda on the basis that she has red hair. The MTLB has quite obviously taken into account an irrelevant consideration, even though it is not expressly stated in the Act that 'the MTLB shall not consider the colour of an applicant's hair'. The decision will also be unreasonable (see Chapter 15). A recent example of a court quashing a decision because an irrelevant consideration was taken into account is *R v Home Secretary ex p Venables* (1997). The House of Lords held that the Secretary of State, in fixing the tariff period of detention to be served by the defendants in the James Bulger murder case, could not take into account public petitions or public opinion as expressed in the media; these were irrelevant considerations to what was a function comparable to that of a sentencing judge.

Note that not every consideration will be either irrelevant (in the sense that the decision maker may not have regard to it) or relevant (in the sense that the decision maker must have regard to it). There is also a category of considerations to which the decision maker may have regard if, in his or her judgment and discretion, he or she thinks it right to do so. Within this third category, as Simon Brown LJ explained in *R v Somerset CC ex p Fewings* (1995), the decision maker enjoys a 'margin of appreciation within which ... he may decide just what considerations should play a part in his reasoning process' (pp 1049–50). In that case, the Court of Appeal held that the council was entitled, in resolving to ban stag hunting from land owned and held for amenity purposes by the council, to the 'cruelty argument'; Simon Brown LJ characterised that argument as either an argument to which the council was obliged to have regard (as a relevant consideration), or at least an argument to which it was entitled to have regard within the third category referred to above (thus differing from the judge at first instance, Laws J, who had held that it was an irrelevant consideration). In fact, the majority of the Court of Appeal overturned the council's decision, because the council had failed to take into account the objects and purposes of the statutory power under which it was acting: see below, 12.5.

In practice, it may not be easy to discover whether or not a consideration has been taken into account by the decision maker – unless the decision maker reveals that it has been influenced by that factor by giving reasons for its decision. It may be particularly difficult if the decision maker does not have a duty to give reasons (as to which, see below, 13.6.5), especially since discovery

is rarely ordered in judicial review proceedings (certainly nothing in the nature of a 'fishing expedition' will be ordered).

## 12.5 Improper purpose

A decision maker ought only to use a power given to it by Parliament for the purpose or purposes for which it was given the power. The decision maker acts *ultra vires* if it uses the power for a different purpose. The classic case in which this principle was set out is *Padfield v Minister of Agriculture, Fisheries and Food* (1968). The minister had a discretion conferred by the Agricultural Marketing Act 1958 to refer complaints about the operation of the milk marketing scheme to a commission. The minister refused to refer a complaint from milk producers to the commission because he feared that, if the complaint was upheld, it would undermine the whole milk marketing scheme. The House of Lords held that this decision was unlawful, because he was exercising his discretion not to refer for a wrong purpose: to protect the existing scheme. The statute conferred the power to refer on the minister just so that such challenges could be made. As Lord Reid (p 1034) put it:

> The minister's discretion ... must be inferred from a construction of the Act read as a whole, and for the reasons I have given I would infer that the discretion ... has been used by the Minister in a manner which is not in accord with the intention of the statute which conferred it.

A more recent example is *R v Inner London Education Authority ex p Brunyate* (1989). Under the Education Act 1944, local education authorities were given powers to appoint school governors, and had an (apparently) unfettered power to remove them from office. The ILEA decided to remove certain governors because it disagreed with the policies which they were pursuing. The House of Lords held that, construing the statute as a whole, the governors were given an independent function. Therefore, the ILEA was acting with an improper purpose in attempting to remove them for a reason which would undermine that independent function. Once again, working out whether a decision maker is acting with an improper purpose is a matter of fact in each case, looking at the statutory context. We can look at one more illustration, using our example.

The MTLB resolves that in considering licence applications, it will favour 'active followers of an organised religion' in order 'to promote the growth of spiritual awareness in the country'.

This decision could be challenged on the ground that the MTLB has adopted an improper purpose (promoting spiritual awareness) in exercising its discretion to issue licences. Looking at the statute as a whole, it is clear that this was not one of the purposes for which Parliament conferred the power on the MTLB, rather (from the extract of the statute which we have seen), it

would appear that the primary purpose was to ensure that market stalls are run by honest ('fit and proper') persons.

Do not be too worried about the precise distinctions between categories such as 'irrelevant considerations' and 'improper purpose' – they tend to run into each other. For example, in the last example above, one could say that the MTLB has acted illegally because it has taken an irrelevant consideration into account (promoting spiritual awareness) rather than saying that it has adopted an improper purpose. It doesn't matter how you describe it; what is important is to identify that the decision maker has acted outside its powers by exercising its discretion wrongly. A good recent example of a case which can be categorised under either heading is *R v Somerset CC ex p Fewings* (1995) (council's ban on stag hunting on council land unlawful; discussed above, 12.4).

## 12.6 Fettering of discretion

If Parliament gives a discretion to a particular public decision maker, then that authority must actually exercise the discretion. 'Discretion' means, essentially, making a choice between two or more options. So the courts insist that the decision maker actually makes that choice in each case: that is, applies its mind to the different possible decisions which it could make, and chooses between them. The courts will not allow a decision maker to prejudge cases, or to bind or 'fetter' its discretion by adopting a rigid policy so that the outcome of individual cases is decided in advance. This is known as the rule against the fettering of discretion. It is best illustrated by our example.

The MTLB, in a state of shock after twice having its decisions quashed in relation to Albert, goes to the other extreme. It decides to adopt a policy which provides that 'any applicant with any criminal convictions (other than driving convictions) cannot be considered fit and proper, and so must be refused a market stall licence'. Albert applies for a licence for a third time, and this time he is refused, because of the policy. He challenges the decision.

The decision is unlawful. The MTLB has adopted a rigid policy which binds it as to how it decides future applications. Even if that policy was completely reasonable (in this case you may think it is not), it is still unlawful, because it fetters the MTLB's discretion to decide each individual case according to its merits. Albert would succeed in an application for judicial review.

A more complex recent example of a decision relying upon the rule against fettering of discretion is *R v Secretary of State for the Home Department ex p Fire Brigades Union* (1995). This case concerned the Criminal Injuries Compensation Scheme, which was originally set up by way of prerogative power in 1964, but was put on a statutory basis by the Criminal Justice Act 1988 which, however, provided that its provisions (in this regard) would come

into force 'on such day as the Secretary of State may ... appoint'. The Secretary of State did not appoint a date, but rather, in 1993, indicated that he would, instead, bring in a new non-statutory 'tariff' scheme. The applicants, who regarded the 'tariff' scheme as less favourable than the statutory scheme under the 1988 Act, challenged the decision of the Secretary of State on the basis that, by introducing the 'tariff' scheme, he was thereby unlawfully fettering his discretion in relation to the statutory scheme. The House of Lords held, by a bare majority, that the statutory power to appoint a date for the coming into force of the 1988 Act imposed a continuing obligation or discretion upon the Secretary of State to consider whether to bring it into force, and that he could not, therefore, bind himself not to exercise that discretion by introducing the inconsistent tariff scheme.

In practice, many, if not most, public bodies develop policies which they adopt to help them take decisions; large scale decision making would be impossible without them. Indeed, there are obvious advantages to having clear policies in organisations: it promotes consistency between different decision makers, it speeds up decision making, and it enables senior people in the organisation to communicate to the actual people making the decisions the factors which they ought to consider.

The rule against the fettering of discretion does not prevent decision makers adopting such policies. It simply insists that policies shall not be applied rigidly, so as to remove any ability to depart from the policy in an appropriate case. A good example of this distinction can be seen in *British Oxygen v Board of Trade* (1971). In this case, the Board of Trade had a discretion to make investment grants for certain purchases. It refused to pay British Oxygen an investment grant for the purchase of a large number of metal cylinders which cost less than £25 each, because it had a policy of not awarding grants for the purchase of items which individually cost less than £25. British Oxygen challenged this policy as a fetter on the Board's discretion to make grants. The House of Lords decided that the policy did not fetter the Board's discretion. The judgments reaffirmed that public bodies are allowed to develop policies to deal with a large number of applications, as long as they are prepared to 'listen to someone with something new to say', and to waive the policy in appropriate cases. In other words, one can have a policy, but it must not be 'set in stone'. There was evidence that the Board of Trade did not apply its policy rigidly, and so the House of Lords rejected British Oxygen's case.

An example of a case going the other way is *Stringer v Minister of Housing and Local Government* (1970). A local authority made a written agreement with Manchester University, by which it undertook to discourage development near the site of a large telescope operated by the university – the university was worried that, if houses were built nearby, the telescope's operations would be disrupted. Later, a builder's application for planning permission to build houses near the telescope was turned down by the local authority, on

the ground (partly) that the development would interfere with the telescope. The builder challenged this decision by way of judicial review, and the court agreed that (a) the agreement between the authority and the university was invalid, because it fettered the authority's statutory discretion to consider applications for planning permission on their merits in each case; and (b) therefore, the particular refusal of planning permission in this case was void also (although an appeal against that refusal to the minister, in which he had confirmed the local authority's decision, was valid for other reasons).

Note that the courts will not necessarily automatically accept the claim by a decision maker that it has 'kept its mind open' in applying its policy; after all, it is a very easy claim to make. In *R v Secretary of State for Transport ex p Sheriff and Sons* (1986), the Department of Transport had circulated a departmental handbook, in which it was stated that a certain grant would be refused in specified circumstances. This was challenged as an unlawful fetter of discretion. The Secretary of State argued that his department did not really rely on the handbook – that he had kept his mind open. The court rejected this, holding that the handbook was 'so much a part of the Department's thinking' that his discretion was clearly fettered.

## 12.7 Delegation of discretion

If an Act of Parliament confers a discretion on a particular public authority, the courts normally require that the discretion be exercised by that same authority. The decision maker is not normally allowed to delegate that discretion to someone else, because that would be contrary to the intention of Parliament as expressed in the words of the statute. If Parliament had wanted that other person to exercise the discretion, it would have conferred the power on them in the first place. To revert to our example: after the Albert debacle, the MTLB resolves that 'decisions as to the fitness and propriety of all applicants for licences shall be taken by the local police force of the relevant area'. The MTLB refuses Albert's (fourth) application for a licence, because the local police state that, as far as they are concerned, he is entirely unfit.

This decision is invalid, because it is flawed by an unlawful delegation of discretion. Parliament conferred the discretion to decide whether the applicant is fit and proper on the MTLB, not on the police.

Note that the courts will examine who *actually* exercises the discretion, and will not be satisfied merely because the authority on whom the discretion is conferred exercises it in name. A decision maker may not '*act under dictation*', by simply adopting someone else's decision as its own. On the other hand, a decision maker is usually allowed to take someone else's view into account. It is a question of judgment in each case which side of the line the decision maker has fallen. Thus: the MTLB adjusts its policy, and resolves that the MTLB will itself decide whether the applicant is fit and proper; but that in

each case it will seek the view of the local police on that question. It rejects Albert's application once again, after hearing the police's view.

It is impossible to tell from these facts whether the MTLB has acted lawfully or not. If it has taken the police's view into account and decided independently whether or not it agrees with it, then the decision is likely to be valid. If, however, it has effectively simply deferred to the police's view, then it has unlawfully acted under dictation. Which of the two is the case might be apparent from the MTLB's records of its decision making process – otherwise, Albert may have an uphill task in trying to show that the decision is flawed.

A good example of the distinction in practice is the case of *Lavender v Minister of Housing and Local Government* (1970). Here, the Minister of Housing and Local Government refused Lavender's application for planning permission to develop land for use as a quarry, after hearing objections from the Minister of Agriculture. The decision was challenged on the ground that the minister had acted under dictation – he had effectively abdicated his decision to the Minister of Agriculture. The House of Lords held that the minister was entitled to listen and to pay close attention to the views of the Minister of Agriculture – but that he could not in effect turn the decision over to the Minister of Agriculture because, under the statute, the decision was his alone. On the facts, the House of Lords held that the minister had wrongly delegated his discretion to the Minister of Agriculture, because he had adopted a policy stating that he would not grant this class of planning applications 'unless the Minister of Agriculture is not opposed'.

Remember that some statutes expressly allow the decision maker to delegate the decision to someone else. Obviously, in that case, the decision maker is allowed to delegate, and the rule against delegation has no effect (save, of course, that the decision maker can only delegate to those to whom the statute permits). Further, the courts may sometimes be prepared to *infer* that a statute permits delegation – that is, the statute contains an implied right to delegate. However, since there is a presumption against delegation, the courts will only find that this is the case if the implication is clear.

### *The* Carltona *principle*

In one exceptional situation, the general presumption against the delegation of discretion is reversed. Where a discretion is conferred upon a minister, the courts presume, in the absence of evidence to the contrary, that the minister is allowed to delegate the discretion to officials in his department – even though the statute does not expressly say so.

The *Carltona* principle takes its name from the well known case of *Carltona v Commissioner of Works* (1943). An official in the Ministry of Works wrote a letter to Carltona Limited, requisitioning the building which it occupied. Carltona challenged the decision to requisition on the basis that, while the letter was written (and the decision taken) by an official, the statute only

conferred the power to requisition on the minister. But the Court of Appeal held that there was a presumption that the minister was allowed to delegate the decision to officials in his department. In part, this decision was simply a recognition of the fact that it would be physically impossible for the minister personally to discharge all the decisions given to him by statute. But the court also pointed out that, because of the doctrine of ministerial responsibility, the minister was responsible to Parliament for what happened in his department (for the decisions taken, for whether he was delegating to people who were too junior, and so on), and therefore there was an additional safeguard in cases of this sort which would not be present in a normal case of unauthorised delegation. The officials in the minister's department are sometimes called his 'alter ego': that is, they are effectively treated as being part of the minister, so that (in one sense) no delegation takes place at all.

The *Carltona* principle is still alive and well today; it is sometimes suggested that it is a dangerous principle which allows excessive delegation (particularly as the doctrine of ministerial responsibility may not be as effective as it used to be, or was assumed to be). In *R v Secretary of State for the Home Department ex p Oladehinde* (1990), for example, the question was whether the Secretary of State had the power to delegate to immigration inspectors the power to deport aliens. Oladehinde argued that Parliament could never have contemplated that such an extreme delegation would occur; he contended that the statute contemplated that decisions might be taken by Home Office officials (as well as by the Secretary of State), but not by immigration inspectors. However, the House of Lords held that, since immigration inspectors are civil servants, they therefore came under the Carltona principle. The principle applied because there was nothing in the statute to exclude it (either expressly or impliedly). The delegation was therefore lawful.

The *Carltona* principle even applies to the 'Next Steps' executive agencies of government, even though in such cases decision making has been devolved out of the traditional departmental structure into the separate agencies (see Freedland, MR [1996] PL 19). Thus, in *R v Secretary of State for Social Security ex p Sherwin* (1996), the Divisional Court held that, since the Benefits Agency was part of the Department of Social Security, and Agency staff belonged to the civil service, the *Carltona* principle applied.

## 12.8 Errors of law and fact

At this stage, we must step back again, and refocus on 'illegality' as a ground of review in more general terms. Up until now, in the example which we have been following through the chapter, the errors which the MTLB has been making have, on the whole, been errors of law. For example, in refusing to consider Albert's criminal record, or taking account of Belinda's red hair, the MTLB has not been making errors of fact, but has been misinterpreting the

extent of its powers: making errors of law. But an authority may sometimes be judicially reviewed for making factual errors, as well as legal errors. For example: the MTLB confiscates Cassandra's stall because it discovers that she is trading without a licence. In fact, Cassandra claims that she does have a licence, but that her registration number has accidentally been omitted from the MTLB's record of licensees.

Cassandra would have grounds to seek review of the MTLB's decision to confiscate her stall because of error of fact: in mistakenly believing that she was unlicensed. However, the courts are, on the whole, reluctant to become involved in reviewing alleged errors of fact. For one thing, the courts may know much less than the decision maker about the factual issues in question (especially in 'specialist' areas) – if the court intervenes, who is to say that, in fact, the decision maker did not get the fact right, and the court wrong? Secondly, the courts' powers to assist them to get to the true facts are very limited. Courts on judicial review applications rarely hear live witnesses, and very rarely order cross-examination (although they have the power to do so), and they are also reluctant to order a party to produce documents or give discovery. Once again, therefore, the original decision maker may be better placed to discover the true facts than the court. Finally, the courts are very nervous about the sheer number of cases which might result if they were to entertain applications for judicial review every time it was alleged that a decision maker had gone wrong on the facts. They are concerned that to do so might effectively turn a system of 'review' into a system of appeals. To take a practical example: the MTLB considers whether to renew David's licence after allegations that he has been selling alcoholic drinks from his stall without the necessary separate drinks licence. After hearing evidence from Oliver that he bought alcoholic drinks from David's stall and hearing David deny it, the MTLB find the allegations proved, and refuse to renew David's licence on the basis that he is not fit and proper.

Could David obtain review of the decision of the MTLB on the basis that it committed an error of fact in concluding that he had sold alcoholic drinks to Oliver? If so, how would the court decide whether the MTLB had or had not made such a mistake? In fact, David probably could not obtain judicial review for such an alleged error.

Compare these difficulties with the courts' attitude to errors of law. When an error of law is alleged, the court can, at least, be confident that it has the necessary expertise to decide the question, and it has a procedure specially designed to help it do so (for example, disclosure of legal arguments very early, in the form 86A). Furthermore, the court has the permission stage to help it filter out cases where the alleged error of law is simply not arguable (by contrast, is very difficult to weed out bad factual arguments at the permission stage). For all these reasons, the courts are far more reluctant in judicial review applications to interfere with findings of fact than with findings of law.

The result of the above is that the courts have to make two sets of distinctions. First, the courts have to distinguish errors of law (which, subject to 12.9 below, are always reviewable), from errors of fact (which may or may not be reviewable). Secondly, the courts have to distinguish reviewable errors of fact ('jurisdictional errors of fact') from non-reviewable errors of fact ('non-jurisdictional errors'). Both of these distinctions are of extreme complexity, and in a typical constitutional and administrative law course you will not be expected to know a vast amount about the area. Nevertheless, it is important to understand the problems which make the area so difficult.

### 12.8.1 Errors of law versus errors of fact

A good illustration of the difficulties which the distinction between errors of law and errors of fact can cause can be seen by going back to our first example: the MTLB's threat to stop Marks & Spencer trading for not having a licence. There, the question at issue was whether the words 'market stall' in the statute include a shop, or a department store. The answer is pretty obviously not – but, for present purposes, the important point is, is the question of the interpretation of 'market stall' a question of fact or law? On the one hand, it seems to be a question as to what ordinary people understand by the term; one might ask: Is the stall outside? Is it temporary? etc. On the other hand, the court has to interpret the wording of the statute: it has to ask what meaning Parliament intended to attribute to the words 'market stall' in the legislation. Is this not a question of law?

Judges have introduced the concept of 'mixed questions of law and fact' to deal with cases in this grey area. Thus one question (Does a Marks & Spencer store come within the definition of a market stall?) may include questions of fact (What are the characteristics of a Marks & Spencer store?) and questions of law (What did Parliament intend by the phrase 'market stall'?). But you should not assume that any question as to the meaning of a word in a statute is necessarily a question of law, even in part; in *Brutus v Cozens* (1973) it was suggested that, when a word in a statute is intended to bear its 'ordinary' everyday meaning, then its interpretation in any particular case is a question of fact, not law.

### 12.8.2 Reviewable and non-reviewable errors of fact

When are the courts prepared to review decisions for alleged errors of fact? Once again, there are no easy answers. A cynic would say that the reason that this issue (and the previous issue, about the distinction between fact and law) is so confused is because the courts are result-driven: they form a view as to whether or not they want to intervene, and then seek to formulate a reason to justify that conclusion. The result is inconsistent and confused decisions. However, trying to simplify a confused area, one can say:

(a) normally, the courts will not review a decision simply because an applicant alleges that the decision maker has made a mistake of fact. Questions of fact are for decision makers, not for the reviewing court. Thus David (above) cannot obtain review of the MTLB's decision just because he says it made a mistake in finding that he sold alcoholic drinks;

(b) however, where the decision maker's entire power to decide (or 'jurisdiction') depends upon it making a finding of fact, then that finding of fact is reviewable (sometimes called a '*precedent fact*'). A decision maker cannot increase its power by mistakenly thinking that it has a power to decide something which it does not. As Lord Wilberforce put it, in *Zamir v Home Secretary* (1980), in some cases:

> ... the exercise of power, or jurisdiction, depends on the precedent establishment of an objective fact. In such a case, it is for the court to decide whether that precedent requirement has been satisfied.

To go back to our example: the MTLB's power to take any action against Marks & Spencer depends upon it making a finding of fact that Marks & Spencer's stores are 'market stalls'. If the correct answer is that the stores are not market stalls, then the MTLB has no power to act against Marks & Spencer. The MTLB cannot, by mistakenly finding that a Marks & Spencer store is a market stall, give itself extra powers. So the courts will intervene to strike down such an error, because the fact in question is a 'jurisdictional fact' – a fact on which the authority's jurisdiction depends.

Another example of a jurisdictional error of fact is the case of *White and Collins v Minister of Health* (1939). A local authority had power (by statute) to acquire land compulsorily – but not if the land in question was part of a park. A landowner objected that a particular order was invalid because the local authority had mistakenly failed to realise that the land in question was part of a park. The Court of Appeal held that it could review the decision on that basis;

(c) the court will also entertain a challenge for error of fact (even if not a jurisdictional fact) where it is alleged that there is no evidence to support the finding of fact at all (it is occasionally suggested that the test is, or should be, no substantial evidence: *Secretary of State for Education and Science v Metropolitan Borough of Tameside* (1977)). This is sometimes seen as part of review for unreasonableness/irrationality (how can one reasonably reach a finding of fact where there is no evidence to support it?). It is, for obvious reasons, not at all easy to establish.

## 12.9 Are all errors of law reviewable?

We have seen that the courts will only review some errors of fact. We have noted that the courts are, for various reasons, much more reluctant to review errors of fact than errors of law. The question then arises – are there any errors

of *law* which the courts will not review? In the past, this was yet another highly complex area. There were cases suggesting that something called a 'non-jurisdictional error of law' did exist – that is, an error of *law* that the courts would not review – a point of law which the decision maker had the final authority to determine, whether rightly or wrongly. Unfortunately, there were almost no cases actually identifying what such errors of law were, and no one was able to produce a satisfactory definition so that one could identify them in the abstract.

The position has today been reached where, in all but a few exceptional circumstances, one can assume that all errors of law are jurisdictional errors. That means that whenever a public decision maker makes an error of law, the court automatically has power to judicially review the decision, without having to worry about whether or not the error 'goes to jurisdiction'. This has great advantages for dealing with a problem question raising a possible error of law. One still has to analyse it to work out whether there is, in fact, an error of law, but, once one is satisfied that there is, one can go straight on to consider whether or not the courts are likely to grant a remedy. In other words, one can usually entirely ignore the whole debate about jurisdictional versus non-jurisdictional errors. And if you look at recently reported cases, you will see, in 99% of them, the courts doing exactly that: ignoring the jurisdictional/non-jurisdictional debate. It is simply assumed that, if there is an error of law, it is reviewable by the courts on judicial review.

The one main exception to this happy assumption is where you are dealing with an 'ouster clause': a statutory provision which seeks to oust the power of the court to review the decision. We deal with this difficult topic in Chapter 16, and also consider there whether the distinction still has some life where one is trying to review not an administrative decision maker or tribunal, but an inferior court. There are also a few anomalous situations where the jurisdictional/non-jurisdictional distinction is still relevant, which you may come across – the most prominent being in relation to the powers of university visitors, where the House of Lords recently reaffirmed the distinction (*R v Hull University Visitor ex p Page* (1993)). The case can be explained as resting on the historically exclusive jurisdiction of university visitors.

## 12.10 A practical approach to errors of law

To conclude what is a fairly complex area, the good news is that, in an ordinary case, most of the problems are ignorable or bypassable. Most errors are errors of law. If you are dealing with an error of law, then you can assume that, once the error is established, the decision is reviewable. To work out whether there is an error of law or not, you need to have in mind the logical tests which we have labelled relevant/irrelevant considerations; improper purpose, fettering and delegation of discretion.

Errors of fact are rarer. Although the dividing line between errors of law and fact is hard to define, in most cases the distinction is, in practical terms, relatively clear (as with the 'David' example, above). Once you spot an error of fact, you need to think carefully about whether it is a fundamental or 'jurisdictional' fact – that is, one on which the authority's entire power depends. If so, it is reviewable. If not, it is probably not reviewable, unless there is 'no evidence' to support the finding of fact.

# GROUNDS OF JUDICIAL REVIEW I: ILLEGALITY

Illegality rests on the fundamental principle that a public authority can only act within its powers or 'jurisdiction.' The courts have developed a number of 'reasoning processes' by which they may conclude that a decision maker has acted outside its powers. These may be summarised as follows:

(a) *acting outside the 'four corners' of the statute* (where the decision maker simply does something which it has no power to do);

(b) *failing to take into account a relevant consideration*. The relevant consideration may be either actually set out in the statute ('express'), or merely implied;

(c) *taking into account an irrelevant consideration*, which again may be either express or implied;

(d) *adopting an improper purpose* (for example, *Padfield v Minister of Agriculture* (1968));

(e) *fettering of discretion*. Whilst it is legitimate for decision makers to adopt policies to help them take decisions (as in *British Oxygen v Board of Trade* (1971)), it is unlawful for anyone exercising a discretion to apply a policy rigidly: *Stringer v Minister of Housing and Local Government* (1970);

(f) *delegation of discretion*. A decision maker must itself exercise a discretion conferred on it unless authorised to delegate that discretion to another. It must exercise that discretion in substance as well as in form; in other words, it must not act under dictation from another authority (*Lavender v MHLG* (1970)). However, under the Carltona principle, a discretion conferred upon a government minister may be exercised by a departmental official, even if the statute does not so provide: *Carltona v Commissioner of Works* (1943); *R v Secretary of State for the Home Department ex p Oladehinde* (1990).

*Public decision makers may be reviewed for errors of law as well as errors of fact*. Whereas errors of law are always reviewable (for present purposes), errors of fact are not. It is therefore necessary to distinguish *errors of law from errors of fact*. In this complicated area, a good rule of thumb is that the interpretation of a word in a statute is a question of law (unless, possibly, the word is intended to bear its ordinary everyday meaning: *Brutus v Cozens* (1973)).

*Most errors of fact are not reviewable.* Summarising a difficult area, one can say that an error of fact is only reviewable if:

(a) the issue of fact is 'fundamental' to the decision maker's power to decide (a '*precedent fact*'); see: *Zamir v Home Secretary* (1980); and *White and Collins v Minister of Health* (1939); or

(b) there is no evidence to support the finding of fact at all.

By contrast, given the recent developments in the law, it is safe to assume that all errors of law are reviewable (because all such errors are 'jurisdictional'). There is a possible exception to this convenient rule in the context of ouster clauses, which we examine in Chapter 16.