

JUDICIAL REVIEW OF COMMUNITY CARE DECISIONS

AN OVERVIEW OF THE CASELAW

By

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About Scott Blair

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GENERAL PRINCIPLES OF JUDICIAL REVIEW

The grounds for judicial review are the same in Scotland as they are in England and Wales: **West v. Secretary of State for Scotland**, 1992 S.C. 385 per Lord President Hope at 413. They are illegality, irrationality and procedural impropriety. These were set out in **CCSU v The Minister for the Civil Service** [1985] AC 374 per Lord Diplock and Lord Roskill.

Judicial review can only be brought in the Court of Session under RCS 1994 r. 58. Judicial review is not an appeal on the merits of a decision. The Court is only concerned with whether the decision maker has followed the legal principles of legality, rationality and procedural propriety.

Human rights challenges under the Human Rights Act 1998 / Scotland Act 1998 based on breach of the section 6 HRA statutory duty or the devolution issue provisions of the Scotland Act are best analysed as a form of illegality challenge.

Note though that not all challenges brought under the HRA are to be brought by judicial review. Just because a case is a human rights case that does not make it a case which requires the use of judicial review.

If the challenge falls within **West v Secretary of State for Scotland** then it should be brought by judicial review. If there is no “West triangle” then the challenge should be brought by another means such as an ordinary action for breach of statutory duty.

ALTERNATIVE STATUTORY REMEDY

Subject to exceptional circumstances a person is expected to exhaust any alternative statutory remedy before seeking recourse to the supervisory jurisdiction: **British Railways Board v Glasgow Corporation**, 1976 S.C. 24. Faulty advice by an agent or adviser is not in general an exceptional circumstance: **Sangha v Secretary of State for the Home Department**, 1997 S.L.T. 545. An exceptional circumstance could be where the decision maker has done something to frustrate or impair the statutory appeal route: **Moss’ Empires v Glasgow Assessor**, 1917 S.C. (H.L.) 1. I shall look at this a little further later.

TITLE AND INTEREST

Issues of title and interest to sue may also arise. In most cases this will not be a problem. The recipient of care or someone challenging a lack of care will clearly have title and interest to sue. Sometimes though the case may involve a challenge where a specific petitioner cannot be identified or they cannot get legal aid or the individual affected by the decision does not want the strain of litigation. Can rights groups shoulder the burden? Probably not on the present state of the law.

The Scottish courts have enforced these rules (which derive from private law cases) with relative vigour: **Scottish Old Peoples Welfare Council, Petitioners**, 1987 S.L.T. 179. There a pressure group campaigning about cold weather payments for the elderly had title but no interest to challenge guidance which they claimed to be unlawful.

In England a looser test of sufficient standing allows for more people to bring challenges than would be the case in Scotland. So for example in **Rape Crisis Centre, Petitioner**, 2002 S.L.T. 527, a challenge to the decision of the Home Secretary to allow the convicted rapist Mike Tyson enter the UK to take part in a boxing match in Glasgow was rejected on title and interest grounds. In contrast in England a similar challenge was lost on the merits, the group challenging the decision their having sufficient standing on which see Lord Hope of Craighead “*Mike Tyson comes to Glasgow - a question of standing*” (2001) P.L. 294-307. The restrictive rules on title and interest make it hard in Scotland for pressure groups to make challenges on behalf of groups of vulnerable individuals. It is easier to do so in England where the test is different.

Recently in **UNISON and GMB, Petrs** [2006] CSOH 193 although there had been a challenge to title and interest, the issue was decided on the merits. In an earlier case the Court appears to have accepted that a Trade Union had title and interest to bring proceedings on behalf of its members: **EIS v Robert Gordon University** [1997] E.L.R. 1 in which Lord Milligan, at page 10, observed that

"Where...a trade union is able to allege that amongst its membership are persons who are likely to be adversely affected by an ultra vires decision of the respondents and that it is unrealistic for such members individually, both on timetabling and prospect of acceptance grounds, to challenge the decision individually, it seems to me that that trade union has not only an interest to challenge the decision but also title to do so."

Both title and interest must be present at the same time and not at some future point : **Shaw v Strathclyde Regional Council**, 1988 S.L.T. 313 ; **Air 2000 v Secretary of State for Scotland (No 2)**, 1990 S.L.T. 335.

A council tax payer has clear title and interest to sue a local authority as a "person interested" under section 101 of the Local Government (Scotland) Act 1973 and his motive for doing so is irrelevant: **Stirrat v City of Edinburgh DC**, 1999 S.L.T. 274.

Where the Human Rights Act 1998 or Scotland Act 1998 on human rights grounds is relied upon the test for standing to bring a challenge is the victim test which is based on art 34 ECHR and the case law of the Strasbourg Court: section 7(3), (4). It is a relatively strict test and under the present case law of the European Court will not allow pressure group challenges.

DELAY

There is no time limit in r. 58 of RCS 1994 for the bringing of judicial review proceedings. However at common law a petitioner can be barred from proceeding with a petition if a plea of mora, taciturnity and acquiescence can be made out: **Hanlon v Traffic Commissioner**, 1988 S.L.T. 802 (ten months too late); **Ingle v Ingles Tr**, 1997 S.L.T. 160 (acquiescence in decision of the Sheriff of four years before). Delay or silence is not enough; there must be prejudice to the respondent **Somerville and others v Scottish Ministers**, 2007 S.L.T. 96. The need for certainty and good administration are the sort of factors which are relevant to a plea of mora. The court will often have to consider the merits of a case before it can determine the issue of mora.

Section 7(5) Human Rights Act 1998 does now impose a time limit of one year from the date of the act or decision complained of for bringing a challenge. This applies to judicial review proceedings as well as challenges brought by other means. The court has an equitable jurisdiction to extend the time limit if it equitable to do so in all of the circumstances.

So human rights challenges can be brought up to a year, or after that at the discretion of the court. It is however suggested that mora based on a shorter period could still be argued as the section 7(5) period is without prejudice to any other shorter period which might be applicable.

In **Somerville and others v Scottish Ministers**, 2007 S.L.T. 96 the Inner House applied the 1 year time limit to human rights challenges brought under the devolution issue procedure of the Scotland Act 1998. This is controversial and seems to be inconsistent with certain comments by the Scottish judges in the Judicial Committee of the Privy Council in **R v HM Advocate and Advocate General for Scotland**, 2003 S.C. (P.C.) 21. The case is under appeal to the House of Lords.

ILLEGALITY

Assessing need-general principles

R. v Berkshire CC Ex p. P

Judges Laws, J. 1997-98) 1 C.C.L. Rep. 141; (1997) 33 B.M.L.R. 71; [1997] C.O.D. 64

P, a severely disabled person, applied for judicial review of a decision of BCC that it did not owe him a duty to assess his needs under the National Health Service and Community Care Act 1990 s.47(1), because, from December 1991 he was resident in the British Home and Hospital for incurables in Streatham. P's residence at that private home was funded partly by the Berkshire Health Authority and partly by the DSS. BCC contended that s.47(1) presupposed the physical availability of services to the applicant for the duty to assess to be invoked.

Held, allowing the application and declaring that BCC should make the appropriate assessment, that (1) on a proper construction of s.47(1) of the 1990 Act there is no condition that the duty to assessment is dependent upon the physical availability of services. The duty to assess arises where the local authority has the legal power to make provision or provide community care to an individual, and (2) the duty to make arrangements under the National Assistance Act 1948 s.29 (1) was confined to persons ordinarily resident within the local authority area, but the power to do so arose whenever the Secretary of State had given his approval, without regard to residence.

I would suggest that the same applies in Scotland under section 12A(1) of the Social Work (Scotland) Act 1968. Availability of physical resources is not relevant as to the decision to assess.

R. v Islington LBC Ex p. Rixon

Judge Sedley, J. [1997] E.L.R. 66; (1997-98) 1 C.C.L. Rep. 119; (1996) 32 B.M.L.R. 136

R, who was severely disabled, applied for judicial review of a decision of I in relation to its provision of community care and educational facilities. R contended that I had failed in its duty to comply with the policy guidance issued by the Department of Health under the Chronically Sick and Disabled Persons Act 1970 s.2, and had acted unlawfully by failing to give adequate reasons for deviating from government policy.

Held, allowing the application, that under the National Health Service and Community Care Act 1990 s.47 a local authority was subject to a duty to assess R's individual needs and decide what care was appropriate. This assessment had to be based on need, not the availability of resources, and the authority was required to follow the Department of Health guidance entitled *Caring for People: Community Care in the Next Decade and Beyond: Policy Guidance* (HMSO, 1990) and also the guidance contained in *Care Management and Assessment* (HMSO, 1994). If the local authority did depart from the guidelines, it had to provide cogent reasons for doing so. I's assessment was unlawful as it had not tailored its consideration to R's individual requirements and his care plan failed to comply with the guidance issued, **R. v Gloucestershire CC Ex p. Barry** 94 L.G.R. 593, (1996) 8 Admin. L.R. 181, [1995] C.L.Y. 3201 followed. Furthermore, it had failed to meet the target duty under the Education Act 1944 s.41 to secure adequate educational provision for the severely disabled.

In giving his judgment he said that Parliament did not intend that local authorities should adopt a take it or leave it approach to guidance. They could depart from it on admissible grounds where there were good grounds to do so but could not depart from it substantially. Further more the reason for not following guidance had to be identifiable from the decision making process.

Under section 5 of the Social Work (Scotland) Act 1968 social work authorities under that Act and the Children (Scotland) Act 1995, Pt II under the general guidance of the Scottish Ministers.

Even so the terms of a guidance circular cannot determine the proper interpretation of primary legislation: **Robertson v.Fife Council**, 2001 S.L.T. 708. However acting under a mistake interpretation of the meaning of guidance is reviewable: **Abdadou v Home Secretary**, 1998 SC 504 at 512D. A policy which precludes the authority from taking guidance into account in an individual case then that would also be unlawful: **R v North Derbyshire Health Authority, ex p Fisher** (1998) 1 C.C.L.R. 150 (QBD).

The **Rixon** case illustrates that an assessment cannot leave areas of need unexplored. In some areas a community care assessment is only carried out for those whose needs appear severe or complex and those who do not fall into that category get something else, a home care assessment. In principle that may not be correct if it avoids the section 12A duty to assess at all or in a comprehensive way.

A section 12A assessment must be needs led and not service driven and a package of care developed which can so far as possible meet those needs. Their needs must be properly recorded. As a consequence of the **Barry** case the duty to assess need and the means by which assessment is done is to be done without regard to resources to meet that need and so an assessment cannot be refused or limited in scope even if the authority reasonably believes that it will not have the resources to meet that need: **R v Bristol City Council, ex p Penfold** (1998) 1 C.C.L.R. 315 per Scott Baker LJ at 329G.

Further an assessment should be renewed at reasonable intervals. This is recommended by Guidance Circular 11/91. As will be seen failure to follow guidance without good cause in itself can be a basis for judicial review.

Meeting need-general principles

R. v Gloucestershire CC Ex p. Barry

Judges Lord Lloyd of Berwick; Lord Nicholls of Birkenhead; Lord Steyn; Lord Hoffmann; Lord Clyde. [1997] A.C. 584; [1997] 2 W.L.R. 459; [1997] 2 All E.R. 1; (1997) 9 Admin. L.R. 209; (1997-98) 1 C.C.L. Rep. 40; (1997) 36 B.M.L.R. 92; [1997] C.O.D. 304; (1997) 94(14) L.S.G. 25; (1997) 147 N.L.J. 453; (1997) 141 S.J.L.B. 91

The needs of a disabled person had to be assessed with reference to the available resources and the eligibility criteria for services could change according to the authority's financial position. G appealed against a Court of Appeal ruling allowing B's appeal against the refusal of a declaration that G was not entitled to take into account costs and available resources in assessing whether, under the Chronically Sick and Disabled Persons Act 1970 s.2(1), a person had a need and whether it was necessary to make arrangements to meet that need. B, an elderly and severely disabled man, had his home help services provided by G reduced on financial grounds and contended that as his needs had not changed since he was assessed, G were under a statutory duty to provide the services necessary to meet those needs and were not entitled to take financial considerations into account when carrying out their duty.

Held, allowing the appeal, that B's contention was mistaken in that it failed to recognise that needs could not be properly assessed without some reference to

the cost of providing for them. In deciding whether a disabled person needed assistance, and if so, what type, it was necessary to apply some criteria and this included the matching of the severity of a disability against the availability of resources. The significance to be attached to the cost of providing services had to include an evaluation of the impact the cost would have on the local authority and the eligibility criteria for services might properly be made more or less stringent depending on the authority's financial position. It was unlikely, particularly in view of the extensive list of facilities included in s.2(1)(a) to 2(1)(h), that Parliament intended that needs must be assessed and services provided regardless of cost.

A milestone case. The duties under section 2 of the 1970 Act were extended to Scotland by the Chronically Sick and Disabled Persons (Scotland) Act R1972.

However please note that the subsequent decision of the House of Lords in **R v East Sussex County Council, ex p. Tandy** [1998] 2 All E.R. 769 treats **Barry** as being limited to the 1970 Act (and by implication the 1972 Act). On that view the **Barry** approach has no application to section 21 of the 1948 Act. In Scotland though given that section 21 is in effect replaced by the section 12 target duties under the 1968 Act, the logic must be that Barry applies to section 12 assessments.

R. v Sefton MBC Ex p. Help the Aged

Jowitt, J. [1997] 3 F.C.R. 392; (1997) 36 B.M.L.R. 110; [1997] C.O.D. 387; (1997) 147 N.L.J. 490

A local authority was entitled to have regard to its resources when assessing a person's need for accommodation under the National Assistance Act 1948. H and others applied for judicial review of the policy operated by S when discharging its duty to provide accommodation to persons in need pursuant to the National Assistance Act 1948 s.21(1)(a), in that S purported to be able to take into account its own resources as well as those of the applicant. Under s.21(1)(a), the cost of residential accommodation had to be met by the applicant unless they had less than GBP 16,000 in capital, in which case the amount payable by them was reduced. S had set a lower capital threshold and accepted applications from those who fell below it, but deferred applications from those with capital between the two thresholds, reviewing each week whether the council could make the provision in view of available resources. If, after being provided with accommodation, an applicant's capital rose above GBP 16,000, they were to be treated as no longer housed under s.21(1)(a), and if their capital again fell below GBP 16,000, they had to re-apply, subject to the other provisions of the policy.

Held, dismissing the applications, that S was entitled to have regard to its resources when deciding whether a person was in need under s.21(1)(a)

following the House of Lords ruling in **R. v Gloucestershire CC Ex p. Barry** [1997] A.C. 584, [1997] 2 W.L.R. 459, [1997] C.L.Y. 4714, where the majority held that a council could take the availability of resources into account when assessing the needs of a disabled person and that there was no distinction between care for the disabled and other types of community care.

In effect the assessment of need involved a limited subjective element, and so as with **Barry**, availability of resources was a relevant factor in the determination of the need for accommodation under section 21 of the 1948 Act. The application of **Barry** to section 21 duties might be thought to be misplaced because of **Tandy**.

There is therefore no duty to meet assessed need but a failure to have regard to the level and type of assessed need in deciding how need is to be met would be subject to judicial review.

Any policy framework for prioritising need cannot fetter the discretion of the authority. If it does it will be reviewable as the next case shows.

R. v Avon CC Ex p. M

Judge Henry, J. (1994) 2 F.L.R. 259

The provision by local authorities of community care services had to be suitable to the needs of the individual concerned, which included the individual's psychological needs, and where the local authority's decision flew in the face of the decision of the review panel, judicial review would lie. M was 22 and suffered from Down's Syndrome. The local authority was required to make arrangements to provide M with accommodation pursuant to its duty under the National Assistance Act 1948 s.21. In 1989 the council began to assess M's needs, and M was placed at a training unit for two years. In June 1991, M was offered a place at Milton Heights and he spent three weeks there in December 1991. He and his family were set on his going there. However, Milton Heights was not a placement within the council area, and the council refused to provide the necessary topping-up funding for the placement. In September 1991 the council had decided on an alternative placement. M sought a review of that decision, and in January 1992, the review panel recommended a placement at Milton Heights. The council rejected the review panel's recommendation, and M sought judicial review. The proceedings were provisionally compromised on the council's revision of its community care policy. M's case would be looked at by a further review panel, with the assistance of a joint report from two experts. In January 1993, the panel decided that M's entrenched position regarding his wish to go there and his likely adverse reaction to any alternative placement formed part of his psychological needs, that his needs, including his psychological needs, were best met by a placement at Milton Heights and that the council should fully fund the placement. The following week, the council rejected that recommendation. M applied for judicial review of the council's decision.

Held, granting the application, that (1) the National Health Service and Community Care Act 1990 s.47 required the community care services provided for M to be suitable to his individual needs, which properly included his psychological needs. M's entrenched wish to be placed at Milton Heights was part of his psychological needs and not merely a matter of personal preference; (2) the council could not overrule the review panel's recommendation without a substantial reason, and without having given the recommendation the weight it required. The strength, coherence and apparent persuasiveness of the recommendation had to be addressed head on if the council were lawfully to depart from it. The council's decision would be quashed.

In **R. v Gloucestershire CC Ex p. RADAR [1994] 4 All ER 421** the decision to purchase a cheaper care service option was upheld.

It has been held to be unlawful to distinguish between personal needs and social, recreational and leisure needs, with a view to making provision for personal needs only : **R v Haringey LBC, ex p. Norton [1997] 10 C.L. 458.**

Even where resources are taken into account they are only one factor. It follows that any question of reduction of service can only be lawfully resolved after a re-assessment of need: **R v Islington LBC, ex p McMillan, R v Gloucestershire County Council, ex p Mahfood and others (1998) 1 C.C.L.R. 7.**

A personal care plan must be prepared to comply with section 12A as the statutory guidance from the Scottish Ministers requires it although it is not an express requirement of the Act. Care plans cannot be reduced in judicial review proceedings but their adequacy or otherwise will be the cornerstone of judicial scrutiny. I shall mention a case just now- **R v Sutton LBC, ex p Tucker (1998) 1 C.C.L.R. 251** a care plan was held to be woefully inadequate-but deal with it when I come to irrationality. The guidance in SW11/91, para. 6.2 sets out what a care plan should contain.

In a care plan it is critical for the authority to make clear if they are saying that there is no need for a service because of a lack of resources (unlawful) or there is an assessed need but no resources to meet it (potentially lawful).

McGregor v South Lanarkshire Council, 2001 S.C. 502; 2001 S.L.T. 233; (2001) 4 C.L.L.P 188 is one of the very few Scottish community care reported judicial reviews.

On 30 May 2000, the petitioner was admitted to hospital after falling at his home. He was aged 90 and suffered from a number of symptoms of advanced old age. On 3 July 2000 the respondents assessed the petitioner's needs for community care services in terms of sec 12A of the 1968 Act and a care plan was approved on 7 July 2000 and identified nursing care as best meeting the petitioner's needs. On 24 August 2000 the respondents wrote to the petitioner's son including a copy

of the community care assessment and advising that the petitioner's name had been placed on a waiting list of persons needing home care and that it would be some months before public funding would become available to the petitioner. The petitioner could not afford nursing care. The petitioner brought a petition for judicial review and argued that the respondents had acted *ultra vires* in placing the petitioner on a waiting list in purported fulfilment of their statutory duties under the Act.

Lord Hardie held that (1) the effect of section 12 was to impose a duty on the local authority to provide a place in a residential nursing home where this was required to satisfy an individual's needs, and the imposition of such an obligation upon local authorities conferred on these individuals a right to enforce that obligation (pp 504G-505F); (2) having decided that the petitioner was unable to care for himself and had insufficient funds to pay for residential care, the local authority was under a duty to make some provision for his care. The nature of that care was a matter for the local authority but the decision to do nothing and place him on a waiting list was *ultra vires* (p 507F); (3) once a local authority determines that an individual's needs call for a particular provision the local authority was obliged to make that provision. In particular, having decided that an individual required the provision of a permanent place in a nursing home, the local authority could not refuse to make such a provision simply because it did not have the necessary resources (p 508D), and declarator that the respondents had acted *ultra vires pronounced* and case remitted back to the respondents to make the necessary provision of residential nursing home care.

It is evident from **MacGregor** that if an authority has identified an assessed need and has decided to provide a particular service to meet that need, it is unlawful for it to fail to provide that service.

I now turn to some further cases which illustrate the range of challenges.

R. v North Yorkshire CC Ex p. William Hargreaves

Judge Dyson, J. (1997-98) 1 C.C.L. Rep. 104

H applied for judicial review of the decision of NYCC to offer his sister a place for respite care, as part of the council's community care service, which was not the placement of her choice.

Held: Application allowed. Provided that a care user was capable of making her preference known as regards respite care, a council was under an obligation to take account of that preference.

R. v Essex CC Ex p. Bucke

Judge Collins, J. [1997] C.O.D. 66

B, a 50 year old male with learning difficulties in receipt of care provided by ECC via a private contractor under the National Health Service and Community Care Act 1990 s.47, sought judicial review of a decision of ECC to change his care provider. To enable B to assume a degree of independent living he required care assistance for 18 hours per week. Following a policy change by ECC, it was decided to change his care provider. B wished to remain with his existing provider, under an exception provided in the new policy, based on his desire to continue receiving care from a male of similar age. It was proposed that B receive care from a younger female. B disliked change and his male carer was concerned that the change could have a detrimental effect on B's health. B submitted that ECC's criteria for exceptions to its policy amounted to an unlawful fetter on its discretion conferred by s.47(2)(a) of the 1990 Act and, furthermore, that while the availability of resources could be taken into account when deciding how to meet B's needs, ECC's policy had been adopted for money saving purposes, which purposes had been placed in advance of B's needs.

Held, dismissing the application, that although an important aspect of care in the community required recipients to be involved in decisions about future care, and that B's needs were of paramount importance, conflict between needs and resources was a matter to be resolved by ECC. The weight to be given to these considerations was for the local authority to decide, provided that the user's needs were not relegated to the need to save money. Resources were a factor, however, in determining how to meet a need, **R. v Gloucestershire CC Ex p. Barry** [1996] 4 All E.R. 421, (1997) 9 Admin. L.R. 69, [1996] C.L.Y. 5529 considered. Changes having an adverse effect on a user would not be unlawful, if the user's needs continued to be properly provided for and the correct balancing exercise had been carried out. On the facts, ECC had correctly carried out the balancing exercise when finding that any detriment to B was not sufficiently significant to qualify as an exception to the policy changes. Failure to notify B of the changes did not constitute a failure justifying the grant of relief.

R. v Kirklees MBC Ex p. Good

Judge Popplewell, J. (1997-98) 1 C.C.L. Rep. 506

G sought judicial review of the decision of K not to make a housing improvement grant in respect of the first floor of a house occupied by the two carers (and their four children) of an elderly and disabled couple who lived on the ground floor. It was submitted that the local authority had a responsibility under the Carers (Recognition and Services) Act 1995 s.1 and the Chronically Sick and Disabled Persons Act 1970 s.2 to provide suitable accommodation for the carers. G further submitted that the elderly couple should have been assessed under either the Chronically Sick and Disabled Persons Act 1970 s.2 or the Disabled Persons (Services Consultation and Representation) Act 1986 s.4. K argued that judicial

review was inappropriate as a provision existed for holding an enquiry for non-compliance with statutory duties under the Local Authority Social Services Act 1970 s.7.

Held, dismissing the applications, that (1) the Carers (Recognition and Services) Act 1995 was irrelevant to the claim. K were under a duty to carry out an assessment of the ability of carers to care but such an assessment was of no practical use as K were not obliged to provide suitable accommodation. Section 2 of the 1970 Act required K to make suitable adaptation of accommodation for the elderly couple but not for G, and (2) K were required to make assessments under s.2 of the 1970 Act if so requested, **R. v Gloucester CC Ex p. Barry** [1995] 1 C.L.Y. 3201 followed. However, as an assessment had been carried out under the carer provision and nothing would be granted on the evidence.

R. v Cumbria CC Ex p. Cumbria Professional Care Ltd

Judge Turner, J. (2000) 3 C.C.L. Rep. 79

CPC applied for judicial review of decisions of CCC, contending that: (1) placements for respite, day and residential care provision for elderly and mentally disabled patients within CCC's own homes were in breach of both national government guidance and Council Directive 92/50; (2) CCC had unfairly used capital funds to upgrade its homes in order to comply with the necessary registration standards for Significantly Mentally Frail, SMF, residents and had required different staffing levels at their own homes from those in the private sector, and (3) waiting lists denied intending residents free access to their private sector choice of location since the National Health Service and Community Care Act 1990.

Held, dismissing the application with costs, that (1) there was no evidence of any unlawful policy. Both the Directive and the Public Service Contracts Regulations 1993 were relevant only to contracts and could not apply where a contractual relationship was excluded because the local authority provider was part of the same legal entity as the purchaser; (2) the Registered Homes Act 1984 s.1(5)(j) clearly exempted local authorities from the need for registration of their own homes and there was nothing to prevent the private sector provider from accommodating SMF residents in separate wings. The difference in staffing levels was not a policy decision, but one of internal procedure, and (3) the waiting lists were caused by a shortage of funding and there was no evidence of discrimination against the private sector provider. In any event, the duty to assess and provide accommodation was owed to the resident and not to the care provider.

R. v Gloucestershire CC Ex p. RADAR

Judge Carnwath, J. (1997-98) 1 C.C.L. Rep. 476; [1996] C.O.D. 253

GCC cut services to 1,000 disabled people in September 1994 for financial reasons. Four individuals affected brought an action against GCC (**R. v Gloucestershire CC Ex p. Barry** 94 L.G.R. 593, (1996) 8 Admin. L.R. 181, [1995] C.L.Y. 3201) in which it was held that GCC had acted unlawfully in making financial issues its only consideration. GCC then sent letters to all of the 1,000 people affected, offering them reassessment, of which 273 replied. The applicant, R, a voluntary organisation, was granted leave to move for judicial review, complaining that GCC had not discharged its duty to reassess by sending the letters and that it should reinstate the cut services pending reassessment.

Held, allowing the application, that (1) under the National Health Service and Community Care Act 1990 s.47, where a person appeared to be disabled, his local authority was obliged to assess what services he required. It was not necessary for the disabled person to make a request for assessment. GCC's letters, which required a response before an assessment would be carried out, did not therefore discharge its duty; (2) GCC were not lawfully required to reinstate services pending reassessment because the court in Barry did not quash GCC's blanket policy to cut services, there was a risk that services might be reinstated only to be withdrawn following reassessment, which could cause confusion, and individuals needs might have changed since the cuts; (3) R had sufficient interest to seek a remedy since that was a matter of general public importance, and (4) judicial review and not the complaints procedure available under the Local Authority Social Services Act 1970 s.7B was the appropriate procedure in a case concerning a local authority's legal obligations.

Under section 12A(1) of the Social Work (Scotland) Act 1968 there is a duty to carry out a community care assessment even if not requested by the client. The **RADAR** case illustrates that an assessment may be called for even if the client does not want one. It also illustrates that the form of letter used in that case did not meet the statutory duty under the English legislation.

Note that there is under section 12A no requirement that services be physically available for the duty to assess to arise.

R. v Kirklees MBC Ex p. Daykin

Judge Collins, J. (1997-98) 1 C.C.L. Rep. 512

D and his wife, both disabled, applied for judicial review of K's decision to rehouse them in a ground floor flat instead of following its previously announced decision to install a stair lift to D's existing first floor flat. D contended that K was bound in law to its first decision and that the second decision was **Wednesbury** unreasonable. K argued that the National Health Service and Community Care Act 1990 s.46(3) did not specifically refer to the Chronically Sick and Disabled

Persons Act 1970 s.2, whereas other recent legislation did, and, consequently, the s.47 duties of assessment and a decision as to the provision of services under the 1990 Act did not apply to the allocation of welfare services under s.2.

Held, dismissing the application, that it was clear that Parliament had intended the s.47 requirement to apply to s.2 provision, **R. v Gloucestershire CC Ex p. Barry** [1996] 4 All E.R. 421, (1997) 9 Admin. L.R. 69, [1996] C.L.Y. 5529 followed. K had failed in its statutory duty to make an assessment of D's needs and to indicate the services required to meet those needs. However, its decision to rehouse D was a cheaper alternative to the provision of a stairlift and could not be considered irrational.

In Scotland section 5A of the 1968 requires local authorities to prepare community care services plans. On the basis of Daykin, assistance ancillary to house is not included but includes services under section 2 of the Chronically Sick and Disabled Persons Act 1970.

R. v Bath Mental Healthcare NHS Trust Ex p. Beck

Judge Owen, J. (2000) 3 C.C.L. Rep. 5

B applied for permission to seek judicial review of a decision by BMH to close a centre leased to WCC, a local authority, and used by 18 voluntary groups as a resource centre for mentally and physically handicapped persons. The closure decision was taken on financial grounds, with WCC opposed to closure but not undertaking the necessary individual assessments of the centre's users so as to provide continuity of care.

Held, refusing the application, that the centre had not been used by BMH to deliver NHS services and it was not unlawful to close it and sell the building for economic reasons. This was so even if BMH, WCC and the local health authority had failed to ensure that services would be provided elsewhere. Duties under the National Health Service Act 1977 s.3 and s.22 were "target duties", **R. v Secretary of State for Social Services Ex p. Hincks** (1979) 123 S.J. 436 considered, and their extent was unclear in the instant case. BMH had not ceased to provide a service, so that the closure decision itself could not be challenged by way of judicial review. Although WCC had not assessed the centre's users' needs on an individual basis, as required under the National Health Service and Community Care Act 1990 s.47 in time for the closure date, it could not be said that it was in breach of its duty under s.47 of the 1990 Act and it was actively collaborating with the health authority to ensure alternative provision for the users, **R. v Secretary of State for the Environment Ex p. Ward** [1984] 1 W.L.R. 834, [1984] 2 All E.R. 556, [1984] C.L.Y. 3438 applied

PROCEDURAL IMPROPRIETY

R. (on the application of Ireneschild) v Lambeth LBC

[2007] EWCA Civ 234; [2007] B.L.G.R. 619; (2007) 10 C.C.L. Rep. 243; [2007] N.P.C. 31

The appellant local authority appealed against the decision ([2006] EWHC 2354 (Admin), (2006) 9 C.C.L. Rep. 686, [2007] 3 C.L. 458) that its community care assessment of the respondent (X) was unlawful. X was a local authority secure tenant. A climbing accident had left her permanently disabled. She could not stand or move unsupported, was in more or less constant pain and used a wheelchair out of doors. She was doubly incontinent. She lived with her two adult sons, who were her primary carers, in a two bedroomed flat on the first and second floors of a large Victorian house. The flat was accessed by steps leading from the street. Within the flat there were two further internal staircases. X was particularly concerned about the risk of falling on the stairs and the impact upon her mobility if she injured her arms. She was also concerned about the risk to her sons of lifting her. She considered that her needs required the local authority to make available to her the ground floor flat in the same house, which had been unoccupied for several years. The local authority disagreed. Its view was that although ideally X would be housed in ground floor accommodation her needs could be dealt with in accordance with the local authority's normal housing allocation policy. The judge quashed the assessment and required it to be carried out again. The local authority submitted that the judge had erred in finding that (1) the local authority had failed to take into account relevant considerations, namely the report of an occupational therapist; (2) the local authority had failed to follow statutory guidance; (3) the local authority had failed to take into account the fact that X's housing assessment had awarded her the maximum number of medical points for transfer to a more suitable property; (4) there had been procedural unfairness because X had not been given an opportunity to address the provisional views of the author of the assessment on certain matters.

Held: Appeal allowed. (1) X had not discharged the burden of establishing that there had been a failure to take into account obviously relevant material. Accepting that, on the facts of the instant case, the author of the assessment was bound to consider the conclusions in the occupational therapist's report, the evidence led to the conclusion that the report had been taken into account. The complaint was in reality that the author of the assessment had preferred the content of one report to that of another. In the light of their contents that preference was not unreasonable. (2) Contrary to the judge's view the assessment did adequately address the issue of independence and the risk to the carers. There was no failure to address essential questions that were required to be addressed under the Fair Access to Care Services guidance under the National Health Service and Community Care Act 1990. In the words of the guidance, the risks in X's case had been assessed as "acceptable". (3) The

housing report and the assessment of the need for community care services were prepared for different purposes. In housing terms the case was urgent but it did not necessarily follow that X's community care needs had to be assessed as substantial. It was for the assessor to form her own view from a community care perspective of what weight to attach to the housing award. (4) The judge had erred in finding that certain conclusions should have been disclosed to X before they were relied on in the preparation of the community care assessment. That would impose too high a duty on the authority, **R. (on the application of Begum (Amirun)) v Tower Hamlets LBC** [2002] EWHC 633 (Admin), [2003] H.L.R. 8, [2003] C.L.Y. 2060 considered. The assessment was prepared as part of an ongoing process, which by its very nature was capable of further review. It was not a final determination of an entitlement. The authority was not bound to consult X on the conclusions of a report by one of its officers before it placed reliance upon them in the assessment process.

R. (on the application of Goldsmith) v Wandsworth LBC

Judges Brooke, L.J.; Chadwick, L.J.; Wall, L.J. [2004] EWCA Civ 1170; (2004) 7 C.C.L. Rep. 472; (2004) 148 S.J.L.B. 1065

The appellant, G, an elderly woman in residential care accommodation whom the local authority decided should be moved to a nursing home, appealed against the refusal of her application to have that decision quashed. The local authority made its decision after G was admitted to hospital following a fall in the care home. G's daughter, L, challenged its conclusion and the local authority referred the case to the Local Continuing Care Panel, a joint health and social services panel, for its consideration. L was not allowed to attend the panel's meeting as it claimed to be only considering "clinical evidence". The panel recommended G be moved to a nursing home. After that meeting a social work team manager of the local authority undertook an assessment which concluded that G was well enough to stay at her care home. The local authority instructed a doctor, who confirmed, without seeing her, that G needed nursing care. L was not informed of the reference to a doctor or involved in his decision making. The local authority then gave its decision to L. A few weeks later a meeting was convened involving L, the doctor and the local authority, which confirmed its decision. G contended that the local authority's decision making process was defective and there was a failure to apply own policy.

Held, allowing the appeal, that when deciding whether a resident in its care needed to be placed in a nursing home, a local authority was under a duty to take a rounded decision, which took into account all relevant factors, rather than treat a doctor's views on the resident's nursing needs as determinative. In the instant case, the local authority's decision making process was sufficiently defective to vitiate its decision. It had based its decision that G should be put in a nursing home on the assessment of a panel to which it had referred the case and the apparent confirmation of that assessment by a doctor which it had later instructed. But the panel's recommendation was flawed because, in breach of the

local guidance, it kept no written record of its discussions or conclusions; it made its decision without having before it the community care assessment, which was carried out afterwards and contradicted its view; and it should have allowed L to attend the meeting, at which not just "clinical" issues were discussed. The local authority had therefore received defective advice. And it was not cured by subsequent events, because the manner in which the doctor was instructed was unacceptable: he was not being asked to provide an independent second opinion, but was being asked to confirm the panel's decision. The doctor undertook a very limited role of reviewing the panel's assessment and the doctor's decision could only be one factor in, and not determinative of, the local authority's decision. The local authority's decision was therefore based on its perception of the panel's assessment being confirmed by the doctor and there was no evidence that it took into account other relevant considerations.

Here the authority found themselves in considerable difficulty because of the inadequacies of their documentation.

Wall LJ castigated Wandsworth's decision-making as "seriously defective throughout" [66], and identified the 2 key questions as: who was the decision-maker; how was the decision made?

He observed:

"... what was the membership of the LCCP? And what were its specific terms of reference...? ...[W]e have no written record of its discussions or its conclusions. I have to say that, quite apart from it being a plain breach of the local guidance ... I find it both unacceptable and extraordinary that such a body does not keep minutes of its meetings, or produce reasons or any other form of record of its discussions and recommendations."

"69 What we do know about the LCCP is that it made its recommendation without having before it a clearly critical piece of information, namely the community care assessment undertaken by [the social worker], the conclusions of which plainly contradicted the reported views of the LCCP. That, in my judgment, is sufficient of itself to vitiate any conclusion it reached or any recommendation it made. The LCCP was meant to be a multidisciplinary body. I simply do not understand how it could embark on its assessment without an up to date community care assessment."

At a subsequent stage in their decision-making process Wandsworth then sought the opinion of a consultant geriatrician, Dr Cottey, and *immediately* following receipt of that opinion (in favour of nursing care) a decision was made. Wall LJ was particularly concerned about the involvement of one of the social workers, Mrs Graham, whose precise role in the process was unclear.

"If [Mrs Graham] is the decision maker ..., that decision, in my judgment, is manifestly flawed. It is not just the juxtaposition of the dates, and the rapid sequence of events from

letter to Dr Cottee to completed care plan. Mrs Graham had plainly made up her mind prior to the flawed meeting on 8 July, and her decision, as communicated via the care plan, is exclusively based on her perception of the LCCP assessment as “confirmed” by Dr Cottee. There is no evidence that she took into consideration or communicated to [G’s daughter] any of the factors relating to the Appellant’s overall well-being as identified by [various documents], and – as her submission to the LCCP panel demonstrates – she was clearly concerned about the financial implications of the decision. In short, the decision of 13 August (if it was hers) was, in my judgment, a decision which was pre-determined, taken in the context of a manifestly flawed process and without a full and proper consideration of all the relevant considerations. If and in so far as the decision was Mr Kelly’s, there is nothing to suggest that he took a different view.” [81]

Is it compatible with actual and apparent fairness for an officer who has taken an earlier decision which is being reviewed also to conduct the review?

In **Feld v Barnett LBC** (2004) *Times*, October 26, CA, the court concluded that a claim of apparent bias could not be sustained, and the same officer could therefore conduct the review.

The issue in **Feld** arose in the context of two homelessness cases, the legislative framework for which comprises a right to an internal review, followed by a right of appeal to the county court. The framework provides that the statutory review, if carried out by an officer, must be carried out by a person who was not previously involved and who is more senior to the initial decision-maker. In some cases, however, the review process may be followed by a fresh decision, rather than an appeal to the county court; and in turn a second review. The legislative framework, though, does not provide who should carry out such a review. In each of the present cases, the same reviewing officer was involved –indeed Barnet employed only one reviewing officer.

The court applied the test for apparent bias in **Porter v Magill** [2002] 2 AC 257, HL, ie whether a fair-minded and informed observer, having considered the facts, could properly conclude that there was no possibility of apparent bias on the officer’s part. There was no suggestion here that the reviewing officers were actually biased. In **Porter v Magill** Lord Hope of Craighead persuaded the English judges to adopt the Scottish test for bias which in turn was said to be consistent with the requirements of art 6 ECHR. .

The court’s pragmatism was evident in the finding that local authorities should not be required to employ additional staff to conduct reviews, within already stretched budgets. The court also referred to the principle of preserving public confidence in the decision-making process, but referred to the availability of the county court appeal as the ultimate means to correct any unfairness.

IRRATIONALITY

R. v Staffordshire CC Ex p. Farley, April 8, 1997

Judge Forbes, J.

F, aged 86, applied for an interim injunction, pending the full hearing of her application for judicial review, to reinstate a community care package that had been provided by S in accordance with its duties under the National Health Service and Community Care Act 1990 s.47 and the Chronically Sick and Disabled Persons Act 1970 s.2. F was disabled, suffering from severe arthritis, poor mobility and a very weak bladder. She was assessed in S's original care plan as requiring a night sitter as she needed regular toileting throughout the night. In November 1996, however, that care plan was changed and the night sitting provision was withdrawn. Instead F was supplied with an attendant between 10pm and 10.30pm to help prepare for bed and ensure she was comfortable for the night. S agreed to restore the care package on the condition that F undertake to meet the costs of the care in the event that she were unsuccessful in the judicial review application. F argued that she did not have the means and although her son had met the costs of the care for the two weeks since it had been withdrawn, he could no longer afford to do so.

Held, granting the application, that it was appropriate in judicial review proceedings to grant an interim injunction. Given F's health and mobility problems, it was difficult to see how S could ensure F's comfort for the night without providing someone to assist her to go to the toilet during the night in safety. There was no evidence that F's circumstances or needs had changed and the decision to withdraw the night care services was **Wednesbury** unreasonable. Whereas it was usual for the court to require a cross undertaking in damages as requested by S before granting an interim injunction, this was an exceptional case. It would be inhumane to expose F to the risk of being without a night sitter and if the injunction was not granted F's comfort and safety during the night could not be ensured; she had no means to meet the costs of the undertaking and although her family had helped they had come to the end of their resources; her case for judicial review was strong; and the full hearing was listed for four weeks' time and the amount of money involved in the care being continued until then was trivial compared to the risk to which F would be exposed if the injunction was not granted.

In **R v Sutton LBC, ex p Tucker** (1998) 1 C.C.L.R. 251 a care plan was held to be woefully inadequate-but deal with it when I come to irrationality. There was a failure to arrange supported accommodation to allow discharge from hospital to take place. There was no statement of the overall objectives in the care plan or the obligations of the service providers or carers and the lack of objectives meant there was a lack of criteria to assess if they objectives had been met. Key

matters such as costings or possible alternative provision had not been recorded. The procuring of short term and interim outcomes instead of long term objectives meant that there had been such a departure from the guidance of the Secretary of State that the actions of the authority had been *Wednesbury* unreasonable or irrational.

R. v Secretary of State for the Home Department Ex p. Zakrocki

Judge Carnwath, J. (1997-98) 1 C.C.L. Rep. 374; (1996) 32 B.M.L.R. 108; [1996] C.O.D. 304; (1996) 93(16) L.S.G. 31; (1996) 140 S.J.L.B. 110

Z applied for judicial review of the Secretary of State's refusal to extend their leave to remain in the UK to enable them to care for an elderly relative, a British citizen, who was entitled to care under the care in the community policy and for whom social services could make no suitable alternative arrangements.

Held, allowing the application, that the objective of the care in the community policy was to promote domiciliary care, and that in the absence of suitable alternative arrangements it was unreasonable, in the **Wednesbury** sense, for the Secretary of State to refuse Z leave to remain in the UK to care for their relative.

R. (on the application of Khana) v Southwark LBC

Judges Henry, L.J.; Mance, L.J.; McKinnon, J. [2001] EWCA Civ 999; [2002] H.L.R. 31; [2002] B.L.G.R. 15; (2001) 4 C.C.L. Rep. 267; (2001) 98(33) L.S.G. 31

K, a 91 year old Iraqi Kurd suffering from, inter alia, paranoid schizophrenia and severely impaired mobility, appealed against the refusal of her application for judicial review of S's decision to make her an offer of full time residential care. K and her husband had been granted permission to enter the United Kingdom on condition that they did not have recourse to public funds; hence they were entitled to community care services pursuant to the National Assistance Act 1948 and the National Health Service and Community Care Act 1990 s.47 but not to income support or housing benefit. K, her husband and daughter lived in a one bedroom second floor flat. Following an assessment of K's needs, S offered a joint placement in a residential home for K and her husband, the primary carer. It was K's contention that her needs would be best met by the provision of a two bedroom ground floor flat so that her daughter could continue to live with them. At first instance, the court held that S's offer of joint residential accommodation was the only reasonable offer and that K's refusal to accept that offer was objectively unreasonable. K appealed, contending that S had acted in a way which no reasonable local authority could and had behaved unlawfully in failing to take her wishes into account.

Held, dismissing the appeal, that whilst S was under a duty to consider K's preferences and beliefs, the assessment of K's accommodation needs and how

those needs were best met were ultimately matters for S. S had made an offer of accommodation of the only type which it considered would meet K's assessed needs. S was required to take K's wishes into account but was under no obligation pursuant to s.21 of the 1948 Act to provide an alternative that would satisfy K's preference if that alternative would not meet all of the assessed needs, **R. v Kensington and Chelsea RLBC Ex p. Kujtim** [1999] 4 All E.R. 161, (2000) 32 H.L.R. 579, [1999] C.L.Y. 3052 applied.

R v North and East Devon Health Authority, ex parte Coughlan [2001] Q.B. 213, CA, is an important case on legitimate expectation and fairness, reasonableness and human rights under Article 8 ECHR. It shows the tighter scrutiny for proportionality when a human right is engaged.

The applicant, who was severely injured in a road accident in 1971, was tetraplegic, doubly incontinent, partially paralysed in the respiratory tract and suffered from recurrent headaches. In 1993 she and seven comparably disabled patients were moved with their agreement from a hospital which the health authority wished to close to Mardon House, a National Health Service facility for the long-term disabled, which the health authority assured them would be their home for life. In 1996 the health authority published its eligibility criteria for long-term NHS care, based on guidance issued by the Department of Health, which indicated that "specialist" nursing services should be provided by the NHS but that "general" nursing care should be purchased by local authorities. Subsequently, the health authority concluded that the applicant and other Mardon House residents did not meet those criteria. In 1998, following public consultation, the health authority decided to close Mardon House and to transfer the long-term general nursing care of the applicant to the local authority, although no alternative placement for her was identified.

On an application for judicial review of the closure decision, the judge quashed the decision to close Mardon House, holding that the applicant and other patients had been given a clear promise that Mardon House would be their home for life and the health authority had not established an overriding public interest which justified it in breaking that promise, that the closure decision was flawed because no alternative placement for the applicant had been identified, that all nursing care was the sole responsibility of the NHS and, therefore, it had not been open to the health authority to transfer responsibility for the applicant's long-term general nursing care to the local authority and that the health authority's eligibility criteria for long-term health care were correspondingly flawed.

Held, dismissing the appeal by the health authority, (1) that pursuant to sections 1 and 3 of the National Health Service Act 1977 the Secretary of State for Health, in fulfilling his duty to promote a comprehensive free health service, could take into account available resources and conclude that it was not necessary to provide some nursing services through the NHS; that those services could then

be provided in connection with accommodation provided by the local authority to a person in need of care and attention under section 21 of the National Assistance Act 1948; that the distinction between nursing care which could and could not be so provided was one of degree which depended on the facts of a particular case and it could not be based solely on whether the care was "general" or "specialist"; that, in general, nursing services could be provided under section 21 of the 1948 Act if they were merely incidental or ancillary to the provision of accommodation under section 21 and of a nature which it could be expected that a local authority whose primary responsibility was to provide social services could be expected to provide; that the applicant's needs were primarily health needs for which the health authority was responsible; and that, accordingly, the closure decision was unlawful because it depended on a misinterpretation by the health authority of its responsibilities under the 1977 Act and on eligibility criteria which placed a responsibility on the local authority which went beyond the terms of section 21 of the 1948 Act ; (2) That if a public body exercising a statutory function made a promise as to how it would behave in the future which induced a legitimate expectation of a benefit which was substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power; that, in such circumstances, the court had to determine whether there was a sufficient overriding interest to justify a departure from what had previously been promised; that in view of the importance of the promise to the applicant, the fact that it was limited to a few individuals and that the consequences to the health authority of honouring it were likely to be financial only, the applicant had a legitimate expectation that the health authority would not resile from its promise unless there was an overreaching justification for doing so; and that, in the circumstances, including the fact that the quality of the alternative accommodation to be offered to the applicant was not known, the closure decision was an unjustified breach of that promise which constituted unfairness amounting to an abuse of power. In that regard the Article 8 ECHR right to a home was a major factor in the balance to be struck.

I would comment that most cases of an enforceable expectation of a substantive benefit are likely to be cases where the expectation is confined to one person or a few people, giving the promise or representation the character of a contract.

R. (On the application Collins) v Lincolnshire HA

Judge David Pannick Q.C. [2001] EWHC Admin 685; (2001) 4 C.C.L. Rep. 429; [2002] M.H.L.R. 1

C, a 35 year old woman with severe learning disabilities caused by cerebral palsy, sought judicial review of a decision of the health authority to cease providing long term care for her. The health authority planned to transfer C and other long term residents from NHS care into the community. C maintained that (1) the health authority had misunderstood and misapplied government policy,

and (2) by reneging on a promise that C's present home was for life the authority had abused its power and had breached C's human rights.

Held, dismissing the application, that (1) the general aim of government policy was to remove people with learning disabilities from long term institutional care in order to promote their independence. In applying this policy all cases had to be individually assessed. The authority's policy documents and reports demonstrated that it had not simply proposed that all persons with learning disabilities should be discharged into the community from NHS care but that such a move should be made where there were no individual health reasons for keeping a person in NHS care. In C's case there were no such reasons and it could not be said that the health authority had misunderstood and misapplied government policy, and (2) the authority was acting in what it regarded to be C's best interests and upon its belief that C would benefit substantially from the move rather than from any financial motive, **R. v North and East Devon HA Ex p. Coughlan** [2001] Q.B. 213 distinguished. Furthermore, the promise made to C in the present case was to a degree uncertain and lacking in clarity. Accordingly, there had been no abuse of the authority's power and no breach of C's human rights.

JUDICIAL REVIEW AND THE DUTY TO EXHAUST ALTERNATIVE REMEDIES

Section 5B of Social Work (Scotland) Act 1968 deals with complaints procedures. Social work authorities are obliged to have such a procedure. Generally this is done through a Complaints Panel.

The recommendation is not binding on the local authority but it must have regard to it and should only be rejected in exceptional circumstances (SWSG 5/1996 , para. 45) and reasons should be given. Failure to follow a recommendation is not a breach of the law but the greater the departure from the reasons the greater the justification that has to be given : **R v. Avon County Council , ex p M** [1994] 2 F.L.R. 1006; **R v. Wigan MBC, ex p Tammadge** (1998) 1 C.C.L.R 581.

A lack of a decision by a Complaints Panel should not arguably mean that judicial review is excluded until remedies are exhausted. A panel is not independent of the authority and cannot bind the authority. It may not be an effective remedy and there is no obligation to exhaust remedies which are not effective. This in turn might raises issues as to whether Article 6 (and indirectly Article 13) of the ECHR has a role to play. Would the presence of a local authority member on the panel mean that Article 6 was breached? The answer is possibly. If so then a panel may not be an effective remedy.

In **Begum v Tower Hamlets LBC** [2003] 2 A.C. 430, HL, the House of Lords dismissed an appeal brought under the Housing Act 1996. It was assumed but not decided that an internal review decision under section 202 of that Act as to the discharge of an administrative function in relation to a homeless person (section 193) was a determination of a civil right or obligation for art 6 ECHR purposes. Although a reviewing officer was not an independent or impartial tribunal and although the statutory appeal from the officer to the County Court was on a point of law alone (and therefore like judicial review not a fact-finding jurisdiction), art 6 was not breached. Such a supervisory jurisdiction was a “full jurisdiction” for art 6 purposes in that administrative law context to satisfy art 6. Mrs Begum had alleged that she had been harassed at her council tenancy and wanted a move. Tower Hamlets had to make an assessment of her factual claims.

Begum reflects what had been done in earlier cases. For example in **R(Beeson) v Dorset CC** [2002] EWCA Civ 448, the Court of Appeal found that art 6 was not violated in circumstances where the appeal from the decision of a council official lay to a panel of councillors in the same local authority. There the decision related to whether or not Mr Beeson had intentionally divested himself of the title to his home so as to avoid local authority care costs when he went into a nursing home. At first instance it had been held that art 6 was not met in such circumstances. The councillors clearly had a financial interest in bringing the disposal into any assessment for liability to charges. Further as the issues turned on dispute issues of fact involving the credibility of Mr Beeson, judicial review was not an adequate safeguard.

Clearly all of this has built on the earlier English and Scottish jurisprudence on art 6 in administrative law contexts. In **Alconbury and others v Department of the Environment, Transport and the Regions** [2003] 2 A.C. 295, HL, held that there was no need for a right of appeal to the courts from the decision of a planning inspector who was in turn subject to Ministerial supervision. Even although what was in issue was the policy of the Minister and the Minister would have the final say, art 6 was not breached. In the context of decisions which turned on matters of policy or discretion, judicial review was enough although the inspector was not independent or impartial and neither was the Minister. The Inner House adopted this approach in **County Properties Ltd v Scottish Ministers**, 2001 S.L.T. 125, overturning the earlier decision of Lord Macfadyen who had come to the opposite conclusion and his decision is reported at 2000 S.L.T. 973. **Begum** can be seen as an extension of this approach from administrative law contexts involving the exercise of discretion or the consideration an application of policy (**Alconbury; County Properties Ltd**) to cases where an administrator has to find facts.

However the apparent certainty of the scope of art 6 and in particular the development of the **Alconbury** approach in **Begum** has perhaps been thrown into more doubt by a recent case from the Strasbourg Court. It seems that the

Alconbury/ Begum line may not always protect local authorities from a violation of art 6 as the next case shows.

In **Tsfayo v The United Kingdom** (Application no. 60860/00, 14 November 2006), the applicant arrived in the United Kingdom from Ethiopia and sought political asylum. She was initially provided with accommodation by the social services department of Hammersmith and Fulham Council. On 21 April 1997, the applicant moved into accommodation owned by a housing association. A member of the housing association's staff assisted the applicant to complete her application for housing and council tax benefit which was submitted to the Council in April 1997. This application was successful.

The applicant was required by law to renew her application for housing and council tax benefit on an annual basis. Because of her lack of familiarity with the benefits system and her poor English, the applicant failed to submit a benefit renewal form to the Council by the required time. In September 1998, the applicant received correspondence from the housing association about her rent arrears. As the applicant did not understand the correspondence, she sought assistance from the Council's advice office. After obtaining this advice the applicant realised that her housing and council tax benefit had ceased. She therefore submitted a prospective claim as well as a backdated claim for both types of benefit to 15 June 1998.

The prospective claim was successful and the applicant began to receive housing benefit again from 4 October 1998, but on 4 November 1998 the Council rejected the application for backdated benefit because the applicant had failed to show "good cause" why she had not claimed the benefits earlier.

During the period from 15 June to 4 October 1998 the applicant lost housing benefit of GBP 860.00, and since her rent in any event exceeded the benefit to which she had been entitled, her rent arrears amounted to GBP 1,068.86. The housing association commenced possession proceedings, seeking the applicant's eviction for non-payment of rent, and the Council also brought proceedings based on the applicant's failure to pay council tax of GBP 163.36 for the year 1998/99. On 19 October 1998 a court order was made allowing the Council to deduct GBP 2.60 per week from the applicant's income support of GBP 35.87.

On 9 November 1998, the applicant's legal advisers wrote to the Council requesting that they reconsider their refusal. However, by letter dated 4 February 1999, the Council informed the applicant that they were upholding their initial decision to refuse council tax and housing benefits.

The applicant appealed. The case was heard on 10 September 1999 by Hammersmith and Fulham Council Housing Benefit and Council Tax Benefit Review Board ("the HBRB"). The HBRB consisted of three Councillors from the

Council. It was advised by a barrister from the Council's legal department. The applicant was represented by Fulham Legal Advice Centre and the Council was represented by a Council benefits officer. The HBRB rejected the applicant's appeal, finding that the applicant must have received some correspondence from the local authority during the period from 15 June to 4 October 1998 concerning the council tax she owed, although no such correspondence was produced to it.

On 13 September 1999 the housing association's possession proceedings against the applicant concluded with a court order requiring her to pay off the rent arrears at GBP 2.60 a week (in addition to the GBP 2.60 per week for council tax arrears).

On 6 December 1999, the applicant sought judicial review of the HBRB's decision. She complained that the HBRB had acted unlawfully because it had failed to make adequate findings of fact or provide sufficient reasons for its decision. The applicant also alleged that the HBRB was not an "independent and impartial" tribunal under art 6 ECHR.

On 31 January 2000, the High Court dismissed the applicant's application for leave to apply for judicial review on the grounds that the Convention had not yet been incorporated into English law, and further dismissed the application on the merits, on the grounds that the HBRB's decision was neither unreasonable nor irrational. The applicant was unable to appeal because legal aid was refused. The applicant subsequently obtained Counsel's opinion that the appeal had no prospects of success.

The European Court carried out an interesting analysis of the domestic case law.

' 24. In the House of Lords' judgment in R. v. Secretary of State for the Environment, ex parte Holding and Barnes, Alconbury Developments Ltd and Legal and General Assurance Society Ltd, [2001] UKHL 23, ("Alconbury"), Lord Slynn of Hadley described the scope of judicial review as follows (§ 50):

"It has long been established that if the Secretary of State misinterprets the legislation under which he purports to act, or if he takes into account matters irrelevant to his decision or refuses or fails to take account of matters relevant to his decision, or reaches a perverse decision, the court may set his decision aside. Even if he fails to follow necessary procedural steps - failing to give notice of a hearing or to allow an opportunity for evidence to be called or cross-examined, or for representations to be made or to take any step which fairness or natural justice requires, the court may interfere. The legality of the decision and the procedural steps must be subject to sufficient judicial control." ...

Lord Slynn continued that he was further of the view that a court had power to quash an administrative decision for a misunderstanding or ignorance of an established and relevant fact (§§ 51-53 of the judgment, and see also Lord Nolan at § 61, Lord Hoffman

at § 130 and Lord Clyde at § 169) and, where human rights were in issue, on grounds of lack of proportionality.

25. In *Runa Begum (FC) v. London Borough of Tower Hamlets* [2003] UKHL 5 (see paragraph 29 below), Lord Bingham of Cornhill made it clear that a court on judicial review (§§ 7-8):

“... may not only quash the authority’s decision ... if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or if the decision maker is shown to have misunderstood or been ignorant of an established and relevant fact ... It is plain that the ... judge may not make fresh findings of fact and must accept apparently tenable conclusions on credibility made on behalf of the authority... .”

D. Consideration of administrative decision-making under the Human Rights Act 2000

26. Since the coming into force of the Human Rights Act 2000, the English courts have considered on a number of occasions the extent to which judicial review can remedy defects of independence in a first instance administrative tribunal.

27. In *Alconbury* (cited above), the House of Lords considered the procedure whereby the Secretary of State had the power himself to determine certain matters of planning and compulsory purchase, subject to judicial review. Following the Court’s judgment in *Bryan v. the United Kingdom*, no. 19178/91, §§ 44-47, Series A no. 335-A, the House of Lords held unanimously that since the decisions in question involved substantial considerations of policy and public interest it was acceptable, and indeed desirable, that they be made by a public official, accountable to Parliament. Although the Secretary of State was not an independent and impartial tribunal, he (or rather, his Department’s decision-making process) offered a number of procedural safeguards, such as an inspector’s inquiry with the opportunity for interested parties to be heard, and these safeguards, together with the availability of judicial review (see paragraphs 24-25 above) was sufficient to comply with the requirement for “an independent and impartial tribunal” in Article 6 § 1.

28. Lord Hoffmann explained the democratic principles underlying this approach as follows (§§ 69 and 73):

“In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. Sometimes the subject-matter is such that Parliament can itself lay down general rules for enforcement by the courts. Taxation is a good example; Parliament decides on grounds of general interest what taxation is required and the rules according to which it should be levied. The application of those rules, to determine the liability of a particular person, is then a matter for independent and impartial tribunals such as the General or Special Commissioners or the courts. On the other hand, sometimes one cannot formulate

general rules and the question of what the general interest requires has to be determined on a case by case basis. Town and country planning or road construction, in which every decision is in some respects different, are archetypal examples. In such cases Parliament may delegate the decision-making power to local democratically elected bodies or to ministers of the Crown responsible to Parliament. In that way the democratic principle is preserved.

... There is however another relevant principle which must exist in a democratic society. That is the rule of law. When ministers or officials make decisions affecting the rights of individuals, they must do so in accordance with the law. The legality of what they do must be subject to review by independent and impartial tribunals. This is reflected in the requirement in Article 1 of Protocol No. 1 that a taking of property must be 'subject to the conditions provided for by law'. The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament. ..."

29. The House of Lords returned to these issues in Runa Begum (cited above). The appellant had been offered a flat by the local authority, but considered it unsuitable for herself and her children because, she alleged, it was on a housing estate known for drugs and crime and in close proximity to a friend of her ex-husband. She requested a review of the local authority's decision. The reviewing officer was a re-housing manager employed by the same local authority but who had not been involved in the original decision and who was senior to the original decision-maker. She found that there were no serious problems on the estate and that the relationship between Runa Begum and her husband was not such as to make it intolerable for them to risk meeting each other.

30. It was accepted that the case involved the determination of civil rights and that the reviewing officer was not, in herself, an "independent and impartial tribunal". The House of Lords held unanimously that the existence of judicial review was sufficient in this context for the purposes of Article 6 § 1. In reaching this conclusion, Lord Bingham of Cornhill considered three matters as "particularly pertinent": first, that the legislation in question was part of a far-reaching statutory scheme regulating the important social field of housing, where scarce resources had to be divided among many individuals in need; secondly, that although the council had to decide a number of factual issues, these decisions were "only staging posts on the way to the much broader judgments" concerning local conditions and the availability of alternative accommodation, which the housing officer had the specialist knowledge and experience to make; thirdly, the review procedure incorporated a number of safeguards to ensure that the reviewer came to the case with an open mind and took into account the applicant's representations. Lord Bingham commented, generally, on the inter-relation between the Article 6 § 1 concept of "civil rights" and the requirement for an "independent and impartial tribunal", that (§ 5):

"the narrower the interpretation given to 'civil rights', the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to 'civil rights', the more flexible must be the approach to the

requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided. ...”

31. *It was argued before the House of Lords that when, as in Bryan and Alconbury, the decision turned upon questions of policy or “expediency”, it was not necessary for the appellate court to be able to substitute its own opinion for that of the decision-maker; that would be contrary to the principle of democratic accountability. However, where, as in Runa Begum, the decision turned upon a question of contested fact, it was necessary either that the appellate court should have full jurisdiction to review the facts or that the primary decision-making process should be attended with sufficient safeguards as to make it virtually judicial. In response, Lord Hoffmann (§§ 37-44) underlined that the fact-finding in Bryan had been closely analogous to a criminal trial, since the inspector’s decision that Mr Bryan had acted in breach of planning control would be binding on him in any subsequent criminal proceedings for failing to comply with the enforcement notice. Lord Hoffmann continued:*

“A finding of fact in this context seems to me very different from the findings of fact which have to be made by central or local government officials in the course of carrying out regulatory functions (such as licensing or granting planning permission) or administering schemes of social welfare such as [housing the homeless]. The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision-maker (see De Cubber v. Belgium [judgment of 26 October 1984, Series A no. 124-B]).

But utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. I said earlier that in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament. This case raises no question of democratic accountability. ...

On the other hand, efficient administration and the sovereignty of Parliament are very relevant. Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes”

32. *Following the House of Lords’ judgment in Alconbury, but before that in Runa Begum, the High Court examined whether the HRRB procedure at issue in the present application was compliant with Article 6, in a case where the determination of the central issues of fact depended on an assessment whether the claimant was telling the truth: Bewry (R. on the application of) v. Norwich City Council [2001] EWHC Admin 657. The Secretary of State conceded that the HRRB lacked the appearance of an independent and*

impartial tribunal. On the question whether judicial review proceedings were sufficient to remedy the problem, Moses J observed:

“There is however, in my judgment, one insuperable difficulty. Unlike an inspector [in a planning case], whose position was described by Lord Hoffman [in R. v. Secretary of State for the Environment, ex parte Holding and Barnes, Alconbury Developments Ltd and Legal and General Assurance Society Ltd, [2001] UKHL 23; [2001] 2 All ER 929: see Holding and Barnes plc v. the United Kingdom (dec.), no. 2352/02, ECHR 2002] as independent, the same cannot be said of a councillor who is directly connected to one of the parties to the dispute, namely the Council. The dispute was between the claimant and the Council. The case against payment of benefit was presented by employee of the Council and relied upon the statement of an official of the Council (the Fraud Verification Officer in the Council’s Revenue office). ...

The reasoning carefully set out by the Board enables the court to ensure that there has been no material error of fact. Even in relation to a finding of fact, this court can exercise some control if it can be demonstrated that the facts found are not supported by the evidence. But, in that respect, the court can only exercise limited control. It cannot substitute its own views as to the weight of the evidence ... In my judgment, the connection of the councillors to the party resisting entitlement to housing benefit does constitute a real distinction between the position of a [planning] inspector and a Review Board. The lack of independence may infect the independence of judgment in relation to the finding of primary fact in a manner which cannot be adequately scrutinised or rectified by this court. One of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary facts and the inferences drawn from those facts. ...

Thus it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence. This court cannot cure the often imperceptible effects of the influence of the connection between the fact finding body and a party to the dispute since it has no jurisdiction to reach its own conclusion on the primary facts; still less any power to weigh the evidence. Accordingly, I conclude that there has been no determination of the claimant’s entitlement to housing benefit by an independent and impartial tribunal. The level of review which this court can exercise does not replenish the want of independence in the Review Board, caused by its connection to a party in the dispute.”

The Secretary of State was granted leave to appeal against this judgment but, in the event, decided not to appeal.

The Bewry judgment was approved and followed, after the House of Lords’ judgment in Runa Begum, by the High Court in R. (Bono and another) v. Harlow District Council [2002] EWHC 423.”

The European Court decided that there had been a violation of Article 6.

“39. The Court recalls that disputes over entitlement to social security and welfare benefits generally fall within the scope of Article 6 § 1 (see Salesi v. Italy, judgment of 26 February 1993, Series A no. 257-E, § 19; Schuler-Zgraggen v. Switzerland, judgment of 24 June 1993, Series A no. 263, § 46; Mennitto v. Italy [GC], no. 33804/96, § 28, ECHR 2000-X). It agrees with the parties that the applicant’s claim for housing benefit concerned the determination of her civil rights and that Article 6 § 1 applied. The applicant therefore had a right to a fair hearing before an independent and impartial tribunal.

40. The HBRB was composed of five elected councillors from the same local authority which would have been required to pay a percentage of the housing benefit if awarded, and the Government conceded on these grounds that the Board lacked structural independence. They contended, however, that the High Court on judicial review had sufficient jurisdiction to ensure that the proceedings as a whole complied with Article 6 § 1.

41. The Court recalls that even where an adjudicatory body determining disputes over “civil rights and obligations” does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are “subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1” (Albert and Le Compte v. Belgium, judgment of 10 February 1983, Series A no. 58, § 29).

42. In Bryan v. the United Kingdom, judgment of 22 November 1995, Series A no. 335-A, §§ 44-47, the Court held that in order to determine whether the Article 6-compliant second-tier tribunal had “full jurisdiction”, or provided “sufficiency of review” to remedy a lack of independence at first instance, it was necessary to have regard to such factors as the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal. In Bryan, the inspector’s decision that there had been a breach of planning controls involved some fact-finding, namely that the buildings which Mr Bryan had erected had the appearance of residential houses rather than agricultural barns. However, the inspector was also called upon to exercise his discretion on a wide range of policy matters involving development in a green belt and conservation area, and it was these policy judgments, rather than the findings of primary fact, which Mr Bryan challenged in the High Court. The inspector lacked the requisite appearance of independence from the executive, since the Secretary of State had the power, albeit applied only in exceptional circumstances, to withdraw a case from him. The inspector followed a quasi-judicial procedure, and was under a duty to exercise independent judgment. Any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court, which also had the power to satisfy itself that the inspector’s findings of fact or the inferences based on them were neither perverse nor irrational. The Court concluded that there had been no violation of Article 6 § 1 and added that:

“Such an approach by an appeal tribunal on questions of fact can reasonably be expected in specialised areas of the law such as the one at issue, particularly where the facts have already been established in the course of a quasi-judicial procedure governed by many of the safeguards required by Article 6 § 1. It is also frequently a feature in the systems of judicial control of administrative decisions found throughout the Council of Europe member States. Indeed, in the instant case, the subject-matter of the contested decision by the inspector was a typical example of the exercise of discretionary judgment in the regulation of citizens’ conduct in the sphere of town and country planning.”

43. *The Convention organs followed the approach set out in Bryan to find that there had been “sufficiency of review” in a number of cases against the United Kingdom (see, for example, X. v. the United Kingdom, no. 28530/95, Commission decision of 19 January 1998, concerning a determination by the Secretary of State that the applicant was not a fit and proper person to be chief executive of an insurance company; Stefan v. the United Kingdom, no. 29419/95, Commission decision of 9 December 1997, concerning proceedings before the General Medical Council (“GMC”) to establish whether or not the applicant was mentally ill and thus unfit to practise as a doctor; Wickramsinghe v. the United Kingdom (dec.), no. 31503/96, 9 December 1997, concerning disciplinary proceedings before the GMC; and see also Kingsley v. the United Kingdom [GC], no. 35605/97, § 32, ECHR 2002-IV).*

44. *The domestic courts have also applied the principles in Bryan, notably the House of Lords in Alconbury and Runa Begum (see paragraphs 27-31 above). In the latter case, the House of Lords found that judicial review of a housing officer’s decision that the claimant had been unreasonable in rejecting the accommodation offered to her provided “sufficiency of review” for the purposes of Article 6 § 1. The House of Lords stressed that although the housing officer had been called upon to resolve some disputed factual issues, these findings of fact were, to use the words of Lord Bingham in that case, “only staging posts on the way to the much broader judgments” concerning local conditions and the availability of alternative accommodation, which the housing officer had the specialist knowledge and experience to make. Although the housing officer could not be regarded as independent, since she was employed by the local authority which had made the offer of accommodation which Runa Begum had rejected, statutory regulations provided substantial safeguards to ensure that the review would be independently and fairly conducted, free from improper external influences. Any significant departure from the procedural rules would have afforded a ground of appeal.*

45. *The Court considers that the decision-making process in the present case was significantly different. In Bryan, Runa Begum and the other cases cited in paragraph 43 above, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the HBRB was deciding a simple question of fact, namely whether there was “good cause” for the applicant’s delay in making a claim. On this question, the applicant had given evidence to the HBRB that the first that she knew that anything was amiss with her claim for housing benefit was the receipt of a notice from her landlord – the housing association – seeking to repossess her flat because her rent*

was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal (see paragraph 21 above). Nor, unlike the cases referred to, can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take.

*46. Secondly, in contrast to the previous domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded. As Mr Justice Moses observed in *Bewry* (paragraph 32 above), this connection of the councillors to the party resisting entitlement to housing benefit might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built into the HBRB procedure (paragraphs 22-23 above) were not adequate to overcome this fundamental lack of objective impartiality.*

*47. The applicant had her claim refused because the HBRB did not find her a credible witness. Whilst the High Court had the power to quash the decision if it considered, *inter alia*, that there was no evidence to support the HBRB's factual findings, or that its findings were plainly untenable, or that the HBRB had misunderstood or been ignorant of an established and relevant fact (see paragraphs 24-25 above), it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility. Thus, in this case, there was never the possibility that the central issue would be determined by a tribunal that was independent of one of the parties to the dispute.*

48. It follows that there has been a violation of Article 6 § 1”.

Arguably judicial review might not be sufficient to cure any defect in decision making by a local authority panel where the alleged breach is based on Article 6. Note though that it is more likely to be the case that Article 6 will be breached where the disputed issues were matters of fact as opposed to matters of judgment or policy. Note too that as well as providing an argument why complaints panel procedure should not be used, the case might provide an argument in any particular case that the complaints panel itself has breached human rights. That is a ground of review based on illegality.

Where the dispute turns on matters of fact or expert assessment judicial review is unlikely to be a useful remedy. Much might depend on the attitude of the Court.

In England the view has been expressed that where there requires to be an authoritative resolution of a legal issue judicial review is to be preferred : **R v**

Devon County Council, ex p Baker [1995] 1 All ER 73 per Simon Brown LJ at 92, CA.

So where there is a clear point of law, such as failure to follow guidance, then complaints procedure is not a remedy as that would require points of law to be argued before a body who were not lawyers : **R v Sutton London Borough Council, ex p Tucker** (1998) 1 C.C.L.R. 251.

JUDICIAL REVIEW AND THE OMBUDSMAN

The role of the Scottish Public Sector Ombudsman under the Scottish Public Sector Ombudsman Act 2002 should not be overlooked, no least because as recently as last week a judicial review case was decided in Scotland on a decision made by this official. I shall come to that presently.

This official can investigate complaints of maladministration in local authorities. Complaints about social services and community care could be brought. He would expect an attempt to be made to resolve any complaint through the complaints panel in the first instance. Also where the complainer has a legal remedy then the Ombudsman will not accept jurisdiction. Where any remedy is uncertain that might present different considerations. The following case out with social services law, but still relevant at the general level is illustrative.

In May 1995, Mrs Thomas - the Local Government Ombudsman for the north of England - issued her report on the investigation of a complaint about the way Liverpool City Council had considered a planning application. The application had been made by Liverpool Football Club and was for an extension to an existing stand at the Anfield Road end of the Football Stadium. The Ombudsman found that seven councillors had breached the National Code of Local Government Conduct by voting in favour of the application without declaring their interest as season ticket holders or, in one case, as a regular attender. The Ombudsman also found that the two main political parties had applied a "whip" to the way in which their members should vote on the application. She found that applying a whip in this case amounted to maladministration.

Liverpool City Council did not agree with the Ombudsman's conclusions and was granted leave for judicial review. In the High Court, Mr Justice Hooper refused the City Council's application to quash the Ombudsman's report. The City Council appealed to the Court of Appeal.

One of the questions considered by the Court of Appeal (**R v Commissioner for Local Administration, ex parte Liverpool City Council**, The Times, 3 March 2000) was whether the Ombudsman should have investigated the complaint because judicial review of the Council's decision might have been possible.

Section 26(6) of the Local Government Act 1974 provides that a Local Government Ombudsman should not conduct an investigation of any action of which the person aggrieved has or had a remedy by way of proceeding in any court of law unless the Ombudsman is satisfied that, in the particular circumstances, it is not reasonable to expect the person aggrieved to have resorted or to resort to court proceedings. There is a parallel provision in the 2002 Act.

Commenting on this in the Liverpool case, Lord Justice Henry said that:

"What may not have been recognized back in 1974 was the emergence of judicial review to the point where most if not almost all matters which could form the basis for a complaint of maladministration are matters for which the elastic qualities of judicial review might provide a remedy".

Lord Justice Henry said that:

"In my judgement this was a clear case for the application of the proviso [ie the exercise of the discretion to investigate despite the availability of judicial review]. Serious allegations of maladministration had been made. Such allegations could best be investigated by the resources and powers of the Commissioner, with her powers to compel both disclosure of documents, and the giving of assistance to the investigation. The Commissioner was in a position to get to the bottom of a prima facie case of maladministration, and the ratepayers would be unlikely to have reached that goal, having regard to the weakness of the coercive fact finding potential of judicial review. As she found, it would be very difficult, if not impossible, for the complainants to obtain the necessary evidence in judicial review proceedings. Additionally, the complainants were a group in modest housing, unlikely to have the means to pursue the remedy. The Commissioner was clearly right to use the proviso to continue her investigation. This case is a good example of a case where the Commissioner's investigation and report can provide the just remedy when judicial review might fail to; and can reach facts which might not emerge under the judicial review process."

Here is a useful "ready reckoner" of the differences between judicial review and the Ombudsman.

- The courts can give a *definitive interpretation of the law*. Ombudsmen cannot. They act on what they understand the law to be but that is a world away from declaring the law as only the courts can.
- The Ombudsman's function is to deal with complaints that "injustice" has been caused by "maladministration". Neither "injustice" nor "maladministration" has a statutory definition. Parliament left it for the Ombudsman to decide the meaning of the words. In considering what "maladministration" is, the courts have quoted with approval what Richard

Crossman (then Lord President of the Council) said in the debates on the Parliamentary Commissioner Bill in 1967. Mr Crossman said that "maladministration" included "bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude and so on". The "and so on" deserves comment. Lord Denning said "It would be a long and interesting list, clearly open-ended, covering the manner in which a decision is reached or discretion is exercised..." (*R v Commissioner for Local Administration ex parte Bradford City Council* [1979] 1 Q.B. 287).

- The courts' rulings are binding and enforceable. The Ombudsmen make recommendations which are not binding. But recommendations are almost always accepted in full.
- The courts can quash a decision and stay action. Ombudsmen cannot. It is interesting that the local authorities sometimes decide to defer action - for example, whether to charge for a community care service - until the result of our investigation about the matter is known.
- There is provision for appeal against decisions in judicial review proceedings. There is no right of appeal against an Ombudsman's decision. While the decision is subject to judicial review, the judges have shown commendable restraint in resisting the temptation to substitute their judgment for the Ombudsman's on the merits of the complaint.
- The proceedings in judicial review are adversarial and they are conducted in public. By contrast, Ombudsmen's investigations are inquisitorial, and, by law, are conducted in private.
- In judicial review, the onus is on the parties to obtain evidence and to decide what information to present. Ombudsmen themselves go out to find the information and have more scope than the courts to ferret out the facts.
- In judicial review, the unsuccessful party may be ordered to pay the expenses of the other side. The Ombudsman's investigation is provided without charge to either party and no-one need be legally represented or produce their own expert evidence.
- Judicial reviews are conducted in accordance with procedural rules but the procedure for conducting an investigation shall be such as the Ombudsman considers appropriate in the circumstances of the case" and the Ombudsman "may obtain information from such persons and in such manner, and make such inquiries, as he thinks fit. Compensation is rarely awarded in judicial review proceedings. The Ombudsmen often recommend a financial remedy.

- Finally, the courts are bound by precedent. Ombudsmen are not, although obviously they make efforts to be consistent as they could be open to judicial review if we acted inconsistently without good cause.

For some disputes, judicial review is the only suitable means of obtaining redress; for example, where the dispute turns on a point of law. In other cases, judicial review can offer a better outcome. For example, where a binding decision is essential or urgent interim relief is required. But in other case, a dispute which could be the subject of judicial review proceedings is better dealt with by an Ombudsman's investigation. This would be the better course where, for example, the complainant does not know the full facts and could not obtain them through court proceedings. Or where the cost of judicial review would be disproportionate to the remedy sought. Or where the complainant was neither well off nor poor enough to be entitled to legal aid. Or where the just remedy is a full explanation, an apology and some financial redress. Or where there is a widespread failure in an administrative system which could not be identified satisfactorily without a detailed investigation. Or where the complainant is too vulnerable to cope with the adversarial nature of court proceedings. In such cases, recourse to the Ombudsman may be preferred to judicial review.

But there are notable similarities between judicial review and the Ombudsman.

Neither judicial review nor an Ombudsman's investigation provides a means of appealing against the merits of a decision.

Both are concerned with the way a decision or action was taken. The court and the Ombudsman will consider whether the way the decision was taken:

- was lawful;
- was procedurally proper;
- took into account irrelevant considerations or failed to take into account relevant considerations; or
- was otherwise unreasonable (ie perverse or irrational).

Does the Ombudsman provide an alternative to judicial review?

My answer would be "yes" and "no".

The Ombudsman will not investigate if the dispute turns on a point of law or statutory interpretation. That is exclusively a matter for the courts. In urgent cases, the courts can provide "interim relief": the court can order the public authority to stop or start doing something pending a full hearing of the dispute.

The Ombudsman cannot nor can he or she quash a decision. An Ombudsman can, however, make recommendations for changes to administrative systems in the way the courts cannot. An Ombudsman can obtain for a complainant payments for distress caused by maladministration. An Ombudsman's investigation can produce a comprehensive explanation about what happened in a way that judicial review proceedings rarely can.

In these ways, judicial review and Ombudsman investigations are not alternatives.

Ombudsman decisions can themselves be the subject of judicial review. In **Argyll and Bute Council v. Scottish Public Sector Ombudsman** [2007] CSOH 168, 17 October 2007, Argyll and Bute Council asked the court to review a decision by the Scottish Public Services Ombudsman that they had a duty to provide funding for the personal care of a resident over 65 in a private care home. The Council argued that their duty as a local authority to provide funding for the personal care of people over 65 arose only where the personal care was provided by them, and not where it was provided through an entirely private arrangement between the resident or his or her relatives and the care home. Lord Macphail decided that it was not possible to interpret the legislation about free personal care as obliging a local authority to make payments for personal care that was not provided by them. He accordingly held that the Ombudsman's decision that the legislation placed a statutory duty on Argyll and Bute Council to provide funding for the personal care of the resident concerned was incorrect.

Before reaching his decision Lord Macphail gave the Scottish Ministers an opportunity to instruct counsel to appear before the court and make submissions in the public interest about the correct interpretation of the legislation about free personal care. They declined to do so. Lord Macphail expressed his disappointment that he had not been afforded such assistance and indicated that he had reached his decision with reluctance.

Free personal care for people over 65 is the subject of the Community Care and Health (Scotland) Act 2002 and regulations made under the Act. Section 1(1) of the Act provides that a local authority are not to charge for social care provided by them (or the provision of which is secured by them) if that social care is personal care.

Before the Act came into force, where a local authority acting under the Social Work (Scotland) Act 1968 provided a person with accommodation which included personal care, it was obliged to charge, subject to means-testing, for the element of personal care as well as for the housing element of the accommodation.

In 1999 the Royal Commission on Long Term Care (the Sutherland Commission) recommended that personal care should be exempted from means-testing and should be available for those who needed it. Their recommendation was endorsed by the Health and Community Care Committee of the Scottish

Parliament. When the bill which became the Act was introduced in the Parliament, the Minister for Health and Community Care, Mr Malcolm Chisholm, said, "*We will ensure that personal care is free for all Scotland's oldest people: the dementia sufferer and the stroke victim; those at home as well as those in care homes.*" The Act provides that local authorities are not to charge for personal care provided by them. The regulations made under the Act state that accommodation provided by a local authority under the 1968 Act does not include the first £145 per week of personal care.

Mr William McLachlan complained to the Ombudsman that Argyll and Bute Council had failed to provide a service to his father between February and June 2006 in that they had not provided funding for his personal care.

The Council, acting under the Social Work (Scotland) Act 1968, assessed that Mr McLachlan's father was entitled to free personal care. In February 2006 Mr McLachlan placed his father in a private care home and claimed that his father was entitled to free personal care. The Council told him that all their free personal care budget was committed, but his father would be placed on a priority list. Eventually they contributed £145 per week towards his personal care costs with effect from 28 June 2006. He died on 4 April 2007.

Mr McLachlan complained to the Ombudsman. The Ombudsman conducted an investigation and issued a report on 28 November 2006. She decided that the Council had been obliged by the terms of the 2002 Act to provide Mr McLachlan's

father with free personal care, and she recommended that the Council should calculate and pay a sum equivalent to the payments which in her view should have been paid to him from the date when he became eligible for them until the date when the Council began to make the payments.

The Council applied to the Court for judicial review of the Ombudsman's decision. They argued that it should be set aside for two principal reasons. The first was that the obligation to pay for personal care arose only where it was provided by the local authority. The second was that the Act forbade a local authority to charge for personal care, but did not impose an obligation to make any payment.

Lord Macphail upheld the Council's first argument and decided that it was not possible to interpret the legislation as obliging a local authority to make payments for personal care which was not provided by them. It was concerned only with not charging for personal care provided by a local authority. The personal care provided to Mr McLachlan's father had been provided to him by his family, who had made an entirely private arrangement with the care home, with which the Council had not been concerned. Lord Macphail therefore held that the Ombudsman's decision that the Act placed a statutory duty on the Council to provide funding to him was incorrect.

Lord Macphail said that he reached that conclusion with reluctance. However, while a court in interpreting legislation must always seek the true intention of the legislature, it could not ignore the natural meaning of the clear and unambiguous words Parliament had chosen to use, even where it suspected that Parliament might have provided differently if a particular question or issue had been exposed to them. Lord Macphail also said that he was acutely aware that his decision meant that there had been a widespread misunderstanding of the meaning and effect of the legislation on the part of local authorities, the Scottish Executive and persons over 65 in private care homes and their families.

In July 2007 Lord Macphail gave the Scottish Ministers an opportunity to instruct counsel to appear before the Court and submit that the Council's first argument was wrong. He said, when inviting the Scottish Ministers to do so, that the matter was of great importance and that the Court would derive invaluable assistance from submissions made on their behalf. However, the Scottish Ministers decided not to appear. In his judgment Lord Macphail recorded his disappointment that the Court had not been afforded the assistance of submissions made by the Scottish Ministers.

Lord Macphail rejected the Council's second argument that the Act did not impose on a local authority an obligation to make any payment, but only disentitled them from charging for personal care. Lord Macphail observed that while the legislation about free personal care was unusually complex, it implied that a local authority were entitled to make payments in respect of personal care in accommodation provided by them.

In his judgment Lord Macphail examined the constitutional position of the Ombudsman [paras 4-21]. In the present case the Ombudsman did not maintain that she was immune from judicial review. A question arose, however, as to whether it would be appropriate for her decision in the present case to be set aside by the Court. Lord Macphail held that in the circumstances of this case the petitioners, Argyll and Bute Council, had a substantial interest in having the decision set aside, and accordingly that it should be reduced by way of judicial review if it was found to be unsound.

In view of his conclusion on the Council's first argument Lord Macphail set aside the Ombudsman's decision that they had been obliged to provide Mr McLachlan's father with free personal care.

Lord Macphail pointed out that the first argument had not been presented to the Ombudsman.

He rejected other criticisms which the Council had made of the Ombudsman's report. He observed that it had been within the discretion of the Ombudsman to determine the scope of her investigation and the appropriate level of response to

the complaint, and that the purpose of her report had been to deal with the complaint in an effective and intelligible manner.

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