ADMINISTRATIVE LAW

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The author of that remark would have been hard put to it to find words for the period since the second world war, which is as different from his own as his own was different from that of the Stuart kings. As his generation came to recognise the need for the administrative state, they had also to devise more efficient machinery. The Northcote–Trevelyan Report (1854) on the civil service was one milestone; another was the opening of the civil service to competitive examination in 1870. Meanwhile the modern type of ministerial department was replacing the older commissions and boards. The doctrine of ministerial responsibility was crystallising, with its correlative principles of civil service anonymity and detachment from politics. Thus were laid the foundations of the vast and powerful bureaucracy which is the principal instrument of administration today. Scarcely less striking has been the expansion of the sphere of local government, extending to education, town and country planning, and a great many other services and controls.

If the state is to care for its citizens from the cradle to the grave, to protect their environment, to educate them at all stages, to provide them with employment, training, houses, medical services, pensions, and, in the last resort, food, clothing, and shelter, it needs a huge administrative apparatus. Relatively little can be done merely by passing Acts of Parliament and leaving it to the courts to enforce them. There are far too many problems of detail, and far too many matters which cannot be decided in advance. No one may erect a building without planning permission, but no system of general rules can prescribe for every case. There must be discretionary power. If discretionary power is to be tolerable, it must be kept under two kinds of control: political control through Parliament, and legal control through the courts. Equally there must be control over the boundaries of legal power, as to which there is normally no discretion. If a water authority may levy sewerage rates only upon properties connected to public sewers, there must be means of preventing it from rating unsewered properties unlawfully.[6] The legal aspects of all such matters are the concern of administrative law.

Administrative law

A first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power. This, at any rate, is the heart of the subject. The governmental power in question is not that of Parliament: Parliament as the legislature is sovereign and beyond legal control. But the powers of all other public authorities are subordinated to the law, just as much in the case of the Crown and ministers as in the case of

[6] See *Daymond* v. *Plymouth City Council* [1976] AC 609; below, p. 852.

local authorities and other public bodies. All such subordinate powers have two inherent characteristics. First, they are all subject to legal limitations; there is no such thing as absolute or unfettered administrative power. Secondly, and consequentially, it is always possible for any power to be abused. Even where Parliament enacts that a minister may make such order as he thinks fit for a certain purpose, the court may still invalidate the order if it infringes one of the many judge-made rules. And the court will invalidate it, *a fortiori*, if it infringes the limits which Parliament itself has ordained.

The primary purpose of administrative law, therefore, is to keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. 'Abuse', it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law which they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it. It is a common occurrence that a minister's order is set aside by the court as unlawful, that a compulsory purchase order has to be quashed or that the decision of a planning authority is declared to be irregular and void. The courts are constantly occupied with cases of this kind which are nothing more than the practical application of the rule of law, meaning that the government must have legal warrant for what it does and that if it acts unlawfully the citizen has an effective legal remedy. On this elementary foundation the courts have erected an intricate and sophisticated structure of rules.

As well as power there is duty. It is also the concern of administrative law to see that public authorities can be compelled to perform their duties if they make default. The Inland Revenue may have a duty to repay tax, a licensing authority may have a duty to grant a licence, the Home Secretary may have a duty to admit an immigrant. The law provides compulsory remedies for such situations, thus dealing with the negative as well as the positive side of maladministration.

Function distinguished from structure

As a second approximation to a definition, administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities. This is only one part of the mass of law to which public authorities are subject. All the detailed law about their composition and structure, though clearly related to administrative law, lies beyond the proper scope of the subject. So it is not necessary to investigate how local councillors are elected or what are the qualifications

of the court to interfere. The law draws the boundaries within which the administration is a free agent.

Judicial control, therefore, primarily means review, and is based on a fundamental principle, inherent throughout the legal system, that powers can be validly exercised only within their true limits. The doctrines by which those limits are ascertained and enforced form the very marrow of administrative law. Rights of appeal, on the other hand, have no such central place. They may or may not exist in any given case, and although it is in general most important that they should exist, this is a question of policy which can be reserved for the chapter on Statutory Tribunals.

Legality, merits and discretion

The distinction between 'merits' and 'legality' is not in fact so rigid as the previous section would suggest. Partly this is because there are various forms of error which can be remedied either on appeal or on review, so that the two systems overlap.[54] Partly also it is because there are many situations in which the courts interpret Acts of Parliament as authorising only action which is reasonable or which has some particular purpose, so that its merits determine its legality. Sometimes the Act itself will expressly limit the power in this way, but even if it does not it is common for the court to infer that some limitation is intended. The judges have been deeply drawn into this area, so that their own opinion of the reasonableness or motives of some government action may be the factor which determines whether or not it is to be condemned on judicial review. Although in principle the dichotomy between legality and merits is still observed, the dividing line becomes blurred. The further the courts are drawn into passing judgment on the merits of the actions of public authorities, the more they are exposed to the charge that they are exceeding their constitutional function.

But unless the courts are prepared to act boldly in this direction, they can give but feeble protection against administrative wrongdoing. The whole problem is centred on the question of discretionary power, which lies at the heart of administrative law. When Parliament grants power to public authorities, it inevitably also gives them discretion. Each authority has to decide for itself whether to act or not to act, and how it wishes to act. If this discretion is not conferred, the authority has not a power but a duty. Many of the most difficult problems of judicial review are concerned with the question where power stops and duty begins. Even if the authority has undoubted power to do something, there may be duties as to how it is to be done.

[54] See below, p. 712.

The ultra vires doctrine is therefore not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same: an improper motive, or a false step in procedure, makes an administrative act just as illegal as does a flagrant excess of authority. Unless the courts are able to develop doctrines of this kind, and to apply them energetically, they cannot impose limits on the administrative powers which Parliament confers so freely, often in almost unrestricted language. If merely because an Act says that a minister may 'make such order as he thinks fit', or may do something 'if he is satisfied' as to some fact, the court were to allow him to act as he liked, a wide door would be opened to abuse of power and the rule of law would cease to operate.

It is a cardinal axiom, accordingly, that every power has legal limits, however wide the language of the empowering Act. If the court finds that the power has been exercised oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful. Although lawyers appearing for government departments often argue that some Act confers unfettered discretion, they are guilty of constitutional blasphemy. Unfettered discretion cannot exist where the rule of law reigns. The notion of unlimited power can have no place in the system. The same truth can be expressed by saying that all power is capable of abuse, and that the power to prevent abuse is the acid test of effective judicial review.

The purpose of these generalisations is to emphasise that, despite the legalistic appearance of the doctrine of ultra vires, it need not prevent the development of wide-ranging judicial review. Many decisions of the courts have vividly illustrated the possibilities, especially in recent years.

THE DOCTRINE OF ULTRA VIRES

The central principle

The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law. To a large extent the courts have developed the subject by extending and refining this principle, which has many ramifications and which in some of its aspects attains a high degree of artificiality. The vital question is, to what lengths should it be carried?

Where the empowering Act lays down limits expressly, their application is merely an exercise in construing the statutory language and applying it to the facts. Thus if land may be taken by compulsory purchase provided that it is not part of a park, the court must determine in case of dispute whether

three different conclusions, showing all possible variations both on the law and on the facts. The High Court held that the law required impartial consideration, and that in fact it had not been given. The Court of Appeal held that the law required impartial consideration, but that it had been given. It was left for the House of Lords to hold that the law did not require impartial consideration at all: the minister could be as biased as he liked, provided that he observed the procedure laid down by the Act.

On the facts of the case, there seems much to be said for the middle road followed by the Court of Appeal. It is a virtue in a minister to have a policy and to advocate it. He also has to face opposition and to make public speeches. If, when he does so, he lets fall a defiant remark, that is by no means inconsistent with an ability to consider, or reconsider, the whole project when later the inspector's report arrives. The law must allow for the departmental bias which he is expected and indeed required to have. The relevant question is whether the minister, when he comes to make his decision, genuinely addresses himself to the question with a mind which is open to persuasion.[15]

The decision of the House of Lords threatened to become a source of difficulty because Lord Thankerton, who delivered the only reasoned speech, appeared to throw doubt on the applicability of the rule against bias to any kind of administrative case. He said that the minister had no judicial or quasi-judicial duty and that the only question was whether he had complied with the statutory directions to appoint a person to hold the public inquiry and to consider that person's report. He made no mention of many previous cases holding that a minister considering the report of an inquiry had a quasi-judicial duty—this was, indeed, the stock example of this situation.[16] Lord Thankerton said that an example of a quasi-judicial function was that of an arbitrator, and that was only in cases of that kind that bias was relevant. But an arbitrator has a judicial as opposed to a quasi-judicial function, that is to say, he decides according to the facts and the law only, and not according to policy. It was for discretionary decisions based on policy that the term 'quasi-judicial' was introduced, so that the principles of natural justice might be applied to them so far as practicable. The House of Lords therefore unsettled the 'basic English' of administrative law, in a manner all too characteristic of that period. Forty years later, however, it can be said that the decision has been paid little more than lip-service. The need to set higher standards for inquiry procedure has been recognised by the reforms made under the Tribunals and Inquiries Act and

[15] *CREEDNZ* v. *Governor-General* [1981] 1 NZLR 173, where a complaint of predetermination by ministers was likewise unsuccessful. The reasoning is much superior to that in the *Franklin* case.

[16] See above, p. 47, below, p. 504.

in accordance with the Franks Committee's recommendations, so that ministers' decisions now provoke less litigation. The House of Lords has also taken a much more extensive view of what is meant by judicial and quasi-judicial functions,[17] and it is once again quite clear that the principles of natural justice apply to administrative acts generally.[18]

EFFECTS OF PREJUDICE

Void or voidable?

In the case of Lord Cottenham's judgment, cited at the outset of this discussion,[19] the judges advised the House of Lords that the disqualifying interest made the judgment not void but voidable.[20] This has sometimes been repeated as if it were true of administrative cases involving bias, thus producing the concept of a voidable administrative act, already criticised. But Lord Cottenham's case had nothing to do with administrative powers. His judgment was given in the Court of Chancery, one of the superior courts of law, and it would naturally be valid unless and until reversed on appeal. It could therefore correctly be described as voidable as opposed to being void from the beginning.

But where an administrative act or decision is subject to judicial review, as opposed to appeal, the court can intervene on two grounds only: ultra vires, and error on the face of the record. Since bias will not appear on the face of the record, the court necessarily intervenes on the basis that the vitiated act is ultra vires, i.e. wholly unauthorised by law and thus void. There is no valid analogy with an appeal from a court of law. Judgments dealing with administrative decisions therefore proceed on the footing that the presence of bias means that the tribunal is improperly constituted, so that it has no power to determine the case; and accordingly its decision must be void and a nullity.[21] Thus the reviewing court's jurisdiction fits correctly into the framework of the ultra vires principle, whereas the notion of a voidable decision does not. A long line of judges of high

[17] For this see below, p. 518.

[18] This statement was approved by Lord Edmund-Davies in *Bushell* v. *Secretary of State for the Environment* [1981] AC 75 at 116.

[19] Above, p. 473.

[20] *Dimes* v. *Grand Junction Canal* (1852) 3 HLC 759 at 785. Parke B. added a dictum about decisions of magistrates, but the authorities he cited did not support him: see (1968) 84 LQR at p. 108.

[21] For fuller discussion see (1968) 84 LQR at p. 104. For other aspects of 'void or voidable' see above, p. 348; below, p. 526.