Landmark CHAMBERS

How far can you push the Court on relief and remedies, given the recent reforms to JR and what is the impact on client advice and practice?

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Introduction (1)

- Relief in JR has, of course, always been discretionary.
- "*It is a first principle of judicial review that remedies (relief) are discretionary: as to whether to grant a remedy and as to what remedy*" (see Fordham Judicial Review Handbook 7th ed.)
- ***R. (Save our Surgery Ltd) v Joint Committee of Primary Care Trusts*** [2013] Med. L.R. 172:

  *"**It is well-settled law that the grant of relief in judicial review is discretionary** … The discretion must be exercised judicially and in most cases in which a decision has been found to be flawed it would not be a proper exercise of the discretion to refuse to quash it … **The discretion of the court in deciding whether to grant any remedy is a wide one. It can take into account many considerations including the need for good administration, delay, the effect on third parties and the utility of granting new relevant remedy**. **The decision can be exercised so as to partially uphold or partially quash the relevant administrative decision** … The interest of the particular applicant is not merely a threshold issue which ceases to be material **once the requirement of standing has been satisfied, it may also bear upon the court's exercise of its discretion as to the remedy, if any**, which it should grant in the event that the challenge is well-founded … **When the defendant is a responsible public body the court may allow the judgment to "speak for itself" and decline to grant further** …"* (emphases added)

Introduction (2)

- In 2015, as you know, a new statutory test was introduced ***requiring*** that relief be refused "*if it appears to the court to be highly likely that the outcome for the applicant would* ***not have been substantially different*** *if the conduct complained of had not occurred*" – ("**the NSD test")**
- Entered into force 13 April 2015, so been with us now for over 8 years …
- I last spoke about the NSD test at this Conference in the summer of 2019; and published an article based on this: "*When does the "no substantial difference test" make a difference in judicial review applications? Does the outcome differ, depending on whether the case is based on EU or UK law?*" By James Maurici and Admas Habteslasie J.R. 2019, 24(2), 127-156

(i) S. 31 (2A) – (2C) of the 1981 Act: substantive stage

"(2A) The High Court—

(a) ***must refuse to grant relief*** *on an application for judicial review, and*

(b) may not make an award under subsection (4) on such an application,*

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court ***may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest****.*

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied." (emphasis added).

*** Damages, restitution or recovery of a sum due.**

(ii) s. 31(3C)-(3F) of the 1981 Act: permission stage

"(3C) ***When considering whether to grant leave to make an application for judicial review, the High Court—***

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so*.*

*(3D) If****, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.***

(3E) ***The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.***

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied." (emphases added).

Background to introduction of the 2015 NSD statutory test (1)

- The infamous *Daily Mail* article of 6 September 2013 ('*The judicial review system is not a promotional tool for countless left-wing campaigners*'), in which Chris Grayling MP, then Lord Chancellor, stated his intention to reform JR to deal with what he described in "*Judicial review – proposals for further reform*" (Cm 8703, Ministry of Justice, 6 September 2013) as "*time and money wasted in dealing with unmeritorious cases which may be brought simply to generate publicity or to delay implementation of a decision that was properly made*" (p. 3).
- The government focused on JRs that turned on what it described as *"minor technicalities*" (see "*Judicial review – proposals for further reform: the government response*", MoJ, February 2014, p. 3). The issue was put this way (p. 28, para 99): *"The government considers that judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality.* ***The government is considering strengthening the law and practice to enable the courts to deal more swiftly with applications where the alleged flaw complained of would have made 'no difference'"*** (emphasis added).

Background to introduction of the 2015 NSD statutory test (2)

- These proposals led to the amendments to s. 31 of the SCA 1981 – see above;
  - This was done despite detailed submissions and commentary opposing the change, see e.g. the UK Constitutional Law Association Blog by Ben Jaffey and Tom Hickman "*Loading the Dice in Judicial Review: The Criminal Justice and Courts Bill 2014*":
    - Describe the proposal as "*[t]he makes-no difference get out of jail free card*";
    - "***It is clear that the concern is not to make judicial review more effective or more streamlined, but a means of making it more difficult to pursue***. *A more effective way of dealing with "no difference" cases is for the Government to admit any error then agree to retake the decision. Instead, the Government will be incentivised to defend such claims. Courts will become embroiled in lengthy evidential disputes about a new defence of 'makes no difference'"* (emphasis added).
  - And was done despite the scepticism expressed by many others (including practitioners and Judges) as to whether the NSD test would actually make any difference to the previous practice.

Claims to which the NSD test does *not* apply

- **(1) Statutory review proceedings e.g. s. 288 claims:**
  - See ***Harrison v SSLUHC*** [2023] EWHC 16 (Admin) at [48] and [49];
  - But note: ***R. (Tewkesbury BC) v Secretary of State for Communities, Housing and Local Government*** [2019] P.T.S.R. 2144 seemingly applying the NSD test in s. 288 proceedings.
- **(2) The Competition appeal Tribunal (applies JR principles):** see ***Meta Platforms Inc v CMA*** [2022] Bus LR 1162 at [167] – [171] and **The Investigatory Powers Tribunal:** see ***Liberty v Security Service*** [2023] UKIPTribl at [183]:
  - Why? These Tribunals are tribunals of the United Kingdom "*and it would be odd (to say no more than that) if remedies were to differ according to whether proceedings are treated as being in one jurisdiction rather than another. The Senior Courts Act 1981 has no application in Scotland*"

Claims to which the NSD test does apply

(1) Obviously applies to JR proceedings in the Higher Courts;

(2) There are also parallel provisions inserted into ss. 15 and 16 of the Tribunals, Courts and Enforcement Act 2007 in relation to the Upper Tribunal's JR jurisdiction;

(3) ***R. (Leigh) v Commissioner of Police of the Metropolis*** [2022] 1 W.L.R. 3141 at para. 105, in relation to D's argument that relief must be refused under the NSD test *"I am prepared to assume that this is an application for judicial review within the scope of these provisions, even though it has become a claim under section 7 of the HRA";*

(4) ***Guiste v Lambeth LBC*** [2020] HLR 12 at [72] – [73], CA leaving open whether s. 31(2A) applies to County Court homelessness appeals under s. 204 of the Housing Act 1996;

(5) ***Luton Community Housing Ltd v Durdana*** [2020] EWCA Civ 445 at [29] and ***Forward v Aldwyck*** [2020] 1 WLR 584 at [25] applies NSD test in possession claim where public law grounds raised as a defence to private law proceedings.

What is the test where the NSD test does not apply?

- The test in ***Simplex v SSE*** [2017] PTSR 1041, 1060: namely that before a Court may exercise its discretion to refuse relief, it must be satisfied that the outcome would inevitably have been the same even if the public law error identified by the court had not occurred. So not necessary for a claimant to show that a public authority would – or even probably would – have come to a different conclusion.
- See ***R (Plan B) v SST*** [2020] PTSR 1446 at para. 272: "*The new statutory test modifies the **Simplex** test in three ways. First, the matter is not simply one of discretion, but rather becomes one of duty provided the statutory criteria are satisfied. This is subject to a discretion vested in the court nevertheless to grant a remedy on grounds of "exceptional public interest". Secondly, the outcome does not inevitably have to be the same; it will suffice if it is merely "highly likely". And thirdly, it does not have to be shown that the outcome would have been exactly the same; it will suffice that it is highly likely that the outcome would not have been "substantially different" for the claimant*"

The principles (1) - *Cava Bien Ltd*

- In ***R (Cava Bien Ltd) v Milton Keynes Council*** [2021] EWHC 3003 (Admin) at [52] , Kate Grange QC (sitting as a Deputy Judge of the High Court) distilled the key principles from the authorities. Lots of them … taken pretty much word for word from the judgment but removed case-law citations that support each one …
- i) The burden of proof is on the defendant;
- ii) The "highly likely" standard of proof sets a high hurdle. Although s.31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as , the threshold remains a high one;
- iii) The "highly likely" test expresses a standard somewhere between the civil standard (the balance of probabilities) and the criminal standard (beyond reasonable doubt);

The principles (2) - *Cava Bien Ltd*

- iv) The court is required to undertake an evaluation of the hypothetical or counterfactual world in which the identified unlawful conduct by the public authority is assumed not to have occurred;
- v) The court must undertake its own objective assessment of the decision-making process and what the result would have been if the decision-maker had not erred in law;
- vi) The court has the unenviable task of (i) assessing objectively the decision and the process leading to it, (ii) identifying and then stripping out the "*conduct complained of*" (iii) deciding what on that footing the outcome for the applicant is "*highly likely*" to have been and/or (iv) deciding whether, for the applicant, the "*highly likely*" outcome is "*substantially different*" from the actual outcome;
- vii) It is important that a court faced with an application for JR does not shirk the obligation imposed by s. 31(2A); the matter is not simply one of discretion but becomes one of duty provided the statutory criteria are satisfied;

The principles (3) - *Cava Bien Ltd*

- viii) The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the JR process remains flexible and realistic;
- ix) The provisions "*require the court to look backwards to the situation at the date of the decision under challenge*" & the "*conduct complained of*" means the legal errors that have given rise to the claim;
- x) The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred. S. 31(2A) is not prescriptive as to material which the Court may consider in determining the "*highly likely*" issue. Furthermore, a witness statement could be a very important aspect of such evidence, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred.

The principles (4) - *Cava Bien Ltd*

- xi) Importantly, the court must not cast itself in the role of the decision-maker. While much will depend on the particular facts of the case before the court, 'nevertheless the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of JR. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is "*highly likely*" that the outcome would not have been "*substantially different*" if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.

The principles (5) - *Cava Bien Ltd*

- xii) It follows that where particular facts relevant to the substantive decision are in dispute, the court must not "*take on a fact- finding role, which is inappropriate for judicial review proceedings*" where the "*issue raised…is not an issue of jurisdictional fact*". The court must not be enticed "*into forbidden territory which belongs to the decision-maker, reaching decisions on the basis of material before it at the time of the decision under challenge, and not additional evidence after the event when a challenge is brought*". To do otherwise would be to use s. 31(2A) in a way which was never intended by Parliament;
- xiii) The impermissibility of the court assuming the mantle of the decision-maker has been particularly emphasised in the planning context where e.g., it may require an assessment of aesthetic judgment or adjudicating on matters of expert evidence;
- xiv) Finally, the contention that the s. 31(2A) duty is restricted to situations in which there have been trivial procedural or technical errors was rejected by the Court of Appeal;

The principles (6)

- On that last principle, NB ***R (Goring-on-Thames PC) v S Oxfordshire*** [2018] 1 W:R 5161 at [47] *"[t]he proposition that the section 31(2A) duty applies only to "conduct" of a merely "procedural" or "technical" kind, and not also to "conduct" that goes to the substantive decision-making itself, is a surprising concept … The concept of "conduct" in section 31(2A) is a broad one, and apt to include both the making of substantive decisions and the procedural steps taken in the course of decision-making. It is not expressly limited to "procedural" conduct. Nor, in our view, is such a qualification implied*";
- On the "*exceptional circumstances*" certification exception in s. 21(2A): considered in ***Plan B*** see above (would have certified given scale of project and importance of issued); ***R (VIP Comms Ltd) v SSHD*** [201] EWHC 994 (Admin) (public interest in ensuring subordinate legislation that is ultra vires being declared to be such).

The principles (7)

- That magisterial exposition of the principles applied and approved in:
  - (1) ***R (HSPSPC) v SSE*** [2022] EWHC 3159 (Admin) at [162]-[163] & [173];
  - (2) ***Noren v SSHD*** [2022] EWHC 2942 (Admin) at [17];
  - (3) ***R (Stratton) v Enfield LBC*** [2022] J.P.L. 1010 at [39];
  - (4) ***Gathercole v Suffolk CC*** [2021] P.T.S.R. 359 at [48];

The principles (8)

- ***Plan B*** (see above, emphases added)
- *"273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind* ***that Parliament has not altered the fundamental relationship between the courts and the executive.*** *In particular,* ***courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review****. If there has been an error of law, for example in the approach the executive has taken to its decision-making process,* ***it will often be difficult or impossible for a court to conclude that it is "highly likely" that the outcome would not have been "substantially different" if the executive had gone about the decision-making process in accordance with the law****.* ***Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.*** *Furthermore, although there is undoubtedly a difference between the old* ***Simplex*** *test and the new statutory test, "the threshold remains a high one" (see the judgment of Sales LJ, as he then was, in* ***R (Public and Commercial Services Union) v Minister for the Cabinet Office*** *[2018] ICR 269, para 89 …."*

The higher test for breaches of retained EU law

- ***Pearce v Secretary of State for Business, Energy and Industrial Strategy*** [2022] Env. L.R. 4
- *"Where a decision is flawed on a point of EU law, the bar for the withholding of relief is set higher than under s.31(2A) (see e.g.* ***R (Champion) v North Norfolk District Council*** *[2015] 1 WLR 3710 at [57] to [58]). Two recent cases have raised the issue whether section 31(2A) is overridden or disapplied by the EU legal test where the latter is applicable, without finding it necessary to decide the point (****R (XSWFX) v London Borough of Ealing*** *[2020] EWHC 1485 (Admin) and* ***Gathercole v Suffolk Country Council*** *[2020] EWCA Civ 1179)"* [147].
- *"Agreed position is that the High Court is bound by EU retained case law to apply the more exacting EU law test where a challenge succeeds on an EU point of law"* [149].
- *" … I have reached the firm conclusion that, applying the test in s.31(2A) of the Senior Courts Act 1981 , there is no justification for withholding the quashing order the Claimant seeks, the same would follow if I were to apply the EU law test."* [150].

Pleading issues (1)

- Does the NSD test need to be pleaded in order for the court to find that it applies?
- **(1) At the permission stage**: no:
  - S. 31(3C)(a) clear that Court "*may of its own motion*" consider the NSD test;
  - But if do plead it then s. 31(3D) provides that the Court "*must*" rather than "*may*" consider it.
  - So, probably a good idea for Ds to plead it;
- **(2) In relation to relief:**
  - The language, of s. 31(2A) is "*if it appears to the court*" and fact this goes to Court's jurisdiction ("*must refuse to grant relief on an application for judicial review*") might suggest it need not be;
  - But more complex … the answer appears to be that it may or may not be required …

Pleading issues (2)

- CA considered this in refusing permission to appeal in the case of ***R (Good Law Project) v Secretary of State for Health and Social Care*** [2021] EWHC 346;
- *"The first argument […] is that reliance on s.31(2A) was not pleaded by the respondent. I accept that, in other circumstances, that might have given rise to a major difficulty for the respondent. But on a proper analysis of the material, it does not do so here."*
- *"[R]egardless of the pleading, the evidence and the submissions made during the trial addressed the issue as to whether the High Priority Lane made any difference to the outcome. In other words, the issue was regarded by both sides as important, and treated by them as such. There is no suggestion that there was or could have been any prejudice as a result of the respondent's failure to plead s. 31(2A) expressly."*
- Where the complaint is that D relied upon s.31(2A) without pleading it, the proper time to take the pleading point is before the trial judge; "*it is too late to raise such a point for the first time on an application for PTA*".

Evidence issues (1)

- (1) See the summary of principles in ***Cava Bien*** (above) "*The Court can, with due caution, take account of evidence as to how the decision-making process would have been approached if the identified errors had not occurred … a witness statement could be a very important aspect of such evidence, although the court should approach with a degree of scepticism self-interested speculations by an official of the public authority which is found to have acted unlawfully about how things might have worked out if no unlawfulness had occurred".*
- (2) ***R. (Oakley) v SSJ*** [2023] 1 W.L.R. 751 "*Evidence post-dating the challenged decision could in principle be relevant when considering relief. But if the decision were shown to be flawed, it would be appropriate to withhold relief only if it appeared to the court that it was highly unlikely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred: section 31(2A) of the Senior Courts Act 1981 ("the 1981 Act"). In this case, the material in Mr Fisher's statement does no more than identify certain assessments which (depending on their outcome) might identify work which could (perhaps with adaptations designed to mimic open conditions) be undertaken in closed conditions. That seems to me to fall very far short of the kind of evidence necessary to satisfy the high threshold set by section 31(2A) of the 1981 Act".*

Evidence issues (2)

- (3) ***R (Logan) v Havering London BC*** [2105] EWHC 3193 (Admin) at para. 55 the application of the NSD test "*should normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision-maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision-making by public authorities*".
- (4) ***R (Enfield LBC) v SST*** [2015] EWHC 3758 at [106] "*The amendments to section 31 of the 1981 Act are not prescriptive about the material which the court may take into account in considering whether 'it appears' to it to be 'highly likely that the outcome for the applicant would not have been substantially different' … it seems to me that a court should normally expect a witness statement or other document with a statement of truth to support a defendant's reliance on these amendments. There is no such material here. For that reason alone, I do not consider that the test in section 31(3C) or (2A) is met in this case".*
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Evidence issues (3)

- (5) ***R (Harvey) v Mendip District Council*** [2017] EWCA Civ 1784 at [47] "*it is relevant that Mr Sheppard presented no positive argument on behalf of the Council in support of such a view and the Council adduced no evidence to support it. Although a court will be appropriately careful in reviewing evidence produced by a decision-maker long after the decision to say how they would have proceeded in the sort of hypothetical scenario on which application of section 31(2A) depends, and will evaluate it carefully in light of the contemporaneous materials in the case, it is nonetheless telling that none of the decision-makers in this case have felt able to put before the court any witness statements to support the contention that they would have granted outline planning permission for the development even if they had appreciated that it was in breach of the Local Plan. In the absence of submissions and evidence from the Council, I simply do not know whether the decision-makers on the Planning Board would say there were material considerations which might have caused them to think it right to depart from the Local Plan and if so what those considerations were.*"

Evidence issues (4)

- (6) ***R (Public and Commercial Services Union) v Minister for the Cabinet*** [2018] I.C.R. 269 at [91]
  - Witness statement in that case *"not evidence of past facts by a witness with knowledge of those facts, but an exercise in speculation about how things might have worked out if no unlawfulness had occurred".*
  - *"speculation is informed by a background understanding of the parameters within which the minister was working and thus is entitled to some weight".*
  - *"However, self-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court".*
  - *"especially so where the public authority has not provided a full evidential picture of all matters which bear upon such parameters. In this case, the minister has not provided the court with a full account of the ebb and flow of debate in the second round of discussions, nor with the minutes of those discussions, to enable the court to make a critical evaluation of the assertions made by .. about the counterfactual position".*
  - *"Nor has the minister provided any detailed information about any discussions with HM Treasury relevant to the parameters under which he was working or about his own internal calculations regarding the level of flexibility available to him in the negotiations"*
  - *"The court has not been placed in a position in which it can make a critical evaluation of the assertions made by [the witness statement] and satisfy itself that they are justified."*

Two themes in the cases that are difficult to reconcile …

- **<u>1) The forbidden territory:</u>** *"be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial reviews"/ "The court must not be enticed 'into forbidden territory which belongs to the decision-maker …"*
- **<u>2) No shirking from the duties in s. 31:</u>** *"The warning in **Plan B Earth** is to be balanced with the requirement that judges do not shirk their s.31(2A) duty and necessarily undertake their own objective assessment of the decision-making process, and what its result would have been"* and *"It is important that a court faced with an application for judicial review does not shirk the obligation imposed by Section 31 (2A) . The provision is designed to ensure that, even if there has been some flaw in the decision-making process which might render the decision unlawful, where the other circumstances mean that quashing the decision would be a waste of time and public money (because, even when adjustment was made for the error, it is highly likely that the same decision would be reached), the decision must not be quashed and the application should instead be rejected. The provision is designed to ensure that the judicial review process remains flexible and realistic."*

Concerns with the NSD test (1)

- Seen concerns when Bill going through Parliament …
- Seen concerns in case-law … Courts invited into the forbidden territory …
- See e.g. "*Why fair procedures always make a difference"* Conor Crummeya M.L.R. 2020 83(6) 1221-1245 and *"Remedies in judicial review: confronting an intellectual blindspot"* Dr Joanna Bell P.L. 2022, Apr, 200-223. The latter based on a study:
- "*Two striking findings are worth mentioning immediately. First, the 2015 reforms were discussed in a substantial number of cases: 83 of the cases in the sample. This indicates that courts are being invited to refuse relief with some frequency. Secondly, however, there was only a very small handful of cases—nine in total —in which relief was refused on this basis. Three of these cases concerned a failure to conduct an impact assessment, which was either subsequently, or would soon be, corrected. In one, revocation of a sponsorship licence was clearly inevitable, due to the applicant's failure to meet a mandatory requirement. In the remaining five, the court was broadly convinced that the legal error was technical because, for instance, despite misconstruing the statutory or policy test, or improperly delegating a decision to a panel, the public authority properly directed its mind to all issues of substance*."

Concerns with the NSD test (2)

- The study has some limits:
  - (1) temporally, the study begins in January 2017, not in 2015;
  - (2) the study encompasses only successful JRs and not, therefore, any obiter remarks about how the 2015 reforms may have applied in unsuccessful challenges.
  - (3) The study does not consider the operation of the reforms at either the permission stage or in the Upper Tribunal.
  - But "*the study offers useful insights into the implementation of the 2015 reforms which, in turn, offer broader lessons for the future.*"

The NSD test as a bit of back-up judicial reasoning …

- Referred to in the study, obiter comment on the NSD test where JR grounds failed.
- See, e.g. only ***R (Kyam) v SSJ*** [2023] EWHC 160 (Admin).
  - *"91. In those circumstances, I conclude that … the reasons given as a whole are sufficient and adequate. If I am wrong about that in relation to the failure to mention Mr Stewart's opinion that Mr Khyam's progress is not simulated, or to give reasons for rejecting that conclusion, I have concluded that it is highly likely that the outcome for Mr Khyam would not have been substantially different if the conduct complained of had not occurred, and in those circumstances Section 31(2A) Senior Courts Act 1981 obliges me to refuse to grant any relief."*
- Lots and lots of examples like this …
- Reduces appealability of decision, need to overturn in CA: (i) merits *and* (ii) NSD test.

Some conclusions on the NSD test and advice for clients

- The study may suggest the NSD test more often than not fails to prevent relief being granted;
- But there seems to be a growing willingness by Courts to speculate and refuse relief under NSD test;
- An unresolvable tension in the provision between the forbidden territory for JR and not shirking the duty Parliament has imposed;
- So, takes me back to what Michael Beloff used to say was to the only advice to give clients in a JR where you think they have a strong case, namely: *"It is a case that you should win but you may well lose …"*
- But can now add to that: " … *and even if you win, as a result of the duties imposed on the Court by the NSD test, you may well still lose …"*

Other remedy issues (1) – s. 29A of the SCA 1981

- MOJ Consultation on JR Reform – July 2020
- Independent Review of Administrative Law – March 2021
- Royal Assent 28 April 2022 – only applies to claims after entry into force
- Introduces new s. 29A Senior Courts Act 1981:
  - Suspended quashing orders (SQOs)
  - Prospective quashing orders (PQOs)
  - Conditional quashing orders (CQOs)
- *"If a quashing order includes [suspension], the impugned act is (subject to any conditions under subsection (2)) upheld until the quashing takes effect. Where (and to the extent that) an impugned act is upheld by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect."*

Other remedies issues (2) – ongoing supervision (i)

- ***R (P) v Essex County Council***: Munby J said that it was not part of the function of the Administrative Court to: "*monitor, regulate or police the performance by the county council [in that case] of its statutory functions on a continuing basis. The function of the Administrative Court is ... to review the lawfulness of a decision, action or failure to act in relation to the exercise of a public function. In other words, the Administrative Court exists to adjudicate upon specific challenges to discrete decisions.*"

Other remedies issues (2) – ongoing supervision (ii)

- ***R. (ClientEarth) v Secretary of State for Environment, Food and Rural Affairs (No.3)*** [2018] EWHC 398 (Admin) at [12]–[19:
- Although substantial progress had been made, the court was still faced with a continuing failure by the Government to meet its obligation to reduce air pollution.
- The court had to keep the pressure on the Government to ensure that compliance with the Regulations and the Directive was actually achieved.
- It could not realistically monitor the Government's performance itself, but it could adapt its procedure to provide a quick, efficient and low-cost means of enabling the claimant to bring the matter back before the court if there was evidence that the objective in view was not being, or had not been, achieved.
- Where, as in the instant case, there was an expert claimant which, to date, had advanced only properly arguable claims and which had demonstrated both high level expertise, legal and technical, and a responsible attitude towards making a claim, it was appropriate to grant an extended liberty to apply.

Other remedies issues (2) – ongoing supervision (iii)

- That was a wholly exceptional course for the court to take, however, given the delays to date in achieving compliance, it was both necessary and appropriate.
- Accordingly, as against the secretary of state, the parties would have liberty to apply on notice: (a) for further or additional relief; (b) in relation to any issue that might arise during the preparation of the supplementary plan to the English air quality plan; and (c) as to the lawfulness of the final supplementary plan. Different considerations applied as regards the Welsh Ministers. There had not been the same unsuccessful attempts to produce a proper air quality plan by the Welsh Ministers and they had recognised the need to draft a compliant plan from early on in the proceedings. It was not appropriate to add the third of the three elements of the liberty to apply in their case. The ordinary rules requiring permission to apply for JR would apply to any future claim against them
- *"I do not read the judgment of Munby J, nor that of Holman J in Yusuf, as excluding the existence of jurisdiction in this Court to make such an order if the circumstances demand it. No party submitted that they did. The common law is an adaptable and flexible instrument well capable of devising remedies that meet the justice of particular cases*." [8]

Questions?

Thank you for listening

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