ELY PLACE
CHAMBERS

REMEDIES- HOW DO JUDGES DECIDE?

- **WHEN WILL THEY SUBSTITUTE THEIR OWN DECISION?**
- **WHEN WILL THEY REFER IT ALL BACK TO THE ORIGINAL DECISION MAKER?**
- **WHAT ARE THE PREDICTORS?**

Richard Clayton QC undertakes a wide range of advisory and litigation work covering data protection/Freedom of Information, discrimination, environmental, human rights, local government, public procurement, Privy Council/international work and regulatory/disciplinary work. He has extensive experience in conducting Supreme Court and Privy Council appeals and Lord Wilson in ***Mohammed v Public Service Commission of Trinidad*** [2017] UKPC 31 said "*Mr Clayton QC with the charm and skill which is characteristic of him*." Chambers Directory 2019 describes him as "*one of the finest minds at the Bar – an intellectual giant who is an asset to the Bar*." "*Very, very clever*."

Richard sits as a Deputy High Court judge and has been the United Kingdom representative to Venice Commission (Council of Europe's advisory body on constitutional law) since 2010. Recent cases of note include ***R (British Homeopathy Association v National Health Service England*** (2018) (consultation challenge*); **R (Page) v Darlington Borough Council*** (2018) (local government cuts); ***R (Watch Tower) v Charity Commission*** (2016) Court of Appeal (judicial review and alternative remedy); ***R(English Bridge Union) v Sports England*** (2015) (whether Sports England acted unlawfully in refusing to recognise bridge as a sport); and ***Kennedy v Information Commission*** (2015) (Supreme Court- Freedom of Information, Article 10 and common law right to freedom of expression). Richard has also undertaken 7 Privy Council appeals in the last 18 months and many cases in the Caribbean eg a guideline Court of Appeal decision on fairness in contempt proceedings (2018); defending Commissioners in a judicial review challenge to an inquiry (2019); a bias application claim against the Chief Justice to the Trinidad Court of Appeal and a case in Anguilla for the AG before the East Caribbean Court of Appeal.

INTRODUCTION

1. I have been asked to look at relief in judicial review proceedings and, in particular, to consider:

   - how do judges decide issues concerning relief;
   - when will they substitute their own decision for that of the public body;
   - when will the Court refer the decision back to the original decision maker; and
   - what are the predictors as to the Administrative Court's approach to relief?

2. The Court can grant relief in judicial review proceedings by making, in principle, the following orders: a mandatory order, a prohibiting order or a quashing order, a declaration, an injunction or a claim for damages, restitution or the recovery of a sum due (provided the claimant does not seek such a remedy alone).

1. HOW DO JUDGES DECIDE ISSUES CONCERNING REMEDIES?

3. The approach the Courts take in administrative law cases demonstrate at least two fundamental principles in play.

4. First, as Lord Hailsham stressed in ***Chief Constable of The North Wales Police v Evans***:[1]

   > *It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner.*

5. This deferential attitude accounts for the very restrictive approach the Courts normally take to mandatory orders, ie an order which requires a public body to make a particular decision. A Court will not, in general, award a mandatory order compelling a public body to reach a particular decision, as such, although a number of striking recent cases the Supreme Court has recently done so in: the Supreme Court has decided, that where there is a breach of a duty, a mandatory order may be granted- if it appears in all the circumstances to be the appropriate form of relief. Recent examples of mandatory orders include whether the Director of Public Prosecutions should promulgate a specific policy in relation to assisted suicide[2]and to require the claimant's son to be admitted to a faith school, which had excluded him on racial grounds.[3] In ***R(ClientEarth) v Secretary of State for the Environment*** the Supreme Court made a mandatory order requiring the Secretary of State to prepare new air quality plans for London and to deliver the plans to the European Commission by the end of the year.[4] As a result, ClientEarth has

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[1] [1982] 1 W.L.R. 1155 at 1160

[2] ***R(Purdy) v Director of Public Prosecutions*** [2010] 1 A.C. 345 at [56] (Lord Hope));

[3] ***R(E) v The Governing Body of JFS*** [2009] UKSC 15; [2010] 2 A.C. 728

[4] [2015] 4 All E.R. 724 at [30]–[31] and [35]

returned to the Administrative Court repeatedly to police the enforcement of the Supreme Court's order.[5]

6. More routinely, the Administrative Court will compel a public body to exercise a jurisdiction (like requiring the decision maker to hear and decide a case where the public body has misunderstood its statutory powers)[6] or to give consideration to using a discretionary power, as in ***R v Tower Hamlets LBC ex parte Chetnik Developments*** where the House of Lords made a mandatory order requiring the local authority to consider its power to refund rates paid in error by the rates payer.[7]

7. Secondly, a key principle of English legal system is that where there is a right, there is a remedy. But, exceptionally, in judicial review proceedings relief is discretionary, so that a claimant may win the battle by showing that a public body has acted unlawfully, but lose the war- because the Court declines to grant relief.

8. The rationale given by Lord Bingham to explain to a Martian why the principle of the rule of law should allow public law remedies to be discretionary was answered in these terms: "*well, yes, probably up to a point, provided the discretion is strictly limited and the rules for its exercise were clearly understood*".[8] Lord Bingham then went on to set out the grounds where the Administrative Court could properly refuse a public law remedy in a case of a proven abuse of power which he identified as:

    - delay;
    - standing;
    - acquiescence ie if the claimant fails to take a point before a decision maker which is reasonably open to him;
    - the conduct or motive of the claimant;
    - the exhaustion of other remedies;
    - the inevitability of the outcome;
    - no useful purpose for granting relief;
    - adverse consequences of granting relief;
    - effective no go areas- which are now very rare.

The new default position for ordering relief in judicial review proceedings

9. In the past public bodies which have been found to be acting unlawfully routinely argue that no relief should be granted by the Court in the exercise of its discretion, and has often succeeded.

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[5] see ***R(ClientEarth) v Secretary of State for the Environment*** [2016] EWHC 2740 (Admin); [2016] EWHC 3613 (Admin); [2017] EWHC 1618 (Admin); and [2017] EWHC 1966 (Admin).

[6] ***R v Nottingham County Court ex p Byers*** [1985] 1 WLR 403

[7] [1988] A.C. 858

[8] Lord Bingham "Should Public Law Remedies be Discretionary" published in Tom Bingham ***The Business of Judging Selected Essays and Speeches*** OUP, 2000.

10. Nevertheless, where a public body has acted unlawfully, the House of Lords has said that a Claimant is normally entitled *ex debito justitciae* to relief: see ***Grunwick Processing Laboratories v ACAS***.[9] Thus, in ***Berkeley v Secretary of State for the Environment***.[10] Lord Bingham said that the discretion of the court not to quash an *ultra vires* act was very narrow;[11] and Lord Hoffmann said that it would be exceptional for a court to exercise its discretion not to quash an *ultra vires* decision.[12]

11. This approach appears to have been developed further by the Supreme Court in ***R((Hunt) v North Somerset Council***. The Claimant challenged a local government cuts decision. He lost at first instance but succeeded before the Court of Appeal. However, by this stage the case had run on beyond the relevant budget year- so that it was impossible for the local authority to reinstate the cuts it had made. Nevertheless, Lord Toulson said:[13]

> *in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding. In some cases it may be sufficient to make no order except as to costs; but simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no "must" about making a declaratory order, and if a party who has the benefit of experienced legal representation does not seek a declaratory order, the court is under no obligation to make or suggest it.*

12. In ***Hunt*** the Supreme Court also held that the claimant was entitled to his costs: the local authority had been unsuccessful on the substantive issues and had been "*unsuccessful*" only in the limited sense that the ruling of the Court of Appeal had come too late, because the authority had successfully resisted the claim in the court below. The Supreme Court decided that, if a party who had been given permission to proceed with a judicial review claim and succeeded, after fully contested proceedings, in showing that the Defendant acted unlawfully, the Defendant must then establish some good reason why the Claimant should not recover his reasonable costs. Consequently, the Supreme Court adopted a similar analysis to that used by the Court of Appeal in ***M v Croydon LBC*** when dealing with costs when a Defendant fails to respond properly to a Pre-Action Protocol letter. In ***M*** the Court of Appeal held that, where a claimant sent a Pre-Action Protocol Letter, issued proceedings and obtained a positive result before the case settled, he was, nevertheless, entitled to his costs.[14]

The effect of a quashing order

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[9] [1978] AC 655 at 695 per Lord Diplock
[10] [2001] 2 AC 603
[11] *Ibid* at 608
[12] *Ibid* at 616
[13] [2015] 1 W.L.R. 3575 [12]
[14] [2012] 1 W.L.R. 2607

13. The remedy most frequently ordered by the Administrative Court is a quashing order. Section 31(5) of the Senior Courts Act 1981 states that:

> *If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition—(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or (b) substitute its own decision for the decision in question.*

14. The effect of a quashing order is to treat the original decision as being null and void and of no effect from its inception. As Lord Bingham pointed out in ***McLaughlin v Governor of the Cayman Islands***: [15]

> *14 It is a settled principle of law that if a public authority purports to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlap), the dismissal is, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declares or orders. Thus the office-holder remains in office, entitled to the remuneration attaching to such office, so long as he remains ready, willing and able to render the service required of him, until his tenure of office is lawfully brought to an end by resignation or lawful dismissal. These propositions are vouched by a large body of high authority which includes* ***Wood v Woad***;[16] ***Vine v National Dock Labour Board***;[17] ***Ridge v Baldwin***;[18] ***Anisminic Ltd v Foreign Compensation Commission***;[19] ***Malloch v Aberdeen Corpn***;[20] ***F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry***;[21] ***Calvin v Carr***;[22] ***Zainal bin Hashim v Government of Malaysia***; [23]***Boddington v British Transport Police***[24] *and Wade & Forsyth,* ***Administrative Law***.[25]

15. In general, once a Court decides that a decision is unlawful and that a quashing order is appropriate, it will usually make it plain that the decision under challenge has no effect, with the result that the House of Lords in ***Ahmed v Her Majesty's Treasury*** refused to suspend the quashing order it made.[26]

The impact of declarations on prospective decisions for the future

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15 [2007] 1 W.L.R. 2839

16 (1874) LR 9 Ex 190 , 198 (Kelly CB) and 204 (Amphlett B)

17 [1956] 1 QB 658, 675–676 (Jenkins LJ) and [1957] AC 488 , 500 (Viscount Kilmuir LC), 503–504 (Lord Morton of Henryton), 506–507 (Lord Cohen)

18 [1964] AC 40 , 80–81 (Lord Reid), 139–140 (Lord Devlin)

19 [1969] 2 AC 147 , 170–171 (Lord Reid), 195–196 (Lord Pearce), 207 (Lord Wilberforce)

20 [1971] 1 WLR 1578 , 1584 (Lord Reid), 1598–1599 (Lord Wilberforce)

21 [1975] AC 295 , 365 (Lord Diplock)

22 [1980] AC 574 , 589–590 (Lord Wilberforce for the Board)

23 [1980] AC 734 , 740 (Viscount Dilhorne for the Board)

24 [1999] 2 AC 143 , 154–156 (Lord Irvine of Lairg LC)

25 9th ed, pp 300-301

26 [2010] 2 A.C. 534 at 690 [4-8]

16. The jurisdiction of the Administrative Court to grant declarations is very wide, and it is clear that a Court will grant a declaration where a real issue arises between the parties in contesting the proceedings and there is a need for some relief to be granted.[27]

17. In particular, a Claimant may find declarations of real value when seeking to direct a decision maker to follow a particular procedure to achieve fairness- to affect the process for remaking the original decision which has been successfully challenged. For instance, a minister, who was held to be in breach of a statutory duty to consult interested parties when making subordinate legislation, was required to do so following the grant of declaration;[28] and a declaration that there should be sufficient disclosure to ensure that the claimant can properly present his best case fundamentally altered the procedure where victims of alleged miscarriages of justice challenged their convictions.[29] Declarations concerning the correct legal principles to be applied to future decisions are also valuable where relief has been refused in a particular case on grounds of delay.[30]

18. Unlike prerogative orders (like a mandatory order, prohibiting order or a final injunction), a declaration does not (formally) compel a public body to act (or refrain from acting) in a particular way. Thus, in ***Webster v Southwark LBC*** Forbes J held that, since the order of the Court was declaratory and not coercive, the local authority's refusal to comply with its terms did not amount to a contempt of court, although he did decide to issue a writ of sequestration.[31]

2. WHEN WILL JUDGES SUBSTITUTE THEIR OWN DECISIONS FOR THOSE OF THE PUBLIC BODY?

19. As indicated above, Judges will not substitute their own decision for those of the public body under challenge. The standard remedy is for the Court to quash an unlawful decision and allow the public body to remake it a second time.

20. However, as discussed above, the Supreme Court has recently granted mandatory orders- if it appears in all the circumstances to be the appropriate form of relief.

21. Furthermore, under CPR 54.19 the Court has the very limited powers to substitute its own judgment for that of the decision maker:

> *(1) This rule applies where the court makes a quashing order in respect of the decision to which the claim relates.*
>
> *(2) The court may –*

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[27] See Woolf LJ in ***R v Secretary of State for Social Services ex p CPAG*** [1990] 2 Q.B. 540, 556

[28] ***R v Secretary of State for Social Services ex p AMA*** [1986] 1 WLR 1

[29] ***R v Secretary of State for the Home Department ex p Hickey No 2*** [1995] 1 W.L.R. 734

[30] ***R v Dairy Product Quota Tribunal for England ex p Caswell*** [1989] 1 WLR 1089

[31] [1983] Q.B. 698

(a)

(i) remit the matter to the decision-maker; and
(ii) direct it to reconsider the matter and reach a decision in accordance with the judgment of the court; or

(b) in so far as any enactment permits, substitute its own decision for the decision to which the claim relates.

(Section 31 of the Supreme Court Act 1981 enables the High Court, subject to certain conditions, to substitute its own decision for the decision in question.)

22. For example, in criminal judicial review cases where a defendant challenges his sentence, the Administrative Court has the power to vary the sentence imposed by the criminal court.[32]

23. In addition, the Court now has special powers to substitute decisions under s 35 of the Senior Courts Act (as amended by s 141 of the Courts, Tribunal and Enforcement Act 2007):

(*5) If, on an application for judicial review, the High Court quashes the decision to which the application relates, it may in addition–*

(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or
(b) substitute its own decision for the decision in question.

(5A) But the power conferred by subsection (5)(b) is exercisable only if–

(a) the decision in question was made by a court or tribunal,
(b) the decision is quashed on the ground that there has been an error of law, and
(c) without the error, there would have been only one decision which the court or tribunal could have reached.

(5B) Unless the High Court otherwise directs, a decision substituted by it under subsection (5)(b) has effect as if it were a decision of the relevant court or tribunal.

24. The limitations that s 31(5A) imposes are significant. ***R((O'Connor) v Avon Coroner*** concerned an inquest. Following an argument with his then wife at a hotel in Crete, the father pushed their children off a hotel balcony and threw himself after them.[33] Their son died from his injuries. The father was tried for manslaughter in Greece, and acquitted on the basis of psychiatrists' reports, stating that he had been suffering from temporary psychosis. At an inquest into the son's death, the coroner delivered a verdict of unlawful killing. The claimant then sought judicial review of

[32] Section 43 of the Senior Courts Act 1981
[33] [2011] Q.B. 106

the verdict and an order substituting a narrative verdict describing the circumstances of the death. The coroner did not seek to uphold his verdict, acknowledging that he had erred in law in that he had treated as irrelevant the mental state of the father and his capacity to understand his acts.

25. The Divisional Court allowed the claim for judicial review, expressing its views on the approach the coroner ought to have taken towards insanity issue as well as and what other verdict, if any, ought to be substituted. The Divisional Court allowed the claim and held that, since a coroner's verdict of unlawful killing, necessarily, predicated a finding equivalent to that required for a conviction of, at least, manslaughter in a criminal trial (including the requisite mental element), the coroner had misdirected himself in law and his verdict had to be quashed. It decided that the Greek psychiatrists' reports did properly raise an issue of insanity, but this did not preclude its certain rejection- once all the appropriate evidence was evaluated. Consequently, the Court was unable to conclude that there was only one decision to which the coroner could without erring have come, and would therefore remit the matter for further consideration since section 31(5A)(c) of the Senior Courts Act 1981 precluded it substituting its own decision.

3. WHEN WILL THE COURT REFER THE DECISION BACK TO THE ORIGINAL DECISION MAKER?

26. The ultimate position is that the Court will invariably refer a decision back to the original decision maker- unless the factors identified by Lord Bingham justify another perspective. Whether the Court refuses to set aside an unlawful decision will always depend on the precise context and the particular facts and circumstances of the case.

27. Many of the factors that I shall now discuss are frequently addressed at the permission stage- and are extensive areas of law in their own right. I shall, therefore, confine myself to some illustrative examples of how these principles work out in practice when the Court comes to consider granting relief.

The Claimant's delay

28. The question of delay is often a knock-out blow at the permission stage, particularly where Claimants fail to appreciate that the primary obligation under CPR 54.5(1)[34] is to act "*promptly*" and that the 3 month period is a backstop.

29. Even if a Claimant is can show there is a "*good reason*" for delay, a Defendant is still entitled to argue under s 31 of the Senior Courts Act that undue delay has resulted in detriment to good administration or has caused substantial hardship or substantial prejudice.

[34] CPR 54.5(1) states that "*(1) The claim form must be filed – (a) promptly; and (b) in any event not later than 3 months after the grounds to make the claim first arose*".

30. The question of what amounts to detrimental to good administration is "*relatively unexplored*" (see Sedley LJ in ***R(Lichfield Securities Ltd) v Lichfield DC***),[35] and, as Richards J pointed out in ***R(Gavin) v Haringey LBC*** they "*serve to emphasise the need for caution in deciding whether the grant of relief really would be detrimental to good administration and, if so, how much weight to attach to that detriment*".[36] Lord Denning has said that Courts should be unwilling to excuse a breach of the standards required by administrative law merely upon the ground that to quash the decision would cause the decision-maker administrative inconvenience: "*even if chaos should result, still the law must be obeyed*".[37]

31. The conflict between ensuring that unlawful decisions do not stand and the interests of legal certainty in preserving decision making is illustrated by ***R v Dairy Produce Quota Tribunal ex p Caswell***[38] and the dicta of Lady Hale in ***Betterment Properties v Dorset CC***, a village green case.[39] In ***Caswell*** "*there is an interest in good administration independently of hardship, or prejudice to the rights of third parties*". [40] Nevertheless, it has been held evidence may be required where a Defendant argues that relief should be refused on the ground it is detrimental to good administration.[41]

32. Substantial prejudice will arise in the planning context where the developer has relied on permission to enter into contracts with third parties[42] or where there was a substantial delay in bringing judicial review proceedings and the developer would incur financial penalties.[43]

The question of the Claimant's standing

33. Consideration of standing at the permission stage is designed to weed out hopeless cases which have no realistic prospect of success and the test formulated in ***R v Somerset CC ex p Dixon*** was whether the Claimant could properly be described as "*a busybody nor a mere troublemaker*".[44]

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35 [2001] EWHC Civ 304 [39]

36 [2003] EWHC 2591 (Admin) [82]

37 ***Bradbury v Enfield LBC*** [1967] 1 W.L.R. 1311 at 1324 (Lord Denning MR); see also ***R. v Governors of Small Heath School Ex p. Birmingham*** CC [1990] C.O.D. 23, CA

38 [1990] 2 AC 738

39 [2014] A.C. 1072

40 ***R v Dairy Produce Quota Tribunal ex p Caswell*** [1990] 2 A.C. 738 at 749***; R v Monopolies and Mergers Commission ex p Argyll*** [1986] 1 W.L.R. 763 at 774; ***Coney v Choyce*** [1975] 1 W.L.R. 422 at 436; ***R v Panel on Takeovers and Mergers ex p Guinness*** [1990] 1 Q.B. 146 at 177; ***R(007 Taxis Limited) v Stratford on Avon DC*** [2011] A.C.D. 61.

41 ***R v Secretary of State for the Home Department ex p Oyeleye*** [1994] Imm. A.R. 268 (no evidence of detriment to good administration had been put before the court and accordingly the court could not be satisfied that there was any such detriment).

42 ***R v Swale BC ex p Royal Society for the Prevention of Birds*** (19910 2 Admin L Rep 790

43 ***R(Gavin) v Haringey LBC*** [2003] EWHC 2591 (Admin)

44 Dixon [1997] J.P.L. 1030

34. By contrast, at trial where the issue is whether relief should be refused, sufficient interest has to be assessed against the whole legal and factual context. In considering standing Lord Wilberforce in ***IRC v National Federation of Self-Employed and Small Business*** stressed in that:[45]

> *it will be necessary to consider the powers or the duties in law of those against whom the relief is asked, the position of the applicant in relation to those powers or duties, and to the breach of those said to have been committed. In other words, the question of sufficient interest cannot, in such cases, be considered in the abstract, or as an isolated point: it must be taken together with the legal and factual context. The rule requires sufficient interest in the matter to which the application relates.*

The Claimant's failure to take a point reasonably open to him

35. Waiver of a fairness complaint can be fatal. In ***R(Hill) v Institute of Chartered Accountants in England*** the Court of Appeal held that that there would be no breach of the rules of natural justice where the person accused or his duly authorised advocate agreed that a member of the tribunal could absent himself for a part of the hearing and, having read a transcript of the evidence given in his absence, return, continue the hearing and contribute to the decision.[46] However, it stressed that, for such an agreement to have effect, it had to be voluntary, informed and unequivocal. In the absence of any evidence that the client's apparent agreement was involuntary or uninformed, a tribunal was entitled to rely on the agreement of a properly qualified advocate to any proposed procedural course without having to go behind the advocate and check that his client personally agreed with what the advocate had said. In those circumstances it decided that there was no breach of the duty to act fairly.

36. Similarly, a local authority which sought to challenge the Minister's confirmation of its own proposals to reorganise schools relied on its own procedural error and was refused relief (although the Court said it might take a different view if the application had been made by a school governor).[47]

The Claimant's conduct or motive

37. It is sometimes said that a remedy may be refused where a Claimant is motivated by some improper purpose or ill will. However, the Court of Appeal in R(Mount Cook Land Ltd) v Westminster CC said that he Claimant's motive in making a claim for judicial review—whether it is commercial or otherwise—is not a relevant consideration in the Court's decision to grant or withhold a remedy[48] (unless the motive raises questions as to abuse of process.[49]

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[45] [1982] A.C. 617; and see also ***R v Secretary of State for Foreign Affairs ex p World Development Organisation*** [1995] 1 WLR 386 at 395, 396 and ***R v Inspectorate of Pollution ex p Greenpeace No 2*** [1994] 4 All ER 329 at 349-350

[46] [2014] 1 W.L.R. 86

[47] ***R v Secretary of State for Education ex p Birmingham City Council*** (1985) 83 LGR 79

[48] [2004] C.P. Rep. 12 at [45]-[46]

[49] See ***Land Securities Plc v Fladgate Fielder*** [2010] Ch. 467 at [67]).

The obligation to pursue alternative remedies

38. The question of whether there is an alternative remedy will normally be resolved at the permission stage- in ***R(Watch Tower) v Charity Commission*** Lord Dyson MR described the principles as being:[50]

> *If other means of redress are "conveniently and effectively" available to a party, they ought ordinarily to be used before resort to judicial review: per Lord Bingham of Cornhill in* ***Kay v Lambeth LBC****.*[51] *It is only in a most exceptional case that a court will entertain an application for judicial review if other means of redress are conveniently and effectively available.*

39. However, in ***R v Birmingham City Council ex p Ferrero***, the Court of Appeal allowed the appeal on the ground that the Court should have used the statutory appeals procedure.[52] In particular, the Courts have expressed the view that they should resist the temptation to give a judgment, simply because the case is before them- since that would undermine the policy underlying the exhaustion of remedies principle.[53]

Relief serves no useful purpose

40. A Court may refuse relief where the hearing is too late to have any practical effect. Thus, in ***R v Inner London Educational Authority ex p Ali*** the Court refused a declaration of a breach of statutory duty because the authority was due to be abolished very shortly after the judgment.[54]

41. Relief may also be refused for a breach of a fair procedure if the breach has not, in fact, prevented the individual from having a fair hearing. Thus, a failure of an investigatory body to disclose material did not entitle the Claimant to relief when the material was known to him and he had an opportunity to deal with it;[55] although it would be equally possible to argue that there was no breach of the duty to act fairly in the circumstances. Similarly, in ***R(Edwards) v Environment Agency (No.2)*** the House of Lords decided not to quash a decision to disclose a report which had, by the date of judgment, already been disclosed.[56]

The adverse impact on third parties or on administration

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50 [2016] 1 W.L.R. 2625 [19]
51 [2006] 2 AC 465 , para 30
52 [1993] 1 All ER 510
53 ***R v Brentford General Commissioners ex p Chan*** [1986] STC 113
54 [1990] COD 317
55 ***R v Monopolies and Mergers Commission ex p Brown*** [1987] 1 WLR 1235
56 [2008] 1 W.L.R. 1587 at [62]-[65]

42. It is common place to refuse relief where third parties have acted in the belief that a decision the regulatory body's decision was valid such as judicial review cases brought against the Monopolies and Mergers Commission[57] or the Take-over Panel.[58]

43. The implications of administrative burdens on questions of granting relief was exemplified by the Court of Appeal's decision in ***R v Monopolies and Mergers Commission ex p Argyle Group***.[59] The Chairman of the Commission decided that a take-over bid had been abandoned so that the bidder was free to make a fresh bid. Under the relevant statute the Commission was required to make the decision, not the Chairman. However, the Court of Appeal refused to grant relief. Sir John Donaldson MR was of the view that there was a need for speedy decision-making, finality and decisiveness to be made, particularly where financial markets were affected. The public interest had been protected by the Secretary of State who had approved the decision. These factors told against the Claimant, a commercial rival, seeking to prevent the bidder from making a fresh bid, and the Court refused in all the circumstances to make a quashing order.

25 April 2019 **RICHARD CLAYTON QC**

[57] ***R v Monopolies and Mergers Commission ex p Argyle Group*** [1986] 1 WLR 763

[58] ***R v Panel of Take-overs and Mergers ex p Datafin*** [1987] QB 815

[59] [1986] 1 WLR 763