Case-law update:
Significant cases for judicial review practitioners in the last 12 months

ALEXANDER RUCK KEENE

39 Essex Street
1. Introduction

1. This paper covers significant cases in the judicial review field in the last 12 months. It addresses: (1) issues of standing; (2) decisions amenable to judicial review; and (3) grounds for judicial review. Finally, it notes briefly one important case on procedural matters, although this will be covered in greater detail in other papers to be given today.

2. Standing

2. There have been very few cases over the last 12 months in which the issue of standing has been the subject of sustained analysis. For present purposes, it suffices to make brief mention of just one, R(Singapore Medical Council) v GMC [2006] EWHC 3277. Here, Davis J was faced with “most unfortunate litigation,” arising out of a decision of the GMC not to pursue a charge against a GMC-registered doctor who had been found guilty of professional misconduct. The main issue in the case was whether the GMC owed the Singapore Medical Council (‘SMC’) a duty of fairness, to include a duty to consult, when deciding not to pursue the charge. Whilst he concluded that he did not need to decide the question of standing to determine the case (adversely to the SMC), Davis J expressed considerable doubt as to whether the SMC in fact had standing to bring the claim. The fact that the SMC was not owed any of the duties of a complainant to the GMC was one factor suggesting that they lacked standing; furthermore, Davis J did not consider that the strongly worded concerns of the SMC as to the impact upon the “integrity” of the SMC could of themselves give the SMC standing.

Decisions amenable to judicial review

3. As with the previous year, 2006-7 has again been marked by debates as to the extent to which claimants can seek to challenge “political” decisions by means of judicial review. In R(Bancoult) v Secretary of State for Foreign & Commonwealth Affairs [2007] EWCA Civ 498, the Court of Appeal upheld in ringing terms the earlier decision of the High Court [2006] EWHC 1038 (Admin), that Orders in Council are acts of the executive and, as such were amenable to judicial review. The High Court had ruled that the Orders in Council promulgated in 2004 forbidding the return of the Chagos Islanders to their islands were invalid as an abuse of power. The Court of Appeal upheld the decision in the face of the appeal by the Secretary of State. It held that the use of the prerogative power of colonial governance did not enjoy generic immunity from judicial review. Where the prerogative was the source of the decision-making power, in constitutional practice the power was generally exercised by those holding ministerial rank, as had happened in the instant case. The Court further considered that there was nothing in either the Orders in Council or the claim for judicial review which made the issues non-
justiciable on grounds of subject matter. As to the merits of the, the Court of Appeal found in favour of the Chagossians: (1) on the basis that they had a legitimate expectation that they would be allowed to return home following the Government’s acceptance of the quashing of an earlier Ordinance preventing their return; and (2) on the basis that the 2004 Orders in Council were an abuse of power because they did not properly take their interests into account.

4. By contrast, the Courts showed themselves somewhat more wary of entanglement in matters arising out of the Iraq war and out of Guantanamo Bay.

5. In R(Gentle and Clarke) v Prime Minster & Ors [2006] EWCA Civ 1689, [2007] 2 WLR 195, the Court of Appeal was asked to rule on the lawfulness of the refusal of the Government to hold an independent inquiry into the circumstances that led to the invasion of Iraq. The claimants founded their case upon the procedural limb of Article 2 ECHR, submitting that it was at least arguable that the United Kingdom was in breach of Article 2 of the Convention by sending armed forces to Iraq without taking reasonable steps to satisfy itself that the invasion was lawful as a matter of public international law. The claimants also sought to argue that there were no forbidden areas in the Convention, such that there was no principle of non-justiciability which could be applied to put some potential violations of Article 2 of the Convention beyond judicial scrutiny. The Court of Appeal started by considering the question absent the Convention and the HRA 1998; it had little difficulty in determining that the question was non-justiciable on the basis that it would involve consideration of international instruments (the relevant UNSC resolutions) and of policy decisions made in the areas of foreign affairs and defence, both of which were the exclusive responsibility of the executive. So far, perhaps, so not very surprising. More interesting – although, again, ultimately not very surprising in its outcome – was the approach taken by the Court of Appeal to the question of Article 2 and its “forbidden areas.” The Court considered (1) that there was no arguable breach of the substantive obligation under Article 2; and (2) there had to be limits to the breadth of the Convention such that the procedural obligation (which was, itself, an implied obligation) envisaged that there were policy areas which would fall outside the scope of the Convention.

6. In R(Bisher Al Rawi & Ors) v (1) Secretary of State for Foreign & Commonwealth Affairs (2) SSHD [2006] EWCA Civ 1279 [2007] 2 WLR 1219,

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1 As they had to circumvent R (Campaign for Nuclear Disarmament) v Prime Minister of the UK [2002] EWHC 2777 (QB).
2 The Court did not find explicit guidance upon this point in the Strasbourg jurisprudence, but was content to proceed on the basis of “indications” in Taylor v United Kingdom (23412/94), McBride v United Kingdom (2006) 43 EHRR SE10, Jordan v United Kingdom (2003) 37 EHRR 2, as well as the decision in Scholes v SSHD [2006] EWCA Civ 1343.
the Court of Appeal was asked to consider the Secretary of State’s refusal to make formal requests to the United States government for the return to the United Kingdom of non-British persons detained at Guantanamo Bay, where such requests had been made on behalf of British citizens. The detainees had previously been resident in the UK and had been granted Indefinite Leave to Remain. The challenge was brought in several different ways: (1) on the basis that it constituted racial discrimination; (2) it constituted a breach of legitimate expectation; (3) it breached the rights of family members under Articles 3 and 8; (4) the Secretary of State had misinterpreted international law; and (5) his conclusion that representations would be ineffective and counter-productive was flawed by a failure to have regard to all material considerations. For present purposes, the last of these grounds of challenge is of importance. Applying R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598, the Court of Appeal, unsurprisingly, ruled that the challenge inappropriately sought to open up the “forbidden area” of foreign policy. Furthermore, the Court of Appeal considered that it was for the decision maker to decide what were the relevant considerations, especially where the decision concerned foreign policy. The Court of Appeal concluded with a number of general observations about challenges in this field of the law:

a. It is trite law that inherent in the whole of the ECHR is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. The task of striking this balance is shared by the courts and elected government. Where a public decision is challenged in a matter not touching the ECHR, again the courts and executive (if government is the primary decision-maker) each bear a responsibility for the result.

b. A recurrent theme of public law in recent years has been the search for a principled means of disentangling the functions of these different arms of government. The reach of the executive’s role has sometimes been described by reference to the “deference” accorded to it by the courts.

c. A difficulty in deciding this question of law (at least in a fair number of cases) arises from the fact that, particularly since the HRA came into force, our conception of the rule of law has been increasingly substantive rather than merely formal or procedural. Thus the rule of law requires not only that a public decision should be authorised by the words of the enabling statute, but also that it be reasonable and (generally in human rights cases) proportionate to a legitimate aim. But reasonableness and proportionality are not formal legal standards. They are substantive virtues, upon which, it may be thought, lawyers do not have the only voice: nor necessarily the wisest. Accordingly the
ascertainment of the weight to be given to the primary decision-maker’s view (very often that of central government) can be elusive and problematic.

d. The courts have a special responsibility in the field of human rights. It arises in part from the impetus of the HRA, in part from the common law’s jealousy in seeing that intrusive State power is always strictly justified. The elected government has a special responsibility in what may be called strategic fields of policy, such as the conduct of foreign relations and matters of national security. It arises in part from considerations of competence, in part from the constitutional imperative of electoral accountability (Secretary of State for the Home Department v Rehman [2003] 1 AC 153, per Lord Hoffmann). In the conduct of foreign affairs and in national security matters, the common law assigns the duty of decision upon the merits to the elected arm of government; all the more so if they combine in the same case. The court’s role is to see that the government strictly complies with all formal requirements, and rationally considers the matters it has to confront. Here, because of the subject-matter, the law accords to the executive an especially broad margin of discretion. It is the court’s duty to decide where lies the legal edge between the executive and judicial functions.

3. Grounds for judicial review

Reasons

7. A perennial question in reasons challenges is the extent to which it is appropriate for the decision-maker to rely upon reasons not fully articulated at the time. This question arose in stark terms in R (London Fire and Emergency Planning Authority) v Secretary of State for Communities and Local Government [2007] EWHC 1176 (Admin), [2007] All ER (D) 310 (May). The Secretary of State had decided to substitute her own decision for that of the disciplinary tribunal in the case of two fire-fighters dismissed for breaching their conditions of service (and, in particular, for their role in a fire-consultancy business they ran alongside their regular employment). The reasons in each case noted the fire-fighter's record in the Fire Service and indicated that "in the interests of justice" the secretary of state considered that dismissal was too harsh a penalty. When the authority applied for judicial review (among other things) on the ground that the secretary of state's reasons were insufficient, the secretary of state subsequently provided extended reasons. Stanley Burnton J quashed the decision on a number of grounds, inter alia, the deficiency in the reasoning. He considered that "[t]he invocation of 'the interests of justice' is wholly uninformative, no more than a formula suggestive of the absence or concealment of specific reasons. It is evident from the reduction in the sanctions itself that the Secretary of State thought dismissal
was too harsh, and ... to state that a sanction is too harsh is, or certainly should be, a statement of the obvious. Why the penalty was too harsh is unexplained ... The Authority was left entirely in the dark” (paragraph 64). He considered that the expanded reasons should not be accepted, in so far as they justify the original decisions: "[t]hey were produced a year after the decisions were taken, without the benefit of any contemporaneous record of the reasons given at the meeting of 12 January 2006 for rejecting the original recommendation, and well after the Authority had formulated its challenge to the original reasons. I do not question the honesty of the maker of the belated witness statement, but it seems to me that in these circumstances the Court cannot and should not be assured that the reasons put forward in the expanded reasons were in fact the reasons and, what is equally important, that they represent a comprehensive summary of the salient reasons for the Secretary of State’s decision to reject the unanimous recommendations of his [sic] officials and to allow the appeals" (paragraph 66). I note that he would have been prepared to accept that expanded reasons could be accepted where they indicated a defect in a decision which was not apparent in the original reasons, because “[i]n such a case, there is no reason for the court to be concerned that the expanded reasons are significantly incomplete, since the disclosed defect will lead to the quashing of the decision.”

Consultation

8. The 12 months since October 2006 have seen a number of important decisions about consultation. Key amongst these was the decision in R(Greenpeace) v Secretary of State for Trade and Industry [2007] EWHC 311 (Admin) (2007) Env LR 29. Here, Sullivan J considered the consultation process carried out by the Secretary of State for Trade and Industry on the future production of electricity in the United Kingdom. The Secretary of State had declared as a result of the consultation that he would support nuclear new build as part of the UK’s future generating mix. Greenpeace applied to quash the decision, basing itself upon the White Paper on the future of energy production in the UK that addressed the possible use of new nuclear power plants to produce electricity. The White Paper indicated that the Government was not minded to support new nuclear build and that there was to be “the fullest public consultation” before the Government reached any decision to change its policy. Thereafter the secretary of state announced a review of the White Paper and issued a consultation document or paper for an energy review on the securing of long-term affordable energy in the UK including the use of electricity generated from nuclear power new build. Responses on energy policy were sought from all interested parties including members of the general public over a 12 week consultation period. Greenpeace contended that this consultation process was entirely inadequate.

9. Sullivan J first had to consider whether the decision was amenable to judicial review, given that it was dealing with a “high-level strategic decision.”
Applying the well-known dicta of Laws LJ in R (Nadarajah) v SSHD [2005] EWCA Civ 1363, he found that the starting point to be taken was that where a public authority had issued a promise or adopted a practice that represented how it was supposed to act in a given area, the law would require the promise or practice to be honoured unless there was a good reason not to do so. He therefore found that it would have been “curious” if the law were not able to hold the Government to the promise of consultation given in the White Paper. He also took account the fact that the Government was a signatory to the Aarhus Convention, which required it to provide opportunities for public participation in the preparation of policies relating to the environment. Given the importance of the decision under challenge it was difficult to see how a promise of anything less than "the fullest public consultation" would have been consistent with the Government's obligations under the Aarhus Convention.

10. Sullivan J then considered the consultation process in some detail before pronouncing it very seriously flawed, procedurally unfair and a breach of Greenpeace's legitimate expectation that there would be the fullest consultation. In particular, he found that:

a. The purpose of the consultation document was unclear. It gave the appearance of being an issues paper, namely a preliminary stage in the consultation process, which was to be followed by a consultation paper containing proposals on which consultees could make informed comment.

b. As an issues paper, Sullivan J found that the consultation document was satisfactory but as the consultation paper on an issue of such importance and complexity it was manifestly inadequate.

c. The consultation paper contained no proposals as such, and even if it had, the information given to consultees, particularly regarding the critical issues of building costs and nuclear waste, was insufficient. There was effectively no discussion of the public considerations that would apply to nuclear new build.

d. The period given for consultation was inadequate and it could not be said that following the consultation period the decision made by the secretary of state would have been reasonably foreseeable by those consultees who took the consultation document at face value and relied upon it.

11. Sullivan J therefore granted the declaration, thereby forcing the Secretary of

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3 Strictly, the 1998 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.
State to restart the consultation process. As a postscript, I note that Greenpeace has now, in fact, pulled out of the revived consultation process on the basis that it, too, is a “sham.”

12. Stanley Burnton J had cause to consider the question of consultation in the context of the recruitment of doctors and dentists in R(Bapio Action Ltd) v (1) SSHD (2) Secretary of State for Health [2007] EWHC 1999 (QB). The Home Office changed the Immigration Rules applying to foreign postgraduate doctors and dentists and the Department of Health changed its guidance to NHS employers. The combined effect was to make it more difficult for foreign doctors and dentists to enter the UK for post-graduate training and for doctors on the Highly Skilled Migrant Programme to obtain appointments in the NHS. The Claimants contended the Home Office was under a duty to consult BAPIO (the British Association of Physicians of Indian Origin) before making the changes to the Immigration Rules. The Court found that the obligation to consult could not be based simply on the allegation that the change in the Immigration Rules was unfair. Further, Stanley Burnton J considered that the Immigration Rules were sufficiently similar to delegated legislation that he was bound to take into account the principle enunciated by Megarry J in Bates v Lord Hailsham [1972] 1 WLR 1373, namely that the court could not impose an obligation to consult into delegated legislation where Parliament had not done so. As the Immigration Rules contained no express or implied obligation to consult, Stanley Burnton J had therefore to examine whether there were any special circumstances which could lead to the imposition of such an obligation. He found that there was no established consistent pattern of consultation (cf CCSU v Minister for the Civil Service [1985] AC 374 and R v Falmouth Port Authority ex p SW Water [2001] QB 445). He also noted that BAPIO had had some warning that the changes were in the offing, at a meeting of NHS employers at which BAPIO was represented, such that there was no unfairness in the circumstances of the change. Interestingly, I note that the judge was prepared to accept (at paragraph 59 of the judgment) that any duty to consult would in fact have been inapplicable because the announcement of the consultation process would have led to a large number of doctors applying to take advantage of the old scheme before it was changed. He therefore dismissed the core of the challenge, although he did allow an ancillary challenge to the effect that the Home Office had not complied with its duty under s.71 Race Relations Act to have due regard to the need to eliminate unlawful racial discrimination (although he found that this failure did not justify quashing the decision).

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4 By way of contrast, another high-profile and controversial decision – that to move to a new method of recruiting junior doctors subsequently survived – just a legal challenge on the basis, inter alia of breach of legitimate expectation and a breach of an alleged duty to consult: R (Legal Remedy UK Ltd) v SoS for Health [2007] EWHC 1252 (Admin), in part because the Court accepted that the Secretary of State was in an urgent and difficult position (albeit, to the outside eye, one which appeared to be of his own making).
13. In R(Niazi & Ors) v SSHD [2007] EWCA Civ 1495, the Divisional Court considered the implications of the SSHD’s decision to abolish a discretionary ex gratia scheme for the payment of compensation to those who had suffered miscarriages of justice. The decision was announced without notice or prior consultation at a point when each of the lay claimants was in a position to make a claim under the scheme but had not yet done so. The remaining claimants were the firms of solicitors who were acting on their behalf, and who challenged the decision announced at the same time to reduce the costs to be awarded under the statutory scheme. As a starting point, the Divisional Court noted that the ex gratia scheme was entirely discretionary, that it was open to the SSHD to withdraw it, and that his reasons for doing so were not irrational. The Divisional Court considered that that had been nothing amounting to a representation or promise either that the scheme would continue indefinitely or that the SSHD would consult or give notice before withdrawing it. Furthermore, it noted that there was no established practice of consultation with anyone, let alone with unidentified future potential claimants under the discretionary scheme. There was an established practice of paying compensation in cases that were judged to qualify under the scheme, but that was a substantive, not a procedural, practice. In the circumstances, no legitimate expectation could be spelled out that the scheme would not be withdrawn without consultation. The Divisional Court also found against the solicitor claimants in their challenge to the reduction of the costs allowable, although this was in large part because of the concession made by the SSHD that the assessor would be prepared to consider representations in any individual case that the costs should be awarded at a higher rate.

14. A distinct note of exasperation can be detected in the Court of Appeal’s judgment in R (Fudge) v SW Strategic Health Authority & Ors [2007] EWCA Civ 803, arising out of a challenge to an alleged failure to consult under s.11 Health and Social Care Act 2001 (‘s.11’). Section 11 imposed an obligation on bodies identified in the section to make arrangements to secure public involvement in and consultation on proposals relating to national health services. At first instance, the High Court refused to grant a declaration that either the strategic health authority or PCT had been obliged to involve the public in or consult about the process by which the Department of Health had proposed to introduce an Independent Sector Treatment Centre (‘ISTC’), and had refused to quash the Department's decision to select a particular provider as preferred bidder under the ISTC scheme.

15. The Court of Appeal, applying the strict wording of s.11, found that the obligation to consult only arose where the relevant body was actually providing health services (rather than where it was to provide services in the future). On the facts, there was a limited period of time when the PCT was providing services so as to fall within s.11; the Court of Appeal found that the PCT did not escape the obligation on the basis that it was not responsible for

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making any decision. However, the Court refused to grant a declaration because it would accomplish nothing, especially in circumstances where the Claimant had – very late in the day – acknowledged that there was no question of such a declaration actually changing matters. The Court expressed the strong view that, “in those cases where the obligation under s.11 may be limited, very little will be achieved by bringing proceedings for judicial review” (paragraph 66), and that “these proceedings were wholly disproportionate to the limited utility of the result achieved.”

16. Medical issues arose again in *EISAI Limited v NICE* [2007] EWHC 1941 (Admin). Here, the question before Dobbs J was the appropriateness or otherwise of guidance issued by NICE in respect of the use of a particular class of drugs for the treatment of Alzheimer’s. A key plank of the challenge was that the consultation process entered into before the decision was made was unfair because only a partially executable version of the economic model prepared by independent academics was disclosed to consultees. Dobbs J rejected the core of the challenge, finding that although the consultation process was “highly structured” (paragraph 60), the limited disclosure of information given during the process was sufficient to meet the criteria set down in case-law. It appears that the judge was in part swayed by the fact that the claimant was a pharmaceutical company, and was not excited by the prospect of those in the claimant’s position being able to peer review NICE’s decisions given that they had an interest in the outcome of those decisions. She did, however, allow the challenge to a limited degree, finding that the guidance given was discriminatory in its approach to the issue of atypical groups.

**Legitimate expectation**

17. Funding tensions between local and central government featured in two of the main decisions on legitimate expectation in the course of 2006-7. In linked challenges ([2007] EWHC 1873 Admin), both Corby and Slough Borough Councils challenged the decision of the Secretary of State for Communities & Local Government that they were not entitled to incentive payments under the Local Authority Business Growth Incentives Scheme. Under the scheme local authorities were entitled to receive a grant where the annual growth in its business rates receipts exceeded a set target. On the facts, Newman J found that the scheme as promulgated gave rise to a substantive legitimate expectation on the part of the Claimants that actual rateable growth recorded would be reward. However, the judge found that, to put it charitably, matters had gone somewhat awry in the way in which the scheme had been implemented and, in particular, in the way in which the Valuation Office Agency had been instructed to calculate growth for purposes of determining eligibility to a grant. The effect was that, in both cases, significant growth was not recorded, and hence the claimant local authorities did not receive any grant. Perhaps unsurprisingly, the judge then found that the Secretary of
State had acted incompatibly with the legitimate expectation of the Claimants without legal excuse for doing so. He therefore quashed the grant determinations.

18. If Corby and Slough were satisfied with the outcome of their challenge, it is fair to say that Hillingdon is unlikely to have been with the outcome of their challenge. In R(LB Hillingdon) v Secretary of State for Education and Skills [2007] EWHC 514 (Admin), Hillingdon challenged the decision of the Secretary of State to limit the funding available for after-care for those who had previously been unaccompanied asylum seeking children (‘UASC’). As a result of a 2004 decision, local authorities came under a duty to provide after-care services to UASC under s.23C(1) Children Act 1989. The Secretary of State had provided additional funds to local authorities most affected by the judgment, because they were particularly close to airports or ports. Hillingdon had been one of these authorities, and had benefited in the financial year 2004-5. In 2005, the funding had been reduced; Hillingdon had, however, determined its budget on the basis of the 2004-5 funding and found itself with a very substantial hole in its budget. It challenged the decision on the basis, in particular, that it had a legitimate expectation that the 2004-5 funding would not be altered to its detriment. However, Forbes J found that on the facts that the Secretary of State had never promised that the grant would be paid at the same level beyond the first year, and that it was or ought to have been clear to Hillingdon that the funding formula was likely to be reviewed in future years. He therefore declined to find any legitimate expectation upon which Hillingdon could rely. He also found that, although it might be useful for a local authority to know the amount of a particular year’s grant before setting its budget, the fact that the grant was discretionary meant that it was lawful for the Secretary of State to decide on its amount even after the local authority had incurred the expenditure.

Bias

19. As in previous years, the Courts in 2006-7 found new areas in which to consider questions of bias. Perhaps the most important decision is that of R(Brooke & Ors) v Parole Board [2007] EWHC 2036 (Admin), in which the independence of the Parole Board was challenged under both the provisions of the common law regarding apparent bias and Article 5(4) of the ECHR. The Court considered the history of the Parole Board, and also examined in some detail its current arrangements and its relationship with its sponsoring department, the Ministry of Justice. Although two previous – and recent – Strasbourg challenges to the Board’s independence had been rejected by the ECtHR, the Court found that the full evidence had not been before the Strasbourg court in either decision. The Court held that the relationship of

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sponsorship between the MoJ and the Parole Board was such as to create what objectively appeared to be a lack of independence, and to cause the MoJ sometimes to treat the board as part of its establishment. That had led to inadequate protection for the security of tenure of members. It had also led to documented examples of the use of the powers of the MoJ (of funding, appointment and the giving of directions) which had not been consistent with the need to maintain the board’s objective independence. The Court was particularly concerned by the practice of regular confidential meetings between the Parole Board and the MoJ, given that the latter was a party before it on decisions determinative of prisoners’ liberty. In conclusion, “[w]hat was a perfectly appropriate, if not essential relationship with the Secretary of State when the Board existed to advise him upon decision-making which was his statutory responsibility is no longer appropriate once the Board has been entrusted by Parliament with the duty of making the decisions itself, as a court, and those decisions are binding upon him” (paragraph 63).

20. As in previous years, planning matters continued to throw up thorny questions of bias. An example is R (Port Regis School Limited) v North Dorset District Council & Shaftsbury Agricultural Society [2006] EWHC 1373 (Admin); [2006] JPL 1695. Here, the allegation of bias concerned Freemasonry. There, the challenge arose from a proposal that one of the rooms of a pavilion to be erected on a new agricultural showground would be set aside for a use by a Masonic lodge. The allegation of apparent bias arose from the fact that two of the councillors who had attended and voted at the meeting were Freemasons. One of the objective facts being assessed by the Court was that it was wrongly believed that the Lodge intended to take a room. The case appears to have proceeded on the basis that the particular nature of Masonic rules and relationships gave rise to a real possibility of bias. The Court considered that Masonic oaths did not require councillors to act contrary to law or exercise partially towards Masons or Freemasonry. In the terms in which the issue was addressed, the conclusion was hardly surprising. As Newman J indicated, the case could have been fought on the basis of an advancement of common interests. In that sense the case would have been little different to a councillor being a leader of a scout group, and a planning application benefiting another scout group.

21. R (Island Farm Development Limited) v Bridgend County Borough Council) [2006] EWCA Civ 1573 arose out of a council’s refusal to sell land to a developer. The ‘Island Farm’ site, of some 13.5 hectares, had been acquired by the predecessor to the council for the purposes of commercial development and planning permission was in place for such a use. In the 2000s, the leader of the council pushed the scheme forward, in conjunction with training facilities for the Welsh Rugby Union. By 2004 the Council’s cabinet had agreed Heads of Terms for the disposal of their property. However the contract was not signed before the majority group lost power in
elections. The opposition parties had campaigned against the Island Farm scheme in the elections and on forming a coalition administration instructed officers to freeze the Island Farm disposal process. One member of the new cabinet had been secretary of the Island Farm Action Group which had campaigned against the scheme. In January 2005 the Council’s coalition cabinet decided not to proceed with the sale and to retain the land. The developer attacked the decision for pre-determination bias, arising primarily from the election manifesto, the councillor’s involvement in IFAG and as Mr Justice Collins said “the fact that the majority of the cabinet disapproved of the development was well known to all interested in the matter.” However, the judge found that the minutes showed that the Cabinet considered the matter without preconceptions.

22. Mr Justice Collins considered that the councillors were entitled to act on their election policies and seek to stop the sale if they lawfully could. The judge expressed some doubts about the approach of Richards J in R(Georgiou) v Enfield LBC, saying:

“Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance... The reality is that Councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should.”

23. Because of the particular statutory route of appeal, National Assembly for Wales v Condron [2006] EWCA Civ 1573 is not a judicial review decision, but it falls to be considered in this section because it raises the same issues. The apparent bias issue here arose from an alleged remark made in a chance meeting between the Chair of the Planning Decision Committee, Carwyn Jones AM, and one of the objectors to a highly controversial opencast mining scheme, Mrs Jennie Jones. The application had received a favourable recommendation from an Inspector and the Assembly’s Committee was to debate the report the following day. Mr Jones was alleged to have said that he was “going to go with the Inspector’s Report.” The Committee then resolved that it was minded to grant the application and permission, the subject of the challenge, was formally issued in due course. It was found at first instance that Mr Jones was biased. Before the Court of Appeal, however, the view was taken that the attributed words went no further than indicating a predisposition to follow the inspector’s report and not a closed mind. It did not

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matter how the person to whom those words were addressed had interpreted them. The question was whether the fears expressed by the complainant were objectively justified. Accordingly, the Court made it clear that the judge must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision. The Court of Appeal emphasised that there was a clear distinction between a legitimate predisposition towards a particular outcome and an illegitimate predetermination of the outcome. The wider context of a chance meeting and a casual remark was also important in assessing the significance of the words used. Having regard to the terms of the inspector’s report, the fact that the members of the committee had relevant training and were subject to a code of conduct, and the nature of their discussions, which were unusually prolonged, a fair-minded and informed observer would not conclude that there was a real possibility that Mr Jones, himself, or the Committee as a whole was biased.

24. Finally in this section, I note the case of R(Ware) v Neath Port Talbot CBC [2007] EWHC 913 (Admin). Although not strictly a bias case, this case is of considerable relevance to planning matters, and represents something of a cautionary tale for monitoring officers. Four of the local authority’s councillors who sat on the local authority’s planning committee and who formed a non-politically aligned group attended a meeting where opponents of a proposed development discussed their objections. The councillors did not express any view as to the planning application at the meeting and later made a declaration to that effect. Before the planning committee convened to reach a decision about the development, a monitoring officer advised that the individual members should make a site visit to the proposed development and that a failure do so, whilst not precluding a member from the decision-making process, might call into question the decision-making process and result in a challenge to any decision reached. When the planning committee convened to consider the planning application, a monitoring officer asked the four councillors if they would consider making another declaration about their attendance at the earlier meeting at which the application had been discussed. The councillors asked if it would be better for them to leave. The monitoring officer told the councillors that it was a matter for them, but he warned them of the possibility of a complaint to the ombudsman if they participated in the decision-making process. The four councillors having regard to that advice did not participate further. The application for the development was then approved by 13 votes to 12. The Claimant contended that the four councillors had wrongfully recused themselves so that the decision to grant the application in their absence fell to be quashed.

25. In line with the approach that he had taken in Island Farm, Collins J emphasised that councillors should approach the decision with an open mind and though they might be predisposed to a particular view they should be prepared to change their minds in response to the argument. However, he
emphasised that it was equally important that councillors should not be
prevented from carrying out the duties imposed on them by the democratic
system by overcautious advice from monitoring officers. They should not
participate in a decision only if there was a real risk that a fair-minded and
informed observer would perceive bias. In the instant case, Collins J held that
there was no doubt that the four councillors had felt under pressure not to
participate in the decision-making process. He found that the advice given to
them by the monitoring officer had been wrong in the impression that it gave
and was intended to give. On the particular facts of the case before him, he
found that advice given to the councillors had been tantamount to a
suggestion that the councillors had better not remain and take part in the
decision-making process. On the evidence it was plain that the councillors
had wanted to remain and take part in the process but for the advice that they
received. They had not had the opportunity of independent advice and their
absence might have affected the planning committee’s vote and the decision
reached. The decision reached on the application was therefore quashed.

Irrationality

26. As in previous years, there have not been a great number of cases in which a
rationality challenge has succeeded.9 Perhaps the most important within the
last 12 months was R(Bradley & Ors) v Secretary of State for Work and
Pensions [2007] EWHC 242 (Comm). The Ombudsman found that there had
been maladministration on the part of the Secretary of State, in particular in
respect of the advice and information provided to workers as to the security to
pensions provided by the Pensions Act 1995. The Secretary of State rejected
all but one of the Ombudsman’s findings and recommendations. Bean J,
adopting the reasoning of a case concerning the Local Government
Ombudsman,10 concluded that, absent a successful application for judicial
review on the part of the Secretary of State, the findings of the Ombudsman
are binding on him, subject only to exceptions where the findings are
objectively shown to be flawed or irrational or peripheral, or where there is
genuine fresh evidence to be considered.11 Bean J found that, on the facts,
no reasonable Secretary of State could disagree with the Ombudsman’s
finding of maladministration in relation to the information issued to the public
about the security of pension schemes. Bean J did, however, decline to
quash any of the other rejections, in part because he found the Ombudsman’s
conclusions to have been logically flawed in some key respects.

27. Two decisions in the planning field merit short notice here, as both shed
different light on the weight that must be placed on the report reached by a

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9 One, following in the footsteps of R (Rogers) v Swindon National Health Service Primary Care
Trust [2006] EWCA Civ 392 was R (Otley) v Barking & Dagenham NHS PCT [2007] EWCH 1927
(Admin), in which Mitting J found the decision of the NHS trust to refuse to fund a treatment for
cancer was irrational where the treatment produced beneficial results and the patient’s case was
exceptional.


11 See R(Danaei) v SSHD [1997] EWCA Civ 2704.
planning inspector. In both R (Chaston) v Devon County Council [2007] EWHC 1209 (Admin) and R (Enfield LBC) v Mayor of London [2007] EWHC 1795 (Admin), conclusions reached by planning inspectors were not followed by the relevant public authority; in both cases, it was found that the decision was unsustainable in consequence.

28. One decision of considerable importance to practitioners in the community care field raised, in part, questions of rationality, but in reality is of more importance as an indicator of the stance that the Courts are likely to take in future to certain classes of challenge in this field. In Lambeth LBC v Irenenschild [2007] EWCA Civ 234, the Court of Appeal had some stern words to say about challenges to community care assessments under s.47 NHSCA 1990. The judge at first instance had found that an assessment had been unlawful on a number of bases, in particular because the assessor had failed to obtain and to take into account an OT report and because she had failed to take into account the statutory FACS guidance. The Court of Appeal allowed Lambeth’s appeal, but the decision is of note for the views expressed as to the circumstances under which such challenges should be brought. Hallett LJ emphasised that assessments cannot be the subject of “over zealous textual analysis. Courts must be wary, in my view, of expecting so much of hard pressed social workers that we risk taking them, unnecessarily, from their front line duties” (paragraph 57); further “a community care assessment... is operational and inevitably judgmental. It must be carried out quickly. I accept the Appellants’ argument that a social worker preparing such an assessment cannot be expected to engage in a detailed analysis of the material obtained (often from many sources), decide what particular points have and have not been specifically addressed by the ‘service user’ thus far, and then take steps to ensure that any points which have been missed or not sufficiently addressed are drawn to the attention of the ‘service user’ for his or her response” (paragraph 71).

Abuse of power

29. In R(S) v SSHD [2007] EWCA Civ 546, the Court of Appeal had cause to analyse the doctrine of abuse of power within the immigration context. At first instance, removal directions had been quashed on the ground that the SSHD’s delay in handling of S’s asylum application (which had been made in 1999) had been excessive and unfair. At first instance, the Court had considered the test for unfairness and abuse of power in R(Rashid) v SSHD [2005] EWCA Civ 744, and had concluded that, while S had not satisfied the test, he had still been treated unfairly. The Court of Appeal noted that, in the ordinary course of events, S’s claim would rest solely on the basis of his Article 8 rights and that delay alone would not normally improve such a claim. The Court of Appeal then turned to consider Rashid, and found the

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12 [2007] EWHC 51
13 See Strbac v SSHD [2005] EWCA Civ 848.
decision not to have been entirely satisfactory. In particular, the Court of Appeal was unhappy with the fact that Rashid appeared to transform “abuse of power” into a “magic ingredient” able to achieve remedial results which other forms of illegality could not match, in circumstances where the existing authorities did not go anywhere near that far. The Court of Appeal preferred to approach matters by a different route, namely that the court could conclude that a legally material factor in the exercise of the SSHD’s discretion to grant leave to remain was the correction of injustice and that, in a suitably extreme case, it could be that there was only one way in which the SSHD could exercise that discretion. On the facts of S’s case, the Court of Appeal concluded that there had been a deliberate and unlawful decision to postpone a category of cases solely to deal with a backlog, without any regard for fairness and consistency. In the circumstances, the Court of Appeal considered itself entitled to conclude that, had S’s case been dealt with within a reasonable period of time, he would have obtained first ELR and then ILR, such that his failure to do so was due to illegality on the part of the SSHD.

Human rights

30. Perhaps the most important human rights decision of the year, at least for judicial review practitioners, was Johnson, a decision which divided the judicial committee of House of Lords and has divided opinion amongst practitioners. The short point before their Lordships was whether a privately-owned care home was performing functions of a public nature within the meaning of s.6(3)(b) HRA when providing care and accommodation to residents placed with it by a local authority. Lord Bingham and Baroness Hale dissented strongly; but Lords Mance, Neuberger and Scott considered that the home was not exercising such functions. Whilst all of their Lordships appeared to agree on the test to apply, and the ultimate test was the functions being performed by the contractor, they differed sharply as to whether the particular functions were of a public nature. In the final analysis, it appears that the touchstone of the difference between the majority and the minority was their attitude to the consequence of a finding in Mrs Johnson’s favour, namely that those placed in the care home by a local authority would be able to rely directly on the provisions of the ECHR when their fellow privately-paying residents would not have that protection. There were some strong positions taken by their Lordships, perhaps the starkest of which was Lord Neuberger’s apparent willingness to countenance contracting-out “certain services previously performed by local authorities [so as] to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators” (paragraph 152).

31. R (Wright & Ors) v Secretary of State for Health & Anor [2006] EWHC 2286 (Admin) concerned the applicability of Articles 6 and 8 to the scheme set up by the Care Standards Act 2000 for the protection of vulnerable adults. A key

14 Johnson & Ors v Havering LBC [2007] UKHL 27.
feature of the scheme was the provisional listing on the POVA list of care workers following referral under s.82 of the act. Inclusion on the list acted as an effective bar to a person working as a care worker with vulnerable adults, subject to three possible remedies: (1) trying to persuade the Secretary of State that the listing was unjustified; (2) applying to the Care Standards Tribunal, but only after a provisional listing had lasted for more than 9 months; or (3) applying for judicial review. The claimants were all made the subject of references in respect of matters which had taken place before the Act had come into force.

32. Stanley Burnton J concluded that, given the aim of the Act, it was necessary that the Secretary of State be able to consider matters that had arisen before the Act came into force, even if there was the potential for unfairness in retrospection, even if there was not the equivalent duty to refer a person in respect of “pre-Act acts” as there was in respect of post-Act acts. He considered that the fact that the suspension was temporary did not prevent Article 6 ECHR from being engaged, since listing had so significant an effect on the listed person’s right to work. This being so, he considered that the provisional listing procedures laid down by the Act were unfair and a disproportionate approach to the problem of provisional action. In particular, the fact that care workers could not apply to CST for 9 months was an unjustified interference with the right of access to the courts under Article 6; the availability of judicial review was in the circumstances an inadequate remedy. He further considered Article 8 to be considered, given that listing interfered with personal relationships with colleagues and the vulnerable adults involved. Given his conclusions on the Article 6 question, it was perhaps not surprising that the judge concluded that the listing procedure was incompatible with Article 8, too. Interestingly, Stanley Burnton J took it upon himself to suggest ways in which the scheme could be modified to render it compatible, for instance by modifying the provisional listing so as to allow for imminent listings (i.e. a prohibition on working with vulnerable adults which came into force a short period after notification of the decision to be continued unless the care worker made application to the CST within a specified period).

33. Religious questions arose in a number of the cases. The fate of Shambo the bull occupied the attention of the press and the Courts in Swami Suryanda v Welsh Ministers [2007] EWCA Civ 893, although the ultimate decision was perhaps not entirely surprising. Clothing restrictions at school were considered in both R (X) v Headteachers and Governors of Y School [2007] EWHC 298 (Admin) and Playfoot v Millais School Governing Body [2007] EWHC 1698 (Admin). In both cases, the Courts sought to balance the rights of individual pupils under Articles 9 and 14 ECHR to wear particular items of clothing in purported manifestation of their religious beliefs with the right of their schools to impose a uniform. In both instances, the Court sided with the schools, and in light of these decisions, it seems that only a truly egregious or ill-considered policy will be overturned by the Courts.
Procedural matters

34. In Tweed v Parades Commission for Northern Ireland [2006] UKHL 53, the House of Lords had to consider the question of disclosure in the judicial review context. The precise factual circumstances of the case are not relevant for present purposes. Traditionally, this has been limited to specific documents and has been ordered only where there was evidence that the public authority’s written evidence was inaccurate, misleading or incomplete. However, expressing themselves in slightly different ways, all of the judicial committee of the House Lords agreed that this approach should be modified henceforth, at least in challenges raising issues of proportionality under the HRA 1998. Lord Carswell expressed the view that “it would now be desirable to substitute for the rules hitherto applied a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. It will not arise in most applications for judicial review, for they generally raise legal issues which do not call for disclosure of documents… Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice. This object will be assisted if parties seeking disclosure continue to follow the practice of specifying the particular documents or classes of documents they require… rather than asking for an order for general disclosure” (paragraph 32). Lord Brown indicated that “on [the approach advocated by Lord Carswell], the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker” (paragraph 57).

Alex Ruck Keene
39 Essex Street
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alex.ruckkeene@39essex.com