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

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1. Introduction

This paper covers significant cases in the judicial review field in the last 12 months. It addresses: (1) issues of standing; (2) bodies amenable to judicial review; (3) decisions amenable to judicial review; and (4) grounds for judicial review. The question of costs in judicial review proceedings is one that has been the subject of some detailed consideration in recent months, but is to be discussed elsewhere in today and is therefore not covered in this paper.

2. Standing

Johnson

2. One case that bears highlighting in this regard is R (Johnson) (Deceased) v SSHD & Cumbria County Council (Interested Party) [2006] EWHC 288 (Admin). Mrs Johnson, an elderly lady, had applied for judicial review of the decision of the SSHD not to agree to amend the National Assistance (Assessment of Resources) Regulations 1992. She died after permission had been granted. The chairman of a charity (Age Concern South Lakeland) applied to be substituted as claimant. Counsel acting on his behalf sought to rely upon CPR r.19.2, but, as Silber J noted, CPR r.19.2(4)(a) provided an “insuperable obstacle” to him because he could not show that Mrs Johnson’s interest had passed to him. The alternative ground advanced was under the Court’s general case management powers under CPR r.3.1(2)(m). Silber declined to exercise the court’s powers to substitute the chairman of the charity. He noted: (1) that, if the issue raised was as far-reaching as was contended, it would be open to another person affected to bring proceedings in their own name; (2) it would not be a proportionate use of the Administrative Court’s limited resources to accede to the application, as it would have the effect of delaying the hearing of claims of other litigants; (3) there were “serious doubts” as to whether the chairman of the charity could claim to be the victim of an unlawful act, as required by s.7 HRA 1998; (4) the claim might well face substantial difficulties at substantive stage; (5) and, in any case, the conditions for adding a party under Part 19.2(4) of the Rules were narrow, and it seemed that there would have to be very cogent factors to conclude that there were other reasons why a court should rely on its long-stop case management powers under CPR r.3.1 to grant the application. No such factors were present in the instant case.

Lady Berkeley

3. The application of CPR r.19 to public law matters more generally was considered even more recently in Lady Berkeley v First Secretary of State (22.9.06). Here, the applicant wished to be substituted as the claimant in proceedings that had been issued under s.288 Town and Country Planning Act 1990 by a society (the River Thames Society). She was the vice-chairman of the society, and had indeed initiated the society’s application. The defendant argued that she should not be substituted, as to
do so would undermine the intended preclusive effect of s.288(3) TCPA 1990, and that the applicant was a separate person who had appeared before the planning inspector in her own right and had chosen not to apply within the time period. Underhill J held that it was possible, by a “benign interpretation” of the concept of passing an interest, it would just be possible to argue that CPR r.19.1 applied to public law proceedings. However, he found that it was preferable to conclude that it was not intended to cover public law cases, and that the power of substitution arose from the inherent jurisdiction of the court. In the circumstances, Underhill J was prepared to find a sufficient relationship between the applicant and the society (in particular because he took the view that she would have issued the proceedings had the society not done so) and made the order for substitution.

RJM

4. Although not strictly a question of standing, it is of interest to note that the Administrative Court has recently decided that being homeless is not a “status” for purposes of Article 14 of the ECHR (and hence, logically, that it will not in future be possible for a homeless person to bring a claim alleging a breach of Article 14 ECHR on that basis alone). In R (RJM) v SS for Work and Pensions [2006] EWHC 1761 (Admin), James Goudie QC, sitting as a Deputy High Court Judge, had cause to consider the compatibility of the Income Support (General) Regulations 1987 (‘the Regulations’)

\footnote{Made under the Social Security Contributions and Benefits Act 1992.}

with the requirements of the ECHR. The Regulations provided that a disability premium component of income support was not available to a homeless person. It was common ground that the claimant could bring himself within the ambit of Article 1 of Protocol 1 to the ECHR (protecting his right to property) such that, prima facie, he was entitled to enjoy the rights guaranteed by that Article without discrimination by reference to, inter alia, his “status.” Applying R (S) v Chief Constable of South Yorkshire Police [2004] 1 WLR 2196, the Deputy High Court Judge found that “status” for these purposes had to equate to a “personal characteristic.” The Deputy High Court Judge found (at paragraph 29) that having or not having something (even as basic as accommodation) is not such a personal characteristic. He did, however, go on to consider in the alternative whether the claimant was in an analogous position to a person with accommodation (and was not convinced that it did – paragraph 38), and, in any event, that any differential treatment discrimination could be justified on the basis of the Government’s policy as to the assistance of homeless persons.

Al-Skeini

5. Similarly, although not again a question of standing, the case of R (Al-Skeini & Ors) v Secretary of State for Defence is of some interest in determining the extra-territorial scope of the HRA 1998. A claim under the HRA 1998 was brought on behalf of two categories of Iraqis: (1) those shot by British soldiers in their homes or in the street during the British occupation; and (2) an Iraqi citizen who died while in the custody of British forces in Iraq. In a lengthy judgment, the Court of Appeal held,
in brief, that the Iraqis falling into the first category had no enforceable rights under the HRA 1998, because their deaths occurred outside the jurisdiction of the UK, but the Iraqi falling into the second category had an enforceable right because his death had occurred within the jurisdiction of the UK for purposes of Article 1 ECHR.  

3. Bodies amenable to judicial review

Mullins

6. In **R (Mullins) v Appeal Board of the Jockey Club & Anor** [2005] EWCHC 2197 (Admin), the High Court had cause to reconsider whether the Jockey Club was amenable to judicial review. **R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan** [1993] 1 WLR 909 (CA) had previously decided that it was not, but it was submitted that the decision should be distinguished, primarily in light of the jurisprudence as to the meaning of “public body” under the provisions of the HRA 1998. In a robust decision, Stanley Burnton J held that the Jockey Club was not amenable to judicial review. Importantly, he found that both CPR Part 54 (governing judicial review proceedings) and s.6 of the HRA 1998 shared the context of public law and applied to functions of a public nature. He found that the test to be applied under CPR Part 54 was substantially the same as that applied by the court in **Aga Khan**, namely whether the functions of the club were governmental. He therefore found that the decision in the earlier case remained authority for the proposition that the club was not a public authority for the purposes of s.6 and that the particular function exercised in that case, which was identical to the function exercised in the instant case, was not a function of a public nature. He therefore held that Mr Mullins could only challenge the decision of the Appeal Board by way of private law, not public law proceedings. 

Johnson

7. The decision in **R (Heather) v Leonard Cheshire Foundation** [2002] EWCA Civ 366 was revisited by the High Court in July, in **R (Johnson & Ors) v LBH Havering** [2006] EWHC 1714 (Admin), a claim brought by care home residents for judicial review of a decision of the defendant local authority to seek a private sector operator to accept transfer of, operate and expand two care homes, and to close another two care homes once the residents had been transferred to suitable alternative accommodation. The Claimants were, at the time of bringing with the claim, housed

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2 See also **R (Ali–Jedda) v Secretary of State for Defence** [2006] EWCA Civ 327, in which the Court of Appeal upheld the first instance decision that the right to liberty and security provided in United Kingdom law by the Human Rights Act 1998 Sch.1 Art.5 was displaced in relation to a dual British and Iraqi national who had been detained in Iraq under the authorisation granted by United Nations Security Council in Resolution 1546, which gave the multi-national force the power to intern for imperative reasons of security. 

3 Note that, subsequently, Stanley Burnton J went on to hold that the Court had jurisdiction under CPR r.40.20 to grant declaratory relief in private-law proceedings, such that (to all intents and purposes) Mr Mullins was able to obtain the same relief in his private-law proceedings as if he had been able to bring judicial review proceedings. **Mullins v McFarlane** [2006] EWHC 986 (QBD).
in care homes owned by the local authority and provided with care under s.21 National Assistance Act 1948. They argued that the transfer to the private sector of the homes would result in a significant diminution in their rights under the ECHR and would thus be unlawful under s.6(1) HRA 1998 as a failure by the local authority to ensure real and effective protection for all of their Convention rights.

8. The Secretary of State for Constitutional Affairs, intervening (and in this supported by the Claimants and the Disability Rights Commission, which had also intervened), argued that a private body, in providing accommodation to persons in need of care and assistance, pursuant to arrangements made with a local authority in the exercise of that authority's functions under s.21 and s.26 of the 1948 Act, was exercising functions of a public nature within the meaning of s.6(3)(b) HRA 1998.

9. Forbes J found (at paragraph 32]) that he was constrained by the Court of Appeal authority of Leonard Cheshire to hold that a private body, in providing accommodation to persons in need of care and assistance pursuant to arrangements made with a local authority in the exercise of that authority's functions under s.21 and s.26 of the 1948 Act, was not ipso facto exercising functions of a public nature. Forbes J considered that nothing in either domestic authority (in particular that of the House of Lords in Aston Cantlow PCC v Wallbank [2004] 1 AC 546 and R (Beer) v Hampshire Farmer’s Markets Ltd [2004] 1 WLR 233) or Strasbourg case-law justified a departure from the principles set down in Leonard Cheshire.

10. Forbes J dismissed the claimant’s claim that their Convention rights would be diminished, noting that they would continue to enjoy the very same Convention rights that they had previously, and that the transfer did not absolve the local authority of its duty under s.6(1) to act compatibly with their Convention rights. The local authority would be under a continued obligation to take appropriate steps to safeguard their lives, to protect them from inhuman and degrading treatment and to safeguard their private and family life, home and correspondence.

Moreton

11. In R (Moreton) v Medical Defence Union Ltd [2006] EWHC 1948 (Admin), Newman J had cause to consider whether the Medical Defence Union (‘MDU’) was amenable to judicial review. The MDU is a private company limited by guarantee, whose members are doctors, dentists and other healthcare professionals. In return for an annual membership fee, MDU members are afforded the right to request certain discretionary membership benefits including, importantly, an indemnity in respect of claims brought against them. It is not an insurance company (Medical Defence Union Ltd v Department of Trade [1980] Ch 82), and members have no entitlement to insist on the exercise of the discretionary power in their favour.

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12. Mr Moreton (together with a substantial number of other patients) had brought proceedings against an orthodontist, but the MDU had agree to provide an indemnity in respect of only three of the claims. Mr Moreton brought proceedings arguing that the MDU was so closely woven into the fabric of public regulation or into the system of government or governmental control as to make it subject to judicial review.

13. Newman J found that the MDU could not be said to be woven into the fabric of public regulation, and placed particular emphasis on the (uncontested) fact that insurance companies providing indemnities to practitioners were not amenable to judicial review. Newman J also rejected the argument that the MDU was performing a governmental function (such that, if it did not exist, the government would have to carry the relevant function out itself). The relevant function, he found, was the provision of insurance cover, but (even if Parliament had required it) he found that this would not have led to the conclusion that an insurance company that met the requirement would be exercising a public function. Newman J therefore held that the MDU was not amenable to judicial review.

Sinclair Gardens

14. The decision in R (Sinclair Gardens Investments) (Kensington) Ltd v Lands Tribunal [2005] EWCA Civ 1305 is of limited but significant practical importance for those involved in property law. The facts are not material, but the Court of Appeal held that the decision of the Lands Tribunal to refuse permission to appeal from the Leasehold Valuation Tribunal was amenable to judicial review. However, before permission to apply for judicial review could be granted, the Court of Appeal held that it would have to be shown not only that the refusal of permission to appeal was wrong in law but also that the error was sufficiently grave to justify the case being treated as exceptional.

4. Decisions amenable to judicial review

15. If there is one identifiable trend in cases decided over the past year, it is perhaps in the ever-expanding scope of matters that have fallen within the remit of judicial review challenges. A particular focus has been on high political questions, in particular those arising out of the war in Iraq.

Gentle

16. In R (Gentle & Ors) v (1) Prime Minister (2) SS for Defence (3) Attorney General [2006] EWCA Civ 1078, the Court of Appeal had cause to consider whether an independent inquiry should be held into the circumstances that led to the invasion of Iraq. The claimants, relatives of members of the British armed forces killed during the war, sought to bring a challenge by way of judicial review to the Government’s refusal to hold such an inquiry. The core of the claimant’s case was that the Government was under an obligation to hold an independent inquiry by virtue of the
operation of Article 2 ECHR (cf R (on the application of Amin) v Secretary of State for the Home Department [2004] 1 AC 653).

17. The claimants had lost at first instance, and appealed to a strong Court of Appeal (including the Master of the Rolls and the President of the Queen’s Bench Division). Not without very considerable reluctance, the Court of Appeal granted permission, holding that the case raised questions of general importance that should be finally decided after full argument (paragraph 6). The Court of Appeal agreed with Collins J that, prima facie, the deaths were within the jurisdiction of the United Kingdom by virtue of Article 1 of the Convention. Not without some reluctance, they acceded to the claimants’ argument that the purpose of an inquiry would be to discover the full facts relevant to the deaths to meet the aims identified by Lord Bingham at paragraph 31 of Amin, namely “to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.” As such, they held that an inquiry, if otherwise appropriate, would have a legitimate purpose. The Court of Appeal also considered that there was “some force” in the submission that it was not necessary for the claimants to show that the invasion was carried out in bad faith, merely that the circumstances (and the lawfulness) were unclear and merited further examination, along with the question of whether the unlawfulness (if any) caused the deaths of the soldiers.

18. The parties proceeded in the appeal on the basis that the question was justiciable if an inquiry was held to be appropriate under Article 2 ECHR (see paragraph 18). It will be of interest to see whether this position is maintained at the substantive hearing, which will be held in November before the Court of Appeal.

Bancoult

19. A further example of the increasing willingness of the Courts to become involved in political questions is to be found in the decision of the Divisional Court in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs [2006] EWHC 1038. Here, the Divisional Court had cause to consider the lawfulness of the refusal of the Government to allow the inhabitants of the British Indian Ocean Territory (‘BIOT’) to return, after a successful challenge to the lawfulness of their removal in 2000. The Government had not attempted to appeal the earlier decision, but had come to the conclusion that it was not feasible to resettle the islanders, and proposed the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004 (both of which were made by the Queen as Orders in Council), which together provided that there would be no right of abode in the territory and no right of entry without a permit. The claimants, displaced islanders, challenged the rationality and proportionality of the Orders. The Divisional

5 As interpreted in Soering v United Kingdom (1989) 11 EHRR 439.
Court held, first, that the rationality of the Orders had to be tested by reference to the interests of the BIOT, rather than the interests of the UK and the US. In finding that the Orders were irrational, the Divisional Court characterised as “repugnant” the suggestion that a minister could justify an Order in Council for the exile of a whole population from a British Overseas Territory as being for the "peace, order and good government" of a colony was repugnant. The Divisional Court further found that the Orders were not immune from judicial review, as on a proper analysis the decision to make them was not that of the Queen but that of the Secretary of State, such that they were subject to the normal rules of justiciability. Perhaps unsurprisingly, the Government is to appeal the decision.

Begum

20. In **R (Begum & Ors) v Returning Officer for Tower Hamlets LBC** [2006] EWCA Civ 733, the Court of Appeal considered the power of the courts to intervene in elections. The High Court had ordered that a forthcoming local election be countermanded and there be a fresh election, on the basis that the claimants (who wished to stand as Respect party candidates) had a legitimate expectation that the returning officer would examine their nomination papers for errors. She had not done so, had then misfiled the papers. After the deadline for submission had expired, the nominations were found to be invalid as they contained errors. The Court of Appeal found that the High Court had been wrong to find a legitimate expectation that each paper would be examined, as the returning officer had done no more than give an informal offer of assistance, which could not displace the legal duty on the candidates to present their nomination papers correctly. The Court of Appeal agreed, though, that the returning officer had failed to comply with her statutory duty to examine the nomination papers (as they had been misfiled). The Court of Appeal declined to grant the relief ordered by the High Court, however. It held that the courts should be very slow to intervene in electoral matters, as there was in place a statutory code (the Representation of the People Act 1983) which contained no provision for judicial review proceedings to be brought during the course of an election. It did not exclude the possibility that a mandatory injunction could be made to countermand an election, but considered that such a power should be used very rarely. The Court of Appeal therefore held that the claimants would have to contest the result after the election had been held.

5. **Grounds for judicial review**

Irrationality

21. The high-profile case of **R (Rogers) v Swindon NHS PCT** [2006] EWCA Civ 392 provides a relatively rare example of a successful challenge on rationality grounds.

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6 Taking into account **R Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs** [2005] 3 WLR 837.
The policy of the PCT was to refuse funding for treatment with the unlicensed drug Herceptin save where exceptional personal or clinical circumstances could be shown. The claimant failed at first instance\(^7\) to persuade the High Court that the policy was irrational. The Court of Appeal took a different view. The Court was prepared to accept that the PCT’s policy could be rational provided that it was possible to envisage (and the decision-maker did envisage) what such exceptional circumstances. If it was not possible to envisage any such circumstances, the policy would be in practice a complete refusal of assistance, and as such would be irrational because it was sought to be justified not as a complete refusal but as a policy of exceptionality\(^8\) applied. The Court then went on to consider whether there were any relevant exceptional circumstances that could justify the PCT granting treatment to one patient but refusing it to another within the eligible group. It found that there was no rational basis for distinguishing between patients within the eligible group on the basis of exceptional clinical circumstances any more than there was on the basis of personal circumstances. The Court found that, once the PCT had decided to fund Herceptin for some patients and that cost was irrelevant, the only reasonable approach was to focus on the clinical needs of the individual patient and to fund patients within the eligible group who had been properly prescribed Herceptin by their physicians. The Court of Appeal therefore found that the policy was irrational and unlawful.

Fairness

\(TB\)

22. In **R (TB) v Stafford Combined Court** [2006] EWHC 1645, the Divisional Court had cause to consider the requirements of procedural fairness in the context of the disclosure of the psychiatric records of a 14-year old who was a witness in a trial relating to sexual offences against her. A witness summons compelling the disclosure of the records had been presented to the NHS trust but not to the claimant, who was therefore unable to make representations at the hearing at which disclosure was ordered. The Trust contacted the Official Solicitor and both asked the judge to state a case. The judge, who was unwilling to delay the trial, called the claimant to court at short notice to ask her view as to disclosure. She was unrepresented and reluctantly agreed to the disclosure to avoid delay of the trial. The Divisional Court was not impressed with the approach taken by the trial judge. It noted the importance of confidentiality of medical records, in particular those of young people.\(^9\) It found that procedural fairness (in the light of the undoubted application of Article 8 of the ECHR) required that the claimant should have given notice of the application for the witness summons and the opportunity to make representations, orally if she wished, before the order was made. In the circumstances, the Divisional Court found that the interference with the claimant’s Article 8(1) rights was unjustified, although it made it clear that its decision was limited to the particular facts of the case, and the further

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\(^7\) [2006] EWHC 171 QB.

\(^8\) See **R (G) v North West Lancashire Health Authority** [2000] 1 WLR 977.

\(^9\) See, in this regard, **Ashworth Security Hospital v MGN Ltd** [2002] 1 WLR 2033 and **R (Axon) v Secretary of State for Health** [2006] 2 WLR 1130.
scope of persons and classes of persons to whom notice was required to be given by Article 8 was not clear.

Legitimate expectations

Nadarajah

23. In **Nadarajah v Secretary of State for the Home Department** [2005] EWCA Civ 1363 Laws LJ reviewed (at paragraphs 46-58) the principles to be applied to legitimate expectation. He noted that the consistent theme of the case-law relating to legitimate expectations was that, where a public authority had issued a promise or adopted a practice that represented how it proposed to act in a given area, the law required the promise or practice to be honoured unless there was a good reason not to do so. The principle behind that proposition was a requirement of good administration, by which public bodies ought to deal in a straightforward and consistent manner with the public. He found that that was a legal standard that, although not to be found in the Convention, took its place alongside such rights as fair trial and no punishment without law. That standard might only be departed from in circumstances where to do so was the public body's legal duty or was otherwise a proportionate response having regard to a legitimate aim pursued by the public body in the public interest.

Bishop

24. The question of legitimate expectation (in this case as to assessment) arose in **R (Bishop) v Bromley LBC** [2006] EWHC 2148 (Admin). Here, the claimant (the daughter and carer of a service user) applied for judicial review of a decision of the local authority to close the day-care facility used by her father. The relevant local authority committee had invited comment on a proposal to consult on discontinuing the day-care services at that centre for budgetary reasons. During the consultation period, reviews of the ongoing needs of the service users were carried out, resulting in a decision to close the centre subject to prior arrangement of alternative services for current users. The committee upheld the decision and service users were informed. The claimant contended that that the decision should be quashed, inter alia because the local authority had failed in its legal duty to carry out a reassessment of the needs of service users before deciding to close the centre. Kenneth Parker QC, sitting as a deputy High Court Judge, applied **R v North and East Devon Health Authority Ex p Coughlan** [1999] LGR 703, and held that it was only in exceptional circumstances that a complete multi-disciplinary assessment would be required before a decision to close a care home was taken. Perhaps unsurprisingly, he noted that it would be difficult to draw up any general principle to describe special circumstances and each case had to be judged on its own merits. However, he found that the instant case was not so exceptional so as to require assessment or reassessment of needs. He found that the local authority had had a perfectly rational basis for making the decision and no detailed assessment had been reasonably required before a rational closure decision could be taken.
Consultation

Edwards

25. In Edwards & Anor v Environment Agency & Ors [2006] NPC 74, the Court of Appeal upheld the decision of the first instance judge that the Environment Agency breached the common law duty of fairness when it was found to have withheld certain internal reports from the consultation process undertaken before granting a conditional permit to Cemex UK for the continued operation of its cement plant. The reports were found to be potentially material to the decision of the Agency and to the members of the public attempting to influence it. However, the Court of Appeal upheld the decision of the first instance judge to refuse relief, as the Court found that it would be pointless to quash the permit simply to allow the public to be consulted on data that was no longer current.

Smith

26. In R (Smith) v North Eastern Derbyshire Primary Care Trust, The Times 11.9.06, the Court of Appeal considered the question of consultation in the context of the provision of GP services. The PCT had invited and carried out a tender process for General Practitioner services in respect of two surgeries. It subsequently made the decision to engage a company to provide those services, and to negotiate with the company as a preferred bidder. The claimant sought to challenge that decision and have it quashed on the ground that the trust had failed to perform its statutory duty of consultation under s.11 Health and Social Care Act 2001. At first instance, the judge found that the PCT had breached its duty under s.11, but refused to grant relief because (1) the claimant had failed to have recourse to a patient’s forum; and (2) because he doubted whether the PCT would have come to a different decision even had it received and considered the claimant’s views.

27. The Court of Appeal allowed the claimant’s appeal. It held that a patient’s forum did not have the power or status to decide whether s.11 of the 2001 Act applied or to require a primary care trust to reverse a decision. It further held that a PCT could not avoid or mitigate a failure to consult by suggesting an approach to a patient’s forum. Applying R (Cotton) v Chief Constable of Thames Valley, Independent 22.12.89, the Court of Appeal emphasised that it was not enough to consider that it was probable that a decision-maker would have reached the same decision following the required consultation; rather the decision-maker had to show that the decision would inevitably have been the same even had the review process been conducted properly.

Parents for Legal Action

28. In R (Parents for Legal Action Ltd) v Northumberland CC [2006] EWHC 1081 (Admin), Munby J had cause to consider the consultation process embarked upon by a local education authority adopting a revised tier of schooling. In deciding upon the
proposal, the LEA had adopted a three-stage decision making process. The first two stages involved general countywide consultation and concluded with a decision to adopt a two-tier system as the basis for the third stage consultation. At the third stage of consultation it was envisaged that there would be discussion of the impact of various possible two-tier structures on individual schools and school partnerships. The decision to adopt the two-tier system had been made on the basis of various documents, including a report that set out the financial implications of both two and three-tier models. Though the LEA had agreed to obtain an independent evaluation of the financial and educational viability of its proposals, it had in fact made its decision without obtaining such an evaluation.

29. Munby J found that the consultation process was procedurally unfair because there had been a failure to consult properly and in accordance with the requirements of ss.28 and 29 Schools Standards and Framework Act 1998. Whilst a phased consultation process was acceptable, what was not acceptable was the fact that at the third stage of the consultation process individual schools were limited to a consideration of different two-tier models, rather than a consideration of both two-tier and three-tier models. Consultation had to be undertaken when the proposals were in their formative stage, and since consultations relating to individual schools had only taken place after the LEA had decided to adopt the two-tier system, the claimants had not had an opportunity to express their views in relation to the specific schools that concerned them. However, Munby J found that this finding did not entitle the parents to a declaration that the decision was unlawful or to a quashing order, solely that the parents were, in principle, entitled to appropriate declaratory relief as to the form that the third stage of the consultation process should take.

British Waterways Board

30. In R (British Waterways Board) v First Secretary of State [2006] EWHC 1019 (Admin), the question arose of the consultation to be expected where there was only one potential consultee. Here, the Secretary of State introduced by way of Regulations a structure by which non-domestic rates were imposed upon the claimant in respect of the canals and inland waterways that it owned and managed. A consultation paper had recorded the government's intention to "introduce a transitional scheme from 1 April 2005 for those properties that face significant changes in their rates bill as a result of revaluation." The relevant regulations were introduced as transitional arrangements, but included no protection for the claimant, who was the only ratepayer to be affected by the change. The scheme was held to be irrational and unfair in the way in which it had brought about sudden and dramatic increase in its liability to rates. Although there was no statutory obligation to consult, having chosen to do so, Collins J found that the Secretary of State ought to have let the claimant know what was proposed and allowed the Board to comment on those proposals. He held that it was not fair, if it had been decided that consultation was needed, to exclude the Board in relation to a proposal that would produce such a dramatic consequence.

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