

ALBA Summer Conference 2024

Impossibility and statutory duties:

Issues arising from the UK Supreme Court's decision in *Imam*

1. This paper will consider some of the issues raised by the Supreme Court's decision in *R (Imam) v Croydon London Borough Council* [2023] UKSC 45; [2023] 3 WLR 1178 ("*Imam*")¹:
 - a. What is the test for determining whether compliance with a statutory duty is "impossible"?
 - b. What evidence must a public authority produce in order to establish the impossibility of compliance with a statutory duty on the basis of insufficiency of resources?
 - c. How might the approach in *Imam* apply to central government departments?
2. It will also consider whether the use of "impossibility", in the sense given in *Imam*, as a basis for determining whether to refrain from compelling performance of a statutory duty on the grounds of lack of sufficient resources, might have unintended consequences. There are, on the one hand, powerful arguments why the courts might adopt a high bar before withhold a mandatory order. As Lord Sales observed at §40 of his judgment in *Imam*, such a decision has implications for the rule of law. On the other hand, Lord Sales makes clear that he is not adopting a standard of "absolute impossibility": §51. Instead, "impossibility" is to be examined by reference to: (a) whether and to what extent performing the statutory duty would have the effect of disrupting existing plans for the allocation of the authority's resources; (b) whether the authority has taken all reasonable steps to perform its duty; and, (c) whether it would be institutionally appropriate for the court to disrupt the authority's existing plans. There is, in this respect, a mismatch between the use of "impossibility" as a test (i.e. because impossibility is, given its literal meaning, absolute) and the factors which Lord Sales suggests should guide the exercise of the court's remedial discretion in this area.
3. That mismatch carries with it the risk that a determination of "impossibility" of compliance with a statutory duty is misunderstood by the public authority and the wider public as tacitly accepting the authority's failure to meet its statutory obligations as being unavoidable. That in turn risks making the future compliance with statutory duties less, not more, likely. The paper will suggest how those unintended consequences might be

¹ This paper follows on from the presentation given by Martin Westgate KC. That presentation sets out the background to the *Imam* decision.

addressed through use of other remedial tools and case management powers available to the courts.

The test for impossibility

4. The issue before the Court in *Imam* was whether limits on the resources of a local housing authority ("Croydon") should affect the exercise of a court's discretion to make a mandatory order when the authority is in breach of its duty under section 193(2) of the Housing Act 1996 to ensure that suitable housing is available to a person who is eligible for assistance.
5. Lord Sales took as his starting point the well-established principle that a court should not make a mandatory order to require compliance with a statutory duty where it is impossible to comply: §§48-49. He acknowledged, however, that what qualifies as impossibility of performance gives rise to complex questions, in particular as to the relevance of resources. He then made clear that he was not adopting a standard of "absolute" impossibility of compliance, of the kind established in *Bristol and North Somerset Railway* (1877) 3 QBD. In that case, the defendant company was issued a statutory order to build a bridge over its track. However, the company had no money and, critically, no power to raise money. It had transferred possession and use of the railway in perpetuity to another railway company and had no funds or property "*except that airy nothing, the reversion after a perpetuity*": (1877) 3 QBD at p.12. It was in those circumstances that Cockburn CJ stated that "*The Court cannot put people in prison for not complying with an order when they have not means of doing so*": (1877) 3 QBD at p.12. In contrast, "Croydon", Lord Sales observed at §51, was "*not so bereft of means to fund this sort of acquisition as was the railway company in Bristol and North Somerset Railway, for which the impossibility of compliance appeared absolute*".
6. Lord Sales proceeded to explain the factors which a court should consider when examining the question of impossibility of compliance with a statutory duty, stating as follows, at §52:

"In my view, however, when examining the question of impossibility of compliance and whether it is appropriate to grant mandatory relief, it is relevant to have regard to the additional impact of a mandatory court order... It is not just a question of what resources are available to the housing authority immediately or after a period, but also of whether, and to what extent, it would be appropriate for a court order to be made which may have the effect of disrupting existing plans for the allocation of the authority's resources. At the same time, it is the court's role to enforce the law. The issue is how to balance these various considerations."

7. At §53, Lord Sales stated that the authority “has to provide a detailed explanation of the situation in which it finds itself and why this would make it impossible to comply with an order”. This, he said at §54, requires “the authority ... to show that it has taken all reasonable steps to perform its duty”, the question of whether the authority has taken all reasonable steps being an objective one for the court to determine, not a matter of application of the test of reasonableness or rationality in the *Wednesbury* sense.
8. It is clear from these passages that Lord Sales was not setting down a test of actual impossibility. Impossibility of compliance would ordinarily connote a binary state of affairs: something is either possible or it is not. Instead, impossibility is to be examined by reference to: (a) whether and to what extent performing the statutory duty would have the effect of disrupting existing plans for the allocation of the authority’s resources; (b) whether the authority has taken all reasonable steps to perform its duty; and, (c) whether it would be institutionally appropriate for the court to disrupt those plans.
9. That the court is not concerned with actual impossibility is reinforced by Lord Sales’ response to the claimant’s argument that Croydon could have discharged its statutory duty, by diverting other resources available to it, or borrowing more to buy or adapt a property to meet the claimant’s needs. This, said Lord Sales at §61, “would be to go further than is justified bearing in mind the appropriate balance between the role of the court and the role of a local authority”:

“61. [...] In setting the parameters within which the question of impossibility is to be assessed, one cannot wholly disentangle that issue from underlying considerations of what is the proper role of a court and what is the proper role of the authority in this context. Local authorities have many functions conferred on them, some in the form of statutory duties and others in the form of discretions (which may themselves shade into duties if circumstances arise which rationally require their exercise in particular ways). In planning its affairs and setting its budgets, an authority has to balance all the demands placed upon it by Parliament and match these with the sources of income available to it. A court cannot carry out that function itself, since it lacks the democratic authority, detailed knowledge of the range of demands and range of funding options available and the administrative expertise required for this.

62. Yet if a court makes a mandatory order which has the practical effect of requiring an authority to divert funding from allocations already made in its annual budget, it would unduly disrupt that balancing exercise carried out by the local authority as regards the funding for due performance of its different functions. The court cannot know with any confidence whether its order will cut across the performance of other statutory duties to which the authority is subject. The making of a mandatory order gives the statutory duty which it reflects a super-added force, which means that the authority has to give priority to complying with it; but in circumstances where the

authority might be struggling to accommodate and perform properly a range of statutory duties, this may have an unduly distorting effect upon the overall balance already struck by the authority in its previous budgeting process in an attempt to reconcile all the demands upon it. It is difficult to know whether by requiring, through the making of a mandatory order, an authority to give priority - after settling its overall budgetary allocations - to one out of the many statutory duties and functions imposed on it, the carrying out of the authority's other duties and functions will be unduly compromised. Unlike in the field of financial insolvency procedures, there is no process for imposing a moratorium on claims with a view to ensuring that they are all accommodated fairly and equally on a *pari passu* basis. The authority is the clearing house for meeting all the claims made upon it. A court should be careful not to exceed its own proper role by disrupting without good justification the authority's own attempt to reconcile those claims in a fair way through its ordinary budgeting process, once that has been finalised."

10. In these passages, Lord Sales sets out the potentially wide-ranging consequences of compelling a public authority to comply with a statutory duty in the face of severe resource constraints. He also acknowledges the limits to the court's institutional competence to balance competing demands on limited resources relative to the democratic authority and administrative expertise of a public authority. These are the factors that give rise to the dilemma faced by the court. On the one hand, having found that a public authority is in breach of a statutory duty imposed on it by Parliament, the court has a constitutional duty to enforce that legal obligation. As Lord Sales observed at §40:

"When it is established that there has been a breach of such a duty, it is not for a court to modify or moderate its substance by routinely declining to grant relief to compel performance of it on the rounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament's legislative instruction."

11. On the other hand, the courts also have a duty to recognise the limits to its institutional competence. When Parliament legislates to impose a statutory duty on a public body it does so in the knowledge that the court has a remedial discretion in how to enforce those duties: §41. The courts must therefore also consider the wider implications of compelling a public authority to comply with a statutory duty, such as the need to reopen other decisions, change existing plans or divert resources from other areas. These concerns are clearly important.

Proving impossibility of compliance

12. If it is not necessary to provide evidence of actual or absolute impossibility in the *Bristol Railway* sense, then what must a public authority show to establish "impossibility" of

compliance with a statutory duty in the sense used by Lord Sales in *Imam*? It appears from §52 of Lord Sales’ judgment that the question of whether it would be appropriate for a mandatory order to be made only arises if it “*may have the effect of disrupting existing plans for the allocation of the authority’s resources*”. It is this concern which must be balanced against the interest in holding a public authority to its statutory obligations. Accordingly, as a minimum, a public authority will need to show that it cannot, within the confines of its existing planning, meet the statutory duty that is sought to be enforced.

13. It appears that when assessing whether the discharge of a statutory duty would disrupt existing plans as a result of financial constraints, the court is to take as its starting point existing budgetary allocations made by the authority. This is the logic of Lord Sales’ position at §62 that a court should be “*careful not to exceed its own proper role by disrupting without good justification the authority’s own attempt to reconcile those claims in a fair way through its ordinary budgeting process, once that has been finalised*” (underlining added). This is similar to the approach taken by the judge at first instance, who held that unchallenged budgetary decisions already taken by the authority should be the starting point for identifying the resources available to Croydon: [2021] EWHC 739 (Admin) at §81(v). In this regard, the judge had followed the Court of Appeal’s decision in *R (Domb) v Hammersmith and Fulham London Borough Council* [2009] LGR 843. That case concerned a challenge to a decision by the Council to charge for non-residential home care services. The complaint was that, in reaching that decision, there had been a failure to have due regard to the Council’s disability equality duties. The claimant argued that the Council had erred in limiting its consideration to either imposing a charging scheme for provision of non-residential home care services or raising the eligibility threshold for those services. These were the only options available to the Council following a budgetary decision taken earlier that year to reduce council tax by 3%. The Court of Appeal held that the Council was entitled to treat the unchallenged budgetary decisions taken earlier in the year as the parameter for the options available to it. Rix LJ, with whom Lord Clarke MR and Sedley LJ agreed), stated at §§60-61:

“60. [...] As it is, the budget meetings in February 2008, none of which are in issue or before us as a matter of evidence, will have looked at the options and had come to certain preliminary decisions and, in all likelihood, many final decisions too. One example of those final decisions was the decision to reduce Council Tax by 3%. It is conceded by Mr Wolfe that he cannot attack that decision, but that must be true of the very many other budget decisions as well. We just do not know the ramifications of the budgetary meetings and decision-making: those decisions have not been challenged and no evidence about them has been formulated. They simply lie in the past, as data. For all we know, the budget had to be balanced; and each department or spending area had to be capable of living within its own budget. However, we simply do not know these matters, for they have never had to be investigated.

61. In these circumstances, it is in my view mistaken to suggest that all possible theoretical options had to be regarded as being open and in contention in connection with the matter which came up for consideration on 16 June 2008. Decision making would become simply impossible on such a basis. One has to start somewhere, and the budget decisions which had already been taken, whether final or capable of being revisited, are not capable of being impugned in these proceedings.”

14. Existing budgetary decisions are, however, only the start of the analysis. Lord Sales identified other matters which the court should consider when determining whether an authority has taken all reasonable steps to comply with its statutory duties. These are issues which an authority will need to address in evidence. One of the reasons why the matter was remitted to the High Court was that Croydon had not addressed these points in evidence.

- a. The authority must show that it has given priority in allocating its limited available resources to meeting its statutory duties over fulfilling merely discretionary functions: §56. It was in this respect that Croydon’s evidence was found wanting. The Court of Appeal had been correct to find that Croydon had not sufficiently explained its approach to allocating properties currently available, and in particular whether it had chosen to assign such properties for allocation under Part VI of the Housing Act (in respect of which Croydon had a discretion) and Part VII (in respect of which Croydon had a duty): §57.
- b. Consideration should be given to whether there is any general contingency or allowance with existing budget allocations that could enable the authority to discharge its statutory duty. Croydon, said Lord Sales, should explain whether there is a general contingency fund to deal with unexpected calls for expenditure and, if so, why it cannot be used in the present case: §66.
- c. Consideration should also be given as to whether the authority was on notice in relation to the non-performance of its duty but failed to take the opportunity to react to that in good time. *“The longer an authority with notice of the problem has sat on its hands”,* said Lord Sales, *“the more important it may be for the court to enforce the law by making a mandatory order rather than marking the unlawfulness of the authority’s conduct by making a quashing order or declaration”*: §67. He then said the following in relation to the notice and budgetary decisions taken by a local authority:

“However, since the critical decisions regarding budgeting for any necessary expenditure to meet a duty are likely to be taken at council level, an inquiry may be required to examine when the authority became aware of the problem

at that level and, if they remained unaware of it at that level, why that happened.”

15. This final consideration has potentially significant implications for existing budgetary decisions. This hints at the possibility that it may be possible for the court to look behind existing budgetary decisions to determine to what extent those decisions were taken in the knowledge that they might result in the authority being unable to discharge its statutory duties. It is unclear what sort of enquiry this would entail and how interventionist a court might be when interrogating budgetary and spending decisions taken by a public authority. How will a court decide if a public authority was on notice but failed to take action? Will the court require evidence of all budgetary decision-making? Once an authority has been made aware of a problem, are they required to ensure that existing plans are amended to address the issue? And if so, how quickly must such amendments take place? Can they follow existing financial planning cycles? How will a court decide whether a particular course of action was available to the public authority? How far down the chain of decision-making will the court go? For example, will it consider prior decisions, such as the level at which it sets taxes, which determine the available spending envelope? It is easy to see that such an enquiry would rapidly draw the courts into areas conventionally considered to be beyond the court’s institutional competence.

How does the approach in *Imam* apply to central government?

16. *Imam*, and the cases cited in the judgment as examples of cases where compliance with a statutory duty was found not to be possible due to resource constraints, all concerned local authorities. How would the Supreme Court’s approach in *Imam* apply to central government departments?
17. If the test for impossibility of compliance based on financial constraints was impossibility in the absolute *Bristol Railway* sense, then the outcome might be straightforward. Judged against the standard of “absolute” impossibility, it is difficult to see how resource constraints could ever be an answer to statutory duties imposed on Her Majesty’s Government, an entity with recourse, in theory, to HM central funds and significant borrowing potential.
18. However, the sorts of factors identified by Lord Sales as being relevant to determining impossibility of compliance could, in theory, lead to a finding of impossibility of compliance with a statutory duty by a central government department as a result of resource constraints.

19. Following the approach in *Imam*, the court should consider the following factors to determine feasibility of compliance with a statutory duty: (a) whether and to what extent performing the statutory duty would have the effect of disrupting existing plans for the allocation of the authority's resources; (b) whether the authority has taken all reasonable steps to perform its duty; and, (c) whether it would be institutionally appropriate for the court to disrupt those plans.
20. In determining whether compliance with a statutory duty would interfere with existing budgetary or spending plans, consideration would need to be given to the appropriate starting point, which is not straightforward in the case of central government. Would the court consider a department's existing budget as representing the limit on its available resources? With the introduction of spending reviews, departmental budgets are usually set several years in advance through the spending review process.² There is only limited scope for a department to obtain additional funding outside of the spending review process and there is no guarantee that requests for additional funds, if made, will be granted. Government departments also have no revenue raising powers, so if additional funds are not provided by HM Treasury, the only other option available is to reallocate funds from within the departmental budget. Would a court consider the extent to which performing a statutory duty would disrupt the department's existing spending plans? Following the approach in *Imam*, the court might require evidence to demonstrate that the Minister had given priority in allocation of its limited available resources to meeting its statutory duties over spending on discretionary functions. But might the court go further and enquire into departmental budget allocations made as part of the Government's spending review process?
21. The court was invited to scrutinise HM Treasury's decision making in *ClientEarth v Secretary of State for the Environment, Food and Rural Affairs (No 2)* [2017] PTSR 203 [2016] EWHC 2740 (Admin) ("*ClientEarth No (2)*"). ClientEarth sought judicial review of the

² Spending reviews, which usually cover a period of several years, set out headline spending plans for each Government department. Based on these plans, the Government makes formal requests to Parliament for funds for each department on an annual basis. These requests are usually presented in April and approved by Parliament in July. Parliament approves the funding through Supply resolutions which are then given legal effect through a Supply and Appropriations (Main Estimates) Act. This legislation provides the legal basis for issuing money from the Consolidated Fund to Government departments in accordance with the spending plans set out in the formal requests to Parliament. The Government may make additional requests to authorise new funding levels and/or to authorise changes to the purpose for which money is sought by departments. These supplementary requests are also approved through supply resolutions and given legal effect in a Supply and Appropriations (Anticipation and Adjustments) Act.

Government's 2015 Air Quality Plan on the basis that the Secretary of State had erred in her approach to the requirement that periods of exceedances should be kept "as short as possible" and had given disproportionate weight to considerations of cost, political sensitivity and administrative difficulties. As part of developing the Air Quality Plan, both DEFRA and DfT had made bids to HM Treasury for elements of funding necessary for the plan. A submission to HM Treasury ministers from Treasury officials stated that *"we have pushed DEFRA and DfT to provide the least cost pathway to compliance"* which involved *"defining the minimum set of actions required to meet compliance (and so the overall cost envelope)"*: §34. ClientEarth criticised the role of HM Treasury in the process. Garnham J found that there was no basis for criticism, stating at §93:

"It seems to be wholly unsurprising that in its dealings with DEFRA the Treasury should have been seeking to manage and limit the extent of public expenditure. That is what the Treasury is there for. Unless it were the case that the Government permitted the Treasury to refuse to fund measures necessary to ensure compliance, or the Treasury took over DEFRA's management of the response to the Directive (and I have seen no evidence of either), then I see no grounds for criticism. Whilst I recognise that negotiations with HM Treasury must have been challenging, DEFRA was the department responsible for ensuring compliance with the Directive. For understandable reasons HM Treasury did not wish more public funds spent than was necessary to achieve compliance. But doing no more than was necessary was sufficient."

22. The implication of that reasoning is that the position may have been different had there been evidence that HM Treasury had refused to provide the funds necessary to achieve compliance with the Government's obligations under the Air Quality Directive. The case therefore suggests a willingness on the part of the courts to scrutinise the information considered by HM Treasury as part of the spending review process and illustrates the sorts of enquiry which it might carry out to determine whether decisions regarding budgeting were taken with notice of the impact that a decision might have on compliance with a statutory duty.
23. When considering whether the relevant Minister has taken all reasonable steps to perform its duty, would the court require evidence that the department had sought additional funding from HM Treasury outside of its budget allocation? In *R (Law Society) v The Lord Chancellor* the Divisional Court (Singh LJ and Jay J) noted that the amount of money which HM Treasury had made available in the current spending review to address CLAIR had been a principal driver for the decision under challenge. The Divisional Court accepted *"that these were important practical factors to be borne in mind"* but stated that they *"could never have been overriding"* and while *"HM Treasury may have refused to make more money available ... there is no evidence that it was ever asked"*: §234. What would the position be if HM

Treasury refused such a request? Would the court scrutinise the rationality of HM Treasury's response? In *Imam*, Lord Sales stated that consideration should be given to whether the body responsible for budget decisions was on notice in relation to the non-performance of a statutory duty. Would the court inquire into the extent to which HM Treasury was aware of the implications of its spending decisions?

24. These are just some of the questions which may arise in the event that the test of impossibility of compliance falls to be applied to the discharge of a statutory duty by a central government department. It is easy to see that the sorts of questions that might arise risk drawing the courts into areas of enquiry traditionally considered to fall outside its institutional competence.

Unintended consequences of using impossibility of compliance

25. It is right that the threshold for withholding relief should be a high one. As Lords Sales observed in *Imam*, when a breach of statutory duty has been established, the court should not routinely refuse to grant relief to compel performance: *"That would involve a violation of the principle of the rule of law and an improper undermining of Parliament's legislative instruction"*. As explained above, however, the test set out by Lord Sales in *Imam* is not one of impossibility in a literal sense. It is a test which requires the court to balance the interests in compelling performance with a statutory duty against the wider implications of such an order for the public authority and the public. Given the polycentric nature of public sector decision-making, particularly in a context of constrained resources, it must be right that the court has regard to such factors in determining how to exercise its remedial discretion.
26. The concern, however, is that if a court declares that public authority is in breach of an unqualified statutory duty, but at the same time makes a determination that compliance is "impossible", this could have unintended consequences.
27. Where a court grants a declaration that a public authority is in breach of a statutory duty but at the same time finds that compliance with that duty is impossible, this could create uncertainty. The courts do not usually grant coercive orders in addition to declaratory orders. Coercive orders are considered unnecessary because: (i) a declaratory order has the effect of declaring the law and a public body which acts in disregard of the law, as declared by the courts, will usually be acting ultra vires its authority; and, (ii) there is a long-established constitutional principle that the executive will comply with the law as

declared by the courts. Lord Reed explained the position in his judgment in *Craig v HM Advocate* [2022] 1 WLR 1270 at §44 and §46 as follows³:

“44. ...[S]ome general observations about the use of declaratory orders in public law may be helpful. It has been firmly established since the case of *M v Home Office* [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order, and that it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory orders instead.

[...]

46 The Government’s compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The courts’ willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government’s compliance with declaratory orders in the absence of coercion. In other words, it is because ours is a society governed by the rule of law, where the Government can be trusted to comply with court orders without having to be coerced, that declaratory orders can provide an effective remedy. Although cases have occurred from time to time in which Ministers have failed to comply with court orders (such as *M v Home Office* and the recent case of *R (Majera) v Secretary of State for the Home Department* [2021] 3 WLR 1075), they are exceptional, and can generally be attributed to mistakes and misunderstandings rather than deliberate disregard. However, where a legally enforceable duty to act, or to refrain from acting, can be established, the court is capable of making a coercive order, as *M v Home Office* and *Davidson v Scottish Ministers* 2006 SC (HL) 41 demonstrate. Furthermore, a declaratory order itself has important legal consequences. First, the legal issue which forms the subject matter of the declaration is determined and is *res judicata* as a result of the order being granted: *St George’s Healthcare NHS Trust v S* [1999] Fam 26, 59–60. In addition, a minister who acts in disregard of the law as declared by the courts will normally be acting outside his authority as a Minister, and may consequently expose himself to a personal liability for wrongdoing: Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959), pp 193–194.”

28. The court’s approach in *Imam* is potentially at odds with the principle that the executive can be trusted to comply with declaratory orders. If the court were to grant a declaration that there was an unlawful breach of a statutory duty, that would engage the expectation that the executive will comply with that order. If, at the same time, it were to withhold a mandatory order on the basis that compliance with the duty is impossible, it would be

³ See also *National Council for Civil Liberties v Secretary of State for the Home Department* [2019] Q.B. 48 per Singh LJ and Holgate J at §§51-52.

communicating an inconsistent expectation to the executive. A similar observation was made by Chamberlain J in *R (ECPAT UK) v Kent County Council & Ors* [2023] EWHC 2199 (Admin) in the context of exercising the power in s.29A(1)(a) of the Senior Courts Act 1981 to make a suspensive quashing order. He observed, at §50:

“Declarations may also be appropriate in conjunction with quashing orders, to make clear to the parties and the public the respect in which the impugned act was unlawful. But there is no power to grant a suspended declaration. If the court were to grant a declaration that an impugned act is unlawful and at the same time exercise the power in s. 29A(1)(a) of the 1981 Act, with the effect that the impugned act is upheld during the period of the suspension, it would be saying two inconsistent things. So, on 27 July 2023, I declined to grant any declaration in relation to the Kent Protocol or the NTS Protocol. However, in relation to the Kent Protocol, the quashing order was suspended only until 18 August 2023. At that point, it was appropriate to grant a declaration making clear that Kent CC had acted and was acting unlawfully, in breach of its duties under the CA 1989, by failing to accommodate, and then look after, all UAS children when notified of their arrival by the Home Office.”

29. There is also a practical risk that, by making a finding that compliance with a statutory duty is impossible, the court is (mis)understood tacitly to accept the public authority’s failure to meet its statutory obligations (i.e. by appearing to accept that the authority “could do no other”). That risks making future compliance with important statutory duties less likely, not more.

Case management as a solution?

30. An alternative approach, where there are significant impediments to a public authority immediately complying with a statutory duty or where a mandatory order requiring immediate compliance might have significant deleterious consequences for good administration, might be for the courts to adopt a more interventionist approach to case management. There are a number of remedial tools available to courts which ensure, on the one hand, how to achieve compliance remains a decision for the public authority while on the other hand, ensuring that the court retains oversight of compliance with the underlying legal duty. These include:
- a. declarations with liberty to apply to return the matter to court;
 - b. mandatory orders to produce a plan; and
 - c. review hearings.
31. Using these case management powers, the court can avoid making an order which a public body is unable immediately to comply with, but (i) avoids weakening the impetus to comply with a statutory duty and (ii) leaves the question of how to comply with the public body in question.

Declaration with liberty to apply

32. If there is concern that a statutory duty will not be complied with within an appropriate timeframe, the court could grant a declaration with liberty to apply for further relief should this prove necessary.

33. The court adopted this approach in *R v Hillingdon LBC Ex p. Royco Homes Ltd* [1974] Q.B. 720. That concerned an application to quash a grant of planning permission on the ground that conditions attached to the grant were ultra vires. The claimant also sought a mandatory order requiring the council to reconsider the planning application and decide it afresh according to law. Lord Widgery CJ (with whom Melford Stevenson and Bridge JJ agreed), adjourned the application for a mandatory order with liberty to apply in case it proved necessary “to achieve a proper solution” to the problem, stating at p.732 E-F:

“In my view the position following the order that certiorari should go is that the council as local planning authority will now be required to reconsider the second application for planning permission and reach a conclusion on it according to law. I have little doubt that the council will do what is required of it under those circumstances, and, therefore, at the moment it would be, I think, wholly premature for this court to consider an order of mandamus.”

34. In *R v Liverpool City Corp Ex p. Ferguson* [1985] I.R.L.R. 501, the court granted a declaration with liberty to apply for further relief if necessary. That case concerned a challenge to a decision by the Council not to pay teachers who reported for work on a day of national strike action. The High Court quashed the decision and made a declaration that all teachers who were willing and able to work on the day of action should be paid. The applicants had also sought an injunction restraining the Council from withholding payment of salary due to teachers. The Council resisted the injunctive relief sought on the basis that the Council needed an adequate opportunity to process the lists of applicants who were available to work on the day of action to ensure that there were “no undue expenditure of money”. Mann J set a date by which all payments to which there was an entitlement had to be made, but with liberty to apply.

35. In circumstances where the court has found that immediate compliance with a statutory duty is impossible in the *Imam* sense, an order which provides for liberty to apply if compliance has not been achieved within a specified timeframe would: (i) create a clear signal that the court expects the public authority to take steps to comply with its statutory duty whilst (ii) signalling that it considers it appropriate to afford the public authority a reasonable period of time to comply. The courts have made clear that including a

provision for liberty to apply will only be justified in exceptional cases.⁴ But in circumstances where the court has already determined that compliance with a statutory duty is “impossible” in the *Imam* sense, the test of exceptionality is likely to be met.

Mandatory order to produce a plan

36. The device of including provision for liberty to apply can be combined with a mandatory order to produce a plan for achieving compliance.

37. That was the approach adopted in the *ClientEarth* litigation concerning the Government’s Air Quality Plan. The Government accepted, following a reference to the CJEU, that it was in breach of its obligation under the Air Quality Directive 2008/50/EC to produce air quality plans setting out appropriate measures “so that the exceedance period can be kept as short as possible”. Lord Carnwath, giving a judgment with which Lords Neuberger, Mance, Clarke and Sumption agreed, granted a mandatory order requiring new plans complying with the Directive to be prepared in accordance with a defined timetable: §31.⁵ He stated that there should be liberty to apply to the Administrative Court for variation of the timetable or for determination of any other legal issues which might arise between the parties in the course of preparation of the plans. The 2015 Air Quality Plan which the Government subsequently produced was successfully challenged in *ClientEarth No 2*. In a separate judgment concerning remedies (*R (ClientEarth) v Secretary of State for the Environment Food and Rural Affairs* [2016] EWHC 363 (Admin)) a question arose as to the degree of oversight which it was appropriate for the Administrative Court to retain over the process. Garnham J accepted that in the context of “routine judicial review challenges” there are good reasons for a court to decline to monitor or oversee compliance with court

⁴ As Munby J observed in *R(P) v Essex CC* [2004] EWHC 2027 (Admin) at §33, the Administrative Court “reviews...lawfulness of a decision, action or failure to act in relation to the exercise of public function”; it does not “monitor and regulate the performance of public authorities”. See also *ECPAT UK & Ors v Kent CC & Ors* [2023] EWHC 2199 (Admin) per Chamberlain J at §§11-13; *R (Richards) v Environment Agency* [2022] Env LR 14 per Fordham J at §67; *Harris v Environment Agency* [2023] 2 CMLR 8; [2022] EWHC 2606 (Admin) per Johnson J and *Yousuf v Secretary of State for the Home Department* [2016] EWHC 663 (Admin) per Holman J.

⁵ [2015] UKSC 28; [2015] PTSR 909. Lord Carnwath stated at §31 that in normal circumstances, where a responsible public authority is in admitted breach of a legal obligation but is willing to take appropriate steps to comply, the court might think it right to accept a suitable undertaking rather than impose a mandatory order. Due to restrictions on Government business during election period, that was not an undertaking which the Government could give. In those circumstances, the court decided that the “new Government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue” and that “the only realistic way to achieve this is a mandatory order requiring new plans complying with article 23(1) to be prepared within a defined timetable”.

orders. He held, however, that the particular nature of the case, and the fact that it turned a European Directive, meant that there should be continued liberty to apply on notice for further or additional relief or for determination of any other legal issues which might arise in the course of preparing a modified air quality plan. He made clear, however, that liberty to apply would not encompass fresh proceedings to challenge the new plan once made: §§16-19.

Review hearings

38. In the *ECPAT* litigation, Chamberlain J exercised ongoing oversight of the discharge of statutory duties through the use of a suspended quashing order made pursuant to section 29A of the Senior Courts Act 1981 together with detailed case management orders. That case concerned a challenge to the protocol agreed between Kent County Council (“Kent CC”) and the Home Secretary setting out how Kent would deal with unaccompanied asylum-seeking (“UAS”) children entering the UK in Kent, as well as a protocol setting out the procedure for the transfer of responsibility of these children from one local authority to another. In the first of a series of judgments ([2023] EWHC 1953 (Admin)), Chamberlain J held that Kent CC was acting in breach of its duties under the Children Act 1989, by failing to accommodate and look after all UAS children when notified of their arrival in Kent by the Home Office. He also concluded that the Home Secretary had acted unlawfully by agreeing the Kent Protocol, which capped the number of UAS children for whom Kent CC would accept responsibility and by arranging the transfer of responsibility of these children. In a second judgment on relief ([2023] EWHC 2199 (Admin)) Chamberlain J made an order quashing the Kent Protocol in its entirety and part of the protocol for transferring responsibility of children. However, he suspended the effect of both orders under s.29A(1)(a) of the Senior Courts Act 1981 for three weeks, listing a further hearing to consider whether to grant any further relief. In explaining the benefit of the remedial flexibility afforded by s.29A, Chamberlain J observed:

“These provisions provide a remedial flexibility that was previously unavailable. They enable the court to deal with situations where one or more public authorities are engaged in conduct that is unlawful, but real harm would be caused if that conduct had to stop immediately. The court can set a date by which the unlawful conduct must be brought to an end while providing, subject to conditions under s. 29A(2), that the conduct may continue in the meantime.”

39. There is no provision to make a suspended declaration. It follows that unless, as in *ECPAT*, a public authority’s failure to discharge its statutory duty is accompanied by an unlawful act susceptible to a quashing order, this new remedial power will not be of direct utility in the scenario considered in *Imam*. However, case management orders made by Chamberlain J to accompany the suspended quashing order illustrate the sort of oversight

which the court may provide in exceptional cases where there is ongoing non-compliance with a legal obligation. Between the first hearing in July 2023 and June 2024, Chamberlain J retained oversight of the steps being taken to rectify the unlawful state of affairs. These included: a series of review hearings; mandatory orders prescribing a schedule of procedural and substantive steps which had to be taken between hearings; and requirements to file evidence setting out what steps had been taken to comply with mandatory orders.

40. As Chamberlain J noted, ([2023] EWHC 2199 (Admin) at §14), *“even before the introduction of the power to make suspended quashing orders, there were circumstances in which the court exercised its remedial jurisdiction in such a way as to allow it to monitor the action taken by a defendant to comply with its judgment”*. Chamberlain J cited the ClientEarth case as an example:

“15 One example is *R (ClientEarth) v Secretary of state for the Environment, Food and Rural Affairs* (No. 3) [2018] EWHC 398 (Admin). In that case, Garnham J explained at [12]-[17] that, despite the substantial progress made, there was a continuing failure by the government to comply with its legal obligation to reduce air pollution. He did not doubt the government’s good faith or sincerity, but noted that “the history of this litigation demonstrates that good faith, hard work and sincere promises are not enough”. Rather, the court “must keep the pressure on the government to ensure the compliance with the regulations and the Directive is actually achieved”. Garnham J recognised that the insertion of a liberty to apply avoided the need to obtain permission should the order not be complied with and that there was “great value in the healthy discipline that is provided by the Administrative Court procedures in managing and regulating the grant of judicial review in this court”. Nonetheless, there was a justification for a liberty to apply, given that “we have an expert claimant, which to date has advanced only what are properly arguable claims, and which has demonstrated both high level expertise, legal and technical, and a responsible attitude towards making a claim.

16 The present case has many of the same features. Kent CC has known that it is acting unlawfully for some time. The first report from its monitoring officer to the effect that its refusal to accept newly arriving UAS children into its care was unlawful was on 2 September 2020. There was a second such report on 10 July 2021. Despite this, the unlawful failure to accept all UAS children continued for more than 2 years, having been formalised in the Kent Protocol in September 2021. The history of this litigation shows that an impasse was reached where Kent CC and the Home Secretary each blamed the other for this unlawful state of affairs. Moreover, the breach of duty identified has had, and is continuing to have, very serious consequences, felt by identifiable children, who are not looked after by any local authority, as they should be.”

41. The ECPAT litigation indicates that in exceptional cases the court may play a useful role in supervising the process by which public authorities remedy conduct which has been found to be unlawful. Chamberlain J noted, ([2023] EWHC 2199 (Admin) at §53-§54), that the following features of the case strongly supported the remedial role performed by the court:

“53. The first is that, although the court’s judgment appears to have prompted a great deal of useful work by Kent CC and the Home Secretary, considerable work remains to be done. The second is that there appear to be further disputes emerging between Kent CC and the Home Secretary as to how matters should now progress. If the court does not retain some further role, there is a serious danger that the parties will revert to positions of each blaming the other and that these positions will lead, again, to an impasse.

54. I have borne carefully in mind that the court’s continued role imposes burdens on Kent CC. Its senior staff will have to spend time preparing evidence for the court, rather than concentrating on remedying the unlawful situation which my judgment identified. Nonetheless, the evidence about the steps taken in the last three weeks seem to me to show that, despite the undoubted burdens imposed by it, the court’s continued supervision has focussed minds and achieved results.”

42. Chamberlain J emphasised in each of his judgments the exceptional nature of the remedies granted in the case. These were justified by the unlawful state of affairs which placed at serious risk of harm a large number of vulnerable children.
43. The exceptional nature of cases where the court has found compliance with a statutory duty is impossible may also justify ongoing oversight by the court. As Chamberlain J observed in the ECPAT case, “*the court’s continued supervision has focussed minds and achieved results.*” This may be just what is required to ensure that a public authority, when faced with the seemingly impossible, seeks to achieve the impossible.

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