ROSAMUND SMITH

SEMI-FINAL

RESPONDENT E-BUNDLE

William Sanders & Kate Tidmarsh

16.06.25

CONTENTS:

List of authorities:

R v Disciplinary Committee of the Jockey Club Ex p. Aga Khan [1993] 1 W.L.R. 909
Pages: 909, 919, 921 – 924, 927 – 933

Law v National Greyhound Racing Club [1983] 1 W.L.R. 1302
Pages: 1302 – 1303, 1307 – 1309, 1311 – 1312

R on the application of Mullins v Jockey Club Appeal Board (No.1) [2005] EWHC 2197 (Admin)
§§: 35

R (Possible (The 10:10 Foundation)) v Secretary of State for Transport [2025] EWHC 1101
§§: 116 – 117, 119 – 120

Webster v Lord Chancellor [2016] Q.B. 676
§§: 30 – 32, 34

Senior Courts Act 1981
§: 31

MIDDLE TEMPLE ROSAMUND SMITH MOOTING COMPETITION 2025

IN THE SUPREME COURT OF JUSTICE

B E T W E E N:

MRS HARMONY WATERS

Appellant

and

UK PADDLEBOARDING

Respondent

1. UK Paddleboarding ("**UP**") is the National Governing Body responsible for the organisation of competitive paddleboarding competitions in the United Kingdom of Great Britain and Northern Ireland and a member of the International Paddleboarding Association ("**IPA**").

2. UP's role has never had a statutory underpinning. When established in 1995, UP was a private not for profit company incorporated under UK law. In recognition to its services to sport, it was awarded a Royal Charter in 2015.

3. Its functions include the setting of a Code of Conduct with respect to national standards for clubs, coaches, professionals and volunteers. The Code includes requirements on the part of participants in competitions to conduct themselves at all times in a sportsmanlike manner.

4. Affiliated clubs, their members, coaches and professional athletes ("**participants**") must agree to abide by the Code, as a condition of accreditation, and participation at competitions. UP enjoys a disciplinary jurisdiction over participants. Its decisions are subject to an appeal to the UP Disciplinary Panel ("**the Disciplinary Panel**"), composed of members selected by UP for their expertise and experience in paddleboarding and sports generally. The Panel enjoys powers to issue sanctions, including the exclusion from UP affiliated membership, accreditation and participation in competitions.

5. Whilst membership of UP is voluntary, each of the UK paddleboarding clubs, and over 90% of the 1 million regular paddleboarders are affiliated to it. UP has been entrusted by the IPA with selection of athletes to represent the UK at international competitions, and is responsible in the UK for the organisation of major national competitions. UP trains and licences coaches entitled to work at UP affiliated clubs, and awards a number of lucrative central training contracts for coaches engaged to train its elite group of athletes. A requirement of UP affiliation is routinely imposed upon coaches by professional indemnity insurers.

6. UP was initially funded solely by membership subscriptions, and by the revenue generated from its commercial activities in running and promoting paddleboarding activities and competition. Since 2015, it has received funding from the Department for Culture, Media and Sport to fund its administration and its promotion of paddleboarding participation at grassroots level. In 2024, some 50% of UP's overall budget was made up of that public funding, the calculation of which in turn is underpinned by a statutory instrument.

7. UP's UK Paddleboarding Championship is held on 1 March 2025.

8. During the competition Harmony Waters ("**HW**") a paddleboarding coach with a rolling central coaching contract with UP, renewed annually, loses the final in a controversial photo finish to Glen Rapid. She had to that date enjoyed a lucrative competitive and coaching career, spanning a decade, and enjoyed six figure commercial endorsements.

9. Interviewed immediately after the race, HW questions the organisation of the event, criticises what she described as the "disgraceful" state of the course and particularly the pollution/ water quality of the river selected which she claims impacted upon athlete health. Later that evening, she sends a series of tweets. She describes the state of watercourses as a national emergency and advocates the disruption "by any means" of the industrial activities discharging untreated sewage into courses used by UP. The next day, roads adjoining industrial plants and trading estate near several rivers favoured by the UP are found blocked by a series of sand deposits.

10. HW is referred by UP to its Disciplinary Panel. On 1 April 2025, HW is found to have conducted herself in an unsportsmanlike manner both in the intermediate aftermath of the race, and by her tweets issued later that evening. The Disciplinary Panel finds that HW has brought the sport into disrepute, and imposes a two-year ban from competition.

11. The Disciplinary Panel does not revoke HW's affiliation, and her entitlement to continue activities as a UP affiliated coach remains. Its decision is final.

12. Shortly afterwards, the UP's Chief Executive declines to renew HW's coaching contract. A press spokesman states that the decision has been taken for "sporting reasons", unconnected to the 1 March controversy. It is said that the UP has for some time wished to refresh its coaching roster and bring in new talent.

13. HW makes a GDPR request. She obtains the minutes of the meeting discussing renewal. There was a lengthy discussion of her conduct. UP's officers had advised that it was felt difficult to justify non-renewal in light of the Disciplinary Panel's decision on HW's entitlement to retain her coaching affiliation. It was nonetheless considered by the Chief Executive to be prudent not to renew until "the 1 March controversy" had died down. "Sporting reasons" were to be given as the reason for that decision.

14. HW brings an action for judicial review against the UP. She argues
    (1) the decisions of the Disciplinary Panel are subject to judicial review;
    (2) the Disciplinary Panel's decision was unlawful on account of the Disciplinary Panel's failure to take into account material considerations: she points to the lack of any consideration or reference in its reasons to her unblemished record, to the sincerity of her views, and to her constitutional entitlement to express such views. It was telling that the Panel declined her request to be permitted to attend its hearing to voice those concerns in person.
    (3) the decision of UP not to renew her national coaching contract is subject to judicial review.
    (4) that decision was taken in bad faith: the reasons offered by UP did not properly reflect the underlying grounds of the decision. She argues that the minutes of the relevant meeting demonstrate UP's awareness that the actual rationale of the decision would not withstand legal scrutiny.

15. The Administrative Court grants permission for judicial review, but dismisses HW's claim, on the grounds that it is well established that neither the decision of a national sporting governing body's disciplinary panel, nor a decision of that body in a commercial context are subject to the Court's judicial review jurisdiction. The judgment records that, had the court

enjoyed jurisdiction, then it would have found for HW on both of the substantive grounds advanced.

16. HW appeals. UP enters a Respondent's Notice with respect to the substantive conclusions of the Administrative Court. The Court of Appeal has upheld both aspects of that decision.

17. HW is granted permission to appeal by the Supreme Court, the Court considering that the issue of the susceptibility of National Sports Governing bodies to judicial review is ripe for consideration by the highest court.

18. The Supreme Court has directed that:
    a. Leading counsel should address the primary question of *whether* the challenged decisions of the UP's Disciplinary Panel / its activities in the commercial sphere are subject to judicial review.
    b. Junior Counsel should address the question of the *grounds* of judicial review available to HW if either (1) the decision of the Disciplinary Panel or (2) its decision not to renew the contract with UP are subject to judicial review.

COLIN THOMANN KC
39 Essex Chambers
28 May 2025

IN THE SUPREME COURT OF JUSTICE OF THE UNITED KINGDOM

ON APPEAL FROM THE COURT OF APPEAL (CIVIL DIVISION)

BETWEEN:

MRS HARMONY WATERS

Appellant

-and-

UK PADDLEBOARDING

Respondent

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT

Submissions

Ground One: The challenged decision of the Respondent and its activities in the commercial sphere are not subject to judicial review:

1. The decision of the Respondent's Disciplinary Panel:

1.1 The Respondent is a "private not for profit company incorporated under UK law".

1.2 Being a private company, there is no available route to judicial review for the Appellant's claim. The relevant authority, most notably of *R v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 1 W.L.R. 909 and *Law v National Greyhound Racing Club* [1983] 1 W.L.R. 1302, has long and unambiguously held that sporting regulatory bodies are never to be considered public bodies nor susceptible to judicial review. Under any conceivable test or metric, the Respondent is to be deemed a private body:

(i) But for test: if the Respondent did not exist as a body, the strong likelihood (as with sports of far greater commercial and cultural significance) is that the government would not provide this service but that it would instead be provided by another private media or commercial outfit. (See *Khan* 922 §H and 930 §B).

(ii) Statutory underpinning test: The Respondent's function has "never had a statutory underpinning". It is submitted that without a statutory underpinning there can be no ultra vires or otherwise improper exercise of statutory power and therefore, no statutory wrong to be remedied by judicial review. This is

perhaps the strongest indication that the Respondent is to be considered a private body. (See *Khan* 931 §C).

(iii) Monopoly power test: The Respondent is not a monopoly power insofar as it does not hold *exclusive* control over participants of the sport in the UK. Only "90% of the 1 million regular paddleboarders are affiliated to it." This does not account for irregular paddleboarders and in any event leaves a large contingent of at least 100,000 paddleboarders that are unaffiliated.

(a) Even should the court consider the Respondent to hold virtual or effective monopoly power, this alone is insufficient to either deem that the Respondent is a public body or that judicial review is an appropriate response. Significantly larger sports than paddleboarding are governed by a single regulatory body; a sport as niche as paddleboarding (with only 1 million regular participants) is therefore bound to be regulated by one body and this is not indicative of a public character. (See *Khan* 922 §F and 928 §H).

(iv) Consensual submission to regulation via contract test: "Membership" with the Respondent "is voluntary" and as such the Appellant voluntarily acquired a membership with the Respondent and agreed to be bound by its regulation. Moreover, the "lucrative central training contract" that the Appellant was awarded by the Respondent is an employment contract like any other. This is a strong indication that the relationship between the parties is a commercial and private one and that the matter is not susceptible to judicial review. It is reiterated in *Law* 1309 §§C and G, that where a relationship, such as between the Appellant and Respondent, is one arising wholly from contract, even should the decisions and activities of the regulatory body affect the public in some way this relationship is nevertheless a private one. (See *Law* 1307 §§B – C. See also *Khan* 924 §C, 928 §H, 932 §H and 933 §G).

(v) Public funding test: That some "50%" of the Respondent's "overall budget was made up of public funding" in 2024 and that this calculation was "underpinned by a statutory instrument" is of no moment. A great many organisations and institutions receive funding generated by taxation, but this alone is no indication that they are public bodies. (See *R on the application of Mullins v Jockey Club Appeal Board (No.1)* [2005] EWHC 2197 (Admin) §35).

(a) In any event, the funding provided by the Department for Culture, Media and Sport is specifically designated for "promotion" of the sport "at grassroots level". It is submitted that the money received from the government would therefore never be used to fund the "lucrative central training contract" at issue. As such, the Appellant has no grounds to seek judicial review as it cannot be said that the allocation of the public funding is itself of relevance to either her career or general coaching activities.

(vi) Public function or governmental concern test: The activities, both disciplinary and commercial, of the Respondent plainly do not represent or overlap with even quasi-governmental functions. As submitted above at **1.2(i) and (ii)**, the regulation of paddleboarding is not provided for by legislation nor would it be if the Respondent did not exist. (See *Khan* 922 §G, 930 §A and 932 §H).

(vii) Public regulation test: The activities of the Respondent do not form a part of a wider system of public regulation and are concerned only with the operation of a discrete and niche sporting activity. (See *Khan* 921 §C and 923 §H). Tellingly, the Respondent's employees cannot be said to be office-holders. (See *Khan* 927 §B).

2. The Respondent's activities in the commercial sphere (not to renew the Appellant's coaching contract):

2.1 Similarly for the above reasons, it is submitted that the Respondent's commercial activities are a further indication that it is a private body and not susceptible to judicial review. (See *Law* 1308 §§G – H).

3. Appropriate recourse:

3.1 In the alternative, even should the court consider the Appellant's claim technically amenable to judicial review, the appropriate recourse is to be found not in the Administrative Courts but in an Employment Tribunal. It is inappropriate for a claim to be settled by judicial review where there exists another field of law governing the issue. The dispute between the Appellant and the Respondent is typical of employment contract disputes and warrants no special treatment that cannot be realised at Tribunal, as such bringing this claim under judicial review would amount to an abuse of process. No injustice would be created by dismissal of this appeal. (See *Law* 1308 §G).

4. Public policy considerations:

4.1 There also exists a significant threat in the form of unbridled future judicial review claims against all manner of institutions should this appeal succeed. This would both undermine the characteristic swiftness of judicial review and extend its borders well beyond what is appropriate. (See *Khan* 923 §B and 929 §D).

Ground Two: The Disciplinary Panel's decision to ban the Appellant from competition and the Respondent's decision not to renew the Appellant's coaching contract were both lawful.

5. The Disciplinary Panel ("the Panel") did not fail to consider material considerations:

5.1 There are three categories of consideration:

(i) considerations which a decision-maker is required by statute or similar to take into account;

(ii) considerations which must not be taken into account; and

(iii) considerations which a decision-maker may take into account if in his discretion he thinks it right to do so.

5.2 This appeal concerns the last category. As regards this category, unless the consideration is so obviously material that it must be taken into account, there is a margin of appreciation within which the decision-maker may decide what consideration should play a part in his reasoning process. The test for whether a consideration is so obviously material that it must be taken into account is the

Wednesbury irrationality test. (See *R (Possible (The 10:10 Foundation)) v Secretary of State for Transport* [2025] EWHC 1101 §90).

5.3 The Panel's meeting was to rule on the Appellant's conduct and its serious consequences for the reputation of the sport. The code of conduct required the Appellant to act in a sportsmanlike manner, and the Panel was entitled to solely consider the Appellant's conduct, and the consequences of that conduct. It was not irrational not to take into account the Appellant's unblemished record, the sincerity of her views, and her "constitutional entitlement" to express such views.

5.4 In any event, the decision should stand as it is highly likely that the Panel would have exercised its discretion in materially the same way. (See s.31(2A) Senior Courts Act 1981).

6. The decision of the Respondent cannot be said to be made in bad faith:

6.1 The reason given for the non-renewal of the coaching affiliation ("sporting purposes") is vague but this does not amount to the decision being made in bad faith. An allegation of bad faith is essentially an accusation of dishonesty. (Compare *Webster v Lord Chancellor [2016] Q.B. 676* §§30-32).

6.2 The Respondent was entitled not to follow the advice regarding the relevance of the Panel's decision; there is a clear distinction between a decision not to revoke the Appellant's coaching certificate and a decision not to renew her coaching contract. In any event, there was no dishonesty.

7. It is the Respondent's ultimate submission that the decisions and activities taken by the Respondent are not amenable to judicial review. In any event, the decisions affecting the Appellant were lawful. The court is respectfully invited to dismiss this appeal.

William Sanders & Kate Tidmarsh

[COURT OF APPEAL]

*REGINA v. DISCIPLINARY COMMITTEE OF THE JOCKEY CLUB, *Ex parte* AGA KHAN

1992 Nov. 23, 25, 26; Dec. 4

Sir Thomas Bingham M.R., Farquharson and Hoffmann L.JJ.

Judicial Review—Domestic tribunal—Jockey Club—Racehorse owner's agreement to be bound by club's rules—Club exercising control over racing—Decision of club's disciplinary committee disqualifying owner's horse from race and fining trainer—Whether decision amenable to judicial review

The Jockey Club, incorporated by Royal Charter, exercised responsibility for the organisation and control of racing and training activities in Great Britain. The club's powers and duties did not derive from primary or secondary legislation and its dominance was principally maintained through the issue of licences and permits by which the club's stewards entered into contracts with racecourse managers, owners, trainers and jockeys, who were required to submit to a comprehensive regulatory code, the Rules of Racing, published by the stewards for the conduct of the sport. It was common ground that the applicant, a racehorse owner registered with the club, had agreed to be bound by such rules. In 1989 the applicant's filly was routinely examined after she had won a major race and a sample of her urine was said to contain a substance prohibited by the rules. At a subsequent inquiry the club's disciplinary committee concluded that such a substance was present in her urine and in consequence, as prescribed by the rules, disqualified the filly and fined her trainer. The applicant sought leave to move for judicial review by way of an order of certiorari to quash the committee's decision. On the grant of leave trial was directed of a preliminary question whether the decision was amenable to judicial review. The Divisional Court determined that question against the applicant and dismissed his application.

On the applicant's appeal:—

Held, dismissing the appeal, that although the Jockey Club exercised dominant control over racing activities in Great Britain its powers and duties were in no sense governmental but derived from the contractual relationship between the club and those agreeing to be bound by the Rules of Racing; that such powers gave rise to private rights enforceable by private action in which effective relief by way of declaration, injunction and damages was available; and that, accordingly, the club's decision was not amenable to judicial review (post, pp. 924B–C, D, 929H—930B, D, F–G, 931A, D, 933F–G).

Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864, D.C.; *Law v. National Greyhound Racing Club Ltd.* [1983] 1 W.L.R. 1302, C.A. and *Reg. v. Panel on Take-overs and Mergers, Ex parte Datafin Plc.* [1987] Q.B. 815, C.A. considered.

Decision of Divisional Court of the Queen's Bench Division affirmed.

The following cases are referred to in the judgments:

Bank of Scotland v. Investment Management Regulatory Organisation Ltd., 1989 S.L.T. 432

Breen v. Amalgamated Engineering Union [1971] 2 Q.B. 175; [1971] 2 W.L.R. 742; [1971] 1 All E.R. 1148, C.A.

glamorous. The industry it regulates is smaller and, some would feel, more dispensable. But the two bodies, within their respective spheres, exercise much the same powers in much the same way. The N.G.R.C.'s Rules of Racing plainly owe much to those of the Jockey Club. If the N.G.R.C.'s contentions were rightly rejected in *Law's* case for the reasons given, the applicant's contentions could not without anomaly be upheld on this appeal, unless the bounds of judicial review have been significantly extended in the years since that case was decided.

In arguing that such extension has indeed occurred, the applicant relies principally on *Reg. v. Panel on Take-overs and Mergers, Ex parte Datafin Plc.* [1987] Q.B. 815. In that case the Court of Appeal (Sir John Donaldson M.R., Lloyd and Nicholls L.JJ.) held that the panel was in principle amenable to judicial review. The decision was novel, because the panel was not created by statute or by any exercise of prerogative or governmental power. But there was evidence that the Department of Trade and Industry had decided not to regulate take-overs by statutory instrument and to rely instead on the panel's enforcement of the City Code on Take-overs and Mergers. As Sir John Donaldson M.R. put it, at pp. 835–836:

> "The picture which emerges is clear. As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where E.E.C. requirements called for statutory provisions. No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel. Its lack of a direct statutory base is a complete anomaly, judged by the experience of other comparable markets world wide. The explanation is that it is an historical 'happenstance,' to borrow a happy term from across the Atlantic. Prior to the years leading up to the 'Big Bang,' the City of London prided itself upon being a village community, albeit of an unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary. It is a process which is likely to continue, but the position has already been reached in which central government has incorporated the panel into its own regulatory network built up under the Prevention of Fraud (Investments) Act 1958 and allied statutes, such as the Banking Act 1979."

Sir John Donaldson M.R. cited at length from *Ex parte Lain* [1967] 2 Q.B. 864, and came to the core of his decision in principle [1987] Q.B. 815, 838:

> "The Criminal Injuries Compensation Board, in the form which it then took, was an administrative novelty. Accordingly it would have been impossible to find a precedent for the exercise of the supervisory jurisdiction of the court which fitted the facts. Nevertheless the court not only asserted its jurisdiction, but further asserted that it was a

Nicholls L.J. expressed his conclusion, at p. 852:

> "In my view, and quite apart from any other factors which point in the same direction, given the leading and continuing role played by the Bank of England in the affairs of the panel, the statutory source of the powers and duties of the Council of the Stock Exchange, the wide-ranging nature and importance of the matters covered by the code, and the public law consequences of non-compliance, the panel is performing a public duty in prescribing and operating the code (including ruling on complaints)."

The effect of this decision was to extend judicial review to a body whose birth and constitution owed nothing to any exercise of governmental power but which had been woven into the fabric of public regulation in the field of take-overs and mergers. *Reg. v. Advertising Standards Authority Ltd., Ex parte Insurance Service Plc.* (1989) 2 Admin.L.R. 77 appears to me to be a precise application of the principle thus established to analogous facts.

Mention should be made of two cases, both in the Divisional Court and both involving the Jockey Club. The earlier of the two was *Reg. v. Disciplinary Committee of the Jockey Club, Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207. In this case the applicant sought judicial review of a decision that his name be removed from the list of those qualified to act as chairman of a panel of local stewards. The Jockey Club challenged the jurisdiction of the court to grant judicial review. Neill L.J. observed that if the matter were free from authority he might have been disposed to conclude that some decisions at any rate of the Jockey Club were capable of being judicially reviewed, but found it impossible to distinguish the binding authority of *Law v. National Greyhound Racing Club Ltd.* [1983] 1 W.L.R. 1302. Roch J., with some difference of emphasis, reached the same decision. The case may be distinguished from the present on two grounds. First, it does not appear (although this may not be entirely clear) that there was any contract between the applicant and the Jockey Club. Secondly, the question whether the applicant or some other local steward should act as chairman may fairly be seen as a domestic question lacking public significance and involving no exercise of power which could be seen as affecting the public.

The later decision was *Reg. v. Jockey Club, Ex parte R.A.M. Racecourses Ltd.* [1993] 2 All E.R. 225. In that case the applicant for judicial review was a racecourse management which sought to challenge the Jockey Club's allocation of racing fixtures. The Jockey Club again challenged the court's jurisdiction to grant judicial review. On this issue Stuart-Smith L.J., being unconvinced that the court's decision in *Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207 was wrong, felt bound to follow it although adding that he would but for that authority have held that the Jockey Club were amenable to judicial review.

Simon Brown J. held himself similarly bound to follow *Ex parte Massingberd-Mundy*, but in doing so expressed some criticism of the wider grounds of that decision. He thought it possible to distinguish *Law's* case [1983] 1 W.L.R. 1302 in which the applicant had been bound to the club by contract, particularly in the light of *Reg. v. Panel on Take-overs and Mergers, Ex parte Datafin Plc.* [1987] Q.B. 815. In the course of his judgment he said [1993] 2 All E.R. 225, 247:

> "I find myself, I confess, much attracted by Mr. Beloff's submissions that the nature of the power being exercised by the Jockey Club in

discharging its functions of regulating racecourses and allocating fixtures is strikingly akin to the exercise of a statutory licensing power. I have no difficulty in regarding this function as one of a public law body, giving rise to public law consequences. On any view it seems to have strikingly close affinities with those sorts of decision-making that commonly *are* accepted as reviewable by the courts. And at the same time I certainly cannot identify this particular exercise of power with that of an arbitrator or other domestic body such as would clearly be outside the supervisory jurisdiction."

But he concluded, at p. 248:

"Plainly the Jockey Club for the most part take decisions which affect only—or at least essentially—those voluntarily and willingly subscribing to their rules and procedures. The wider public have no interest in all this, certainly not sufficient to make such decisions reviewable. But just occasionally, as when exercising the quasi-licensing power here under challenge, I for my part would regard the Jockey Club as subject to review."

In that case, as in *Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207, but unlike *Law's* case [1983] 1 W.L.R. 1302 and the present case, there was no contract between the applicant and the club.

In *Reg. v. Football Association Ltd., Ex parte Football League Ltd.*, The Times, 22 August 1991, Rose J. had to consider the susceptibility of the Football Association to judicial review. Having reviewed the authorities (including some not touched on here) at some length, the judge gave reasons based both on principle and pragmatism for rejecting the application (see the transcript):

"I have crossed a great deal of ground in order to reach what, on the authorities, is the clear and inescapable conclusion for me that the F.A. is not a body susceptible to judicial review either in general or, more particularly, at the instigation of the League with whom it is contractually bound. Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only. I find no sign of underpinning directly or indirectly by any organ or agency of the state or any potential government interest, as Simon Brown J. put it in *Reg. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1992] 1 W.L.R. 1036, nor is there any evidence to suggest that if the F.A. did not exist the state would intervene to create a public body to perform its functions. On the contrary, the evidence of commercial interest in the professional game is such as to suggest that a far more likely intervener to run football would be a television or similar company rooted in the entertainment business or a commercial company seeking advertising benefits such as presently provides sponsorship in one form or another. I do not find this conclusion unwelcome. Although thousands play and millions watch football, although it excites passions and divides families, and although millions of pounds are spent by spectators, sponsors, television companies and also clubs on salaries, wages, transfer fees and the maintenance of grounds, much the same can also be said in

relation to cricket, golf, tennis, racing and other sports. But they are all essentially forms of popular recreation and entertainment and they are all susceptible to control by the courts in a variety of ways. This does not, of itself, exempt their governing bodies from control by judicial review. Each case will turn on the particular circumstances. But, for my part, to apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap. It would also, in my view, for what it is worth, be a misapplication of increasingly scarce judicial resources. It will become impossible to provide a swift remedy, which is one of the conspicuous hallmarks of judicial review, if the courts become even more swamped with such applications than they are already. This is not, of course, a jurisprudential reason for refusing judicial review, but it will be cold comfort to the seven or eight other substantive applicants and the many more ex parte applicants who have had to be displaced from the court's lists in order to accommodate the present litigation to learn that, though they may have a remedy for their complaints about the arbitrary abuse of executive power, it cannot be granted to them yet."

No case directly raising the issue whether a sporting regulatory body is susceptible to judicial review, and if so in what circumstances, has yet reached the House of Lords. But our attention was drawn to *Calvin v. Carr* [1980] A.C. 574, a Privy Council case in which an owner challenged a disciplinary ruling of the Australian Jockey Club. He proceeded by writ in the ordinary way, there was no argument on procedure and the hearing preceded *O'Reilly v. Mackman* [1983] 2 A.C. 237, which had the effect of directing professional attention to these jurisdictional issues. To that extent this authority must be viewed with caution. It is nonetheless evident that their Lordships regarded the disciplinary hearing as "an essentially domestic proceeding" in which all who took part had accepted the Rules of Racing: [1980] A.C. 574, 597.

Conclusions

I have little hesitation in accepting the applicant's contention that the Jockey Club effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public. I am willing to accept that if the Jockey Club did not regulate this activity the government would probably be driven to create a public body to do so.

But the Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body. While the grant of a Royal Charter was no doubt a mark of official approval, this did not in any way alter its essential nature, functions or standing. Statute provides for its representation on the Horserace Betting Levy Board, no doubt as a body with an obvious interest in racing, but it has otherwise escaped mention in the statute book. It has not been woven into any system of governmental control of horseracing, perhaps because it has itself controlled horseracing so successfully that there has been no need for any such governmental system and such does not therefore exist. This has the result that while the Jockey Club's powers may be described as, in many ways, public they are in no sense governmental. The discretion

conferred by section 31(6) of the Supreme Court Act 1981 to refuse the grant of leave or relief where the applicant has been guilty of delay which would be prejudicial to good administration can scarcely have been envisaged as applicable in a case such as this.

I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of Rules of Racing administered by the Jockey Club, there were a statutory code administered by a public body, the rights and obligations conferred and imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may be, that the powers which the Jockey Club exercises over those who (like the applicant) agree to be bound by the Rules of Racing derive from the agreement of the parties and give rise to private rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long-standing principle to extend the remedy of judicial review to such a case.

It is unnecessary for purposes of this appeal to decide whether decisions of the Jockey Club may ever in any circumstances be challenged by judicial review and I do not do so. Cases where the applicant or plaintiff has no contract on which to rely may raise different considerations and the existence or non-existence of alternative remedies may then be material. I think it better that this court should defer detailed consideration of such a case until it arises. I am, however, satisfied that on the facts of this case the appeal should be dismissed.

FARQUHARSON L.J. This appeal constitutes another attempt to extend the frontiers of judicial review. The Aga Khan is an owner of racehorses and is registered as such with the Jockey Club.

In 1989 he owned a filly called Aliysa which he entered for the Oaks in 1989. She won the race and a routine sample of her urine was taken from her. Upon analysis at the Horseracing Forensic Laboratory it was discovered that the sample contained 3-hydroxycamphor ("3–HC") which is a metabolite of camphor. The origin of the 3–HC was and remains unknown, but camphor is under the rules a prohibited substance.

In 1990 an inquiry was held which Mr. Stoute, the filly's trainer, was required to attend. On 20 November the disciplinary committee concluded that while 3–HC is a metabolite of other substances besides camphor it was satisfied that camphor was the source of the 3–HC found in the sample. By that finding Aliysa was automatically disqualified under rule 180(ii). Mr. Stoute was fined £200 under the provisions of rule 53(i). While the committee's findings imputed no blame to the owner the Aga Khan considered that they reflected on his position as head of a large religious group as well as on his reputation as an owner and breeder of racehorses.

It was for these reasons that he resolved to bring proceedings against the Jockey Club on the basis of a number of allegations with which this court is not presently concerned. The Aga Khan elected not to proceed by writ but instead sought leave to apply for judicial review of the decisions of the disciplinary committee of the Jockey Club. Leave to apply was granted by Macpherson of Cluny J. who warned the applicant that his "first hurdle" would be to establish that the decision of the committee was susceptible to judicial review.

A penalties wherever non-statutory powers and penalties were insufficient or non-existent or where E.E.C. requirements called for statutory provisions. . . . Its jurisdiction extends throughout the United Kingdom. Its code and rulings apply equally to all who wish to make take-over bids or promote mergers, whether or not they are members of bodies represented on the panel."

B Both the chairman and deputy chairman of the take-over panel are appointed by the Governor of the Bank of England. The panel was and is in its function a unique body, but the court found that it was an integral part of a system which performed public law duties. In so deciding the court rejected the argument that the sole test of whether such a body was susceptible to judicial review was its source of power, C and held it was entitled to consider such factors as the nature of the power. Sir John Donaldson M.R. said, at p. 838:

"In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the D exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction."

Understandably the decision in *Ex parte Datafin Plc.* involved some development of the law relating to judicial review but, bearing in mind the concluding words of the citation just made, the court did not question E the decision in *Law's* case [1983] 1 W.L.R. 1302, which was cited to it in argument.

There have been two attempts to bring proceedings for judicial review against the Jockey Club since the decision in *Ex parte Datafin Plc.* [1987] Q.B. 815. In the first, *Reg. v. Disciplinary Committee of the Jockey Club, Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207, the applicant sought to challenge a decision of the Jockey Club to remove him as chairman of F the panel of local stewards. There was no contractual relationship between the parties in regard to the appointment. The Divisional Court held that it was bound by the decision in *Law v. National Greyhound Racing Club Ltd.* [1983] 1 W.L.R. 1302 to refuse the application, although both judges indicated that if the matter had been free from authority they would have been disposed to say that at any rate some of G the decisions of the Jockey Club were amenable to judicial review.

The second case, already referred to, is *Reg. v. Jockey Club, Ex parte R.A.M. Racecourses Ltd.* [1993] 2 All E.R. 225. The applicant's complaint was that the Jockey Club had allocated an insufficient number of meetings to their racecourse. Here again there was no contractual relationship, and the allocation of meetings was exclusively a matter for the club. Although dismissing the application on its merits the Divisional H Court went on to consider the question of jurisdiction. Both Stuart-Smith L.J. and Simon Brown J. considered themselves bound by the decision in *Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207 but both said that if they had not been they would have held the Jockey Club susceptible to judicial review.

In argument Mr. Kentridge for the applicant has said that it is not necessary for him to assert that *Law's* case [1983] 1 W.L.R. 1302 was wrongly decided, but he submits that in the light of *Ex parte Datafin Plc.*

[1987] Q.B. 815 the decision was on too narrow a basis. Furthermore he seeks to distinguish the two cases on their facts.

In the light of the authorities already referred to in this judgment the issue in this appeal is whether on the one hand the Jockey Club is a domestic body which exercises its powers consensually or whether on the other there are public elements in the discharge of its functions which render it amenable to judicial review.

It is well known that all the major sports in this country are controlled by bodies whose task it is to ensure that the rules are properly observed and so far as possible to maintain proper standards and ensure fair play. It may well be that the Jockey Club is the most powerful of them all. Although it is now governed by a Charter it has exercised control over horseracing for over 200 years. Its licensing and disciplinary powers are so extensive that nobody can play any significant part in the sport, whether as owner, trainer, jockey or racecourse owner without the approval of the club. Racing is now so popular and widespread that it takes on the character of an industry, with a huge turnover of money in the betting which depends on it. It is with this general background that Mr. Kentridge submits that the Jockey Club cannot realistically be described as a domestic body and that there are elements in its make-up and duties which make it properly susceptible to public law remedies. He accepts that it is not part of any government scheme of regulation, nor backed by any statutory sanctions, but argues that: (1) although its jurisdiction is nominally consensual the Jockey Club powers go far beyond the consent of a particular person; (2) that it is in fact supported by extensive powers in its overall control of racing; (3) by its rules it exercises powers over persons who have never submitted to those rules, as when those who are deemed to be undesirable are warned off racecourses under the club's control; (4) the club's activities and functions are carried out not, or perhaps not only, in the interest of its members but also for the benefit of the public, in particular those who go racing or bet on horses; (5) the position of the Jockey Club, as the controller of racing, is recognised by Parliament by its association with the betting levy duty, which is applied in the interests of racing; (6) unlike most clubs incorporated under Royal Charter it has imposed upon it both powers and duties; and (7) if there were no voluntary body like the Jockey Club to exercise disciplinary control over the sport, Parliament would be likely to create a body with similar powers to the Jockey Club.

It is conceded that there is or at all events was a contractual relationship between the club and the applicant, both when he applied to be and was accepted as a registered owner and when he entered Aliysa for the Oaks. There was in all probability also a contract between the applicant and those responsible for Epsom Racecourse. By entering into those agreements the applicant was expressly submitting to the Rules of Racing and acknowledging that he was governed by the disciplinary powers of the Jockey Club. Mr. Kentridge has referred to the lack of reality of describing such a relationship as consensual. The fact is that if the applicant wished to race his horses in this country he had no choice but to submit to the club's jurisdiction. This may be true but nobody is obliged to race his horses in this country and it does not destroy the element of consensuality.

Mr. Kentridge criticises the decision in *Law v. National Greyhound Racing Club Ltd.* [1983] 1 W.L.R. 1302 in that the court concentrated particularly on the source of the power of the National Greyhound

Racing Club. That power was of course consensual. As a result of *Ex parte Datafin Plc.* [1987] Q.B. 815 the source of power is only one element to consider in deciding whether there was a sufficient public element to make the activity of the body concerned amenable to public law.

Mr. Kentridge also seeks to distinguish *Law's* case [1983] 1 W.L.R. 1302 from the present one on its facts. He asserts that the National Greyhound Racing Club is not in the same powerful position with regard to its sport as the Jockey Club. If there were no National Greyhound Racing Club the government would not step in to control the sport as it is not of the same importance.

Moreover he claims that the decision is authority only for the propositions that (a) a domestic tribunal whose powers are derived solely from contract is not subject to judicial review and (b) the provisions of section 31 of the Supreme Court Act 1981 are purely procedural.

Mr. Milmo submits that the Jockey Club is not amenable to judicial review on the grounds that the exercise of its functions is consensual and there was no public element in the making of the decision. He emphasises that the particular decision under review concerns the disqualification of one horse in one race. However, Mr. Milmo goes much further and asserts that the overall control which the Jockey Club exercises over racing is a comprehensive structure so that one cannot isolate one rule. Either all or none of the club's decisions are susceptible to judicial review. In the present case the club's power to enforce the rules is grounded solely in contract, and there is no statutory input. The fact that their powers are consensual is demonstrated by the fact that the same duty is owed by the club to all the other participants in the race. Mr. Milmo rejects the criticism of *Law's* case which he submits is good law.

There was no effective distinction between the functions of the National Greyhound Racing Club and the Jockey Club. The rules of the two bodies are similar, and so in consequence are their powers. The fact that the Jockey Club was granted a charter while the National Greyhound Racing Club is incorporated makes no real difference. Put shortly, Mr. Milmo's argument is that, if the jurisdiction is based solely on consent, it matters not if there is a public law element. The feature of consent provides the private right and in those circumstances one never gets to what might be called the *Datafin* stage.

For my part I cannot find that *Ex parte Datafin Plc.* [1987] Q.B. 815 affects the ratio of the decision in *Law's* case [1983] 1 W.L.R. 1302. I bear in mind Lord Parker C.J.'s observations that there should be an element of flexibility in the use of certiorari so that it can be adapted to changing situations but there has never been any doubt that public law remedies do not lie against domestic bodies, as they derive solely from the consent of the parties. In *Law's* case the court was applying well established principles. The question remains whether the Jockey Club, or this particular decision of it, can properly be described as a domestic body acting by consent.

In principle it is difficult to see any distinction between the National Greyhound Racing Club (or its corporate equivalent) and the Jockey Club. The only apparent factual difference lies in the extent of its jurisdiction. For that matter the other governing bodies of the major sports come in the same category unless some distinction can be found in the rules. Neither do I find any public element in the Jockey Club's position and powers within the meaning of that term as explained in

Ex parte Datafin Plc. [1987] Q.B. 815. No doubt, as Lawton L.J. observed in *Law's* case [1983] 1 W.L.R. 1302, 1307, many of the decisions of the Jockey Club through its committees will affect members of the public who have no connection with it, but there is a difference between what may affect the public and what amounts to a public duty. It is difficult to see that the disqualification of this particular filly—important though the race was—could transform the role of the Jockey Club from a domestic to a public one. The courts have always been reluctant to interfere with the control of sporting bodies over their own sports and I do not detect in the material available to us any grounds for supposing that, if the Jockey Club were dissolved, any governmental body would assume control of racing. Neither in its framework nor its rules nor its function does the Jockey Club fulfil a governmental role.

I understand the criticism made by Mr. Kentridge of the reality of the consent to the authority of the Jockey Club. The invitation to consent is very much on a take it or leave it basis. But I do not consider that this undermines the reality of the consent. Nearly all sports are subject to a body of rules to which an entrant must subscribe. These are necessary, as already observed, for the control and integrity of the sport concerned. In such a large industry as racing has become, I would suspect that all those actively and honestly engaged in it welcome the control of licensing and discipline exerted by the Jockey Club.

For these reasons I would hold that the decision of the Disciplinary Committee of the Jockey Club to disqualify Aliysa from the 1989 Oaks is not susceptible to judicial review.

As to Mr. Milmo's assertion that the question of the Jockey Club's susceptibility to judicial review must be answered on an all or nothing basis, I can only say as at present advised that I do not agree. In *Reg. v. Jockey Club, Ex parte R.A.M. Racecourses Ltd.* [1993] 2 All E.R. 225 Simon Brown J. had similar reservations. In both that case and *Reg. v. Disciplinary Committee of the Jockey Club, Ex parte Massingberd-Mundy* [1993] 2 All E.R. 207, the applicants had no contractual relationship with the Jockey Club. While I do not say that particular circumstances would give a right to judicial review I do not discount the possibility that in some special circumstances the remedy might lie. If for example the Jockey Club failed to fulfil its obligations under the charter by making discriminatory rules, it may be that those affected would have a remedy in public law.

In the present appeal there is no hardship to the applicant in his being denied judicial review. If his complaint that the disciplinary committee acted unfairly is well-founded there is no reason why he should not proceed by writ seeking a declaration and an injunction. Having regard to the issues involved it may be a more convenient process.

I would dismiss the appeal.

HOFFMANN L.J. The Jockey Club is an exclusive private club incorporated by Royal Charter which controls the racing industry. It does so by tradition, widespread acceptance and the contractual consent of almost all active participants in racing to the club's Rules of Racing and the jurisdiction of its disciplinary committee. This control gives the club considerable power over a section of the economy which is not only important in itself but supports another important economic activity, namely horserace betting. The question in this appeal is whether the

power exercised by the club brings its decisions into the realm of public law, so that they are amenable to judicial review. In my view it does not. However impressive its powers may be, the Jockey Club operates entirely in the private sector and its activities are governed by private law.

There is no reason why a private club should not also exercise public powers. The Law Society is essentially a club, incorporated by Royal Charter, perhaps less exclusive than the Jockey Club, but private nonetheless. Not all solicitors choose to belong. But the Law Society also exercises public powers, conferred by statute in the public interest. In exercising these powers, the Law Society operates in the realm of public law: see *Swain v. The Law Society* [1983] 1 A.C. 598. In the case of the Jockey Club, however, there is no public source for any of its powers. It operates directly or indirectly by consent. The power is direct against those who have agreed to be bound by the Rules of Racing and indirect against those who have not. So for example, the club has power under rule 2(iv) to exclude persons not bound by the Rules of Racing from premises which it licenses, such as racecourses or training stables, and the power can be effectively exercised because the occupiers of those premises have agreed not to admit anyone whom the club has decided to exclude.

Reg. v. Panel on Take-overs and Mergers, Ex parte Datafin Plc. [1987] Q.B. 815 shows that the absence of a formal public source of power, such as statute or prerogative, is not conclusive. Governmental power may be exercised de facto as well as de jure. But the power needs to be identified as governmental in nature. In *Ex parte Datafin Plc.* Sir John Donaldson M.R. explained how in 1986 the panel had come to occupy the position it did, at pp. 835–836:

> "As an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where E.E.C. requirements called for statutory provisions. No one could have been in the least surprised if the panel had been instituted and operated under the direct authority of statute law, since it operates wholly in the public domain. . . . Prior to the years leading up to the 'Big Bang,' the City of London prided itself upon being a village community, albeit of an unique kind, which could regulate itself by pressure of professional opinion. As government increasingly accepted the necessity for intervention to prevent fraud, it built on City institutions and mores, supplementing and reinforcing them as appeared necessary. It is a process which is likely to continue, but the position has already been reached in which central government has incorporated the panel into its own regulatory network built up under the Prevention of Fraud (Investments) Act 1958 and allied statutes, such as the Banking Act 1979."

What one has here is a privatisation of the business of government itself. The same has been held to be true of the Advertising Standards Authority (*Reg. v. Advertising Standards Authority Ltd., Ex parte Insurance Service Plc.*, 2 Admin.L.R. 77) and the Investment Management Regulatory Organisation Ltd. ("I.M.R.O."): *Bank of Scotland v. Investment Management Regulatory Organisation Ltd.*, 1989 S.L.T. 432. Both are private bodies established by the industry but integrated into a

system of statutory regulation. There is in my judgment nothing comparable in the position of the Jockey Club. It is true that it has been incorporated by Royal Charter, but this seems to me simply a mark of royal favour to racing. The club nominates three members of the Horserace Betting Levy Board, but this is to represent the disparate private interests of the racing industry, which enjoys the benefit of the levy. There is nothing to suggest that, if the Jockey Club had not voluntarily assumed the regulation of racing, the government would feel obliged or inclined to set up a statutory body for the purpose. The reactions of successive governments to the proposals of, among others, the Royal Commission on Gambling (1978) (Cmnd. 7200) and the Fourth Report of the House of Commons Home Affairs Committee on the Levy on Horserace Betting (1991) (H.C. 146) suggest a determination to leave racing firmly in the private sector.

In *Law v. National Greyhound Racing Club Ltd.* [1983] 1 W.L.R. 1302 this court decided that the National Greyhound Racing Club Ltd. was not amenable to judicial review notwithstanding that it controlled the greater part of the dog racing business in much the same way as the Jockey Club controls horseracing. The club was held to be a purely domestic tribunal because the source of its power lay in contract and nothing else. The case was decided before *Reg. v. Panel on Take-overs and Mergers, Ex parte Datafin Plc.* [1987] Q.B. 815 and did not consider whether, notwithstanding the lack of any public source for its powers, the club might de facto be a surrogate organ of government. I would accept that, if this were the case, there might be a conflict between the principle laid down in *Ex parte Datafin Plc.* and the actual decision in *Law's* case [1983] 1 W.L.R. 1302 which required a re-examination of whether *Law's* case still governed the present case. I would also accept that a body such as the Take-over Panel or I.M.R.O. which exercises governmental powers is not any the less amenable to public law because it has contractual relations with its members. In my view, however, neither the National Greyhound Racing Club Ltd. nor the Jockey Club is exercising governmental powers and therefore the decision in *Law's* case remains binding in this case.

It is true that in some countries there are statutory bodies which exercise at least some control over racing. It appears from *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487 that this is the position in Tasmania and we were told that it was also true of certain of the United States. But different countries draw the line between public and private regulation in different places. The fact that certain functions of the Jockey Club could be exercised by a statutory body and that they are so exercised in some other countries does not make them governmental functions in England. The attitude of the English legislator to racing is much more akin to his attitude to religion (see *Reg. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1992] 1 W.L.R. 1036): it is something to be encouraged but not the business of government.

All this leaves is the fact that the Jockey Club has power. But the mere fact of power, even over a substantial area of economic activity, is not enough. In a mixed economy, power may be private as well as public. Private power may affect the public interest and the livelihoods of many individuals. But that does not subject it to the rules of public law. If control is needed, it must be found in the law of contract, the

doctrine of restraint of trade, the Restrictive Trade Practices Act 1976, articles 85 and 86 of the E.E.C. Treaty and all the other instruments available in law for curbing the excesses of private power.

It may be that in some cases the remedies available in private law are inadequate. For example, in cases in which power is exercised unfairly against persons who have no contractual relationship with the private decision-making body, the court may not find it easy to fashion a cause of action to provide a remedy. In *Nagle v. Feilden* [1966] 2 Q.B. 633, for example, this court had to consider the Jockey Club's refusal on grounds of sex to grant a trainer's licence to a woman. She had no contract with the Jockey Club or (at that time) any other recognised cause of action, but this court said that it was arguable that she could still obtain a declaration and injunction. There is an improvisatory air about this solution and the possibility of obtaining an injunction has probably not survived *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A.* [1979] A.C. 210.

It was recognition that there might be gaps in the private law that led Simon Brown J. in *Reg. v. Jockey Club, Ex parte R.A.M. Racecourses Ltd.* [1993] 2 All E.R. 225 to suggest that cases like *Nagle v. Feilden* [1966] 2 Q.B. 633, as well as certain others involving domestic bodies like the Football Association in *Eastham v. Newcastle United Football Club Ltd.* [1964] Ch. 413 and a trade union in *Breen v. Amalgamated Engineering Union* [1971] 2 Q.B. 175, "had they arisen today and not some years ago, would have found a natural home in judicial review proceedings." For my part, I must respectfully doubt whether this would be true. Trade unions have now had obligations of fairness imposed upon them by legislation, but I doubt whether, if this had not happened, the courts would have tried to fill the gap by subjecting them to public law. The decision of Rose J. in *Reg. v. Football Association Ltd., Ex parte Football League Ltd.*, The Times, 22 August 1991, which I found highly persuasive, shows that the same is probably true of the Football Association. I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of government.

In the present case, however, the remedies in private law available to the Aga Khan seem to me entirely adequate. He has a contract with the Jockey Club, both as a registered owner and by virtue of having entered his horse in the Oaks. The club has an implied obligation under the contract to conduct its disciplinary proceedings fairly. If it has not done so, the Aga Khan can obtain a declaration that the decision was ineffective (I avoid the slippery word void) and, if necessary, an injunction to restrain the club from doing anything to implement it. No injustice is therefore likely to be caused in the present case by the denial of a public law remedy.

I would dismiss the appeal.

Appeal dismissed with costs.
Leave to appeal refused.

Solicitors: Matthew McCloy & Partners, Newbury; Charles Russell.

D. E. C. P.

move in a hurry. In any case, as was pointed out by Kerr L.J. in *Z Ltd.* v. *A–Z and AA–LL* [1982] Q.B. 558 at 588, it is unsatisfactory that courts should be "cluttered up" with *Mareva* applications more than is strictly necessary.

The solution lies in finding a form of wording which can be incorporated in the original ex parte order, which would enable banks to exercise their ordinary rights of set-off. Mr. Pollock objected that if a special provision were made in favour of bankers, then why not in the case of other third parties. I am not much impressed by that objection. There is no doubt that by far the greatest burden of policing *Mareva* injunctions falls on the banks. In order to avoid the necessity of them coming back for variations, and in order to save court time, it is desirable that in future all *Mareva* injunctions which are intended to be served on banks should contain a suitable proviso. The language suggested by counsel for Barclays Bank International Ltd. is:

> "Provided that nothing in this injunction shall prevent Barclays Bank International Ltd. from exercising any rights of set-off it may have in respect of facilities afforded by Barclays Bank International Ltd. to the defendants prior to the date of this injunction."

It seems to me that that wording is satisfactory, and produces the desired result.

Directions accordingly.
Plaintiffs to pay costs on solicitor and client basis.

Solicitors: *Durrant Piesse; Holman Fenwick & Willan.*

[Reported by COLIN BERESFORD, ESQ., Barrister-at-Law]

[COURT OF APPEAL]

*LAW *v.* NATIONAL GREYHOUND RACING CLUB LTD.

[1983 L. No. 679]

1983 July 18; 29 — Lawton, Fox and Slade L.JJ.

Judicial Review—Domestic tribunal—Declaratory relief—Greyhound trainer's claim against company controlling greyhound racing—Trainer deemed to be bound by company's rules—Disciplinary decision by company's stewards suspending trainer's licence—Action for declaration that suspension invalid—Whether proceedings for judicial review appropriate remedy—Supreme Court Act 1981 (*c.* 54), *s.* 31(1)(2)—*R.S.C., Ord.* 53, *r.*1(1)(2)

The defendants, a company limited by guarantee, acted as a judicial body for the conduct and discipline of greyhound racing in England, Wales and Scotland. They administered a code of rules (the "Rules of Racing") in order to achieve an orderly and viable method of conducting greyhound racing. Stewards were

appointed to enforce the rules. All who wished to take part in greyhound racing in stadia licensed by the defendants were deemed under rule 2 of the Rules of Racing to have read the rules and to have submitted to them and to the jurisdiction of the defendants. By a disciplinary decision given by the stewards on December 9, 1982, after an inquiry which the plaintiff attended, the plaintiff's trainer's licence was suspended for six months on the ground that he had had in his charge a greyhound which showed presence in its tissues of substances which would affect its performance, in breach of rule 174(a)(ii) of the Rules of Racing. By an originating summons the plaintiff sought, inter alia, a declaration that the stewards' decision was void and ultra vires in that the suspension amounted to a breach of the implied term of the agreement between him and the defendants that all actions taken by the stewards which could deprive him of his licence would be reasonable and fair and made on reasonable grounds. The defendants sought to have the proceedings struck out for want of jurisdiction, claiming that by section 31(1) and (2) of the Supreme Court Act 1981[1] the application for the declaration should have been made by way of judicial review under R.S.C., Ord. 53, r.1.[2] Walton J. dismissed the motion.

On appeal by the defendants:—

Held, dismissing the appeal, that the authority of the stewards to suspend the plaintiff's licence was derived wholly from a contract between him and the defendants and the status of the stewards was that of a domestic tribunal albeit their decisions might affect the public, so that the process of judicial review would not have been open to the plaintiff before the Supreme Court Act 1981 was passed; that section 31 of that Act did not enlarge the jurisdiction of the court to enable it to review the decisions of domestic tribunals either by way of orders of mandamus, certiorari or prohibition, or by granting a declaration or injunction by way of judicial review; that the process of judicial review still applied only to public law matters and, therefore, the plaintiff had properly brought an action seeking a declaration in the High Court (post, pp. 1307B–F, 1308D–F, 1309C–D, F–H, 1310E–F, 1311B, 1312B–D, 1313D–E, 1315A–D).

Reg. v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, D.C. and *Reg.* v. *Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617, H.L.(E.) applied.

Reg. v. *British Broadcasting Corporation, Ex parte Lavelle* [1983] 1 W.L.R. 23 approved.

Per Lawton L.J. The purpose of section 31 of the Act of 1981 was to put into statutory language with modifications what was in R.S.C., Ord. 53 (post, p. 1308D).

Decision of Walton J. affirmed.

The following cases are referred to in the judgments:

Cocks v. *Thanet District Council* [1983] 2 A.C. 286; [1982] 3 W.L.R. 1121; [1982] 3 All E.R. 1135, H.L.(E.)

Fisher v. *Director General of Fair Trading* [1982] I.C.R. 71, C.A.

[1] Supreme Court Act 1981, s.31(1)(2): see post, pp. 1307G—1308A.

[2] R.S.C., Ord. 53, r.1: "(1) An application for—(*a*) an order of mandamus, prohibition or certiorari . . . shall be made by way of an application for judicial review in accordance with the provisions of this Order. (2) An application for a declaration or an injunction . . . may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers that, having regard to—(*a*) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari, (*b*) the nature of the persons and bodies against whom relief may be granted by way of such an order, and (*c*) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

On December 9, 1982, the stewards held an inquiry which the plaintiff attended and decided that he had had in his charge a greyhound which on examination showed presence in its tissues of substances which would affect its performance. They suspended his trainer's licence for six months. It is this decision which the plaintiff has challenged in his originating summons.

In my judgment, such powers as the stewards had to suspend the plaintiff's licence were derived from a contract between him and the defendants. This was so for all who took part in greyhound racing in stadia licensed by the defendants. A stewards' inquiry under the defendants' Rules of Racing concerned only those who voluntarily submitted themselves to the stewards' jurisdiction. There was no public element in the jurisdiction itself. Its exercise, however, could have consequences from which the public benefited, as, for example, by the stamping out of malpractices, and from which individuals might have their rights restricted by, for example, being prevented from employing a trainer whose licence has been suspended. Consequences affecting the public generally can flow from the decisions of many domestic tribunals. In the past the courts have always refused to use the orders of certiorari to review the decisions of domestic tribunals. In *Reg.* v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, 882, Lord Parker C.J. said:

> "Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned."

Before the passing of the Supreme Court Act 1981, as I think Mr. Henderson for the defendants accepted, anyone aggrieved by a decision of a domestic tribunal could only proceed by way of a claim for damages or for relief by way of a declaration or an injunction. The old case of *Rex* v. *Benchers of Lincoln's Inn* (1825) 4 B. & C. 855 is no authority to the contrary effect, nor is *Reg.* v. *Aston University Senate, Ex parte Roffey* [1969] 2 Q.B. 538, which on the issue of jurisdiction was probably wrongly decided: see *Herring* v. *Templeman* [1973] 3 All E.R. 569, 585.

Mr. Henderson, however, submitted that section 31 of the Supreme Court Act 1981 has given the court jurisdiction to entertain judicial review of the proceedings of a domestic tribunal if, as in the present case, those proceedings were likely to have consequences affecting the public generally. It was desirable, he said, that the quick remedy of judicial review should be available. He gave this case as an example. The plaintiff has challenged the right of the stewards to apply rule 174(a)(ii). If the plaintiff is allowed to continue with his originating summons, other cases may occur in which the stewards would feel it right to apply rule 174(a)(ii) but until judgment in this case is given there will be uncertainty as to their power to do so.

This submission was based upon the use of the word "shall" in section 31(1) and the terms of subsection (2). Subsection (1) provides by paragraph (*b*) that if an application is made to the High Court for a declaration or injunction under subsection (2) it shall be made in accordance with rules of court by a procedure to be known as an application for judicial review. Subsection (2) provides:

> "A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—(*a*) the nature of the matters in respect of which

relief may be granted by orders of mandamus, prohibition or certiorari; (*b*) the nature of the persons and bodies against whom relief may be granted by such orders; and (*c*) all the circumstances of the case, it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be."

The nature of the matters with which the plaintiff's originating summons deals is the alleged abuse of power by the stewards. Abuse of power, submitted Mr. Henderson, was a matter with which prerogative orders dealt. The circumstances of the case involved the public interest because of the need to stamp out malpractices in greyhound racing. Although prerogative orders had not in the past been made against domestic tribunals, in this case "it would be just and convenient" for the declarations asked for by the plaintiff to be made or refused. Mr. Henderson saw no difficulty in the fact that when the court had regard to "the nature of the persons and bodies against whom relief may be granted by orders of mandamus, prohibition or certiorari," it would find that domestic tribunals were not amongst them. All the subsection required the court to do was to have regard to this factor. If, despite its absence, the court was of the opinion that it was just and convenient to make the declaration it could do so.

I cannot accept this submission. The purpose of section 31 is to regulate procedure in relation to judicial reviews, not to extend the jurisdiction of the court. It puts into statutory language, with modifications, what is in Order 53 of the Rules of The Supreme Court. That Order "introduced a most beneficent reform in the practice and procedure relating to administrative law": see the note 53/1–14/1 in *THE SUPREME COURT PRACTICE* 1982, vol. 1, p. 865. It did not purport to enlarge the jurisdiction of the court so as to enable it to review the decisions of domestic tribunals. In *Reg.* v. *British Broadcasting Corporation, Ex parte Lavelle* [1983] 1 W.L.R. 23, which was a case in which an employee of the British Broadcasting Corporation applied for judicial review and for an order of certiorari under R.S.C., Ord. 53, in respect of a decision to dismiss her, Woolf J. said, at p. 30:

> "[R.S.C., Ord. 53, r.1] has since received statutory confirmation in almost identical terms in section 31 of the Supreme Court Act 1981. There is nothing in rule 1 or section 31 which expressly extends the circumstances in which the prerogative remedies of mandamus, prohibition or certiorari are available. Those remedies were not previously available to enforce private rights but were, what could be described as, public law remedies. They were not appropriate, and in my view remain inappropriate remedies, for enforcing performance of ordinary obligations owed by a master to his servant. An application for judicial review has not and should not be extended to a pure employment situation. Nor does it, in my view, make any difference that what is sought to be attacked is a decision of a domestic tribunal such as the series of disciplinary tribunals provided for by the B.B.C."

He then referred to what Denning L.J. had said in *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, 346 and to Lord Parker C.J.'s judgment in *Reg.* v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, 882. He continued:

> "Notwithstanding the present wording of Ord. 53, r.1 and section 31 of the Act of 1981, the position remains the same and if this

application had been confined to an application for an order of certiorai, in my view there would have been no jurisdiction to make the order sought. However, in seeking a stay, the applicant is seeking, in effect, an injunction. The matter was argued before me on the basis that relief by way of an injunction was being sought on the application for judicial review. Ord. 53, r.1(2) does not strictly confine applications for judicial review to cases where an order for mandamus, prohibition or certiorari could be granted. It merely requires that the court should have regard to the nature of the matter in respect of which such relief may be granted. However, although applications for judicial review are not confined to those cases where relief could be granted by way of prerogative order, I regard the wording of Ord. 53, r.1(2) and section 30(2) of the Act of 1981 as making it clear that the application for judicial review is confined to reviewing activities of a public nature as opposed to those of a purely private or domestic character. The disciplinary appeal procedure set up by the B.B.C. depends purely upon the contract of employment between the applicant and the B.B.C., and therefore it is a procedure of a purely private or domestic character."

I agree with Woolf J. Support for what he said is implicit in two decisions of the House of Lords, namely, *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 and *Cocks* v. *Thanet District Council* [1983] 2 A.C. 286.

I would dismiss the appeal.

Fox L.J. Under rule 2 of the Rules of Racing established by the National Greyhound Racing Club it is provided, inter alia:

". . . every person who is an owner, authorised agent, holder of a licence or the holder of a temporary appointment under rule 104, or who is a subject of rule 83(v) shall be deemed to have read the Rules of Racing . . . and to submit himself/herself to such rules and to the jurisdiction of the N.G.R.C. . . ."

Accordingly, in my view, the authority of the stewards to suspend the licence of the plaintiff derives wholly from a contract between him and the defendants. I see nothing to suggest that the defendants have rights or duties relating to members of the public as such. What the defendants do in relation to the control of greyhound racing may affect the public, or a section of it, but the defendants' powers in relation to the matters with which this case is concerned are contractual.

Apart from the alteration of the Rules of the Supreme Court in 1978 and the provisions of the Supreme Court Act 1981 the prerogative orders would not, in my view, lie to a tribunal set up by the defendants because the powers of such a tribunal derive from contract only. I do not think that the authorities leave scope for any real doubt as to that. In *Reg.* v. *Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 Q.B. 864, 882, Lord Parker C.J. said:

"The only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned."

In *Reg.* v. *Post Office, Ex parte Byrne* [1975] I.C.R. 221, 227, where that statement was approved, it was held that certiorari did not lie in

to enact that the jurisdiction of the High Court to grant the orders is unaltered, I find it impossible, when one comes to section 31, to suppose that the section was intended to require that applications for injunction or declarations in cases coming within section 31(2) should be made in respect of the review of purely private law matters. It seems to me that it would be a very curious result if the court, being required to have regard to "the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari" should make orders on an application for judicial review in cases where the prerogative orders would not apply at all. I agree with the observations of Woolf J. in *Reg.* v. *British Broadcasting Corporation, Ex parte Lavelle* [1983] 1 W.L.R. 23 which are cited by Lawton L.J. in his judgment.

I agree that the appeal should be dismissed.

SLADE L.J. I agree that this appeal should be dismissed. National Greyhound Racing Club Ltd. ("the N.G.R.C.") is a company limited by guarantee, incorporated under the Companies Acts 1948–1976. Its objects are set out in its memorandum of association. The first three stated objects reflect a number of its primary activities. It is to act as a "judicial body" for the discipline and conduct of greyhound racing in England, Wales and Scotland. After consultation and agreement with the British Greyhound Racing Board Ltd. ("the B.G.R.B."), it is to frame, amend and administer a code of rules. It is to license, among others, greyhound racecourses, trainers and officials, and, after consultation with the B.G.R.B., to fix and collect fees relating to such licences.

In exercise of these powers the N.G.R.C. has promulgated Rules of Racing, which are intended to apply to holders of its licences, among other persons. The rules are such as to prohibit those persons who train or race under licence from the N.G.R.C. from being associated with an unapproved racecourse. We were, I think, told that while the N.G.R.C. enjoys no monopoly north of Bedford, all the greyhound racecourses in the south of England hold licences from the N.G.R.C. and that every year several millions of persons visit racecourses licensed by it. The senior steward of the N.G.R.C., Major-General J. H. S. Majury, who has acted in this capacity at the inquiries which have led to the plaintiff's suspension as a trainer, has stated in an affidavit that towards the end of 1981 and during the early months of 1982, the incidence of administration of drugs to greyhounds increased. He states that this increase was of major concern to him and his fellow stewards as guardians of the integrity of the sport and the interests of the racegoing public.

I do not doubt the genuineness of this concern or the importance to the general public of the activities which the N.G.R.C. performs, not least its disciplinary functions. Furthermore, it is easy to understand why the N.G.R.C. would prefer that any person who seeks to challenge the exercise of its disciplinary functions should be compelled to do so, if at all, by way of an application for judicial review. In this manner the N.G.R.C. would enjoy the benefit of what Lord Diplock in *O'Reilly* v. *Mackman* [1983] 2 A.C. 237, 282, described as

> "the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law."

Notwithstanding recent procedural changes, these safeguards are still real and substantial. Leave is required to bring proceedings. Terms may be

imposed as to costs and the giving of security. There is a time bar of three months, though the court has power for sufficient reason to extend this. The court retains firm control over discovery and cross-examination: see generally *O'Reilly* v. *Mackman* [1983] 2 A.C. 237, 262–263 *per* Ackner L.J.

The difficulty, to my mind insuperable, which has faced Mr. Henderson in contending that the process of judicial review is a procedure, and indeed the only procedure, available to the plaintiff in the present case, is that, as he frankly accepted, the Rules of Racing of the N.G.R.C. and its decision to suspend the plaintiff in purported compliance with those rules have not been made in the field of public law. Furthermore, its authority to perform judicial or quasi-judicial functions in respect of persons holding licences from it is not derived from statute or statutory instrument or from the Crown. It is derived solely from contract. Rule 2 of the N.G.R.C.'s Rules of Racing provides that every person who is the holder of a licence shall be deemed to have read the rules and to submit himself to them and to the jurisdiction of the N.G.R.C. The relief, by way of declaration and injunction, sought by the plaintiff in his originating summons is correspondingly based primarily and explicitly on alleged breach of contract.

Thus, this is a claim against a body of persons whose status is essentially that of a domestic, as opposed to a public, tribunal, albeit one whose decisions may be of public concern. Mr. Henderson has not been able to refer us to any case in which relief, by way of any of the pregorative orders, has ever been granted against any such domestic tribunal. The high water mark of the authority relied on in support of the proposition that such relief would have been available even before the passing of the Supreme Court Act 1981, was a passage from the judgment of the Privy Council in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 75, when Lord Radcliffe said:

> "In truth, the only relevant criterion by English law is not the general status of the person or body of persons by whom the impugned decision is made but the nature of the process by which he or they are empowered to arrive at their decision. When it is a judicial process or a process analogous to the judicial, certiorari can be granted."

But those dicta were obiter and were made in the context of a judgment which attempted to draw a distinction (later shown to be erroneous by the decision of the House of Lords in *Ridge* v. *Baldwin* [1964] A.C. 40) between decisions that were quasi-judicial and those that were administrative only. They are, I think, of no assistance to the N.G.R.C. for present purposes.

The relevant law, as it stood in 1975, is to be found reflected in the decision in *Reg.* v. *Post Office, Ex parte Byrne* [1975] I.C.R. 221. In that case a Post Office official, acting under the disciplinary procedure of the Post Office, found that a Post Office telephonist had committed an offence against a supervising officer and placed him on a suspended dismissal. The applicant applied for an order of certiorari to quash the decision on the grounds, among others, that the procedure had contravened the Post Office disciplinary rules. The Divisional Court dismissed the application on the grounds that the only legal authority which any Post Office employee superior in rank to the applicant could exercise in relation to him derived exclusively from the contract of employment made by the

Case No: CO/5769/2004

Neutral Citation Number: [2005] EWHC 2197 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 17 October 2005

Before :

MR JUSTICE STANLEY BURNTON

– –

Between :

The Queen on the application of

WILLIAM MULLINS **Claimant**

− and −

THE APPEAL BOARD OF THE JOCKEY CLUB **Defendant**

−and−

THE JOCKEY CLUB **Interested Party**

– –

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

– –

Tim Kerr QC, **John Gordon SC (**of the Dublin Bar**) and Graeme McPherson** (instructed by **Holman Fenwick & Willan**) for the **Claimant**
Alex Marzec (instructed by **Charles Russell**) made written submissions on behalf of the **Defendant** but did not appear.
Mark Warby QC and **Iain Christie** (instructed by **Charles Russell**) for the **Interested Party**

– –

Judgment
As Approved by the Court

> (1977) 137 C.L.R. 487 that this is the position in Tasmania and we were told that it was also true of certain of the United States. But different countries draw the line between public and private regulation in different places. The fact that certain functions of the Jockey Club could be exercised by a statutory body and that they are so exercised in some other countries does not make them governmental functions in England. The attitude of the English legislator to racing is much more akin to his attitude to religion (see *Reg. v. Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1992] 1 W.L.R. 1036): it is something to be encouraged but not the business of government."

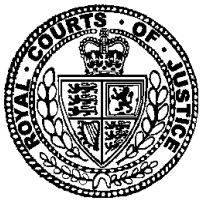
34. Moreover, other countries have different procedural rules. The decision in the present case turns not only on the nature of the disciplinary function of the Jockey Club but also on the particular English procedural rules in Section 1 of Part 54. The combination is not replicated in other jurisdictions.

Other matters

35. Mr Kerr suggested that the Court of Appeal in *Aga Khan* had overlooked a relevant factor, namely that the Jockey Club receives substantial sums from the Government derived from the betting levy. I doubt whether this is so. Sir Thomas Bingham MR referred to the Fourth Report of the House of Commons Home Affairs Committee on the Levy on Horserace Betting (1991) (HC 146) at 913A. Even if that factor had been overlooked, the judgment of the Court of Appeal would not be *per incuriam* , certainly at this level. But in any event state funding is a weak indication that a body or its functions are public. Many indisputably private bodies, such as many bodies whose activities are cultural, and many charities, receive state funding; this does not make them governmental in nature. Finally, Mr Kerr accepted that if the Jockey Club exercises functions of a public nature, it is a so−called hybrid authority for the purposes of section 6 of the Human Rights Act 1998 (see subsection (3)(a)) which exercises both private and public functions. In such a case, it seems to me that unappropriated state funding cannot indicate which of its functions is public.

Changes in the law

36. This seems to me to be the only possible basis for my refusing to follow the decision of the Court of Appeal in *Aga Khan* . The procedural rules applicable to judicial review have changed since it was decided. As I mentioned above, they are now contained in CPR Part 54 Section 1. They were previously contained in Order 53 of the Rules of the Supreme Court. In *R (Heather and ors) v The Leonard Cheshire Foundation* [2002] EWCA Civ 366, at [37], Lord Woolf CJ, giving the judgment of the Court, referred to: "the distinction between the approach of Order 53 of the Rules of the Supreme Court and Part 54 of CPR." He said:



Neutral Citation Number: [2025] EWHC 1101 (Admin)

Case Nos: AC-2022-LON-002885 (CO/3830/2022)
AC-2022-LON-002891 (CO/3840/2022)
AC-2024-LON-000332

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2025

Before :

MRS JUSTICE LANG DBE

- -

Between :

AC-2022-LON-002885 & AC-2024-LON-000332

THE KING **Claimant**

on the application of

POSSIBLE (THE 10:10 FOUNDATION)
- and -
SECRETARY OF STATE FOR TRANSPORT **Defendant**

AC-2022-LON-002891

THE KING **Claimant**

on the application of

GROUP FOR ACTION ON LEEDS BRADFORD AIRPORT (ACTING THROUGH NICHOLAS MARK HODGKINSON)
- and -
SECRETARY OF STATE FOR TRANSPORT **Defendant**

- -

- -

David Wolfe KC, Peter Lockley, Stephanie David and Celia Reynolds (instructed by **Leigh Day**) **for the Claimant in AC-2022-LON-002885 & AC-2024-LON-000332**

Estelle Dehon KC and Ruchi Parekh (instructed by **Leigh Day**) for the **Claimant in AC-2022-LON-002891**
Galina Ward KC, Andrew Byass and Rose Grogan (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: 1 – 4 April 2025

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on 8 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

MRS JUSTICE LANG DBE

> "… [T]he judge speaks of a 'decision-maker who fails to take account of all and only those considerations material to his task'. It is important to bear in mind, however, … that there are in fact three categories of consideration. First, those clearly (whether expressly or impliedly) identified by the statute as considerations to which regard must be had. Second, those clearly identified by the statute as considerations to which regard must not be had. Third, those to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so. There is, in short, a margin of appreciation within which the decision-maker may decide just what considerations should play a part in his reasoning process."

117. The three categories of consideration were identified by Cooke J in the *New Zealand Court of Appeal in CREEDNZ Inc v Governor General* [1981] NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the [relevant public authority] as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

Cooke J further explained at p 183 in relation to the third category of consideration that, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by [the public authority] … would not be in accordance with the intention of the Act."

118. These passages were approved as a correct statement of principle by the House of Lords in *In re Findlay* [1985] AC 318, 333-334. See also *R (Hurst) v London Northern District Coroner* [2007] UKHL 13; [2007] 2 AC 189, paras 55-59 (Lord Brown of Eaton-under Heywood, with whom a majority of the Appellate Committee agreed); *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60; [2009] 1 AC 756, para 40 (Lord Bingham of Cornhill, with whom a majority of the Appellate Committee agreed); and *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, paras 29-32 (Lord Carnwath, with whom the other members of the court agreed). In the Hurst case, Lord Brown pointed out that it is usually lawful for a decision-maker to have regard to unincorporated treaty obligations in the exercise of a discretion (para 55), but that it is not unlawful to omit to do so (para 56).

> 119. As the Court of Appeal correctly held in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305; [2018] PTSR 2063, paras 20-26, in line with these other authorities, the test whether a consideration falling within the third category is "so obviously material" that it must be taken into account is the familiar Wednesbury irrationality test (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410-411 per Lord Diplock).
>
> 120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the *Wednesbury* irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in *Corner House Research* at para 40. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion.
>
> 121. Secondly, a decision-maker may in fact turn their mind to a particular consideration falling within the third category, but decide to give the consideration no weight. As we explain below, this is what happened in the present case. The question again is whether the decision-maker acts rationally in doing so. Lord Brown deals with a case of this sort in *Hurst* (see para 59). This shades into a cognate principle of public law, that in normal circumstances the weight to be given to a particular consideration is a matter for the decision-maker, and this includes that a decision-maker might (subject to the test of rationality) lawfully decide to give a consideration no weight: see, in the planning context, *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (HL), 780 (Lord Hoffmann)."

Grounds of challenge by Possible and GALBA to the JZS 2022

Possible Claim 1, Ground 2 (*Tameside* duty and CCA 2008)

Possible's submissions

91. Possible submitted that, in developing and adopting the JZS, the Defendant breached (a) the *Tameside* duty of inquiry and (b) the requirement to have regard to obviously material considerations, both on the basis that either (i) the JZS was a policy or proposal or a package of policies or proposals, prepared by the Defendant for the purpose of the continuing obligation on the relevant Secretary of State under section 13(1) CCA 2008;

or (ii) the JZS sets out the policies relied upon by the Defendant in relation to how he intends to decarbonise aviation.

92. As a matter of practice, the obligation under section 13(1) CCA 2008 is discharged by the SSESNZ through a process of "commissions" and "returns" from other departments on their policies. Sector teams have primary responsibility for devising the proposals that result in emissions savings. The purpose of the JZS was to set out the Government's policies to decarbonise aviation by 2050. Therefore the JZS was a "proposal or policy" for the purpose of section 13 CCA 2008, prepared by the Defendant, with the intention that the SSESNZ would use the section 13(4) power to take account of the policies and proposals of other national authorities, as explained by the Court in *Global Feedback* at [75], [85] and [93].

93. In the alternative, the Defendant's purpose in developing the JZS was to prepare policies for use by the SSESNZ under section 13(1) CCA 2008 and/or to ensure that aviation will achieve net zero by 2050. Therefore he had to satisfy himself that he had sufficient information to achieve these aims.

94. The duty of inquiry necessarily included consideration of:

i) the deliverability of policies in the JZS, in the light of repeated warnings from the CCC and consultees that the JZS was too optimistic about technological progress;

ii) the timescales over which the policies would take effect;

iii) quantitative projections in respect of each policy measure, including specifically the estimated carbon savings;

iv) the justification of relying upon any unquantified policies to make up the shortfall.

95. Possible no longer pursued any point in relation to emissions from military aviation and withdrew the unpleaded point in paragraph 45(e) of its skeleton argument ("the impact of cumulative risks and uncertainties on deliverability of the JZS overall").

Conclusions

96. In my view, Possible's submissions based on section 13(1) CCA 2008 are unsustainable in the light of *Global Feedback* where similar submissions were rejected by the Court of Appeal.

97. Section 13 CCA 2008 is entitled "Duty to prepare proposals and policies for meeting carbon budgets." It provides as follows:

> "(1) The Secretary of State must prepare such proposals and policies as the Secretary of State considers will enable the carbon budgets that have been set under this Act to be met.
>
> (2) The proposals and policies must be prepared with a view to meeting –

Court of Appeal

Webster *v* Lord Chancellor

[2015] EWCA Civ 742

2015 July 2; 14 Lord Dyson MR, Sir Brian Leveson P, Tomlinson LJ

Human rights — Breach of Convention rights — Judicial act — Defendant convicted and sentenced to nine years' imprisonment — Conviction quashed nearly two years later on ground of trial judge's errors — Defendant's claim for damages for breach of Convention right by public authority — Whether conduct of trial judge disclosing want of good faith — Whether defendant's detention unlawful — Human Rights Act 1998 (c 42), ss 3, 9(3), Sch 1, Pt I, art 5

The claimant was convicted before a judge and jury of rape and a serious sexual assault and sentenced to a total of nine years' imprisonment. Nearly two years later the Court of Appeal (Criminal Division) allowed his appeal against conviction, finding that the trial judge had summed up the facts in such a way as to have removed from the jury's consideration the defence's factual challenge to the complainant's credibility and had failed to warn the jury not to give disproportionate weight to certain prosecution video evidence which had been replayed at the jury's request. The claimant brought a claim against the Lord Chancellor under section 7(1) of the Human Rights Act 1998[1] seeking damages for breach of his rights to liberty and to a fair trial, guaranteed by articles 5 and 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The judge struck out the claim, finding that (i) the trial was a judicial act done in good faith, within section 9(3) of the 1998 Act, so that the claim based on article 6 was precluded by that subsection; and (ii) the validity of the claimant's detention had not been affected by the errors at the trial, with the consequence that the claim based on article 5 failed.

On the claimant's appeal—

Held, dismissing the appeal, (1) that, in considering whether the conduct of a judge in a trial disclosed a want of good faith, within section 9(3) of the Human Rights Act 1998, in an action for damages under the Act, evidence of an ulterior motive by the judicial authority had to be shown; that section 9(3) was not to be read down pursuant to section 3 of the 1998 Act so as to enable damages to be claimed in cases where article 6 rights were breached and so give effect to the right to an effective remedy in article 13 of the Convention since article 13 was not one of the Convention rights scheduled to the 1998 Act and the interpretative obligation in section 3 could

[1] Human Rights Act 1998, s 3(1): "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

S 6: "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right . . . (3) . . .'public authority' includes— (a) a court or tribunal . . ."

S 7(1): "A person who claims that a public authority has acted . . . in a way which is made unlawful by section 6(1) may— (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings . . ."

S 9: see post, para 20.

Sch 1, Pt I, art 5: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court . . . 4. Everyone who is deprived of his liberty by . . . detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided . . . by a court . . . 5. Everyone who has been the victim of . . . detention in contravention of the provisions of this article shall have an enforceable right to compensation."

Art 6.1: "In the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law."

not be applied to the provisions of the 1998 Act itself; and that notwithstanding the errors, since the evidence showed that the trial judge had done her best to conduct a fair trial, the trial had been conducted in good faith and the claim based on article 6 had been rightly struck out (post, paras 33–35, 39, 40, 49, 50).

(2) That the enforceable right to compensation under article 5.5 of the Convention was not intended to provide compensation to a person whose conviction and detention had been reached by a lawfully constituted court but subsequently quashed on appeal; that, although a court's decision would be void ab initio if it had exercised its powers in a procedural manner which involved a gross and obvious irregularity, the errors made by the judge fell far short of that; and that, accordingly, the claimant's detention had not been unlawful and the claim based on article 5 had been rightly struck out (post, paras 42–44, 47–48, 49, 50).

Benham v United Kingdom (1996) 22 EHRR 293, GC applied.

Per curiam. The question of whether a judicial act was done in good faith within section 9(3) of the 1998 Act is unlikely to turn on the application of the burden of proof, not least because bad faith would have to be pleaded and cannot be unsupported by evidence (post, paras 36, 49, 50).

Decision of Mitting J [2014] EWHC 3995 (QB) affirmed.

The following cases are referred to in the judgment of Sir Brian Leveson P:

Benham v United Kingdom (1996) 22 EHRR 293, GC

Cannock Chase District Council v Kelly [1978] 1 WLR 1; [1978] 1 All ER 152; 76 LGR 67, CA

Krzycki v Germany (1978) 13 DR 57

McC (A Minor), In re [1985] AC 528; [1984] 3 WLR 1227; [1984] 3 All ER 908; 81 Cr App R 54, HL(NI)

Marsh v Chief Constable of Lancashire Constabulary [2003] EWCA Civ 284; [2003] Po LR 118, CA

Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431

R v McQuiston [1998] 1 Cr App R 139, CA

R v W [2011] EWCA Crim 1142, CA

R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2007] UKHL 26; [2008] AC 153; [2007] 3 WLR 33; [2007] 3 All ER 685, HL(E)

SBBS v Minister for Immigration and Multicultural and Indigenous Affairs [2002] FCAFC 361; 194 ALR 749

No additional cases were cited in argument.

APPEAL from Mitting J

By a claim form issued on 6 March 2012 the claimant, Phillip Webster, who had been convicted on 16 July 2009 in the Crown Court at Leeds (Judge Kershaw QC and a jury) of the rape of his stepdaughter between July and October 2007 and sentenced to nine years' imprisonment but had successfully appealed against his conviction which had been quashed on 21 March 2011 by the Court of Appeal (Criminal Division) for reasons given on 5 May 2011 [2011] EWCA Crim 1142, instituted proceedings against the Ministry of Justice and the Home Office for damages under sections 6(1) and 7(1)(a) of the Human Rights Act 1998 for breach of his rights under articles 6 and 5.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in that the conduct of the trial by the judge and her summing up to the jury had been incompatible with his right to a fair trial and had not constituted acts done in good faith, and further that he had been unlawfully detained in prison subsequently, which had constituted a

Good faith

25 In this court Mr Garlick argued that the judge was wrong to conclude that the conduct of the trial judge was not capable of amounting to conduct otherwise than "a judicial act in good faith" and, in any event, should have accepted that the burden of proving good faith fell on the Lord Chancellor. In the alternative, he submitted that the judge should have been prepared to interpret narrowly or read down section 9(3) of the 1998 Act so as not to deprive the claimant of an effective remedy in accordance with article 13 of the Convention.

26 Before embarking on a consideration of the meaning of the term "good faith", a prerequisite to liability is that the conduct of the trial was in breach of Convention rights other than article 5. Mr Garlick submitted that, in this case, a breach of the fair trial provisions contained within article 6 was clear because of the failure to comply with the overriding objective to conduct trials justly which includes dealing with the defence fairly and recognising his rights under article 6: see Crim PR r 1.1(1)(2)(b)(c). He also relied on the observations of the Court of Appeal [2011] EWCA Crim 1142 at [40] cited above (at para 17) that they did not consider the judge "came close" to achieving a fair balance of what was necessary.

27 This issue has not been the subject of argument and neither have we been referred to the relevant authorities in relation to article 6 but, for my part, I should not be taken as agreeing that such a breach has been established. The comment to which Mr Garlick referred was not a conclusion as to the conduct of the trial as a whole but, rather, a much more focused criticism of the way in which the judge dealt with the request to replay the video in circumstances in which the defence appear to have foreshadowed that possibility by asking the jury to reflect on the manner in which X gave evidence. That the judge failed to have regard to the procedure recommended by the authorities in these circumstances does not, necessarily or of itself, demonstrate a breach of article 6 even if it is sufficient to render the subsequent convictions unsafe. In any event, Mr Garlick did not suggest that every error in the conduct of a trial, involving a breach of the Criminal Procedure Rules, would lead to a breach of the Convention. Having identified this reservation, however, this aspect was not argued and I proceed on the premise that, absent an unanswerable defence under section 9(3) of the 1998 Act, this part of the claim should not be struck out.

28 Turning to the proper meaning of want of good faith or, putting it the other way around, the meaning of bad faith, Mr Garlick relied again on the overriding objective within the Criminal Procedure Rules and submitted that if the conduct of the judge amounted to "some gross and obvious irregularity of procedure" bad faith would arguably be established. When pressed, he was not able to come up with a definition of bad faith or to do otherwise than to identify what he argued might be evidence of bad faith; in that context, before Mitting J he had contended that it could be inferred from the conduct of the trial judge which was "unbalanced", "highly questionable" and "blatantly unfair".

29 Mr Garlick said that not every mistake, or even every serious mistake, would be sufficient but repeated that demonstrable unfairness to a defendant would be evidence from which bad faith could be inferred. The furthest he felt able to go was to say that dishonesty was not a necessary ingredient (and he did not suggest that Judge Kershaw was dishonest) but

that if a judge knew or ought to have known that he was acting in breach of the rules, that would be sufficient. How far this approach moves beyond a test of simple negligence is not clear.

30 Mr Oliver Sanders for the Lord Chancellor challenged this approach and referred to the concept of bad faith albeit in a very different context of possession proceedings. Thus, in *Cannock Chase District Council v Kelly* [1978] 1 WLR 1, 6 Megaw LJ put the matter in this way:

> "I would stress—for it seems to me that an unfortunate tendency has developed of looseness of language in this respect—that bad faith, or, as it is sometimes put, 'lack of good faith,' means dishonesty: not necessarily for a financial motive, but still dishonesty. It always involves a grave charge. It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant."

31 Mr Sanders also referred to decisions of the Federal Court of Australia. In *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749 the concept was discussed by the full court (Tamberlin, Mansfield and Jacobson JJ) and a series of propositions formulated which, in the light of the dearth of authority in this jurisdiction, it is worth setting out in full albeit omitting the citation of authority, at paras 43–48:

> "43. First, an allegation of bad faith is a serious matter involving personal fault on the part of the decision-maker. Second, the allegation is not to be lightly made and must be clearly alleged and proved. Third, there are many ways in which bad faith can occur and it is not possible to give a comprehensive definition. Fourth, the presence or absence of honesty will often be crucial . . .
>
> "44. The fifth proposition is that the circumstances in which the court will find an administrative decision-maker had not acted in good faith are rare and extreme. This is especially so where all that the applicant relies upon is the written reasons for the decision under review . . .
>
> "45. Sixth, mere error or irrationality does not of itself demonstrate lack of good faith . . . Bad faith is not to be found simply because of poor decision making. It is a large step to jump from a decision involving errors of fact and law to a finding that the decision-maker did not undertake its task in a way which involves personal criticism . . .
>
> "46. Seventh, errors of fact or law and illogicality will not demonstrate bad faith in the absence of other circumstances which show capriciousness . . .
>
> "47. Eighth, the court must make a decision as to whether or not bad faith is shown by inference from what the tribunal has done or failed to do and from the extent to which the reasons disclose how the tribunal approached its task . . .
>
> "48. Ninth, it is not necessary to demonstrate that the decision-maker knew the decision was wrong. It is sufficient to demonstrate recklessness in the exercise of the power . . ."

32 The same court returned to the question in *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, when the ninth proposition was qualified (per Heerey, Moore and Kiefel JJ) in this way:

A "8. As with other areas of the law where wrongful intent is in issue, reckless indifference may be the equivalent of intent. But this is not to say that the test is objective. The inquiry is directed to the actual state of mind of the decision-maker. There is no such thing as deemed or constructive bad faith . . . Illogical factual findings or procedural blunders along the way will usually not be sufficient to base a finding of bad faith. Such B defects can be equally explicable as the result of obtuseness, overwork, forgetfulness, irritability or other human failings not inconsistent with an honest attempt to discharge the decision-maker's duty."

"10. Bad faith may manifest itself in the form of actual bias. Actual bias in this context is a state of mind so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or argument may be presented. It is something more than a tendency of mind or C predisposition . . . Apprehended bias, resting as it does on what may be observed objectively, as distinct from the actual state of mind of the decision-maker, is quite different. While it has been suggested that actual bias may occur subconsciously, that would not establish bad faith in the relevant sense for the purposes of section 474(1) [of the Migration Act 1958] . . ."

D

33 Another formulation of the test for want of good faith (which I accept is analogous to bad faith) in the context of judicial acts is deliberate and knowing breach of the judicial oath to do right to all manner of people after the laws and usages of the realm without fear or favour, affection or ill will. In my judgment, although it is important to interpret the words "fear or favour, affection or ill will" in the context of the judicial oath and no E further, that does no more or less than encapsulate the rather lengthier analysis above.

34 Thus, errors of approach such as are criticised in this case do not constitute prima facie evidence of want of good faith without there also being evidence of ulterior motive of which, here, there is none. On the contrary, it is clear that the judge did her best to try the claimant fairly. Her F general directions were without fault and she took care to ensure that the jury understood the respective roles of judge and jury. As to the law relating to the bracket of dates within which the offence had to be committed, what she said was entirely accurate: her serious error, however, was her lack of recognition (and, thus, the absence of any direction to the jury) that because the offence could not have been committed on a Sunday in that period, the G jury should reflect on the impact of that fact on X's credibility.

35 Similarly, the lack of balance in reminding the jury of the defence case following replaying the video failed to have regard to prevailing practice but does not reveal anything else. Indeed, it is worth underlining that counsel (who had raised the question of the approach to this material) did not submit that she should go further than she did: the only submission that was made was that she should remind them of the cross-examination, H which she acted upon. The other errors are less significant than these and, on their own, would not have put the convictions in jeopardy not least because the jury had heard the entirety of the case: neither, in relation to want of good faith, do they add to the weight to be attached to the other failures.

Senior Courts Act 1981

1981 CHAPTER 54

PART II

JURISDICTION

THE HIGH COURT

Other particular fields of jurisdiction

31 Application for judicial review.

(1) An application to the High Court for one or more of the following forms of relief, namely—

[[F1](a) a mandatory, prohibiting or quashing order;**]**

(b) a declaration or injunction under subsection (2); or

(c) an injunction under section 30 restraining a person not entitled to do so from acting in an office to which that section applies,

shall be made in accordance with rules of court by a procedure to be known as an application for judicial review.

(2) A declaration may be made or an injunction granted under this subsection in any case where an application for judicial review, seeking that relief, has been made and the High Court considers that, having regard to—

(a) the nature of the matters in respect of which relief may be granted by **[**[F2]mandatory, prohibiting or quashing orders**]**;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be.

[[F3](2A) The High Court—

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

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

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

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

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

(3) No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[F4(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

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

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

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

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

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

[F5(4) On an application for judicial review the High Court may award to the applicant damages, restitution or the recovery of a sum due if—

(a) the application includes a claim for such an award arising from any matter to which the application relates; and

(b) the court is satisfied that such an award would have been made if the claim had been made in an action begun by the applicant at the time of making the application.**]**

[F6(5) If, on an application for judicial review, the High Court **[**F7makes a quashing order in respect of**]** the decision to which the application relates, it may in addition—

(a) remit the matter to the court, tribunal or authority which made the decision, with a direction to reconsider the matter and reach a decision in accordance with the findings of the High Court, or

(b) substitute its own decision for the decision in question.

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

(a) the decision in question was made by a court or tribunal,

(b) the **[**F8quashing order is made**]** on the ground that there has been an error of law, and

(c) without the error, there would have been only one decision which the court or tribunal could have reached.

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

(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant—

(a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

[F9(8) In this section "the conduct complained of", in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief.**]**

Textual Amendments

F1 S. 31(1)(a) substituted (1.5.2004) by The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 (S.I. 2004/1033), **art. 4(a)**

F2 Words in s. 31(2)(a) substituted (1.5.2004) by The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 (S.I. 2004/1033), **art. 4(b)**

F3 S. 31(2A)-(2C) inserted (13.4.2015) by Criminal Justice and Courts Act 2015 (c. 2), **ss. 84(1)**, 95(1); S.I. 2015/778, art. 3, Sch. 1 para. 69 (with Sch. 2 para. 6)

F4 S. 31(3C)-(3F) inserted (13.4.2015) by Criminal Justice and Courts Act 2015 (c. 2), **ss. 84(2)**, 95(1); S.I. 2015/778, art. 3, Sch. 1 para. 69 (with Sch. 2 para. 6)

F5 S. 31(4) substituted (1.5.2004) by The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 (S.I. 2004/1033), **art. 4(c)**

F6 S. 31(5)-(5B) substituted (6.4.2008) for s. 31(5) by Tribunals, Courts and Enforcement Act 2007 (c. 15), **ss. 141**, 148; S.I. 2008/749, **art. 2**

F7 Words in s. 31(5) substituted (14.7.2022) by Judicial Review and Courts Act 2022 (c. 35), **ss. 1(2)(a)**, 51(4) (with s. 1(4)); S.I. 2022/816, regs. 1(2), 3(a)

F8 Words in s. 31(5A)(b) substituted (14.7.2022) by Judicial Review and Courts Act 2022 (c. 35), **ss. 1(2)(b)**, 51(4) (with s. 1(4)); S.I. 2022/816, regs. 1(2), 3(a)

F9 S. 31(8) inserted (13.4.2015) by Criminal Justice and Courts Act 2015 (c. 2), **ss. 84(3)**, 95(1); S.I. 2015/778, art. 3, Sch. 1 para. 69 (with Sch. 2 para. 6)

Modifications etc. (not altering text)

C1 S. 31 excluded in part (24.1.2022) by Environment Act 2021 (c. 30), **ss. 39(3)**, 147(3) (with s. 144); S.I. 2022/48, reg. 2(g)

C2 S. 31 applied (with modifications) (25.12.2023) by The Public Service Obligations in Transport Regulations 2023 (S.I. 2023/1369), regs. 1(1), **24(4)**

C3 S. 31(2A)(2B) applied by 2007 c. 15, **s. 16(6A)** (as inserted (8.8.2016) by Criminal Justice and Courts Act 2015 (c. 2), **ss. 84(6)**, 95(1); S.I. 2016/717, art. 3(c) (with **art. 6**))

C4 S. 31(2A)(2B) applied by 2007 c. 15, **s. 15(5A)(5B)** (as inserted (8.8.2016) by Criminal Justice and Courts Act 2015 (c. 2), **ss. 84(4)**, 95(1); S.I. 2016/717, art. 3(c) (with **art. 6**))

C5 S. 31(2A)(2B) applied (4.1.2023) by Subsidy Control Act 2022 (c. 23), **ss. 72(9)**, 91(2); S.I. 2022/1359, reg. 2

Changes to legislation:
Senior Courts Act 1981, Section 31 is up to date with all changes known to be in force on or before 28 March 2025. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.
View outstanding changes

Changes and effects yet to be applied to :

- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:
Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(a) word inserted by 2015 c. 2 s. 85(1)(a)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3)(b) and word inserted by 2015 c. 2 s. 85(1)(b)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)
- s. 31(3A)(3B) inserted by 2015 c. 2 s. 85(2)