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Answers to questionnaire: United Kingdom

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Report by the UK Judicial Representative in Response to the Questionnaire dated 29 June 2018[1]

Executive Summary

In the United Kingdom, administrative law has evolved – this is the theme which emerges through the answers to this questionnaire. The evolution of administrative law in the UK has been described in the following terms: *"while the legislation was enacted from the centre, the general pattern of administration was decentralised."*[2]

Whereas in other European Member States administrative law is more centralised, in the UK, administrative law and consequently appeals before administrative authorities, differ depending on the administrative decision-making context. This is a feature of administrative law in the UK.

The questionnaire is divided in two parts. The first part considers the issue of standing, or who is or can become a party to administrative proceedings before an administrative authority ('Part 1'). Questions then follow on the rights and/or obligations which follow from being a party to administrative proceedings. The second part centres on questions of how administrative authorities determine the facts on which to found their decisions ('Part 2').

Part 1

A short introduction has been provided before the answers to Part 1. This introduction provides some detail to the way in which decisions of administrative authorities can be dealt with through different routes – whether that be through appeals before administrative authorities, tribunals or ombudsmen. These different routes are briefly outlined (paragraphs 1-10).

The main conclusions of Part 1 are as follows:

i. In the judicial context an Appellant must have a *"sufficient interest"* to bring an application (paragraphs 11-14). Appeals before administrative authorities reflect this approach, however there is no common test for who may bring an application, and those who can bring a claim will often be specified by the statute which governs that area of administrative decision-making.
ii. The answers to Part 1 are illustrated through examples. The examples evidence the way in which the parties to administrative appeals differ depending on the administrative authorities' appeals process. This is because the procedures are set by statute or the guidance of the relevant administrative authority. The examples given therefore il-

[1] This response has been prepared by the Judicial Assistant to Lady Arden of the Supreme Court of the United Kingdom, under the supervision of Lady Arden.

[2] Paul Craig, 'UK, EU and Global Administrative Law – Foundations and Challenges', (2015) at pg 67.

lustrate, but cannot represent fully, the diversity of procedures which vary depending on the specific administrative context (paragraphs 18-24).

iii. This approach has the benefit of allowing the procedures to be tailored to the individual context of the decision making. The disadvantage of such an approach is that the procedures are neither homogenous nor centralised.

iv. Redress to the courts should be a last resort and an application can be refused on the basis that an alternative remedy is available which the applicant should have first exhausted (paragraphs 36-37).

v. There are no specific procedural rights which apply across all appeals before administrative authorities (paragraph 39).

Part 2

The main conclusions of Part 2 are as follows:

i. As the UK is an adversarial, rather than inquisitorial, system this is reflected in the administrative appeals process.

ii. However, as is emphasised throughout the answers, although the parties present the facts of their respective cases, as Sir John Donaldson stated, it is a process which *"falls to be conducted with all the cards face upwards on the table"* (*R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941). The parties therefore must balance presenting their cases as best they can, with their obligation not to mislead the court.

iii. The duty of fairness is the overarching answer to the detailed questions asked in Part 2. The principle of the duty of fairness means that where an administrative power is conferred there is a presumption that it will be exercised in a manner which is fair in all the circumstances. What fairness demands is dependent on the context of the decision and will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations and understand the case they have to meet (paragraphs 61-64).

iv. Finally, in respect of the courts' role and fact-finding its role is supervisory rather than a means of reassessment. An appellant must prove that the decision is illegal, irrational, procedurally unfair or that the decision maker failed to respect a legitimate expectation. These grounds are outlined in response to the questions in Part 2 (paragraphs 88-91).

In both parts, the answers to the questions serve to emphasise that although the procedures and rules will differ depending on the administrative decision-making context, core principles underline, and are common to, administrative appeals in the UK.

I. Parties to Administrative Proceedings: Categories and Legal Positions

Introduction

1. It is understood, as per the introductory remarks above, that Part 1 deals with the questions of who is or can become a party to an appeal before an administrative authority – rather than those appearing before an administrative court.

2. At the outset it is worth noting the way in which administrative law has developed throughout the UK. In the UK, administrative proceedings have developed over time, rather than as a matter of design. Some public authorities' appeals are handled independently, by tribunals, while others are not. There is no single piece of legislation which acts as the source for administrative, non-judicial, appeals as there would be in other European countries.[3]

3. The effect is that development has been gradual. However, in the same way as the UK's European counterparts, appeals before administrative authorities are an important means for decision makers to rectify their decisions before the appeal reaches a court.

4. Consequently, appeals before administrative authorities are not, in the UK, standardised. Instead, appeals before administrative authorities must be considered within their specific context. For instance, appeals before an administrative authority will differ depending on whether the appeal is before the Planning Inspectorate in respect of a planning decision, a decision concerning Her Majesty's Revenue & Customs ("HMRC") regarding a tax decision or a decision of the Financial Conduct Authority ("FCA"). Administrative authorities will therefore have different legislation and their own methods of redress. Accordingly, there is variation in how appeals processes work across different policy sectors.

5. Administrative proceedings before administrative authorities are brought through a patchwork of redress mechanisms. These redress mechanisms include appeals be-

[3] For example in Germany where the general principles of administrative procedures law have been defined in the Administrative Procedures Act (VwVfG) since 1976. Up to that time they had found expression in various legal regulations, internal administrative guidelines and in the daily practice of public authorities, or had developed through court rulings and jurisprudence as clauses of an unwritten law and as minimum requirements for an orderly administration under the rule of law; and public authorities applied them in practice as law in force. As explained by the Federal Ministry of the Interior, Building and Community, 'Administrative Procedures Act' <https://www.bmi.bund.de/SharedDocs/downloads/EN/gesetztestexte/VwVfg_en.html> (last accessed 2 October 2018.

fore the administrative authority, statutory inquiries, the ombudsman and different tribunals.

Tribunals

6. It is worth briefly outlining the tribunal system in the UK. The tribunal system is different to other administrative proceedings before an administrative authority, however they are worth mentioning because their purpose is similar in providing a faster, simpler and less formal route than the court's oversight through *"judicial review"*. In that respect, the objectives are markedly similar, although they lie outside the traditional concept of an appeal before the administrative authority itself.

7. A tribunal is an independent body set up by statute, the statutory basis will differ depending on the tribunal, to adjudicate disputes arising under that statutory scheme. In the context of tribunals, the rules of standing, including whether third parties or interested parties may join in appealing the decision, are left to the legislation which creates that tribunal. The effect is that the rules of the tribunal, and who may appeal a decision before them, differs between the tribunals. This is reflective of the administrative process in the UK as a whole – it is not a system which is centralised with common rules between all types of appeals. In 2007 the system of tribunals in the UK was reorganised to provide for two levels of tribunals – the First-tier Tribunal and the Upper Tribunal.[4] Tribunal decisions can be appealed by either party to a higher tribunal or to the courts, but only on a question of law.

Ombudsmen

8. Ombudsmen are a further means of redress before review by the courts, and after administrative authority appeals, which are available in certain circumstances. There is now an Ombudsman in important areas such as: Pensions, Financial Services, Energy Supply, Estate Agents, Prisons and Probation, and Legal Services.

9. This includes the Parliamentary Commissioner for Administration ("PCA"). The PCA is empowered to investigate complaints relating to any action, which is taken by or on behalf of a government department or authority to which the Act applies, where the action taken is in the exercise of administrative functions of that department or authority.[5]

Concluding remarks

[4] Tribunals, Courts and Enforcement Act 2007.
[5] Parliamentary Commissioner Act 1967, ss 4(1), 5(1)

10. In view of the differing ways in which authorities deal with appeals, the below questions are often answered using examples. Given the patchwork way in which administrative law in the UK has developed and continues to develop in contrast to the centralised legal framework in other European jurisdictions, those examples will not comprehensively represent the differences between appeals across different administrative authorities. Nonetheless, they give an insight into how appeals before administrative authorities operate.

1. a) Are the following categories of parties to administrative proceedings for single case decision-making recognized in your legal order:

- **addressees of onerous administrative acts / applicants of beneficial acts,**
- **other individuals (please differentiate, in its case, further, e.g. between individuals claiming subjective rights, concrete legal interests, factual interests, individuals as members of the general public),**
- **associations or non-governmental organisations (e.g. environmental, consumer,…) (please indicate, in its case, details and/or specific requirements),**
- **other administrative bodies?**

11. In the UK judicial review is a process by which the courts review the lawfulness of a decision or action taken by a public body. Section 31(3) of the Senior Courts Act 1981 means that the court must not grant leave for an application for judicial review unless it considers that the claimant has a sufficient interest in the matter to which the application relates. A prospective party can only bring a judicial review, if they have a sufficient interest in the public body's decision. Section 31(3) provides:

"No application [claim] for judicial review shall be made unless the leave [permission] of the court has been obtained in accordance with the Rules of Court [Civil Procedure Rules Pt 54]; and the court shall not grant leave [permission] to make such an application [a claim]unless it considers that the applicant [claimant] has a sufficient interest in the matter to which the application [claim] relates."

12. The test is expressed in terms of interests rather than rights because *"[w]hat modern public law focuses upon are wrongs–that is to say, unlawful acts of public administration. These often, of course, infringe correlative rights, but they do not necessarily do so: hence the test of standing for public law claimants, which is interest-based rather than rights-based"* (*R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498; [2008] Q.B. 365 at [61] (Sedley LJ)).

13. The issue of whether a claimant has sufficient interest in the matter to which the claim relates goes to the court's jurisdiction to entertain the claim for judicial review and is not merely a matter of discretion (*R v Secretary of State for Social Services Ex p. Child Poverty Action Group* [1990] 2 Q.B. 540 at 556). The court may also take the

standing point of its own motion, even if not raised by the parties.[6] The interest must be *"in relation to the matter to which the application relates"*.

14. This approach is reflected in appeals before administrative authorities.

15. Two categories of appellants are referred to in the above. The first, are those who are in receipt of a beneficial administrative act and the second are those who addressees of onerous administrative acts i.e. in this context the question is whether the disadvantages to the individual are out of proportion to the legal purpose of the decision. In both cases, these are the individuals who have a demonstrable interest in an administrative decision and there is no general distinction drawn between the two in the UK.

16. Some examples are included below to illustrate the way in which an appellant is defined, and varies, across different administrative decisions:

Housing benefit and council tax benefit

17. A person affected by a decision[7] in relation to housing or council tax benefit may seek a review of a decision by way of a *"revision"*.[8] This is where it is maintained that there was ignorance or mistake of fact or *"supersession"* which is where there has been a change of circumstances or it is anticipated that one will occur.[9] In this context the definition of a claimant is described as follows:

"A claimant, a person liable to make payments but who is for the time being unable to act, a person appointed for a person unable to act, a person from whom an overpayment is recoverable, a landlord or landlord's agent".[10]

18. A further right of appeal then lies outside the authority, to the Appeals Tribunal.

Housing Act 1996

19. In the context of housing, where a housing authority have decided to seek an order for possession of a dwelling let under an introductory tenancy, the tenant may request a review of that decision.[11] Similarly demoted tenants may request such a review.[12] Again, the individuals who can request a review is limited in this context.

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[6] See, e.g. *R (on the application of Bulger) v Lord Chief Justice* [2001] EWHC Admin 119; [2001] 3 All E.R. 449 at [18].
[7] *"A claimant, a person liable to make payments but who is for the time being unable to act, a person appointed for a person unable to act, a person from whom an overpayment is recoverable, a landlord or landlord's agent*": reg. 3, Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulation 2001 (S.I.2001/1002) ("2001 Benefit Regs").
[8] 2001 Benefit Regs, reg 4.
[9] 2001 Benefit Regs, reg 7.
[10] 2001 Benefit Regs, reg 3.
[11] 2001 Benefit Regs, s. 129.
[12] Housing Act 1996, s167(4A)(d).

School Standards and Framework Act 1998

20. In response to the question of whether other administrative bodies can appeal decisions before administrative authorities it is of note that in the context of the School Standards and Framework Act 1998 the governing body has a right of appeal to the Secretary of State against a suspension of its delegated budget or refusal to revoke the suspension.[13]

21. In the context of challenging an admissions decision relating to a child, an authority must make arrangements for an appeal by a parent or a child.[14] This example illustrates the way in which, in the UK, the review or appeals process will differ depending on the specific type of decision that authority makes.

Parking adjudicators

22. Parking adjudicators determine appeals from owners or persons in charge of vehicles who have made unsuccessful representations to a London authority concerning costs arising out of removal or immobilisation of their vehicles by the authority.[15] It is of note that in this context the category of people who can challenge a decision is phrased in terms of control or ownership in respect of property. Again, the category of individuals who can bring an appeal is specific, and defined, in the context.

Parliamentary Commissioner for Administration (Parliamentary Ombudsman)

23. Parliamentary Commissioner for Administration (Parliamentary Ombudsman) ("PCA2) is empowered to investigate complaints relating to actions taken by or on behalf of a government department or authority to which the Parliamentary Commissioner Act 1967 applies.[16] The PCA is independent of the government and the civil service.

24. Section 6(1) of the Parliamentary Commissioner Act 1967 defines who can make a complaint. This is another example of the category of those who can appeal an administrative authority's decision being defined and, consequently, differing. It provides that complaints can be made by an individual or body of persons, whether incorporated or unincorporated. Complains cannot however, be made by local authorities, nationalised industries, or other bodies appointed by a minister or a government department. The complaint must be made by the person aggrieved, or a personal representation. This definition is relevant in answering the question whether associations, non-governmental organisations and other administrative bodies can challenge administrative decisions.

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[13] School Standards and Framework Act 1998, Sch 15, para 3.
[14] School Standards and Framework Act 1998, s 94(1) and 94(1A).
[15] Road Traffic Regulation Act 1984,s 101(4A), (5A) due to be replaced by the Traffic Management Act 2004, s 98 and Sch 12.
[16] Parliamentary Commissioner Act 1967, ss4(1), 5(1)

Tribunals

25. In the context of tribunals, there is no general concept/definition of the interested party. In the same way as each Act makes clear which decisions have a right of appeal, legislation also makes clear who has the right to appeal. If a third party can appeal against a certain decision this will often be included within the Act which establishes the administrative authority or the jurisdiction of the relevant tribunal. An example of this is Article 62 (4) of the Financial Services and Markets Act 2000 which outlines the right to refer a matter to the tribunal. Interested parties may make an application. Article 62(5) defines an interested party as:
    "(a) the applicant;

    (b) the person in respect of whom the application is made ("A"); and

    (c) the person by whom A's services are to be retained, if not the applicant."

b) Are the categories of parties to administrative proceedings defined
- **in a general codification (i.e. Code of Administrative Procedure,…),**
- **by reference to other codifications (e.g. Code of Court Procedure,…),**
- **by custom(ary law),**
- **by jurisprudence,**
- **in another way (please explain)?**

(cf. Art. 4 (f) EP-Res.; Art. III-2 (3) and (4), III-25 ReNEUAL)

26. As outlined above, and illustrated by examples, in the UK there is no central codification or statute laying out the categories of parties to administrative proceedings. In the context of judicial administrative proceedings, this differs.

27. In administrative appeals before administrative authorities, as exemplified above, the categories of those who can appeal will often be contained in the legislation relating to that administrative authority. An administrative authority may also have produced guidance. However, there is no general codification as there would be in the Administrative Procedures Act (VwVfG) as referred to above.[17]

2. a) Do (sectorial) pieces of legislation establish additional categories of parties to administrative proceedings or do such pieces of legislation modify the general categories? In this case, please give examples!

28. In short, the answer is yes. In response to question 1(a) above examples have been given of specific legislation.

[17] Cited at footnote 3.

b) If such additional categories are established and/or such modifications are provided for, what is the rationale of such additions and/or modifications?

29. As outlined above the categories of those who can review or appeal a decision before an administrative authority is not contained in a central piece of legislation in the UK and so those examples which have been given above are indicative of the multi-staged and multi-layered way in which appeals before administrative authorities have developed over-time and across different areas of administrative decision-making. They are, therefore, not *"additions and/or modifications"* in the way question 2(b) envisages but rather illustrate how administrative law in the UK has gradually developed.

3. As far as the parties are not parties by law (e.g. addressees or applicants), how can the different categories of (potential) parties actually become parties to administrative proceedings?

- **Is a request of the party required?**
- **Is a decision of the administrative authority admitting the party required?**
- **Is the administration obliged to qualify potential parties ex officio?**

30. As outlined above, there is no set procedure as to how a potential party becomes a party to administrative proceedings in the UK. Different administrative authorities have different procedures depending on their own appeal process. Those who can appeal a decision will often be specified in the legislation that relates to the administrative authority, those parties would then begin the appeals process before the relevant administrative authority.

4. a) Are administrative authorities obliged to identify third parties entitled to participate or potentially interested in administrative proceedings?

31. There is no general obligation for administrative authorities to identify third parties who may be interested or wish to participate. However, once a party has identified as an interested party, then administrative authorities will keep them in informed. For instance, in the planning appeals context guidance from the Ministry of Housing, Communities & Local Government published in March 2014 states:

"There are opportunities for interested parties, such as neighbours, to make comments on the majority of types of appeals. The local planning authority will normally advise interested parties of the appeal start date, and the date by which any representations should be made where applicable."[18]

32. However, there is no general obligation to identify third parties which applies to all administrative proceedings.

[18] 'Advice on planning appeals and the award costs', <https://www.gov.uk/guidance/appeals> last accessed 21 September 2018.

b) Is the administrative authority obliged to announce the beginning of administrative proceedings to (potential) third parties to enable their participation?

33. There is no general obligation to do so in the UK. However, again using the example above in the planning appeals context guidance from the Ministry of Housing, Communities & Local Government published in March 2014 states:

"The local planning authority will normally advise interested parties of the appeal start date, and the date by which any representations should be made where applicable."[19]

34. Similarly, in the context of the Financial Conduct Authority, their Enforcement Guide (2016), section 6.10 states:

"Publishing notices is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximise the deterrent effect of enforcement action."[20]

35. However, there is no general obligation to do so.

c) Are there any consequences, if the (potential) party does not make use of its right to participate in the administrative proceedings? Does your legal order provide for a foreclosure of the exercise of the party's rights (preclusion regulation), particularly with regard to later court proceedings (ability to challenge the final decision, legal standing in this regard)?

36. The position of the courts in the UK is that judicial review should only be used where no adequate alternative, such as a right of appeal, is available. Redress to the courts should be a last resort and an application can be refused on the basis that an alternative remedy is available which the applicant should have first exhausted.

37. In a recent decision, *Glencore Energy UK Limited v Commissioners of HMRC* [2017] EWHC 1476 (Admin), the court held that permission to apply for judicial review should be refused as there were other alternative, and adequate, remedies available.

5. If individuals / organisations / other public authorities are not admitted as parties to administrative proceedings by the competent authority on their request, what are the legal consequences?

[19] 'Advice on planning appeals and the award costs', <https://www.gov.uk/guidance/appeals> last accessed 21 September 2018.
[20] FCA, the Enforcement Guide 2016, <https://www.handbook.fca.org.uk/handbook/document/EG_Full_20160321.pdf> last accessed 22 September 2018.

a) Are they entitled to direct court actions against the administrative decision to not admit them as parties to the administrative proceedings? Are (only) original parties (parties by law) to the administrative proceedings entitled to do so?

b) In contrast, do the parties not admitted to the administrative proceedings have to wait for and then challenge the final administrative decision claiming a procedural defect in not admitting them?

c) Can the competent authority remedy any omission to admit a party?

38. As outlined above the relevant statute will often provide a definition of those who can apply for review or appeal of a decision. If there is no statutory right of appeal for such a party, the party might apply for judicial review to the court. The Supreme Court Act 1981, section 31, states that a claimant must have *"sufficient interest in the matter"*. The party could apply at the point of refusal and would not have to wait for the outcome of the substantive proceedings. The competent authority could remedy such an omission.

6. a) Do all categories of parties to administrative proceedings enjoy the same procedural rights:

- **to be heard (orally or in writing),**
- **to be advised by the competent authority concerning the relevant procedural rights,**
- **to submit documents,**
- **to have access to the file, including documents submitted by other parties,**
- **to call witnesses or to initiate other gathering of evidence,**
- **to be provided with a copy of the final decision,**
- **to file a claim in the administrative proceedings?**

b) Or do different categories of parties to the administrative proceedings have different rights? If so, please provide information about the most important differences!

(cf. Art. 9, 11, 14, 15 EP-Res.; Art. III-15, III-23, III-24 ReNEUAL)

39. As the above highlights, there are no specific procedural rights which apply across all appeals before administrative authorities. The procedural rules will therefore depend on the specific context and the rules which have been set by the administrative authority.

40. An example of this is the case of *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59.

41. The question before the Supreme Court was whether the Agency had acted unlawfully in refusing the visa extension application without first inviting Mr Mandalia to supply a further bank statement(s) in accordance with the guidance set out to the Agency's instructions to its caseworkers on handling visa applications ("the Process Instruction"). Therefore, according to the Agency's own policy, the applicant ought to have been permitted to submit such information. The Court allowed the appellant's appeal, holding that the failure to extend to the Appellant the benefit of its own policy made its decision unlawful.

42. The decision underlines that the exercise of statutory powers can be restricted by government policy. An applicant's right to the determination of an application in accordance with government policy is now generally taken to flow from a principle related to the doctrine of legitimate expectation, but freestanding from it. Individuals have a basic public law right to have their cases considered under whatever policy the executive sees fit to adopt, provided that the policy is a lawful exercise of the discretion conferred by statute.

7. Is there a political or academic discussion concerning any kind of reform with regard to the participation rights of third parties to administrative proceedings in your country? Are there recent legislative proposals concerning the participation rights of third parties to administrative proceedings?

Scotland – third-parties

43. In Scotland there has been a long-running debate regarding who can appeal against a planning refusal or planning conditions. The cause of debate is that objectors in respect of planning applications do not enjoy a right of appeal.

44. Proponents of third party appeals argue that it raises the standard of administrative decision making. Those against third party appeal rights emphasise that such appeals introduce additional expense, delay and uncertainty.

45. Third party rights of appeal were considered and consulted on before the enactment of the Planning etc. (Scotland) Act 2006. However, a third party right of appeal was not introduced. This was further replicated in the recent Planning (Scotland) Bill.

46. The debate underlines the importance of carefully considering who should be entitled to appeal a decision of an administrative authority.

Standing – judicial review

47. It is notable that in 2013 the Ministry of Justice released a consultation paper which proposed restrictions upon standing in judicial review proceedings, such that it would be limited to those with a direct interest.[21] This proposal was not pursued.

[21] 'Judicial Review Proposals for further reform' (6 September 2013), <https://consult.justice.gov.uk/digital-communications/judicial-

Third-party interveners

48. In recent years, UK courts have begun to allow third party interventions – applications by public bodies, private individuals or companies, or NGOs to make submissions which raise some issue of public importance. In the UK, the organisation JUSTICE has produced two reports on the issue of third party interventions.[22]

49. JUSTICE's 2016 report highlights dissatisfaction with section 87 of the Criminal Justice and Courts Act 2015.[23] Section 87 reads as follows:

    "(3) A relevant party to the proceedings may not be ordered by the High Court or the Court of Appeal to pay the intervener's costs in connection with the proceedings.

    (4) Subsection (3) does not prevent the court making an order if it considers that there are exceptional circumstances that make it appropriate to do so."

50. JUSTICE's 2016 report argues that this change *"robs the court of the discretion that it normally enjoys by making it mandatory to award costs against an intervener in a number of specified circumstances"*.[24] One of the conditions that indicates that costs are appropriate is where *"the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court"*.[25] JUSTICE raises the concern that this provision could have a chilling effect on interventions.[26]

8. What is the most important and most recent case law of your court relating to the status of third parties to administrative proceedings and their procedural rights therein? Please identify up to three cases and provide some information about the content and relevance of the judgements!

Macris v FCA [2017] UKSC 19

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review/supporting_documents/Judicialreviewproposalsforfurtherreform.pdf> (last accessed 3 October 2018).

[22] One report was produced in 2009 and the latest report was produced in 2016: 'Third party interventions' <https://justice.org.uk/our-work/third-party-interventions/> (last accessed 10 October 2018).

[23] JUSTICE, 'To Assist the Court: Third Party Interventions in the Public Interest' <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf> (last accessed 10 October 2018), foreword at pg 1.

[24] JUSTICE, 'To Assist the Court: Third Party Interventions in the Public Interest' <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf> (last accessed 10 October 2018), foreword at pg 1.

[25] Criminal Justice and Courts Act 2015, s 87(6)(b).

[26] JUSTICE, 'To Assist the Court: Third Party Interventions in the Public Interest' <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf> (last accessed 10 October 2018), foreword at pg 1.

51. *Macris v FCA* [2017] UKSC 19 is a recent decision of the Supreme Court. The decision highlights the importance of defining who is identified by a decision and therefore who is entitled to certain procedural safeguards.

52. The Financial Conduct Authority appealed against a Court of Appeal decision that notices which it had served on a bank had *"identified"* the bank's International Chief Investment Officer, the respondent, as provided for by section 393 (1)(a) Financial Services and Markets Act 2000 ("the 2000 Act"). This appeal turned on the meaning of *"identifies"*.

53. In *Macris v FCA* Mr Macris's complaint was that without giving him a chance to make representations in his own defence, the Financial Conduct Authority published a notice imposing a penalty on his former employer for various irregularities in the conduct of its business, in terms which identify him as the person responsible. The question at issue on this appeal is whether the notices in question did in fact identify him.

54. The provisions of the 2000 Act governing the imposition of penalties provide for three successive notices to be given to a person or firm under investigation: (i) a warning notice describing the action which the Authority is provisionally minded to take and inviting representations (section 207); (ii) a decision notice describing the action that it has decided to take after considering any representations and informing the recipient of his right to refer the matter to the Upper Tribunal (Tax and Chancery) (section 208); and (iii) a final notice describing the action that it is taking once the decision notice has become final, ie after it has been reviewed by the Upper Tribunal or the time for applying for such a review has expired (section 390).

55. The object of the procedure under section 393 is to enable the third party to make representations to the regulator. Subsection (3) requires a copy notice served on a third party to specify a reasonable period of time within which he may do so. Subsection (4) contains a corresponding provision relating to decision notices. The object here is to enable the third party to take the matter before the Upper Tribunal, as subsection (9) entitles him to do. Mr Macris was not supplied with a copy of the notice served on the Bank or given an opportunity to make representations. As an *"approved person"* he was personally under investigation along with his employer. However, he was not party to the settlement with the Bank, and the investigation of his conduct was still in progress at the time.

56. The definition of a third party to proceedings was therefore of central importance in this case.

57. Lord Sumption, at paragraph 12 of the judgment, defined the section 393 obligation as follows:

"The starting point is that section 393 covers the same ground as the general obligation imposed by public law to give those affected sufficient notice to enable them to make representations to protect their legitimate interests. But it does so in a more limited way. So far as it concerns notice of potential criticisms, the section defines what fairness requires in the context of warning and decision notices issued by the Authority."

58. Lord Sumption of the Supreme Court, for the majority, held that a person is identified in a notice under section 393 *"if he is identified by name or by a synonym for him, such as his office or job title"*.

59. The case is important in highlighting the way in which specific legislation will often refine the procedural requirements for fairness in a specific context.

II. Determination of Facts and Discretionary Powers

1. a) In administrative proceedings, do administrative authorities have a general duty to carefully and impartially investigate the facts of the case ex officio in your jurisdiction (principle of investigation)?

60. Administrative authorities must act in accordance with public law principles. In particular, they must act lawfully, rationally and fairly. These principles are relevant when considering if an administrative authority has carefully and impartially investigated the facts. There are fundamental requirements applicable to any public decision in terms of whether the information can be considered relevant, accurate and sufficient to make the decision.

61. The duty of fairness is the overarching answer to the detailed questions asked in Part 2. The principle of the duty of fairness was notably emphasised in in *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531 ("*Doody*") per Lord Mustill at 551:

"What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the per-

son affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

62. A duty of candour is also an important tenet of administrative law in the UK whereby the defendant must make full and frank disclosure of material relevant to the decision under challenge. In *R v Lancashire County Council, ex p Huddleston* [1986] 2 All ER 941 Sir John Donaldson referred to judicial review as *"a process which falls to be conducted with all the cards face upwards on the table and [where] the vast majority of the cards will start in the [public] authority's hands"*.

63. Finally, in respect of independence and impartiality it is of note that in some circumstances, statutory provisions will require that a new review or appeal decision be taken by someone within the authority other than the person who took the original decision complained of. Further, the authority may take into account material not before the original decision-maker and consider any change in facts up to the date of review.[27] An example of this includes under the Housing Act 1996 where review must be carried out by someone who was not involved in the original decision.[28]

64. At question 1(a) above under Part 1, some examples were given to illustrate how standing may differ depending on the administrative authority. Looking at some of those examples again in this context:

b) Are, in contrast, the parties to administrative proceedings generally obliged to present facts or evidence of their own accord (principle of party presentation)?

65. There is no general obligation on a party to present facts or evidence of their own accord. For instance, in the context of a decision of the Department for Work and Pensions the complainant can send to the office any evidence to support their case.[29]

c) Do the rules for determining the facts distinguish between administrative proceedings initiated ex officio or by application?

66. Before administrative authorities there are no set rules for determining facts and there is no general distinction of this kind.

d) Do the rules for determining the facts distinguish between facts which are favourable to the individual and others which are unfavourable to him?

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[27] Homelessness review under Housing Act 1996, s.202; *Mohamed v Hammersmith & Fulham L.B.C.* [2001] UKHL 57.

[28] Introductory Tenants (Review) Regulations 1997 (S.I.1997/72), reg.3(1).

[29] *"You can provide evidence to help the tribunal understand your condition or circumstances so they can make a decision. Evidence can include a letter from a doctor or someone who knows you"*. Available at <https://www.gov.uk/appeal-benefit-decision/after-submit-appeal> last accessed 21 September 2018.

67. Again, there are no specific and universal rules for determining facts. However, as highlighted above administrative authorities are subject to general public law principles which include that they must act fairly, rationally and lawfully. These principles are relevant when an administrative authority is considering whether facts should be disclosed which might be favourable or unfavourable. The duty of candour also means that parties cannot simply present the facts which are favourable to them if to do so would be misleading.

e) Do different models of fact finding in administrative proceedings exist in your country with regard to different subject matters (e.g. ex officio administrative orders prohibiting or requiring specified actions of individuals, licensing of private projects on application, administrative sanctions, specific sectors of administrative law,…)?

(cf. Art. 9 EP-Res.; Art. III-10, III-11 ReNEUAL)

68. Again, the way in which an administrative authority approaches fact finding is something which will vary depending on the administrative authority. However, there is no general rule that a different model of fact finding will exist for different subject matters.

2. If your jurisdiction provides for the duty of the competent administrative authority to care-fully and impartially investigate the facts of a case:

a) Are the parties to administrative proceedings obliged to cooperate in the investigation (e.g. by providing documents or by answering questions)?

b) What are the consequences, if a party to administrative proceedings does not comply with its duty to cooperate?

c) Are there differences in the duty to cooperate among different categories of parties (applicants, potential addressees of the final decisions, third parties)?

(cf. Art. 10 EP-Res.; Art. III-13, III-14 ReNEUAL)

69. As outlined above administrative authorities must act in accordance with public law principles. In particular, they must act lawfully, rationally and fairly. There is no general rule regarding the cooperation of parties at the appeal before the administrative authority stage. This is as reflected by the guidance from the Ministry of Housing, Communities & Local Government published in March 2014 which states that a party may provide documents which it will seek to rely on. The duty of fairness as in *Doody* applies when considering if an authority has carefully and impartially investigated the facts.

3. a) In the fact finding process, is the administrative authority in your legal order bound by strict procedural rules (e.g. demanding for a certain organisation) or is this process subject to discretion of the administrative authority?

70. As outlined above redress procedures provided by the public body or authority are internal to the public body that made the decision or engaged in the action or practice in the first instance.[30] This means that there are necessarily some differences in practice and approach, with administrative authorities enjoying a certain degree of discretion. The administrative authorities therefore enjoy a certain degree of discretion, as limited by any specific legislation and circumscribed by the public law principles of general application, referred to above, which the administrative authority must adhere to.

71. Again, the duty of candour is relevant in this context. In *R v Lancashire County Council, ex parte Huddleston* Lord Justice Parker explained that the defendant *"should set out fully what they did and why, so far as is necessary, fully and fairly to meet the challenge"*. *Doody* similarly emphasises that *"fairness will very often require that he is informed of the gist of the case which he has to answer"*.

b) Has the administrative authority broad discretion in evaluating the facts found in the administrative proceedings?

72. As outlined above the practice and approach of individual administrative authorities will vary, in this way the administrative authority enjoys discretion. However, ultimately that discretion is tempered by the requirement that the administrative authority satisfy the public law principles outlined above.

c) Does your national legal order provide for rules concerning composite investigations, i.e. the collaboration of different administrative authorities (like establishing a responsible officer of one administrative authority) or the collaboration of different officers within one administrative authority, e.g. a hearing officer who may hold hearings with applicants (like asylum seekers) while another officer takes the final decision based on written reports of such a hearing officer?

73. This is not a formalised route in the same way that it exists at a European level. However, nor, at a UK level, is there anything to preclude this.

4. a) Does your national legal order provide for specific rules of evidence for the fact finding in administrative proceedings?

[30] Law Commission, Consultation Paper No 187, 'Administrative Redress: Public Bodies and the Citizen' (17 June 2008), para 3.51.

b) If this is the case, what are the most important principles?

c) If this is not the case, what other (general) rules apply?

d) What is the rationale for the model applied in your jurisdiction?

e) Are there any rules in your national legal order providing for the inadmissibility of certain evidence? If so, please give some details!

(cf. Art. 9 (2) and (3), Art. 11 EP-Res.; Art. III-10 (2), III-15 ReNEUAL)

74. In short, the answer is no – there are no specific rules of evidence for fact finding in administrative proceedings. The administrative authority may have produced guidance outlining its appeals process. If such guidance is available this will be relevant for appellants before the specific administrative authority. However, more generally, as outlined above, an administrative authority must act fairly, rationally and lawfully.

75. This is reflective of the way in which administrative law generally has developed in the UK, gradually rather than as a matter of initial and centralised design. This model also has the benefit of allowing the administration discretion and judicial restraint where possible.

5. In court proceedings, who is responsible for the presentation and investigation of facts and evidence?

a) The court or the parties?

b) Are there differences between the responsibilities of claimants and defendants or between individuals and administrative authorities?

c) Is the administrative court free in the consideration of evidence or are there certain rules of evidence? In the latter case, please give details!

76. In the UK the parties are responsible for the presentation of facts. In terms of differences, there are no different rules of evidence which apply to each party, however it is the claimant's case to prove and so this is relevant for the presentation of evidence. Judicial review assesses the manner in which a decision was made by the administrative authority and so the scope of the court's assessment should be limited in scope, rather than considering the decision afresh.

77. However, the court will control the evidence put before the court. For example, the court may require or permit a party to give oral evidence at the hearing.

78. In terms of the evidence each party should provide the rules of disclosure differ in the context of judicial review. The parties are, however, required to help the court further the overriding objective, which is that a case be dealt with justly and at proportionate cost. Further there is a duty of candour with regard to the conduct of the proceedings. Although cases often focus on the duty of candour of the administrative authority, this duty of candour also applies to the claimant as per *R(F) v Head Teacher of Addington High School* [2003] EWHC 228 (Admin); *R (Tshikangu) v Newham London Borough Council* [2001] EWHC Admin 92.

6. a) What is the general standard of control applied by administrative courts in regard to the fact finding of the administrative authority? Are there limitations in the scope of judicial control?

b) Does your national legal order know standards of (limited) control in regard to complex factual evaluations comparable to the concept of technical discretion applied by the ECJ (see annex to this question below)?

c) If this is the case, what are typical cases in which such a standard of reduced control is applied?

d) Are these cases qualified as a specific category of administrative discretion or are they subject to the general principles concerning discretionary powers of administrative authorities?

79. The jurisdiction of the courts in the UK includes, as referred to above, the judicial review of administrative decisions. In the UK, judicial review is a process by which the courts review the lawfulness of a decision or action taken by a public body. The parties bear the responsibility of presenting their own evidence.

80. Judicial review is best placed to challenge errors of law. The court will also in certain, more limited, circumstances review fact. Examples of this include: (a) where the existence of a set of facts is a condition precedent to the exercise of a power; (b) where there has been a misdirection or mistake as to a material fact; or (c) where the decision is unsupported by substantial evidence.

81. The court exercises a supervisory rather than an appellate function.

7. a) In your national legal order, are the procedural standards to be observed by administrative authorities in their fact finding the more stricter the more the administrative authorities are conceded substantive discretionary powers?

b) What is, as far as applicable, the rationale of reduced (substantive) controls exercised by the administrative courts?

c) Are administrative courts reluctant to interfere with material decision-making of administrative authorities?

d) Do they prefer to focus on procedural aspects?

e) Does your national legal order know prepositioned or anticipated expert opinions (e.g. in environmental law) to which a superior validity is conceded?

f) As far as the concept of technical discretion applied by the ECJ in regard to administrative decisions (or similar) is applied in your national legal order (cf. II.6.b)), can the reduced standard of control be regarded as a consequence of different institutional capacities of courts and administrative authorities?

82. The balance in the UK is based on the principle that the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy.

83. Courts will not, therefore, make decisions on: whether site A or B is suitable for the location of a new airport;[31] whether the United Kingdom should engage in a programme of nuclear disarmament;[32] whether there should be investment in a significant nuclear power programme;[33] whether the programme to produce Trident nuclear warheads should be abandoned;[34] whether there should be further regulation on the environmental effects of crop-spraying;[35] or whether the British invasion of Iraq in 2003 was justified in international law.[36]

84. The aim of judicial review is therefore to exercise a supervisory role rather than to rehear the matter. There is no analogous concept of technical discretion, however the examples illustrate that courts adopt an approach of judicial restraint to the specialised decision making of administrative authorities and the government.

85. So far as the concept of technical discretion is concerned, there is no direct comparison within the UK legal system. The outline of technical discretion helpfully provided with this questionnaire illustrates that it is a tiered and structured approach. However

[31] *Essex CC v Ministry of Housing and Local Government* (1967) 66 L.G.R. 23.
[32] *Chandler v DPP* [1964] A.C. 763 at 798.
[33] *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).
[34] *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3.
[35] *Secretary of State for Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 664.
[36] *R (on the application of Gentle) v Prime Minister* [2008] UKHL 20; examples from De Smith's, 'Judicial Review', (8th Ed), at [1-035].

as is evidenced through the case law in the UK, there are certain decisions which courts cannot or should not easily engage. The reason for this can broadly be divided into two reasons (i) limitations inherent in the courts' constitutional role and (ii) limitations inherent in the courts' institutional capacity. Falling into the latter category would be decisions which involve matters which are in essence matters of preference for the administrative authority or the executive or matters in relation to which the court lacks expertise. This latter category reflects the technical discretion approach, albeit in a less structured or formalised way. As it was put in one case where the court was wary to intervene, it could involve *"donning the garb of policy maker"*.[37] This is particularly so as has been highlighted previously, the review of fact or reviewing the merits of the underlying decision, is not routinely permitted in judicial review. Consequently, there are matters which are best resolved by the administrative authority or executive who has the specialist knowledge. A recent example of this is the decision of *R (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564 in which Beatson LJ of the Court of Appeal said *"[a] reviewing court should be very slow to conclude that the expert and experienced decision-maker assigned the task by statute has reached a perverse"*.

86. A prime example of this judicial restraint is national security. This has historically been an area of decision-making in which the court has exhibited marked judicial restraint.[38] This is reflected by the comments of Lord Sumption in *R (on the application of Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60 in which he said:

> *"There is no challenge to the primary facts. We have absolutely no evidential basis and no expertise with which to substitute our assessment of the risks to national security, public safety and A the rights of others for that of the Foreign Office. We have only the material and the expertise to assess whether the Home Secretary has set about her task rationally, by reference to relevant matters and on the correct legal principle. Beyond that, in a case like this one, we would be substituting our own decision for that of the constitutional decision-maker without any proper ground for rejecting what she had done. All the recent jurisprudence of this court has rejected that as an inappropriate exercise for a Court of review, even where Convention rights are engaged."*

87. Questions of national security can also arise in the context of single-case decision making in the context of civil claims for damages[39] and applications for *habeas corpus*.[40]

8. Are there any constitutional provisions and/or principles governing the questions

a) of the determination of facts of a case by the administration,

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[37] *R (on the application of Legal Remedy UK Ltd) v Secretary of State for Health* [2007] EWHC 1252 (Admin).
[38] See further A.Tompkins, "National Security and the Role of the Court: a ChangedLandscape?" (2010) 126 L.Q.R. 543.
[39] *Tariq v Home Office* [2011] UKSC 35.
[40] *Rahmatullah v Secretary of State for Defence and another (JUSTICE intervening)* [2012] UKSC 48.

b) of the possibilities of the administration to enjoy discretion therein and

c) of the standards of control to be applied by the administrative courts (e.g. a constitutional guarantee of effective judicial remedy, a strict duty of administrative bodies to comply with legal requirements)?

88. As stated above judicial review has generally been limited to challenging errors of law. However, the distinction between challenging law and challenging fact is not always so clear cut.

89. The grounds for judicial review fall under four headings:
   i. Illegality;
   ii. Irrationality;
   iii. Procedural unfairness; and
   iv. Legitimate expectation.

90. Considering each briefly:

   i. Illegality: This arises when a decision-maker exercises a power wrongly, misdirects itself as to the law or acts *ultra vires* (beyond one's legal power).

   ii. Irrationality: This arises when a decision-maker has acted so unreasonably that no reasonable authority could ever have come to the same decision, this is referred to as 'Wednesbury unreasonableness'. Alternatively, a decision-maker may have taken into account irrelevant matters or failed to consider relevant matters.

   iii. Procedural unfairness: This arises when a decision-maker has not properly observed the relevant statutory procedures or the principles of natural justice in the decision-making process. An example of the latter would be the right of a party to be heard or where the decision-maker has exhibited bias.

   iv. Legitimate expectation: An administrative authority may owe a legitimate expectation as to the way in which it will act arising out of its previous statements or conduct.

91. The function of judicial review is therefore not to act as a reassessment.

9. Is there a political or academic discussion concerning any kind of reform with regard to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts in your country? Are there recent legislative proposals con-

cerning the discretionary powers of the administration and the corresponding reduced judicial control?

British Institute of International and Comparative Law

92. The British Institute of International and Comparative Law ("BIICL") highlighted a proposal titled 'The Proposal to Codify Principles of Good Administration in European Institutions: Advancing the Rule of Law'. In November 2012 the Bingham Centre, joined by the Italian Council of State (Consiglio di Stato), hosted a conference which considered the to codify good administrative practice within EU institutions.

93. Professor Paul Craig QC considered the general options for codification ranging from codification of general principles to codification of all substantive and procedural principles. The conference then considered international models of codification including in South Africa and European examples of codification.[41] At the conference Professor Emeritus Carol Harlow of the LSE suggested that codification at the EU level may be a useful way to bring consistency into administrative proceedings that may otherwise be difficult to achieve owing to the varied backgrounds of EU civil servants.

10. What is the most important and most recent case law of your court relating to the discretionary powers of the administration, especially with regard to the determination of facts, and the corresponding reduced judicial control by administrative courts? Please identify up to three cases and provide some information about the content and relevance of the judgements!

A v Secretary of State for the Home Department; sub nom. X v Secretary of State for the Home Department [2004] UKHL 56

94. In terms of case law which is the most important a case which illustrates some of the central features of UK administrative and public law is *A v Secretary of State for the Home Department* (No.2) [2005] UKHL 71, commonly referred to as the Belmarsh Prison case.

95. Following large scale attacks in the United States on 11 September 2001 the United Kingdom Government concluded that there was a public emergency threatening the life of the nation within the meaning of the Convention for the Protection of Human Rights and Fundamental Freedoms. Legislation was passed designating the United Kingdom's proposed derogation from the right to liberty under the Convention, which was scheduled to the Human Rights Act 1998, and temporary emergency powers subject to renewal were enacted.

96. The commission, which by rule 44(3) of the Special Immigration Appeals Commission (Procedure) Rules 2003 2was entitled to receive evidence that would not be admissible in a court of law, reviewed the evidence in respect of each applicant and in a number of open and closed judgments dismissed their appeals. In one case it was al-

[41] Bingham Centre for the Rule of Law, 'The Proposal to Codify Principles of Good Administration in European Institutions: Advancing the Rule of Law?' <https://binghamcentre.biicl.org/projects/goodadmin> (last accessed 2 October 2018).

leged that the Secretary of State had relied on evidence of a third party obtained through his torture in a foreign state.

97. At paragraphs 119 to 127 Lord Hope the House of Lords decided that the Special Immigration Appeals Commission (which had been established in part to determine appeals of those foreign nationals detained on suspicion of involvement in international terrorism) should exclude evidence where it was established on the balance of probabilities that it had been obtained by torture of a third party in a foreign state.

98. The House of Lords allowed the appeals and remitted each case to the commission for reconsideration. The court held as follows:

(1) That evidence of a suspect or witness which had been obtained by torture had long been regarded as inherently unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles on which courts should administer justice, and that, in consequence, such evidence might not lawfully be admitted against a party to proceedings in a United Kingdom court, irrespective of where, by whom or on whose authority the torture had been inflicted. The court held that the Secretary of State did not act unlawfully in relying on such tainted material when certifying, arresting and detaining a person; but that the commission was established to exercise judicial supervision of his exercise of those powers and was required to assess whether at the time of the hearing before it there were reasonable grounds for his suspicion; that, although it might admit a wide range of material which was inadmissible in judicial proceedings, express statutory words would be required to override the exclusionary rule barring evidence procured by torture. The relevant wording in that case could not be interpreted as authorising the displacement of that rule and that, accordingly, the commission could not admit such evidence.

(2) That, since a detainee had only limited access to material advanced against him in proceedings before the commission, a conventional approach to the burden of proof was inappropriate. The court held that the commission should adopt the test of admissibility laid down in article 15 of the Torture Convention and consider whether it was established by such inquiry as it was practicable to carry out and on a balance of probabilities that the information relied on by the Secretary of State was obtained by torture; that if satisfied that it was so established the commission should decline to admit the material, but that, if they were doubtful, they should admit it, bearing their doubt in mind in evaluating it.

99. The case demonstrates the balance between upholding the rights of individuals in the face of national security concerns.

100. In terms of the most recent case law to consider these issues, two examples have been given below. These are *Litvinenko, R (On the application of) v Secretary of State for the Home Department* [2014] EWHC 194 and *R (ZS) (Afghanistan) v Secretary of State for the Home Department* [2015] EWCA Civ 1137.

Litvinenko, R (On the application of) v Secretary of State for the Home Department [2014] EWHC 194

101. The case of *Litvinenko, R (On the application of) v Secretary of State for the Home Department* [2014] EWHC 194 is a recent example of the court assessing the rationality of a decision. This was an application for judicial review of the refusal by the Secretary of State for the Home Department to order the setting up of a statutory inquiry into the death of Mr Litvinenko in London in November 2006.

102. The judgment illustrates judicial restraint in two respects. The first is the basis for dismissing the decision, at [73]:

"I have upheld the claimant's challenge to the adequacy or correctness of the first, third and fourth of the reasons given by the Secretary of State for refusing the Coroner's request to set up a statutory inquiry. I have also indicated my concerns about the fifth and sixth reasons though they are of subsidiary importance for the claim. As to the second reason, the Secretary of State was wrong to proceed on the basis that Article 2 was not engaged but I have found that the procedural obligation under Article 2 does not require any investigation beyond that already carried out and that the error was therefore immaterial."

103. The reasoning of the court illustrates that the court will assess the reason for the decision and the manner in which the decision was made – rather than assessing the merits of the decision itself.

104. However, paragraph 76 of the judgment emphasises that it is not the role of the court to substitute its view of the merits for that of the original decision-maker. The judgment held as follows:

"Accordingly, whilst it will be necessary for the Secretary of State to give fresh consideration to the exercise of her discretion under section 1(1) of the 2005 Act and in so doing to take into account the points made in this judgment, I would stress that the judgment does not of itself mandate any particular outcome." (Emphasis added.)

105. The administrative authority therefore retains control of the decision-making process; however, the court provides a check on the proper exercise of power.

R (ZS) (Afghanistan) v Secretary of State for the Home Department [2015] EWCA Civ 1137

106. Finally, a judgment which illustrates judicial restraint as to facts as regards the original decision-maker is *R (ZS) (Afghanistan) v Secretary of State for the Home Department* [2015] EWCA Civ 1137.

107. The cases highlights at paragraphs 29 and 31 of the judgment the way in which the relevant policy dictates how disagreements as to policy should be addressed.

108. Paragraph 29 says:
"The policy continues by requiring officials to give considerable weight to findings of age made by local authorities, recognising their expertise in the matter, and says that a local authority assessment "will normally be accepted as decisive" in cases where it is the only source of evidence relating to age."

109. Paragraph 31 notes:
"Part 8 of the guidance deals with conflicting evidence, including cases in which contradictory age assessments have been made by two different local authorities. It advises that the second local authority should be asked to confirm it has considered the findings of the first."

110. The administrative authority is therefore in a better position in respect of determining facts.

III. Case Study

Initial Case:

Applicant A applies for a construction permit for the construction of a commercial building at a location on the edge of the built-up area of municipality M.

The competent administrative authority of the district (S – a state authority, not a municipal one) invites F, a farmer who owns the neighbouring piece of land, to express himself on A's application in a given time limit. S informs F that he will not be heard after the time limit has expired. F does not react.

S also consults M, which supports the project because it hopes for a better economic development.

O, a nature protection organisation, learns about the project from the local newspaper and asks S to be involved in the proceedings. O remarks that there have been sightings of red kites (*milvus milvus*, a species listed in Annex I of the Bird Protection Directive 2009/147/EC) at the designated location of the project. S does not reply to this, but internally consults the environment protection authority E (also a state authority). E explicates in its statement to the application, mostly relying on an expert opinion handed in by A as part of his application, that a population of red kites does existed in the concerned area, but from its scientific point of view of nature protection the project was scientifically justifiable because the known breeding areas were sufficiently distant from the designated location of the project and O had not brought forward anything concrete.

M changes its mind and decides to draw up a development plan for the area concerned which is supposed to provide for a residential area.

S issues the permit to A after a procedure without (other) defects and sends a copy to F and M, each containing an accurate instruction on the right to appeal to the administrative court within one month.

F is against the settlement of commercial companies in his vicinity. He thinks there are already enough commercial companies in the village and moreover he is afraid of facing disadvantages in managing his soil because of increasing traffic.

M, F and P, the president of the local "Association for Preserving the Traditions", who wants to defend the beauty of the homeland and thinks that A's project does not fit into the landscape, all bring actions before the competent administrative court against the permit. M also feels itself impaired in its exclusive municipal planning competence.

O learns only five months later, again from the local newspaper, that A received the permit and immediately refers to the competent administrative court. O argues that it should have been involved in the administrative proceedings. O points out that the risk for the red kite

also was not justifiable because, very close to the designated location of the project, an eyrie had been found. The designated, up to now not built-up location constituted an important hunting ground for the red kite. If a construction was allowed here, the breeding success of the local population of red kites would be seriously endangered. O submits an expert opinion of an internationally respected ornithologist which supports its allegations.

Questions:

1. **How is the court going to decide on the objections of M, F and P?**

111. Judicial review is usually limited to examining the process by which the decision was made. In considering the objections of M, F and P the court will not replace its view of the merits in the place of the administrative authority.

112. Instead, as cited above, the court will consider the grounds for judicial review under four headings:
   i. Illegality
   ii. Irrationality
   iii. Procedural unfairness; and
   iv. Legitimate expectation.

113. The parties will therefore have to demonstrate that the administrative authorities failed in one of the above respects. As outlined above, and relevant in the case of F, judicial review is viewed as a route of last resort. The courts are not keen to assess cases where redress which was available has not been explored. This is a particular concern which relates to F's challenge.

2. **How is the court going to decide on the action brought by O? Is the mere fact that S did not involve O in the administrative proceedings going to help O's action to succeed? Supposing that this is not the case, how is the court going to assess the question of the risk for the red kite?**

114. Again, the mere fact that S did not involve O will not by itself justify judicial review. O must demonstrate one of the above grounds for judicial review.

115. In the UK, O could make an argument on the basis of a *"legitimate expectation"*. One of the leading cases is *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, Laws LJ. *R (Bhatt Murphy) v Independent Assessor* drew a distinction between procedural and substantive legitimate expectations (at [28] of the judgment):

(i) A procedural legitimate expectation where the administrative authority has provided an assurance. In such a case the court would not allow the decision-maker to

make the proposed change or arrive at the final decision without consulting or notifying the party. This is a question of good administration.

(ii) A substantive legitimate expectation was stated as a specific undertaking, directed at a particular individual or group, but which the relevant policy's continuance is assured. In *R v North and East Devon Health Authority ex p Coughlan* [2001] Q.B. 213 residents of a care home had been promised by the health authority that it would be their home for life.

(iii) Laws LJ also highlighted the possibility of the *"secondary case of procedural expectation"*. This would be, for example, where a policy had an established policy. An administrative authority must be able to exercise its discretion and so this could not operate as a ban. However, it could go to notification.

116. In this example, O has heard about the project from a local paper. It is not entirely clear the reason why this was included in the local paper i.e. is S obliged to notify the public of developments. Further, O asked S to be involved in proceedings and it is not known the response, if any, that S made to this request. However, it is of note that in the UK in the planning context, such as this, in *R (Majed) v London Borough of Camden* [2009] EWCA Civ 1029 the claimants had not been notified of a planning application. The local council's 'Statement of Community Involvement' indicated that they should have been. Sullivan LJ stated that the Statement of Community Involvement went further than the statutory duty and so this was relevant to the question of whether the party had a legitimate expectation. Sullivan LJ stated a *"legitimate expectation comes into play when there is a promise or practice to do more than that which is required by statute"*. Similarly, in R (on the application of Vieira) v Camden LBC [2012] EWHC 287 (Admin).

117. As such the question which would be asked in assessing O would be – what was O entitled to expect? This reflects the case of Mandalia v Secretary of State for the Home Department

referred to above. This is a fact sensitive question.

Modification:

Case like the initial case, but A now applies for a permit under pollution control law for the construction of a small wind farm (project according to Annex II of the Environmental Impact Assessment Directive 2011/92/EU) in the outskirts of M. M initially supports the project as in the initial case, but then decides to plan a commercial area which is supposed to include the designated location of A's project. E additionally explicates, based on the opinion handed in by A, too, that the risk of collisions of the red kite with the blades of the wind generators was negligible because of the distance of the known breeding areas from the designated location, whereas the opinion brought by O sees an unjustifiable risk because the designated location of the project constituted an important hunting ground of the red kite.

How is the court going to decide on the actions now?

118. If this matter has not previously been raised before the administrative authority, then the matter must first be considered by them. Again, the court will not interfere with a decision of an administrative authority, save where a party can argue with reference to one of the grounds of judicial review. The court will not conduct a review of the substantive balancing of the decision itself.

Annex to question II.6.b)

In recent case law concerning European Union state aid law and European Union competition law (anti-competitive practices, merger control) the European Court of Justice established – according to recent academic writings – a concept of three levels (stages) for the judicial control of administrative fact finding and legal qualification of facts[42]:

1. (abstract) interpretation of legal provisions;

2. determination (or establishment) of (simple) facts (the factual basis);

3. only in case of complex factual matters (interdependencies, causalities, uncertainty,…) evaluation (or appraisal) of complex facts (economic impact, complex prognosis, certain risks for health and safety);

4. (concrete) legal qualification (or characterisation) of simple facts or of the results of a complex evaluation with regard to a legal term – sometimes based on the interpretation of a legal provision.

Concerning levels 2 and 4 the European Court of Justice applies a strict scrutiny while the Court reduces its control on level 3 under the rubric of a so called technical discretion which must be differentiated from classic discretionary powers. For example the European Court of Justice takes the view that the finding that a state aid favours (!) a certain undertaking as prohibited by Art. 107 (1) TFEU requires in some cases (!) a complex (!) economic evaluation of the factual situation. Thus, in such specific factual situations the Commission has a technical discretion and the Court will apply a reduced standard of control ("manifest error") focussing on procedural requirements especially with regard to the duty to carefully and impartially investigate the case[43]. In contrast, articles 107 (3), 108 (3) TFEU provide for a classic discretionary power ("may be considered") of the Commission according to the Court.

Many commentators compare this four-level-concept with concepts in French administrative law. Other jurisdictions tend to omit the 3rd level and to focus on levels 2 and 4. Nevertheless, some jurisdictions have established a broad understanding of discretionary powers probably comprising also categories like the technical discretion under European Union law. Also the German concept of "Beurteilungsspielräume" concerning the administrative concretisation of legal requirements (a form of discretion with a view to the facts rather than with a view to

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42 ECJ case C-104/00 P (DKV/HABM); case C-449/99 P (EIB/Hautem); see also case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

43 See ECJ case 56/64 (Consten and Grundig/Commission); case 42/84 (Remia/Commission); case C-525/04 P (Spain/Lenzing); case C-269/90 (TU München/Hauptzollamt München-Mitte); case C-12/03 P (Commission/Tetra Laval).

legal consequences) may share some parallels with the judicial control of technical discretion in European Union law. In both jurisdictions the judicial control focusses on:

1. compliance with procedural requirements,

2. especially concerning the careful and impartial investigation of the case/facts:

    a. strict scrutiny concerning the factual basis of the complex factual evaluation,

    b. relevance of different standards of proof in various fields of substantive law,

3. compliance with general standards of evaluation of complex factual matters (especially if these standards are set in legislation, statutory instruments, administrative guidelines or publically accepted (private) technical guidelines or norms),

4. avoidance of arbitrary considerations,

5. correct interpretation of the relevant legal terms.

Nevertheless, a major difference between the control by German and European Union courts exists as German administrative courts have a duty to investigate the facts of the case ex officio while the European Union courts tend towards assuming an obligation of the parties to present the facts or evidence.

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