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Questionnaire
The judge and inert administration. Administrative discretionary power

Introduction

The seminar will address the issue of inert administration and the role and competence of the courts in this regard. The inaction or silence of the authorities and its consequences affect the rights of individuals no less significantly than the administrative actions or administrative acts of the authorities. While institutional silence is mainly related to the managerial aspects of public administration, it also interacts and correlates with legal aspects, such as principles of legal certainty, good administration and the prohibition of arbitrariness. The aim of the questionnaire and the seminar is therefore to summarise and analyse the regulation and practice of the Member States in order to determine whether the rights of individuals in the context of administrative silence converge and are comparable in the different legal systems.

As the administrative silence is mainly related to the failure of authorities to act or to reply within the prescribed procedural time limits, the questions in the first section of the questionnaire will provide insights into the regulation and application of procedural time limits in the Member States. The following sections of the questionnaire contain questions that are directly related to the current national regulations of the administrative silence. The regulations are generally classified into a negative model (silence as deemed refusal of a claim) and a positive model (a claim not refused in due time is deemed granted). Most legal systems usually provide for both models and various specific combinations. However, the understanding and regulation of these models, as well as the various exceptions and specific rules, differs among legal systems. The questionnaire also seeks to identify national experiences in implementing Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, intended as a mechanism of simplifying and speeding the administrative activity. And finally, as one of the most important aspects, the questionnaire will clarify the role and competence of the courts in the process of appeal against fictitious acts resulting from administrative silence, also identifying the legal remedies. The questionnaire is intended to identify mentioned aspects for further workshop discussions.

The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification of the discretionary power in each specific case, as well as to the competence of the court and limits of judicial review of use of discretionary power by the authority. The practice and approach of the Member States on this issue vary. Some legal systems between discretion in a narrow sense and margin of

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appreciation in the interpretation of undefined legal concepts. However, in most legal systems no such distinction is made. There are also differences in the methods, characteristics or mechanisms used to determine whether an authority has discretionary power in a particular case. The questionnaire thus aims to identify national regulations and practices on the mentioned issues.

Administrative time limits

1. Are specific administrative time limits within which authorities must take administrative decisions or complete administrative actions set in your legal system?

    - Yes
    - No
    - Only in certain areas of law

    Please specify your answer briefly, if necessary

As set out in more detail below, UK law does not impose a general time limit on public authorities to make administrative decisions or complete administrative actions. However, where a public body is required or empowered by legislation to perform a function or to take a decision, the legislation will sometimes impose a time limit within which the public body must act (see examples below). In the absence of such a provision, or where a public body acts pursuant to prerogative or common law powers, it is usually under a duty to perform the relevant function or take the relevant decision within a reasonable time.

2. Where are the administrative time limits set:

    - The Constitution
    - The general code of administrative law or administrative procedure law
    - Special laws
    - Other

    Please specify your answer briefly, if necessary

A legislative scheme within the UK may provide, expressly or by implication, for the time within which the public authority must perform the relevant duty or the relevant decision must be made.

Alternatively, a legislative scheme might require that a public body act within an indeterminate, but nonetheless identified period, such as "as soon as practicable"[1], "without delay"[2], or "forthwith"[3], the meaning of which is a matter of statutory interpretation. Whether a function has been performed or a decision has been taken within such a period is a question to be decided

[1] Such as section 47(6) of the National Health Service and Community Care Act 1990.
[2] Such as section 8B(8) of the Immigration Act 1971.
[3] Such as section 98(1) of the Social Security Act 1975 (now repealed), considered in *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540, CA.

on the facts of each individual case, bearing in mind the purpose underlying the statutory requirement and the reasons for the time taken by the public body.[4]

In the absence of any express or specifically implied time limit, courts may impose a duty to act within a reasonable time. This can be achieved in two ways. First, where the relevant power is derived from statutory authority, it might be held that the relevant legislation implicitly imposes a duty to act within a reasonable time.[5] *Second, it might be held that the general principle that public bodies must act reasonably when performing a function or taking a decision applies to the timing of such action*[6]*, thereby imposing a duty to perform the relevant function or take the relevant decision within a reasonable time. The concept of reasonable time is a flexible one*[7] *and is a question of whether the public body has acted irrationally by not acting sooner*[8]*. The lack of resources available to a public authority can be a relevant factor to be taken into account when assessing what constitutes a reasonable time.*[9]

An individual may also seek to challenge delay by a public authority through the Parliamentary and Health Service Ombudsman, who is empowered to investigate claims of maladministration in respect of over 250 central government departments and related bodies in the UK.[10] *A complaint may be made by "any member of the public who claims to have suffered injustice in consequence of maladministration"*[11]*, with maladministration generally taken to embrace "bias, neglect, inattention, delay, incompetence, ineptitude, arbitrariness and so on"*[12]*. A complaint may therefore be based on delay by the public authority. The principal remedy open to the Ombudsman is the publication of a report that recommends that the investigated department take one or several courses of action.*

3. Is the concept of "reasonable time" for the setting of administrative time limits defined and applied in your legal system or case-law?

See above.

4. Describe the general time limits in which administrative decisions are made in your legal system.

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[4] See, for example, *Manning v Sharma* [2009] UKPC 37, para 14.
[5] See, for example, *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546, para 51; *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36.
[6] *R (Saadi) v Secretary of State for the Home Department* [2002] UKHL 41.
[7] *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546.
[8] *R v Inland Revenue Commissioners, ex p Opman International UK* [1986] 1 WLR 568, QBD, 571; *R (FH) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin), para 10.
[9] See, for example, *R (FH) v Secretary of State for the Home Department* [2007] EWHC 1571 (Admin).
[10] Created under the Parliamentary Commissioner Act 1967. Note there are also a number of other Ombudsmen in the UK in respect of specific matters and also at "constitutional" levels, such as local and devolved government.
[11] Section 5(1) of the Parliamentary Commissioner Act 1967.
[12] The so-called "Crossman catalogue", see *R v Local Commissioner for Administration, ex p Bradford MCC* [1979] QB 287. Applied in relation to the Parliamentary and Health Service Ombudsman in *R (Rapp) v The Parliamentary and Health Service Ombudsman* [2015] EWHC 1344 (Admin).

See above.

5. Is it possible to extend the administrative time limits? Under what circumstances?

A public body may have an express or implied power to defer performing a function or taking a decision. The existence and scope of that power are questions of interpretation of the statute which creates the relevant function. The decision to defer may be subject to challenge on ordinary public law grounds.[13]

6. Does a person have the right to complain about the authority's decision to extend the time limit?

See above.

7. If an administrative decision is unfavourable to the submitter or the potential addressee of the decision, can it still be made after the expiry of the time limit?

   - Yes
   - No
   - No, unless the delay on the part of the institution has a proper justification
   - Other

   Please specify your answer briefly, if necessary

N/A, on the above basis.

8. Is failing to comply with established administrative time limits a common problem in your country?

   - Rather yes
   - Rather no

Generally, this is not perceived to be a common problem so far as the courts are concerned. Issues of delay may be raised more frequently through the Ombudsman system.

9. What are the main reasons for failing to comply with administrative time limits in your country?

   - Lack of clear regulation
   - Lack of institutional capacity
   - Deficiencies in the administration of the authorities
   - Deficiencies at national policy level
   - Other

[13] For example, see *R v Secretary of State for the Home Department, ex p Norney* (1995) 7 Admin LR 861, QBD, 870-873.

Please specify your answer briefly

Insufficient data in court decisions to provide an answer on this.

10. Are there any penalties, disciplinary or criminal liability for authorities or their staff with regards to not complying with the time limits?

The failure to comply with a time limit (whether express or implied) is likely to be unlawful, although this will not necessarily mean that the ultimate act or decision will be unlawful.

The applicant may seek to require the public body to act without any further delay. Alternatively, they may seem to prohibit the public body from proceeding to perform the relevant function or take the relevant decision (if the delay means it cannot now do so lawfully) or, where the function has already been performed or the decision has already been taken, may seek to have that action quashed (if the delay means it was performed in an unlawful manner).

Any remedy would be directed at the public authority, it would not extend to staff. There is no criminal liability.

Administrative silence

1. Does your national legislation define "administrative silence" as a legal concept? Please specify.

UK law does not recognise the concept of administrative silence, but instead applies the principles set out above.

2. Does your legal system provide for a negative model of administrative silence (deemed refusal of a claim)?

In some instances, see below.

3. Does your legal system provide for a positive model of administrative silence (a claim not refused in due time is deemed granted)?

In some instances, see below.

4. Which regulatory model of administrative silence is more typical for your legal system?

As set out above, UK national legislation does not define administrative silence as a legal concept. As set out below, the negative model is more common in the UK. In the absence of express time limits, where a "reasonable time" standard applies, the characterisation of a model as negative or positive will be of limited relevance.

The negative model

1. What are the types of administrative procedures that the negative model can be applied to:

    - Procedures that are initiated on the basis of an application or claim by a person
    - Ex officio procedures
    - Other

    Please specify your answer briefly, if necessary

2. Does the negative model mean that a person's application or claim is automatically considered to be rejected or are extra actions required in order for the person to be able to appeal the rejection (for example, does the person have to provide proof that authority has been silent on the particular matter in order for it to be able to appeal the rejection)?

The requirements will depend on the provision in question.

*By way of example, the negative model of administrative silence is recognised in section 78(5) of the Town and Country Planning Act 1990 and section 60 of the Planning Act (Northern Ireland) 2011 (the "**Planning Examples**").*

In the Planning Examples, administrative silence is deemed to be a refusal of the relevant application for the purposes of allowing the applicant an opportunity to appeal, without further action required from the applicant.[14]

That being said, as a matter of evidence, were an applicant to appeal the deemed refusal they might have to provide, for example, a copy of the application to show that an application was, in fact, made.

3. Is the process for appealing against a "fictitious refusal" resulting from an administrative silence different from the general appeals process (for example, is there a different time limit or review body than in general appeals process)? Please describe the main differences.

The appeal process will depend on the provision in question.

In each of the Planning Examples, the process for appealing against a "fictitious refusal" is the same as appealing a refusal: insofar as it affects the relevant time limits for making an appeal, the difference is, of course, that the refusal is deemed to have taken place at the end of the time limit for the public body to make the decision, rather than the actual date on which a decision was taken.

[14] See section 78(1) of the Town and Country Planning Act 1990 and section 58(1) of the Planning Act (Northern Ireland) 2011.

4. Can the "fictitious refusal" resulting from an administrative silence be appealed in court?

The ability to appeal a "fictitious refusal" will depend on the provision in question.

With respect to each of the Planning Examples:

- *under the Town and Country Planning Act 1990, the appeal is made to the Secretary of State.*[15]

- *under the Planning Act (Northern Ireland) 2011, the appeal is made to the planning appeals commission.*[16]

In either case, an applicant who had been the subject of a "fictitious refusal" could apply to the courts to for judicial review of the decision of the Secretary of State (although not the original "fictitious refusal").

5. What is the competence of the court if the "fictitious refusal" is found to be unjustified:

    - The court can order the administrative authority to issue a decision, but cannot set a specific time limit in which it shall be done
    - The court can order the administrative authority to issue a decision within a certain time limit
    - The court can decide upon the matter itself
    - Other

    Please specify your answer briefly

Generally, a court may make a mandatory order against a public body to take a decision without further delay.

As set out in the answer to question 4, any court seized of an issue arising out of the Planning Examples would be reviewing a decision of the Secretary of State, rather than the original "fictitious refusal". Thus, only an actual, rather than a deemed, decision would be before the court.

6. What legal remedies are available in your legal system if an authority has failed to comply properly with a court order to issue a decision?

Failure to comply with a court order can, in theory, generate proceedings for contempt of court. Sanctions for contempt of court include imprisonment, fines and seizure of assets. Damages are not available for a failure to comply with a duty in public law, unless there has been a breach of

[15] See section 78(1) of the Town and Country Planning Act 1990.
[16] See section 58(1) of the Planning Act (Northern Ireland) 2011.

human rights (in which case, under the Human Rights Act 1998, damages may be available: see below).

7. In which cases the court has the competence to decide upon the matter itself instead of the "silent" authority:

    - In all cases
    - Only in cases of objective urgency
    - Only in cases which concern significant rights of the person
    - Only in cases in which the authority has no discretionary power or it is limited to zero
    - Never, because only the authority can make a decision
    - Other

Generally, a court of review does not substitute its own decision for that of the primary decision-maker. In substance it may do so if there is only one decision which the authority could rationally take, but would then simply order the authority to take the decision which was the only decision lawfully open to it to take.

As set out in the answer to question 4, any court seized of an issue arising out of the Planning Examples would be reviewing a decision of the Secretary of State, rather than the original "fictitious refusal". Thus, only an actual, rather than a deemed, decision would be before the court.

The positive model

1. What is the main purpose of the positive model in your legal system?

    - To simplify certain administrative procedures
    - To protect the rights of individuals in case an authority fails to comply with the administrative time limits

    Please specify your answer briefly

The positive model was, in part, implemented in the UK's legal system by transposing Article 13(4) of Directive 2006/123/EC into national legislation by the Provision of Services Regulations 2009. Regulation 19(5) of the Provision of Services Regulations 2009, in much the same way as Article 13(4) of Directive 2006/123/EC, provides that, in the event of failure to process an application under an authorisation scheme within the relevant period, authorisation is deemed to have been granted unless different arrangements are in place.

Directive 2006/123/EC specifies administrative simplification as one of its aims. However, where specifically legislated for, the purpose of the positive model will depend on the provision in which it is utilised.

By way of example, where, before the date of expiry of a sex establishment licence, an application has been made for its renewal, the licence is deemed to remain in force until the withdrawal of the application or its determination (notwithstanding that it would otherwise have expired)[17]. The purpose of this provision, among the options set out above, is best categorised as simplifying administrative procedures in the grant and renewal of such licences.

This can be compared to, for example, the notification of planning authorities for certain types of development of land, where work can commence after the expiry of 28 days from the date the application for the development was received by the planning authority if the planning authority has not given any notice of their determination that formal approval is required for the development[18]. This can be categorised as both simplifying administrative procedures and protecting the rights of individuals in cases where the planning authority fails to comply with the relevant time limits.

2. Are there any prohibitions or restrictions on the application of the positive model in certain areas of law in your legal system?

The UK legal system does not contain any specific prohibitions or restrictions on the application of the positive model in terms of areas of law, although there are limitations on the positive model contained in the Provision of Services Regulations 2009 (for example, certain activities like financial services and electronic communications services and networks are excluded, in much the same was as they are under Directive 2006/123/EC).

3. When (a specific moment or particular circumstances) is the person's claim deemed to have been granted?

The specific moment an application is deemed to have been granted will depend on the provision in question.

In the examples given above, the licence for a sex establishment is deemed to remain in force from the moment it expires until the withdrawal or determination of the application, and the notification is deemed approved after the expiry of 28 days from the date the application was received by the planning authority.

4. Does the person have to get any kind of confirmation or proof that the claim has been granted? Where and within what time limit does it need to be received?

Any requirements as to confirmation or proof that a claim has been granted will depend on the provision in question.

No form of confirmation or proof is given to or required from the applicant that a claim has been granted in the examples given above.

[17] See paragraph 11(1) of Schedule 3 to the Local Government (Miscellaneous Provisions) Act 1982.
[18] See, for example, paragraph 6G of Schedule 1 to the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, relating to certain wind turbines.

5. Are there any legal remedies available to third parties affected by the "fictitious decision" of granting a claim, if necessary?

The availability of remedies will depend on the provision in question.

No specific legal remedies are available to third parties affected by the "fictitious decision" of granting a claim that would not be available to third parties upon an actual decision having been made by the relevant public body.

6. Is there a certain procedure that allows to annul a "fictitious decision" of granting a claim? If yes, are there any differences from the general procedure?

The ability to annul a "fictitious decision" will depend on the provision in question and the application of general rules of public law.

There is no specific procedure that allows a public body to "annul" a "fictitious decision".

7. Please describe the implementation of the positive silence model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market in your legal system. In which legal areas has it been implemented? Have there been any difficulties in its' implementation?

As noted above, the Provision of Services Regulations 2009 implement Directive 2006/123/EC. The Provision of Services Regulations 2009 set out those areas to which they do not apply at Regulation 2. No particular problems have emerged in the implementation of Directive 2006/123/EC. It remains in place at the moment in the UK as part of Retained EU law.

Other legal remedies

1. What legal remedies exist in your legal system in situations of administrative silence where the law does not regulate the administrative silence neither in accordance with the positive, nor the negative model?

In the context of administrative silence, the most important public law remedy is the mandatory order. Mandatory orders are available when a public authority is in dereliction of a public duty. They have the effect of compelling the authority to act in light of its obligations.

Depending on the particular circumstances, other remedies which might be sought in tandem with mandatory orders include quashing orders, prohibiting orders, injunctions and declarations.

2. Is a person entitled to claim a compensation for financial loss or non-financial damage which has been caused as a result of the administrative silence of the authority?

Damages are not generally available as a public law remedy. However, claimants may be able to establish that a public law illegality is also actionable in private law, for instance for negligence, breach of statutory duty or misfeasance in public office.

Where administrative inaction violates a person's right protected under the European Convention on Human Rights, section 8 of the Human Rights Act 1998 provides that the court can grant such relief or remedy within its powers as it considers just and appropriate. Section 8(2) qualifies this, providing that damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

Case law and regulation in non-harmonised sectors of law

1. Do you have any case-law where national regulation on administrative silence has been found unfounded or inapplicable in a particular case?

No.

2. Do you have any case law on the application or interpretation of the positive model provided for in Article 13(4) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market? If so, please describe the substance of the most relevant cases.

In Hussain v Waltham Forest LBC *[2022] UKUT 241 (LC), the Upper Tribunal considered a local housing authority's appeal against a decision of the First-tier Tribunal upholding the respondents' applications for licences under the Housing Act 2004. The respondents cross-appealed, arguing that the licences were deemed to have been granted to them after a reasonable time pursuant to Regulations 19 and 20 of the Provision of Services Regulations 2009, which gives effect in English law to Article 13 of Directive 2006/123/EC. According to Regulation 19, authorisation procedures and formalities had to be processed "within a reasonable period" which was fixed and made public in advance. Regulation 20 provided that applications had to be acknowledged "as quickly as possible". The respondents argued that, on the basis that the licences were deemed granted before they were refused, they could not have been refused at a later date.*

The Upper Tribunal held that there was no material difference between the wording of Regulations 19 and 20 and the wording of Article 13 of Directive 2006/123/EC, the purpose of which was to clarify the exact time at which authorisation was deemed to be granted if not previously refused or expressly granted. The Upper Tribunal held that the purpose of Article 13 and Regulation 19 would be defeated if the latter were to be interpreted as meaning that, in any case where an authority did not publicise in advance and notify the fixed period within which an application would be determined, there would be a deemed grant after the expiry of a reasonable period of time, as that would enable authorities which did not specify such a period to fall back on an uncertain period of time and leave applicants vulnerable to delay. In the instant case, the First-tier Tribunal had correctly concluded that the authority had published a decision not to specify a fixed period of time on the basis that it was justified in not doing so by an overriding

public interest in safety within Regulation 19(6). The respondents' cross-appeal was therefore dismissed.

3. Have you submitted a question to the Court of Justice of the European Union in order for it to make a preliminary ruling in a case concerning national regulation on administrative silence? Briefly describe the request and the substance of the judgment.

No.

4. Briefly describe the national regulation on administrative silence in the following legal areas:

4.1. Construction, spatial development planning and environmental protection

The general principles set out in response to "Administrative time limits – Question 2" above apply in these areas of law. See also the Planning Examples above.

4.2. Social security

The general principles set out in response to "Administrative time limits – Question 2" above apply in this area of law.

4.3. Freedom of information

*Freedom of information is governed by the Freedom of Information Act 2000 ("**FOIA**"). Under section 10 of FOIA, a public authority must generally respond to a request for information made pursuant to FOIA "promptly and in any event not later than the twentieth working day following the date of receipt." Where required, an authority may claim a reasonable extension of time to consider the public interest test (weighing the public interest in maintaining one of the statutory exemptions to disclosure against the public interest in disclosure). An extension beyond an additional 20 working days should be exceptional. If the authority needs further details to identify or locate the information, then the 20 working days will commence the day after it receives the required clarification from the requester. Where the authority requires a fee to process the request, the 'clock' will stop on the date it issues a fee notice to the requester and restart once payment is received.*

The Information Commissioner's Office is responsible for the enforcement of FOIA. Both public authorities and requesters can complain to the First-tier Tribunal if they believe that the Information Commissioner's Office has made a mistake in a decision notice. Such a complaint may be brought on a point of law or on the balancing of the public interest test.

Administrative discretionary power

1. How is administrative discretionary power defined in your legal system?

Administrative discretion exists where a public authority or official has a power to make choices between courses of action or where, even though the end is specified, a choice exists as to how that end should be reached. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion. To say that there is a discretion presupposes that there is no unique legal answer to the problem (although occasionally it may be found that although there is a formal discretion, there is only one decision which can rationally be made in the particular circumstances of the specific case).

Discretion may be conferred on a public authority through legislation. Legislation employs a great variety of different formulae to confer discretion and to guide the exercise of that discretion.

The Crown (ie the executive government) has certain historic special powers recognised under the common law that are not dependent on conferral by legislation. These powers are referred to as prerogative powers and they can involve the exercise of discretion. Examples of prerogative powers include: the power to conclude treaties with other states; the power to issue or withdraw passports; the power to declare war; the power to prorogue Parliament; and the power to appoint Ministers.

2. Does your legal system distinguish between discretion (*deutsch – Ermessen*) and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts (*deutsch – Beurteilungsspielraum*)?

The distinction is recognised, it sometimes being said that the interpretation (or application) of an undefined legal concept calls for an evaluative judgment rather than an exercise of discretion. Generally the interpretation of legal concepts is assigned to the judgment of the court rather than an administrative body, whereas administrative discretion is conferred on public authorities. However, it may be found as a matter of interpretation of the legal concept that the evaluative judgment to be made in applying it is primarily reserved to the public authority, in which case the lawful limits of its function are in practice the same as for the exercise of discretion (in particular, it must make a decision which it not irrational).

3. What are the characteristics, criteria or methods used in your legal system to determine whether an authority has discretionary power in a particular case? Provide the most typical examples of case law where the discretionary power has been recognised.
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

Where discretion is conferred by legislation, the courts will determine whether an authority has discretionary power through a process of statutory interpretation. For example, in Padfield v Minister of Agriculture, Fisheries and Food *[1968] A.C. 997, the House of Lords held that section 19(3)(b) of the Agricultural Marketing Act 1958 conferred a discretion on the Minister of Agriculture, Fisheries and Food to refer, or not to refer, complaints relating to the operation of the Milk Marketing Scheme (then in place) to an investigative committee. However, the House of Lords held that Parliament conferred that discretion on the Minister so that it could be used to promote the policy and objects of the conferring statute, which were to be determined by the*

interpretation of that statute; this was a matter of law for the court. In this case, the Minister's reasons for not referring the matter to the investigative committee had not been good reasons in law, and so he was required to reconsider the complaint according to law.

Where discretion arises in the exercise of prerogative powers, the courts decide whether such powers exist and if so their scope in accordance with common law principles. For example, in Council of Civil Service Unions v Minister for the Civil Service *[1985] A.C. 374 the Minister for the Civil Service exercised a prerogative power in peremptorily altering the conditions of service for staff employed at the Government Communications Headquarters, forbidding membership of a union. The House of Lords held that: (i) executive action based on the use of a prerogative power was not immune from judicial review; but (ii) it was for the executive and not the courts to decide whether, in any particular case, the requirements of national security outweighed those of fairness, and in this case the evidence established that the Minister had considered, with reason, that prior consultation about her decision would have endangered national security.*

4. Is there a limit of judicial review of use of discretionary power by the authority in your legal system? If so, please explain possibilities of court examination and assessment in such a case?
   If your legal system distinguishes between discretion and margin of appreciation, please describe both.

Where discretion is conferred by legislation, the scope of judicial review of the exercise of that discretion will be determined by the wording of the power and the context in which it is exercised,[19] *in the light of general principles of public law. In each case, the grounds on which judicial review can be pursued are limited to the following:*

- *Illegality, which arises when an authority misdirects itself in law, exercises a power wrongly, or acts* ultra vires *in purporting to exercise a power that it does not have.*
- *Irrationality, which arises if the authority acts in a way that is so unreasonable that no reasonable authority could ever have come to it, or if the authority took into account irrelevant matters or failed to consider relevant matters.*
- *Procedural unfairness, which arises if the authority has not properly observed the relevant statutory procedures (for example by failing to consult or to give reasons in accordance with the statute), or the principles of natural justice (for example, by showing bias).*
- *Legitimate expectation, which may arise where an authority, by its own statements or conduct as to how it will exercise a discretion, gives rise to a legitimate expectation as to the way in which it will act.*

Where discretion arises in the exercise of prerogative powers, the courts have jurisdiction to determine whether such a power exists and, if it does exist, its extent. However, where the question is whether the exercise of a prerogative power within its legal limits is challengeable in the courts on the basis of one or more of the recognised grounds of judicial review, the answer

[19] *Secretary of State for Education and Science v Tameside MBC* [1977] A.C. 1014 at 1047, per Lord Wilberforce: "there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at".

will depend on the nature and subject matter of the particular prerogative power being exercised.[20] *Examples of prerogative powers regarded as non-justiciable when exercised within their legal limits include those relating to: the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours and the appointment of ministers.*[21]

5. Is judicial review affected by the fact that the discretionary power used by the authority has resulted in a restriction of human rights? Is the intensity of judicial review in such a case different from that in the case of no administrative discretion?

Under section 6 of the Human Rights Act 1998, subject to any clear contrary instruction given in primary legislation, it is unlawful for a public authority to act incompatibly with the rights protected under the European Convention on Human Rights. Consequently, it is open to a claimant to argue that measures other than primary legislation (or secondary legislation that is strictly and directly required by primary legislation) should be declared unlawful for breach of Convention rights. Under section 6(2), a public authority's act that is incompatible with Convention rights will not be unlawful if: (i) the public authority could not have acted in any other way because of another provision of primary legislation; or (ii) the authority is acting to give effect to or enforce primary or secondary legislation which cannot be read compatibly with Convention rights. Human rights claims are often brought alongside or as part of a judicial review claim.

Where alleged violations of fundamental rights are relevant to a rationality review of an exercise of administrative discretion, the courts will apply a more demanding approach to scrutiny than they otherwise would.[22] *Since the Human Rights Act 1998 came into force, the courts have adopted proportionality as the appropriate standard of review in claims in which the exercise of administrative discretion is alleged to have engaged a qualified Convention right protected under that Act, subject to considerations of deference which will be considered within the proportionality analysis. While the precise overlap and differences between a rationality review and a proportionality review are not settled, it is agreed that a proportionality review allows for a higher intensity of review, given the balancing exercise of rights and interests.*[23]

[20] *R (on the application of Miller) v The Prime Minister* [2019] UKSC 41 at para 35.
[21] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 418.
[22] The case of *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514 at 531, established that the court is entitled to subject an administrative decision to a "more rigorous examination… according to the gravity of the issue which the decision determines". In that case, an administrative decision was said to put the applicant's life at risk, and so the basis of the decision called for "the most anxious scrutiny". The case of *R v. Ministry of Defence, ex parte Smith* [1996] QB 517 at 538 accepted a variable standard of review in cases involving alleged human rights violations. In *R v Education Secretary, ex parte Begbie* [2000] 1 WLR 1115, the so called 'Wednesbury unreasonableness' test (now commonly referred to as the 'irrationality' test) was framed as "a sliding scale of review more or less intrusive according to the nature and gravity of that is at stake".
[23] *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 A.C. 532 at 547.