CHAPTER 18

JUDICIAL REVIEW REMEDIES

SCOPE

18–001 This chapter examines the public law remedies—interim and final—that may be made on a claim for judicial review and the extent of the court's discretion to withhold them. The Administrative Court has at its disposal a range of powers to grant remedial orders in relation to a claim for judicial review, stemming from statutory and common law sources.

- Supreme Court Act (Senior Courts Act) 1981 s.37 and CPR Pts 25 and 54 govern interim remedies. These include interim injunctions, stays of proceedings and interim declarations.
- Supreme Court Act 1981 (Senior Courts Act) ss.29 and 31[1] and CPR Pt 54 regulate the main types of final remedy in judicial review claims. The various remedies—prohibiting, mandatory and quashing orders, injunctions and declarations—may be granted either singly or in combination.[2]
- The common law may provide a right to damages, restitution or recovery of a sum due where there has been an unlawful administrative act—but only if the elements of a recognised tort (typically negligence, breach of statutory duty and misfeasance of public office) or other cause of action can also be established.[3] In practice, claims for damages and other monetary remedies are usually determined at a separate hearing after the public law issues have been decided.
- The Human Rights Act 1998 s.4 (declarations of incompatibility) and s.8 (damages for actions breaching Convention rights)[4] provide specific remedies in judicial review and other claims in this context.[5]
- European Community law requires additional and modified remedies to be available in order to ensure the full protection of Community law rights.[6]

[1] As amended on May 1, 2004 by The Civil Procedure (Modification of Supreme Court Act 1981) Order 2004 (SI 2004/1033) (which altered the names of the remedies).
[2] Supreme Court Act (Senior Courts Act) 1981 s.31(2).
[3] See Ch.19.
[4] See 19–025.
[5] See 13–045 The text is set out in Appendix F.
[6] See 14–051.

Function of Remedies

18–002 The modern era of English judicial review is marked by two changes in the way remedial orders are made and thought about. First, prior to the reforms to the judicial review system in 1978,[7] a plethora of technical rules restricted the circumstances in which claimants could be granted remedies in public law. Now the courts are reluctant to let the former intricacies and obscurities hamper the provision of effective redress. The courts adopt a flexible approach—though the willingness to innovate has not extended as far as accepting the radical suggestion that there is no longer any need for remedial orders specific to judicial review.[8]

18–003 Secondly, before the modern era of judicial review, the limits of the High Court's supervisory jurisdiction were defined by placing restrictions on the situations in which the particular remedies of certiorari, prohibition and mandamus could be granted. As we have seen, the approach today is a much broader one: the boundaries of the court's supervisory powers are determined by focusing on the source of legal authority and the character of the function,[9] and whether the subject-matter of the claim is justiciable.[10] Little of the old case law on the reach of each remedy is of much practical relevance.[11] The question to be addressed is therefore no longer, "does certiorari lie against such a decision?" but rather whether the impugned decision is one made by a public authority in the exercise of a public function and is justiciable. Today it can be said that the remedial orders at the disposal of the court perform the subsidiary role of giving practical effect to the judgment of the court.

18–004 The importance of remedies should not, however, be under estimated. In the first of the Hamlyn lectures, published as *Freedom under the Law*, Denning J. saw the biggest challenge facing the judiciary the fashioning of new remedies to protect our freedoms. As this and the next Chapters will make clear, this is one challenge that the judiciary, with the help of Parliament and academics and practitioners, have to a considerable extent successfully met.

Remedies against the Crown and Ministers

No coercive remedies against the Crown directly

18–005 The prerogative orders (mandatory, prohibiting and quashing orders) and injunctions cannot be granted against the Crown directly.[12] Declaratory relief is however available. The justification given for this restriction is

[7] See 15–087.
[8] D. Oliver, "Public Law Remedies and Procedures—Do We Need Them?" [2002] P.L. 91.
[9] Ch.3.
[10] See 1–025; 11–014.
[11] There is no need, for example, to inquiry whether the decision was a "judicial one": see Appendix B on the classification of functions.
[12] On the nature of the Crown, see 3–037.

"both because there would be an incongruity in the Queen commanding herself to do an act, and also because disobedience to a writ of mandamus is to be enforced by attachment".[13]

Ministers are officers of the Crown

18–006 The restriction on coercive remedies against the Crown presents few practical problems as legislation rarely places duties or confers powers on the Crown as such. Most statutory and prerogative powers of central government are exercised by Secretaries of State (who are *officers of the* Crown as distinct from the Crown itself) and coercive judicial review remedies may be granted against ministers in their official capacity.[14]

Interim relief against ministers

18–007 The one difficulty that used to face claimants seeking a remedy against a minister was that, until relatively recently, Pt II of the Crown Proceedings Act 1947, which restricts the circumstances in which injunctions may be granted against ministers, was held to apply not only to private law proceedings against central government but also to restrict the court's powers to grant injunctions on applications for judicial review. In other words, the 1947 Act, which had been passed to make litigation against central government less hampered by outdated technical protections against "the Crown", was believed to qualify the plain words in s.31 of the Supreme Court Act (Senior Courts Act) 1981 giving power to the court to grant injunctive relief during a claim for judicial review. At the time, the bar on injunctive relief against ministers could pose significant practical difficulties for claimants as injunctions were the only form of remedial order which, on an application for judicial review, the court was able to grant on an interim basis pending the full hearing of the case.[15]

18–008 Since the 1990s it is clear, however, that the court does indeed have jurisdiction to grant injunctions against ministers on claims for judicial review. First, the House of Lords held, following the European Court of Justice, that the court had power to grant interim injunctions against ministers where this was necessary in order to protect rights under European Community law.[16] Secondly, the House of Lords held that Pt II of the 1947 Act applies only to "civil proceedings," as defined by s.38(2), not to claims for judicial review.[17] Even though it is now clear that the

[13] *R. v Powell* (1841) 1 Q.B. 352 at 361 (Lord Denman C.J.), cited with approval in *M v Home Office* [1994] 1 A.C. 377 at 415, HL (Lord Woolf); *cf. Page v Hull University Visitor* [1993] A.C. 682 where the HL appears to have accepted without argument that certiorari could lie against the Queen "as visitor" to a University. See further 3–037.
[14] *R. v Commissioners of Customs and Excise Ex p Cook* [1970] 1 W.L.R. 450 at 455 (Lord Parker C.J.). On the nature of the office of Secretary of State, see 3–003.
[15] Since 1998 the court may grant interim declarations: see 18–021.
[16] See 14–039.
[17] *M v Home Office* [1994] 1 A.C. 377; in relation to the Scottish Executive, see *Davidson v Scottish Ministers* [2005] UKHL 74; 2006 S.C. (H.L.) 41.

courts possess jurisdiction to grant injunctions against ministers and other officers of the Crown, this power is exercised only in the most limited of circumstances. A declaration—in interim or final form—will continue to be regarded as the most appropriate remedy on a claim for judicial review involving officers of the Crown.[18]

Interim Remedies

18–009 Interim remedies "hold the ring".[19] As in most other types of claim, there may be a need in claims for judicial review for the court to grant an interim remedy to preserve the position of the parties until a final resolution of the legal dispute between the claimant and defendant.[20] Interim relief may be sought at *any* point, including (in urgent cases) before the claimant has obtained permission to proceed with the claim and even after the final judgment has been given.[21] Most typically, however, interim remedies are sought at the permission stage.[22] In practice the form of interim remedy most commonly granted in judicial review claims is an interim injunction and stay of proceedings. Interim declarations are also available, along with a variety of other orders listed in CPR 25.1(1). The defendant public authority may be willing to give an undertaking to the court, so avoiding the need for a formal interim order to be sought and made.

Urgency

18–010 Interim relief will typically be requested by the claimant at the point of applying for permission to proceed with the claim. The determination of an application for permission typically takes in excess of six weeks, not least because the defendant has 21 days to provide an acknowledgment of service. In some cases this length of time would leave a claimant vulnerable, so it is possible to obtain interim remedies before the point at which the court grants permission. CPR Pt 54 is unfortunately silent on how to make urgent applications and the main Practice Direction adds only that "Where urgency makes it necessary for the claim for judicial review to be made outside London or Cardiff, the Administrative Court Office in London should be consulted (if necessary, by telephone) prior to filing the claim form".[23] Following lobbying from practitioners, a Practice Statement and form for "Request of Urgent Consideration" do however now exist.[24]

[18] *M v Home Office* [1994] 1 A.C. 377 at 412.
[19] An expression used in *R. v Cardiff City Council Ex p. Barry* [1990] C.O.D. 94 and *M v Home Office* [1992] 1 Q.B. 270 at 139J, CA.
[20] CPR Pt 25 governs claims for judicial review as it does other types of claim.
[21] CPR r.25.2(1).
[22] On permission, see 16–041.
[23] PD 54, para.2.4.
[24] Form N463 is available from HM Court Service website; see also *Practice Statement (Administrative Court: Listings and Urgent Cases)* [2002] 1 W.L.R. 810.

In exceptionally urgent cases, application may be made to the out-of-hours judge.[25] Where a request for an interim remedy is refused on the papers, a practice has developed of allowing the application to be renewed at an oral hearing.[26]

Interim injunctions

18–011 An interim injunction is one granted before trial, for the purpose of preventing any change in the status quo from taking place until the final determination of the merits of the case and to ensure that any final order that may be made at the full hearing of the claim should not be rendered nugatory. Interim injunctions may be mandatory[27] or prohibitory.

General approach

18–012 The general approach to the grant of interim relief in civil claims was established in 1975, when the House of Lords held that a claimant need no longer establish a prima facie case, but instead demonstrate that there is a serious issue to be tried, i.e. a claim that is not frivolous or vexatious and discloses a reasonable prospect of success.[28] The claimant having shown that there is, at the least, a serious issue to be tried, the court will then consider whether it is just and convenient to grant an interim injunction. This involves the court assessing the relative risks of injustice by deciding whether there is an adequate alternative remedy in damages, either to the claimant seeking the injunction[29] or the defendant in the event that an injunction is granted against him.[30] The availability of a remedy in damages to the claimant will normally preclude the grant to him of an injunction. Even if damages are available, they may not be an adequate remedy.[31] If there is doubt about either or both the claimant's and/or the defendant's remedy in damages the court will proceed to consider what has become known as the "balance of convenience". The factors to be taken into consideration will vary from case to case. The aim of this approach is to

[25] For a practitioner's view, see K. Marcus, "Urgent Applications, Interim Relief and Costs" [2004] J.R. 256.
[26] *R. (on the application of Q) v Secretary of State for the Home Department* [2003] EWHC 2507 at [10].
[27] See, e.g. *R. (on the application of S) v Norfolk CC* [2004] EWHC 404; [2004] E.L.R. 259 (local education authority ordered to continue funding child's place at a residential college).
[28] *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396. As the editors of the *White Book* point out, since the coming into force of the CPR the context in which interim remedies are sought has changed, not least because there is now encouragement for the early resolution of issues, and at some point the HL's approach may need to be reconsidered: *White Book 2007*, para.25.0.1.
[29] For example, in the event of the interim injunction being refused, but the claimant succeeding at trial.
[30] For example, if the interim injunction is granted but the claimant fails at trial. The grant of an interim injunction is usually conditional on the claimant giving an undertaking to pay damages in these circumstances.
[31] See, e.g. *R. v Kensington and Chelsea RLBC Ex p. Hammell* [1989] 1 Q.B. 518.

avoid the court having to consider difficult questions of law or fact at the interim stage.

Approach in judicial review claims

18–013 The old prima facie case test continues to apply, in effect, in many judicial review cases[32] because a prerequisite to the grant of an interim injunction is normally the grant of permission, where the threshold often approximates more to the need to show a prima facie case than merely a potentially arguable one.[33] Moreover, questions as to the adequacy of damages as an adequate alternative remedy will usually be less, or not at all, relevant because of the absence of any general right to damages for loss caused by unlawful administrative action per se.[34] It follows that in cases involving the public interest, for example where a party is a public authority performing public duties, the decision to grant or withhold interim injunctive relief will usually be made not on the basis of the adequacy of damages but on the balance of convenience test.[35] In such cases, the balance of convenience must be looked at widely, taking into account the interests of the general public to whom the duties are owed.[36]

18–014 Another difference from private law proceedings is that in judicial review, there is less likely to be a dispute of issues of fact. Where the only dispute is as to law, the court may have to make the best prediction it can of the final outcome and give that prediction decisive weight in resolving the interlocutory issue.[37]

18–015 Others factors that may be taken into account in determining the balance of convenience include the importance of upholding the law of the land and the duty placed on certain authorities to enforce the law in the public interest.[38] In the case of a challenge to the validity of a law, the court should not exercise its discretion to restrain a public authority by interim injunction from enforcing apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.[39] The general principle that expression of opinion or the expression and the dissemination of information will not be restrained by

[32] But not all: see, e.g. *R. v Secretary of State for the Home Department Ex p. Doorga* [1990] C.O.D. 109; *Scotia Pharmaceuticals International Ltd v Secretary of State for Health* [1994] C.O.D. 241.
[33] See 16–046.
[34] See Ch.19.
[35] *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603 at 672–673.
[36] *Factortame (No. 2)* [1991] 1 A.C. 603; and *R. v HM Treasury Ex p. British Telecommunications Plc* [1995] C.O.D. 56; *cf. R. v Secretary of State for Health Ex p. Generics (UK) Ltd* [1997] C.O.D. 294;
[37] *Factortame (No.2)* [1991] 1 A.C. 603 at 660 (Lord Bridge).
[38] *Factortame (No.2)* [1991] 1 A.C. 603 at 672.
[39] *Factortame (No.2)* [1991] 1 A.C. 603 at 673 (Lord Goff).

the courts except on pressing grounds applies as much to a public authority which is under a duty to express an opinion as to a private individual.[40]

18–016 The discretionary bars to the award of an injunction[41] are applied with particular stringency to the claimant for interim relief, and he is in any event usually required to give an undertaking in damages lest at the trial the interim injunction is shown to have been wrongly granted and the defendant has suffered loss as a result. Many claimants are legally aided and have insufficient means to give an effective undertaking in damages. This is not a bar to the grant of interim relief,[42] for the requirement of a cross-undertaking is a matter of discretion for the court. Neither ministers nor local authorities have any special exemption from giving cross-undertakings in damages, but a court is unlikely to exercise its discretion to require one where an injunction is sought in a law enforcement action.[43]

Stay of proceedings

18–017 Under CPR r.54.10(2), the court may grant a stay of proceedings when the claimant is granted permission to proceed with a judicial review claim. Authorities are divided as to the scope and effect of such a "stay".[44] The Court of Appeal has held that the term is apt to include executive decisions and the process by which the decision was reached and may be granted to prevent a minister from implementing a decision.[45] The Privy Council has however held, *obiter,* that a stay of proceedings is merely an order which puts a stop to the further conduct of proceedings in court or before a

[40] *R. v Advertising Standards Authority Ltd Ex p. Vernons Organisation Ltd* [1993] 1 W.L.R. 1289; cf. *R. v Advertising Standards Authority Ex p. Direct Line Financial Services Ltd* [1998] C.O.D. 20 (interim injunction granted restraining ASA from publishing adjudication).

[41] See 18–048.

[42] *Ex p. Hammell* [1989] 1 Q.B. 518; *Allen v Jambo Holdings Ltd* [1980] 1 W.L.R. 1252 (but note *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment (Interim Injunction)* [2003] UKPC 63; [2003] 1 W.L.R. 2839 at [39], where the PC held that Allen "should not be taken too far" as "The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice". In *R. v Secretary of State for the Environment Ex p. Rose Theatre Trust Company* [1990] 1 Q.B. 504 Schiemann J. held the court should be extremely slow to grant an injunction without a cross-undertaking in damages; see also *R. (on the application of Greenpeace Ltd) v Inspectorate of Pollution* [1994] 1 W.L.R. 570 at 574.

[43] *F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry* [1975] A.C. 295; *Director General of Fair Trading v Tobyward Ltd* [1989] 1 W.L.R. 517; *Kirklees MBC v Wickes Building Supplies Ltd* [1993] A.C. 227; *Coventry City Council v Finnie* (1997) 29 H.L.R. 658.

[44] The glossary to the CPR states "A stay imposes a halt on proceedings, apart from taking any steps allowed by the Rules or the terms of the stay. Proceedings can be continued if a stay is lifted".

[45] *R. v Secretary of State for Education and Science Ex p. Avon CC* [1991] 1 Q.B. 558 at 561, 563 (Glidewell and Taylor L.JJ.) (decision of minister to make order giving school grant maintained status); and *R. v Secretary of State for the Home Department Ex p. Muboyayi* [1992] 1 Q.B. 244 at 258 (Lord Donaldson M.R declines to express opinion on whether *Avon* will survive an appeal to the HL); *R. v Advertising Standards Authority Ltd Ex p. Vernons Organisation Ltd* [1993] 1 W.L.R. 1289 (application for stay "in truth" a claim for an injunction).

tribunal at the stage which they have reached, the object being to avoid the hearing or trial taking place; and that it could have no possible application to an executive decision which has already been made.[46] The position still awaits clarification by the House of Lords.[47]

18–018 Given the fundamental conflict of authorities over the basic nature of the order, it is difficult to describe with any certainty the principal features of a stay of proceedings. Unlike an injunction it is an order directed not at a party to the litigation but at the decision-making process of the court, tribunal or other decision-maker. It may not, therefore, be an order capable of being breached by a party to the proceedings, or anyone else, and may not be enforceable by contempt proceedings.[48] A decision made by an officer or minister of the Crown can be stayed by an order of the court.[49] Now that it is clear that interim injunctive relief can be ordered against officers and Ministers of the Crown,[50] and the court has power to make interim declarations, this characteristic of the stay is of less importance than it once was. There is much to be said for the view that, in the light of these developments, stays of proceedings may be confined to use in relation to judicial proceedings.[51] It does however, as we point out below, act as an effective brake on administrative action and it is not only the judicial proceedings which are brought to a halt while the stay is in operation.

18–019 Although the court has a general discretion to grant a stay of proceedings subject to any conditions it considers appropriate, cross-undertakings in damages will not normally be required.

18–020 The practical effect of a stay varies depending on the context.[52] Where the public authority has yet to make a final decision, the grant of a stay prohibits them from taking further steps to make that decision. Where a final decision has been made but not yet implemented, a stay will prevent implementation of the decision, which is suspended for the time being and any formal order is treated as temporarily being of no effect. The more

[46] *Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd* [1991] 1 W.L.R. 550 at 556 (Lord Oliver). The Board was considering s.564B(4) of the Jamaican Civil Procedure Code which was in similar terms to RSC, Ord.53 r.3(10)(a) (now CPR r.54.10(2)). *Ex p. Avon* [1991] 1 Q.B. 558 was neither referred to nor cited in argument.

[47] The Law Commission has recommended that "proceedings" in this context ought to be given a narrow meaning. This is in light of the fact that injunctions are now available against ministers on a claim for judicial review and the suggestion that the court ought to be empowered to grant interim declarations: see Law Com. No.226, para.6.26.

[48] *Vehicles and Supplies Ltd* [1991] 1 W.L.R. 550 at 71 (Lord Oliver).

[49] *Ex p. Avon CC* [1991] 1 Q.B. 558 at 558, 562 (Glidewell L.J.). *cf. R. v Secretary of State for the Home Department Ex p. Kirkwood* [1984] 1 W.L.R. 913; *R. v Secretary of State for the Home Department Ex p. Mohammed Yacoob* [1984] 1 W.L.R. 920. In the two House of Lords' decisions in the *Factortame* cases ((*No. 1*)) [1990] 2 A.C. 85; (*No. 2*) [1991] 1 A.C. 603), no mention was made of the question whether the court had power to grant a stay of proceedings against Ministers; it had been suggested that this omission was no accident: see Woolf, *Protection of the Public—a New Challenge* (1990), p.65.

[50] *M v Home Office* [1994] 1 A.C. 377.

[51] C. Lewis, *Judicial Remedies in Public Law*, 3rd edn (2004), para.6–028.

[52] *R. (on the application of H) v Ashworth Hospital Authority* [2002] EWCA Civ 923; [2003] 1 W.L.R. 127 at [45]–[48].

difficult question is whether a stay may be granted where a decision has been both made and implemented. The Court of Appeal has answered this in the affirmative, on the basis that if a final quashing order is eventually made, the decision will be treated as never having had any legal effect and therefore the court should have jurisdiction to say that a decision is without legal effect on a temporary basis.[53]

Interim declarations

18–021 Interim declarations were once "unknown to law" and even said to be "a contradiction in terms".[54] Following recommendations by the Law Commission and in Lord Woolf's *Access to Justice* report, an express power to grant interim declarations was included in the CPR when they were enacted in April 1999.[55] So far, the courts have not made a great deal of use of interim declarations in judicial review proceedings.

Bail

18–022 Until April 2004, the High Court exercised a general inherent power (usually heard by a judge in chambers) to grant bail to a person who had been refused bail by a magistrates' court or the Crown Court pending trial or appeal.[56] That general power to grant bail was abolished by s.17 of the Criminal Justice Act 2003.[57] With the abolition of this alternative remedy,[58] now the appropriate course for a person aggrieved by the refusal of bail by a magistrates' court or the Crown Court will often be to apply for judicial review of that refusal, though the court has warned that it will exercise its jurisdiction sparingly.[59]

Final Remedial Orders

18–023 At the conclusion of the full hearing, a successful claimant may request the court to grant a mandatory order (formally called mandamus),[60] a quashing order (certiorari) or a prohibiting order (prohibition)[61]—a group of

[53] *Ashworth Hospital Authority* [2002] EWCA Civ 923; [2003] 1 W.L.R. 127 at [46].
[54] *International General Electric Co of New York Ltd v Customs and Excise Comrs* [1962] Ch.784 at 790 (Lord Diplock).
[55] CPR r.25.1(1)(b).
[56] *Sezek v Secretary of State for the Home Department (Bail Application)* [2001] EWCA Civ 795; [2002] 1 W.L.R. 348.
[57] As part of the implementation of Sir Robin Auld's review of the criminal court system; note that s.17(6) provides "Nothing in this section affects any right of a person to apply for a writ of habeas corpus or any other prerogative remedy".
[58] *cf. the position in contempt proceedings where there is a right of appeal to the Court of Appeal Criminal Division which must be exercised in preference to making a claim for judicial review: R. v Serumaga* [2005] EWCA Crim 370; [2005] 2 All E.R. 160.
[59] *R. (on the application of M) v Isleworth Crown Court* [2005] All E.R. (D) 42 (Mar); *R (on the application of Allwin) v Snaresbrook Crown Court* [2005] EWHC 742 (guidance on bringing a claim).
[60] See 18–024.
[61] See 18–026.

remedies for historical reasons known collectively as "prerogative orders".[62] The court may also grant injunctions[63] and declarations.[64] For almost all purposes, the mandatory and prohibiting orders can now be regarded as indistinguishable in their effect from final injunctions:[65] All three remedies "direct any of the parties to do, or refrain from doing, any act in relation to the particular matter".[66] A distinctive feature of all these remedies is that the court has discretion to withhold them from a claimant even if the defendant public authority is held to have acted unlawfully.[67] Remedies may be granted in combination with one and other.

Mandatory orders

18–024 The modern approach to remedies—in which the function of remedial orders is simply to give effect to the judgment of the court on substance of a claim—means that it is no longer necessary at this stage to describe the kinds of decision in which mandatory orders may be granted.[68] If the court has found there to be breach of a duty, a mandatory order may be granted if in all the circumstances that appears to the court to be the appropriate form of relief. Mandatory orders will not lie to compel the performance of a mere moral duty,[69] or to order anything to be done that is contrary to law.

18–025 Many of the narrow technicalities which once applied to the grant of mandamus, for example, that it would not lie for the purpose of undoing that which has already been done in contravention of statute,[70] no longer restrict the remedy. It has long been held to be preferable for the claimant to be able to show that he has demanded performance of the duty and that performance has been refused by the authority obliged to discharge it.[71] A claimant, before applying for judicial review, should address a distinct and

[62] Ch.15. In its 1994 report *Administrative Law: Judicial Review and Statutory Appeals*, the Law Commission argued that the Latin names for the prerogative orders obscured their functions to non-lawyers; it recommended that the Supreme Court Act 1981 be amended to renamed (Law Com. No.226, para.8.3). This suggestion was not supported by Lord Woolf in *Access to Justice*, para.13–065, but did find favour with the Bowman committee (see 15–097) and ss.29 and 31 of the 1981 Act were amended in 2004; see 3–016.
[63] See 18–034.
[64] See 18–038.
[65] *M v Home Office* [1994] 1 A.C. 377, 415E.
[66] Words used in the Australian Administrative Decisions (Judicial Review) Act 1977 s.30 which introduced a flexible range of remedies to replace prerogative writs with a view to freeing "judicial review from its emphasis on the character of the remedy sought, instead allowing the court to consider the substance of the applicant's grievance" (Electoral and Administrative Review Commission, Issues Paper No.4, 1990).
[67] See 18–048.
[68] On issues to do with substance, see e.g. the distinction between mandatory and "directory" duties and powers (see 5–064); whether lack of resources may excuse failure to perform what otherwise would be a duty (see 5–152).
[69] For example, to make good a military officer's pay: *Ex p. Napier* (1852) 18 Q.B. 692.
[70] See the 4th edition of this work, p.542.
[71] T. Tapping, *On Mandamus* (1853), pp.282–286.

specific demand or request to the defendant that he perform the duty imposed upon him.[72] Today this learning is encapsulated in the general obligation on claimants to follow the steps set out in the Pre-Action Protocol for Judicial Review, which includes writing a letter before claim.[73]

Quashing and prohibiting orders

18–026 Historically, the orders of certiorari and prohibition had so many characteristics in common that they may, in their modern forms, be discussed together. The one significant difference between them is that a prohibiting order may, and usually must, be invoked at an earlier stage than a quashing order. A prohibiting order will not be granted unless something remains to be done that a court can prohibit. A quashing order will not lie unless something has been done that a court can quash. But it is sometimes appropriate to apply for both orders simultaneously—a quashing order to quash an order made by a tribunal in excess of its jurisdiction, and a prohibiting order to prevent the tribunal from continuing to exceed its jurisdiction.

18–027 It has been held that the orders will not issue to persons who take it upon themselves to exercise a jurisdiction without any colour of legal authority; the acts of usurpers are to be regarded as nugatory. Where a tribunal which had power to grant cinematograph licences adopted a practice of approving building plans before the application for a licence was made, on the understanding that it would later grant the licence if it approved the plans, the courts held that certiorari and mandamus would not go to the tribunal for a refusal to approve plans, since the tribunal had no legal authority whatsoever to make provisional decisions.[74] However, today, in order to remove uncertainty, a court would issue the orders to public authorities that purport to be acting in pursuance of lawful authority. In relation to a void decision, a quashing order *in effect* declares that it was ineffective *ab initio;* in the case of a voidable decision, a quashing order will deprive the decision of legal effect.[75]

18–028 It is still not altogether clear what is the earliest stage at which a claim for a prohibiting order may be made. If want of jurisdiction is apparent, a prohibiting order may be applied for at once. If want of jurisdiction is not apparent, the claim must wait until the tribunal has actually stepped

[72] *cf. R. v Bristol & Exeter Ry* (1843) 4 Q.B. 162, where the only demand made was premature.
[73] See Appendix I.
[74] *R. v Barnstaple Justices Ex p. Carder* [1938] 1 K.B. 385. See also *Re Daws* (1838) 8 A. & E. 936; *R. v Maguire and O'Sheil* [1923] 2 I.R. 58; and *Re Clifford and O'Sullivan* [1921] 2 A.C. 570 (no prohibition to court martial in state of martial law, for it is not a body exercising legal jurisdiction but an instrument for executing the will of the military commander). But for a more satisfactory result see *Steve Dart Co v Board of Arbitration* [1974] 2 E.C. 215 (prohibition issued to a tribunal purporting to act under legislation that did not empower its creation).
[75] On the distinction between void and voidable, see 4–056.

outside its jurisdiction (as by continuing the hearing after an incorrect determination of a jurisdictional fact) or is undoubtedly about to step outside its jurisdiction (as where it has announced its intention to entertain matters into which it has no power to inquire).[76] This is the generally accepted doctrine; but doubts have sometimes been expressed about the power to grant prohibiting orders for an anticipatory excess of jurisdiction.[77] On the other hand, there have been modern decisions in which applications for prohibiting orders have been considered even before the inferior tribunal has had the opportunity to address itself to the disputed question of its jurisdiction.[78] In any event, a doubt as to whether a request for a prohibiting order is premature is likely to be resolved in the claimant's favour if the final order of the tribunal may be protected by statute from challenge.[79]

Remitting the matter back to the decision-maker

18–029 Section 31(5) of the Supreme Court Act (Senior Courts Act) 1981 provides that

> "If, on an application for judicial review seeking a quashing order, the High Court quashes the decision to which the application relates, the High Court may remit the matter to the court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court."

18–030 This power to remit is useful in two main circumstances. First, where otherwise—following the quashing of a decision—the claimant would be inconvenienced by having to reapply to the public authority for a decision to be made. Secondly, where a quashing order alone might risk administrative inconvenience if a public authority had to start proceedings against the claimant afresh.

Substituting a decision

18–031 The general principle that a court hearing a judicial review claim does not substitute its decision for the original decision-maker is subject to two specific and limited exceptions, which extend the jurisdiction of the court when quashing orders are sought.

[76] *Re Zohrab v Smith* (1848) 17 L.J.Q.B. 174 at 176; *London Corp v Cox* (1867) L.R. 2 HL 239; *R. v Electricity Commissioners* [1924] 1 K.B. 171; *R. v Minister of Health Ex p. Villiers* [1936] 2 K.B. 29. See also *R. v Local Commissioner for Administration for North and East Area of England Ex p. Bradford MCC* [1979] Q.B. 287 (reversed in CA), where on a claim to prohibit a local commissioner from investigating certain matters, a declaration was granted that the Commissioner should not investigate complaints that did not prima facie amount to allegations of maladministration.

[77] *Re Ashby* [1934] O.R. 421 at 431.

[78] *R. v Tottenham & District Rent Tribunal Ex p. Northfield (Highgate) Ltd* [1957] 1 Q.B. 103, 107–108 (Lord Goddard C.J.); But a court may decline to exercise its discretion to issue prohibition before the tribunal has had an opportunity to explore the factual issues upon which its jurisdiction may depend: *Maritime Telegraph and Telephone Co Ltd v Canada Labour Relations Board* [1976] 2 E.C. 343.

[79] *R. v Minister of Health Ex p. Davis* [1929] 1 K.B. 619, DC.

18–032 First, where a claimant seeks a quashing order to quash a sentence of a magistrates' court or the Crown Court on the grounds that the court had no power to pass the sentence, the Administrative Court may, instead of quashing the sentence and remitting the matter back, pass any sentence which the former courts could have passed.[80] Secondly, CPR r.54.19(3) provides:

> "Where the court considers that there is no purpose to be served in remitting the matter to the decision-maker it may, subject to any statutory provision, take the decision itself. (Where a statutory power is given to a tribunal, person or other body it may be the case that the court cannot take the decision itself)."

18–033 A statutory foundation for the power for the court "to take the decision itself" was given when the Supreme Court Act (Senior Courts Act) 1981 s.31 was amended by the Tribunals, Courts and Enforcement Act 2007 s.141.[81] On the face of it, CPR 54.19(3) is considerably wider than the power to make substitute orders proposed by the Law Commission in 1994, which would have been confined to situations where the decision-maker was a court or tribunal and expressly limited to errors of law (not procedural impropriety or abuse of discretion) and where there was only one decision which the impugned court or tribunal could properly have reached.[82] The CPR must now be read in the light of the amended s.31 of the Supreme Court Act (Senior Courts Act) 1981, which more closely matches the Law Commission's recommendation. In practice, however, there may be relatively few opportunities for using CPR r.54.19(3).[83] One such may be where the court substitutes words in an inquisition.[84]

Final Injunctions[85]

18–034 The jurisdiction of the High Court to grant injunctions on a claim for judicial review rests on s.31(2) of the Supreme Court Act (Senior Courts Act) 1981[86] which gives the court power to grant an injunction in any case

[80] Supreme Court Act (Senior Courts Act) 1981 s.43; *R. v St Helens Justices Ex p. Jones* [1999] 2 All E.R. 73; *R. v Nuneaton Justices Ex p. Bingham* [1991] C.O.D. 56.
[81] See Appendix E below.
[82] Law Com. No.226, para.8.16.
[83] For an illustration of the type of situation where the "blunt instrument" of the prerogative orders could usefully be supplemented by a power to make a substitute order, see *R. v Tower Hamlets LBC Ex p. Tower Hamlets Combined Traders Association* [1994] C.O.D. 325. See also *Governing Body of the London Oratory School v Schools Adjudicator* [2005] EWHC 1842 (Admin); [2005] E.L.R. 484.
[84] *R. (on the application of Mowlem Plc) v Avon Assistant Deputy Coroner* [2005] EWHC 1359 (Admin).
[85] Detailed references to authorities for basic propositions of law relating to injunctions are omitted: see generally, D. Bean, *Injunctions*, 9th edn (2007).
[86] See s.30 in relation to injunctions restraining a person not entitled to do so from acting in a public office. On the High Court's general jurisdiction to grant injunctions, see s.37.

where it appears just and convenient to do so having regard to: (a) the nature of the matters in respect of which relief may be granted by a prerogative order; (b) the nature of the persons and bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case.

18–035 An injunction is an order of a court addressed to a party requiring that party to do or to refrain from doing a particular act. Hence an injunction may be prohibitory or mandatory. Until late in the 19th century all injunctions were worded in a prohibitory form (e.g. not to allow an obstruction to continue to interfere with the plaintiff's rights), but the direct mandatory form (e.g. to remove the obstruction) may now be used. A final injunction granted on a claim for judicial review is normally indistinguishable in its effect from a prohibiting or mandatory order:[87] injunctions may be granted to prevent ultra vires acts by[88] public bodies and to enforce public law duties.[89] The court may grant an injunction on such terms and conditions as it thinks fit. Although the discretion conferred is very broad, it will be exercised in accordance with recognised principles.

18–036 A final injunction is granted at the conclusion of the proceedings and is definitive of the rights of the parties, but it need not be expressed to have perpetual effect; it may be awarded for a fixed period, or for a fixed period with permission to apply for an extension, or for an indefinite period terminable when conditions imposed on the defendant have been complied with; or its operation may be suspended for a period during which the defendant is given the opportunity to comply with the conditions imposed on him, the plaintiff being given leave to reapply at the end of that time. The elasticity of form and content that characterises the injunction is, indeed, one of its main advantages over mandatory and prohibitory orders.

18–037 In general, a mandatory injunction will not issue to compel the performance of a continuing series of acts—for example, the execution of building or repair works[90] or the operation of a ferry service[91] or the delivery of mail that has been interrupted by an industrial dispute[92]—which the court is incapable of superintending. This rule cannot be expressed without qualification, for the court has jurisdiction to order the abatement of a nuisance although compliance with its order may entail the execution of extensive works over which the court would not be capable of

[87] *M v Home Office* [1994] 1 A.C. 377 at 415E.
[88] See, e.g. *R. v North Yorkshire CC Ex p. M* [1989] Q.B. 411.
[89] See, e.g. *R. v Kensington and Chelsea RLBC Ex p. Hammell* [1989] 1 Q.B. 518.
[90] *Attorney General v Staffordshire CC* [1905] 1 Ch. 336 at 342 (a case where a declaration was sought in respect of liability to maintain and repair a highway).
[91] *Attorney General v Colchester Corp* [1955] 2 Q.B. 207; *cf. Gravesham BC v British Railways Board* [1978] Ch. 379 at 403–405. See also *Attorney General v Ripon Cathedral (Dean & Chapter)* [1945] Ch. 23; *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 1 W.L.R. 204 at 211–212 (maintenance of airfield; injunction prohibitory in form but mandatory in substance).
[92] *Stephen (Harold) & Co Ltd v Post Office* [1977] 1 W.L.R. 1172.

maintaining effective superintendence[93] and it can award a prohibitory injunction to restrain the discontinuance of a public service.[94] It is doubtful whether a mandatory injunction will issue at the suit of a private plaintiff to compel a public authority to carry out its positive statutory duties, unless the statute is to be interpreted as giving the plaintiff a private right of action for breach of those duties; the more appropriate judicial remedy (if any) will be a mandatory order.[95]

Declarations

18–038 A declaration is a formal statement by the court pronouncing upon the existence or non-existence of a legal state of affairs. It declares what the legal position is and what are the rights of the parties. A declaration is to be contrasted with an executory, in other words, coercive judgment which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example to pay damages or to refrain from interfering with the claimant's rights. If the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaration, on the other hand, pronounces upon the existence of a legal relationship but does not contain any order which can be enforced against the defendant.[96] The court may, for example, declare that the claimant is a British subject or that a notice served upon him by a public authority is invalid and of no effect. The declaration pronounces on what is the legal position.

18–039 The fact that a declaration is not coercive is one of its advantages as a public law remedy. Because it merely pronounces upon the legal position, it is well suited to the supervisory role of administrative law in England. In

[93] See, e.g. *Pride of Derby & Derbyshire Angling Association Ltd v British Celanese Ltd* [1953] Ch. 149. Other limited exceptions to the general rule are mentioned in *Attorney General v Colchester Corp* [1955] 2 Q.B. 207, 216

[94] *Warwickshire CC v British Railways Board* [1969] 1 W.L.R. 1117.

[95] *Glossop v Heston & Isleworth Local Board* (1879) 12 Ch.D. 102; and *Attorney General v Clerkenwell Vestry* [18911 3 Ch. 527 at 537 (alleged breach of duty in failing to provide proper drainage system). It appears even a claim for mandamus would have been inappropriate because Parliament had provided another specific remedy: *Pasmore v Oswaldtwistle UBC* [1898] A.C. 387. See also *Attorney General v Pontypridd Waterworks Co* [1908] Ch. 388; *Holland v Dickson* (1888) 37 Ch. D. 669 (illustration of a mandatory injunction issuing to compel the performance of a semi-private nature; statutory duty of company to permit stockholder or shareholder to inspect its books); *Meade v Haringey LBC* [1979] 1 W.L.R. 637 (right to sue for damages does not appear to have been regarded as a condition precedent to the award of a mandatory injunction).

[96] *Webster v Southwark LBC* [1983] Q.B. 698 (Forbes J., although there had been only a declaration and no injunction granted and although a declaration was not a coercive order the court had an inherent power to make an order of sequestration where the interests of justice demanded compliance. If, for example, the courts have declared that an individual has the right to remain in this country, it could be contempt for the Home Office to remove him after having had notice of the declaration). This was accepted to be the position by counsel for the Home Secretary in *M v Home Office* [1994] 1 A.C. 377.

addition, by careful draftsmanship the declaration can be tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that they comply with the law. In many situations all that is required is for the legal position to be clearly set out in a declaration for a dispute of considerable public importance to be resolved. It usually relates to events which have already occurred. However, as will be seen, it is increasingly being used to pronounce upon the legality of a future situation and in that way the occurrence of illegal action is avoided. The courts have jurisdiction to grant an anticipatory injunction, *quia timet*, where this is the only way to avoid imminent danger to the plaintiff but the courts are extremely cautious about granting such relief and the necessity for it can be avoided by granting a declaration instead.

18–040 During the 1970s litigants applied with increasing frequency for declarations in order to obtain relief against the activities of ministers and other public authorities. Many of the landmark decisions which Lord Diplock regarded as constituting the "progress towards a comprehensive system of administrative law [which was] the greatest achievement of the English courts in [his] judicial lifetime"[97] were decided in civil proceedings in which the plaintiff sought a declaration. For example, in perhaps the most important decision of all, *Ridge v Baldwin*,[98] Lord Reid concluded his historic speech by announcing: "I do not think that this House should do more than declare that the dismissal of the appellant is null and void and remit the case to the Queen's Bench Division for further procedure". Similarly, in the almost equally important decision of *Anisminic v Foreign Compensation Commission*,[99] in restoring the decision of Browne J. which had been reversed by the Court of Appeal, the House of Lords granted a declaration that a provisional determination by the Commission was made without, or in excess of, jurisdiction and was a nullity.

Negative declarations

18–041 The courts can be unwilling to grant a negative declaration. By a negative declaration is meant a declaration of no right or no liability. It can also be a declaration as to the absence of any right or power in a defendant or defendant. In order to decide whether a declaration is a negative declaration, it is necessary not merely to examine the terms of the declaration but also its substance since by a careful use of language, what is in fact a negative declaration can be drafted in positive terms.

18–042 There are probably two reasons which explain the reluctance of the court to grant negative declarations.[100] The first is very similar to the reason that explains the opposition to granting declarations as to

[97] *R. v Inland Revenue Commissioners Ex p. National Federation of Self-Employed and Small Businesses Ltd* [1982] A.C. 617 at 641.
[98] [1964] A.C. 40.
[99] [1969] 2 A.C. 147.
[100] *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 K.B. 536 at 564–565 (Pickford L.J.: "I think that a declaration that a person is not liable in an existing or possible action is

theoretical issues, if the objective is to anticipate possible proceedings, those proceedings may never occur. The second reason is that they can be used for the purposes of forum shopping.[101] Where there are no existing proceedings, the court will usually want to be satisfied that there is some bona fide reason for commencing them but if there is the court will then be prepared to decide on the merits whether declaratory relief should be granted.[102]

Theoretical issues and advisory declarations

18–043 If an issue is theoretical, then in ordinary civil proceedings that is a compelling factor against the grant of relief and that remains the situation even if one of the parties has a perfectly legitimate reason for seeking clarification of the legal situation.[103] In claims for judicial review, however, there have now been a number of cases in which the courts have given advisory opinions, in the form of a declaration, where it was clearly desirable that they should do so. The declaratory opinions are given in circumstances where no other remedy would be appropriate. Sir John Laws categorises these situations where it is appropriate for the courts to grant declarations as being "hypothetical". They can equally appropriately be described as raising *theoretical* issues. A hypothetical question is a question which needs to be answered for a real practical purpose, although there may not be an immediate situation on which the decision will have practical affect.[104] A "hypothetical" question has to be distinguished from an "academic" question. An academic question is one which need not be answered for any visible practical purpose, although an answer would satisfy academic curiosity, for example, by clarifying a difficult area of the law. Sir John considers that it would be wrong for the court to grant relief in order to answer academic questions.[105]

one that will hardly ever be made, but that in practically every case the person asking it will be left to set up his defence in the action when it is brought"); *Dyson v Attorney General* [1911] 1 K.B. 410 at 417.

[101] *Camilla Cotton Oil Co v Granadex SA* [1976] 2 Lloyd's Rep. 10 and the speech of Lord Wilberforce.

[102] *Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] A.C. 1136 at 1156; *British Airways v Laker Airways* [1985] A.C. 58; *Staffordshire Moorlands DC v Cartwright* (1991) 63 P. & C.R. 285, CA (granted declarations that planning permission had not been implemented by the defendants, but Mustill L.J. indicated that it was an exceptional case and normally resort should be had to enforcement proceedings).

[103] *Sun Life Assurance v Jervis* [1944] A.C. 111 at 114 (Viscount Simon L.C.: "the appellants are concerned to obtain, if they can, a favourable decision from this House because they fear that other cases may arise under similar documents in which others who have taken out policies of endowment assurance with them will rely on the decision of the Court of Appeal, but if the appellants desire to have the view of the House of Lords on the issue on which the Court of Appeal has pronounced, their proper and more convenient course is to await a further claim and to bring that claim, if necessary, up to the House of Lords with a party on the record whose interest it is to resist the appeal").

[104] See, e.g. *R. (on the application of Sacupima) v Newham LBC* [2001] 1 W.L.R. 563 (because of the "considerable practical importance" of the legal issues, the Admin. Ct and CA dealt with a challenge to the lawfulness of provision of temporary accommodation even though the claimant had by the time of the hearings been provided with satisfactory long-term housing).

[105] J. Laws, "Judicial Remedies and the Constitution" (1994) 57 M.L.R. 213, 214–219.

18–044 The court has jurisdiction to make advisory declarations.[106] Advisory declarations have two main functions: first, to reduce the danger of administrative activities being declared illegal retrospectively, and, secondly, to guide public authorities by giving advice on legal questions which is then binding on everyone.[107]

Declarations of incompatibility

18–045 By s.4 of the Human Rights Act 1998, the court has jurisdiction to grant declarations of incompatibility; these are considered in Chapter 13.[108]

CONTEMPT

18–046 Failure to comply with a mandatory or prohibiting order or injunction, or an undertaking given to the court, is punishable as contempt of court. In theory all the normal sanctions are at the disposal of the court—imprisonment, sequestration, fine—in a case where a public authority fails to comply with a court order in judicial review, a mere finding of contempt rather than a penalty may suffice to mark the gravity of the situation.[109]

18–047 In relation to central government, a court contemplating making a finding of contempt must consider the difference in constitutional law between ministers (who are responsible to Parliament for the failings of their departments and cannot delegate their functions to officials) and officials (who are servants of the Crown, not servants or agents of ministers—though they work under the direction of ministers).[110] It is a minister in his official capacity who a party to the judicial review claim, not officials. It is a minister who is primarily responsible to the court for any failure; but if an official is wilful in his disobedience to a court order, his own conduct may expose him to the risk of being held in contempt.[111] The court may order a senior civil servant to attend court to represent a minister when it is delivering its judgment in contempt proceedings, but a compulsory order to appear should not be made against a civil servant unless there is a good reason for doing so.[112]

[106] *Equal Opportunities Commission v Secretary of State for Employment* [1995] 1 A.C. 1 at 27, 36.
[107] Zamir and Woolf, *The Declaratory Judgment*, 3rd edn (2002), p.143, cited with approval *R. (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777; [2003] A.C.D. 36 at [46].
[108] See 13–045.
[109] *M v Home Office* [1994] 1 A.C. 377.
[110] *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560; *Beggs v Scottish Ministers* [2007] UKHL 3; [2007] 1 W.L.R. 455 at [8] (letters to a prisoner from his legal advisers continued to be opened by prison officers despite an undertaking that this unlawful action would cease).
[111] *Beggs* [2007] UKHL 3; [2007] 1 W.L.R. 455 at [11].
[112] *Beggs* [2007] UKHL 3; [2007] 1 W.L.R. 455 at [13], [40].

Discretion in Granting and Withholding Remedies

Presumption in favour of relief

18–048 The general approach ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order. The court does, however, have discretion—in the sense of assessing "what it is fair and just to do in the particular case"[113]—to withhold a remedy altogether[114] or to grant a declaration (rather than a more coercive quashing, prohibiting or mandatory order or injunction which may have been sought by the claimant)[115] or to grant relief in respect of one aspect of the impugned decision, but not others.[116] But the requirements of the rule of law mean that "the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is shown is very narrow".[117]

18–049 The discretion is narrower still—or in some circumstances non-existent—where the claimant has succeeded in demonstrating a directly effective right under European Community law, given the general obligation on the court to provide effective protection under Art.10 of the EC Treaty.[118] Similarly, where Convention rights are in issue, the court will

[113] See generally: Lord Justice Bingham, "Should Public Law Remedies be Discretionary?" [1991] P.L. 64, 66.

[114] *R. v Lincolnshire CC and Wealden DC Ex p. Atkinson, Wales and Stratford* (1996) 8 Admin. L.R. 529 at 550 (Sedley J.: "To refuse relief where an error of law by a public authority has been demonstrated is an unusual and strong thing; but there is no doubt that it can be done").

[115] See, e.g. *Great North Eastern Railway Ltd v Office of Rail Regulation* [2006] EWHC 1942 at [96] (challenge to charging regime for track access).

[116] Discretion is an inherent characteristic of the remedies of quashing, mandatory and prohibiting orders, declarations and injunctions. Supreme Court Act (Senior Courts Act) 1981, s.31(6) makes express provision for delay to considered by the court (see Appendix D). Quashing orders under various enactments (see 17–025) are expressed in terms of that the court "may quash", see e.g. Town and Country Planning Act 1990 ss.287–288.

[117] *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1)* [2001] 2 A.C. 603 (Lord Bingham). *cf. Credit Suisse v Allerdale* [1997] Q.B. 306 at 355 (Hobhouse L.J.: "The discretion of the court in deciding whether to grant any remedy is a wide one"); *R. v HM Coroner for Inner London South District Ex p. Douglas-Williams* [1999] 1 All E.R. 344 at 347 (Lord Woolf M.R.: "When it comes to exercising this discretion I cannot suggest a better test for a court to apply when deciding whether it should give relief than that it should be 'necessary or desirable to do so in the interest of justice'", in a case relating to a inquest, must be read in context of the use of that expression in Coroners Act 1988 s.13, which provides an alternative remedy to judicial review).

[118] See 14–051; and *Berkeley* [2001] 2 A.C. 603 where the HL rejected the argument that relief should be refused since all the environmental information that would have been part of an environmental impact assessment (which had not been conducted at all) was already in the public domain; but later cases make clear that the mere existence of a European Community law right is not necessarily a bar on the exercise of the court's discretion: *Bown v Secretary of State for Transport, Local Government and the Regions* [2003] EWCA Civ 1170; [2004] Env. L.R. 26; *R. (on the application of Rockware Glass Ltd) v Chester City Council* [2006] EWCA Civ 99 (operation of quashing order suspended); *R. (on the application of Gavin) v Harringey LBC* [2004] 2 P. & C.R. 13 at [40]–[41] (delay provisions in SCA 1981 s.31(6) on delay not inconsistent with principles relating to Environmental Impact Assessments);

need to consider the relevance of ECHR Art.13 which, while not incorporated into national law by the HRA, has a pervasive influence in requiring effective remedies for breaches of Convention rights.[119] The writ of habeas corpus, examined in Chapter 17, is not discretionary but should issue if unlawful detention is established.[120] As with other aspects of the judicial review process, the court must give effect to the "overriding objective" of the CPR in its decision-making about remedies.[121]

18–050 Where the exercise of discretion by a judge at first instance is challenged on appeal, the Court of Appeal will normally intervene only if the judge below proceeded on the basis of the wrong principles.[122]

Delay

18–051 Delay as a ground on which the court may withhold a remedy is expressly recognised in s.31(6) of the Supreme Court Act (Senior Courts Act) 1981 which provides that where there has been undue delay in making a claim for judicial review:

> "the court may refuse to grant—(a) leave [i.e. permission] for making the application [i.e. claim], or (b) any relief sought on the application if it considers that the grant of the relief sought would be likely to cause substantial hardship to, or substantial prejudice to the rights of, any person or would be detrimental to good administration."[123]

18–052 CPR r.54.5(1) states that judicial review claim form must be filed promptly and in any event within three months from the date when grounds for the claim first arose".[124] Delay is thus relevant both at the permission stage and in relation to the grant of relief after the court has determined the merits of the claimant's case. The court regards these as distinct stages and in relation to the latter, delay is a factor to be considered in deciding whether or not to withhold a remedy *only* if to grant relief would be likely to cause hardship, prejudice or detriment to the defendant or a third party within the meaning of s.31(6)(b). At the full hearing the court is not concerned with the question whether there was good reason to extend time for filing the claim form and seeking permission.[125]

18–053 The courts have tended to avoid formulating any precise description of what constitutes detriment to good administration. This is because claims for judicial review arise in many different situations and the need for

[119] See 13–010.
[120] See 17–010.
[121] See 16–011.
[122] *R. v Islington LBC Ex p. Dignan* (1998) 30 H.L.R. 723, CA.
[123] *R. (on the application of Parkyn) v Restormel BC* [2001] EWCA Civ 330; [2001] 1 P.L.R. 108 at [32] (Sedley L.J., describing the provision as "distracting and unhelpful").
[124] See 16–050.
[125] *R. v Criminal Injuries Compensation Board Ex p. A* [1999] 2 A.C. 330; on good reasons to extend time, see 16–054.

finality may be greater in one context than another. It has, however, been observed that "there is an interest in good administration independently of hardship, or prejudice to the rights of third parties".[126] In relation to the permission stage, a court may take the view that it is self-evident that a delay has caused detriment to good administration without requiring specific evidence that this has in fact occurred,[127] but in relation to withholding relief evidence may be required.[128] Courts should be unwilling to excuse a breach of the standards required by administrative law merely upon the ground that to quash the decision would cause the decision maker administrative inconvenience: "even if chaos should result, still the law must be obeyed".[129] In *R. v Secretary of State for Social Services Ex p. Association of Metropolitan Authorities*[130] Webster J. held that, although the Secretary of State had not complied with his statutory duty to consult, the housing benefit regulations under challenge should not be quashed, as delegated legislation is not normally revoked unless there are exceptional circumstances, and to revoke the existing regulations would result in confusion.[131] Fortunately, however, courts traditionally receive arguments based upon administrative impracticability with scepticism. Except where the difficulty caused to the decision maker is more than inconvenience, and approaches impracticability or where there is an overriding need for finality and certainty,[132] a remedy should not be refused solely upon this basis. Even if, contrary to Lord Atkin's dictum, convenience and justice are

[126] *R. v Dairy Produce Quota Tribunal Ex p. Caswell* [1990] 2 A.C. 738; *R. v Monopolies and Mergers Commission Ex p. Argyll* [1986] 1 W.L.R. 763 at 774; *Coney v Choyce* [1975] 1 W.L.R. 422 at 436; *R. v Panel on Takeovers and Mergers Ex p. Guinness Plc* [1990] 1 Q.B. 146 at 177.

[127] *R. v Newbury DC Ex p. Chieveley Parish Council* (1998) 10 Admin.L.R. 676 (unexplained delay in applying out of time for judicial review of major planning proposal).

[128] *R. v Secretary of State for the Home Department Ex p. Oyeleye (Florence Jumoke)* [1994] Imm. A.R. 268 (no evidence of detriment to good administration had been put before the court and accordingly the court could not be satisfied that there was any such detriment).

[129] *R. v Governors of Small Heath School Ex p. Birmingham CC* [1990] C.O.D. 23, CA; *Bradbury v Enfield LBC* [1967] 1 W.L.R. 1311 at 1324 (Lord Denning M.R.).

[130] [1986] 1 W.L.R. 1, DC; and *R. v Gateshead MBC Ex p. Nichol* (1988) 87 L.G.R. 435 (CA refused to quash part-implemented school reorganisation scheme).

[131] Since a large number of local authorities had acted upon the regulations as promulgated by determining claims in accordance with their terms; *R. v Secretary of State for Employment Ex p. Seymour-Smith* [1994] I.R.L.R. 448; *R. v Brent LBC Ex p. O'Malley*; *R. v Secretary of State for the Environment Ex p. Walters* [1998] C.O.D. 121 (CA upheld decision of Schiemann J. that notwithstanding that the extensive consultation process (relating to the redevelopment of council housing estates) carried out by the respondents was flawed, no relief should be granted since there was overwhelming evidence that the granting of review would damage the interests of a large number of other individuals, and it would be "absurd" to ignore such disbenefits); the courts' discretion to refuse relief was said to be a broad one to be exercised in the light of the particular circumstances (see 18–048).

[132] See, e.g. *R. v Monopolies and Mergers Commission Ex p. Argyll Group* [1986] 1 W.L.R. 763 (CA refused to grant a remedy for what was held to be an unlawful delegation of discretion because, among other reasons, commercial considerations dictated that decisions of the MMC should be speedy and final. The CA was influenced, however, by the fact that the unlawful decision had been approved by the minister); *cf. R. v Panel on Takeovers and Mergers Ex p. Datafin* [1987] Q.B. 815, CA.

on speaking terms,[133] conversation between the two should be strictly limited.[134]

Standing

18–054 The extent of the "sufficient interest" of the claimant is a factor to be considered when deciding what, if any, relief to grant.[135] As we have noted, when it comes to deciding in its discretion whether to grant relief—a court is going to be more hesitant in some situations in granting, for example, a mandatory order or an injunction than a declaration.

Remedy would serve no practical purpose

18–055 The court may exercise discretion not to provide a remedy if to make an order would serve no practical purpose. For example, events can overtake proceedings. So a licence, the validity of which is challenged in the proceedings, may have expired by the time the claim is determined by the Administrative Court. Similarly an activity under challenge may have ceased before a remedy has been granted.[136] It may, for instance, be pointless to quash a decision to enable the public to be consulted on data that has become out of date;[137] or to quash a decision to disclose a report which had, by the date of judgment, already been disclosed.[138] Even a declaration may serve little practical purpose in such circumstances.

18–056 The modern purpose of remedies is simply to give effect to the judgment of the court on the substance of the law.[139] In relation to the procedural fairness, however, the courts have in the past sometimes failed to make a clear distinction between (a) holding that a decision is *not unlawful* because the procedural defect is subsequently cured, for example, by an appeal—in which case the claimant has no grounds of complaint, and (b) situations where a ground of review is established but the court nonetheless withholds relief.[140]

[133] *General Medical Council v Spackman* [1943] A.C. 627 at 638.
[134] The same principle may be seen in the case law of the ECJ.
[135] See 2–022; see, e.g. *R. v Felixstowe Justices Ex p. Leigh* [1987] Q.B. 582).
[136] In *Williams v Home Office (No.2)* [1981] 1 All E.R. 1211 and [1982] 2 All E.R. 564, a prison unit had closed.
[137] *R. (on the application of Edwards) v Environment Agency (No.2)* [2006] EWCA Civ 877; [2007] Env. L.R. 9 at [126].
[138] *R. v Sunderland Juvenile Court Ex p. G* [1988] 1 W.L.R. 398; *cf. R. v NW Thames Regional Health Authority Ex p. Daniels* [1993] 4 Med. L.R. 364.
[139] See 18–002.
[140] See Ch.8.

Claimant has suffered no harm

18–057 In some cases the court has withheld a remedy from a claimant on the basis that he has been caused no harm (the term "prejudice" is often used) by the unlawful act of the public authority.[141] Under this head, a minor technical breach of statutory requirement may too insignificant to justify relief. The court may also take into account the fact that the public authority would have made the same decision even if the legal flaw had not occurred.[142] Here it is important to proceed with a considerable degree of caution. As the Law Commission has pointed out, in assuming inevitability of outcome the court is prejudging the decision and thus may be in danger of overstepping the bounds of its reviewing functions by entering into the merits of the decision itself.[143]

Financial ramifications of a remedy

18–058 As we have seen in earlier chapters, the courts have in some cases considered the impact that their judgments may have on resource allocation in deciding whether or not a public authority has acted unlawfully in the circumstances.[144] At the stage we are concerned with in this chapter—the grant of remedies—it is submitted that financial considerations ought not to feature in the calculation of a court deciding whether to grant a remedial order to a claimant who has demonstrated to the court's satisfaction that a public authority has acted unlawfully. An award of damages will have obvious financial implications for a public authority, but the courts do not have regard to the resources available to the defendant in a particular case if tort liability has been established.[145] The same approach should be applied to other remedies available in judicial review claims.

Nullity and ultra vires and discretion

18–059 The result of a decision being unlawful is considered fully elsewhere.[146] However, if (which is doubtful) for the purposes of public law a decision can ever be categorised as being a nullity, then that will be relevant to the

[141] See, e.g. *R. v Dairy Produce Quota Tribunal Ex p. Davies* [1987] 2 C.M.L.R. 399; *R. v Lambeth LBC Ex p. Sharp* (1988) 55 P. & C.R. 232; *R. v Governors of Small Heath School Ex p. Birmingham City Council* [1990] C.O.D. 23; *R. v Governors of Bacon's School Ex p. ILEA* [1990] C.O.D. 414; *R. (on the application of Laporte) v Newham LBC* [2004] EWHC 227.

[142] See, e.g. *Cinnamond v British Airports Authority* [1980] 1 W.L.R. 582; *R. (on the application of Jones) v Swansea City and CC* [2007] EWHC 213 (Admin), [2007] All E.R. (D) 191 (Feb) at [31] ("virtually inconceivable that the defendant would do other than grant planning permission").

[143] Law Com No.226, *Administrative Law: Judicial Review and Statutory Appeals*, para.8.18. See also D. Clark, "Natural Justice: Substance and Shadow" [1975] P.L. 27; *John v Rees* [1970] Ch. 345 at 402 (Megarry J.).

[144] See 5–124 (relevance of financial considerations).

[145] See Ch.19.

[146] See 4–056; *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147 at 171; *London and Clydeside Estates Ltd v Aberdeen DC* [1980] 1 W.L.R. 182 at 189, 203; *Chief Constable of North Wales Police v Evans* [1982] 1 W.L.R. 1155 at 1163; *Hoffmann-LaRoche & Co v Secretary of State for Trade and Industry* [1975] A.C. 295.

exercise of discretion to grant or withhold relief. There can be no purpose in purporting to keep alive a decision which is devoid of all content. Subject to there being some purpose in obtaining the decision of a court, if a court comes to the conclusion that a decision is totally invalid and of no effect, it will normally readily be prepared to grant a declaration to this effect. Strictly speaking there is nothing to be achieved in the case of a decision which is a nullity in making a quashing order. You cannot quash something which is already a nullity. However, in practice adopting a pragmatic approach and so avoiding becoming involved in issues as to the quality and status of an invalid administrative decision, the court will be prepared to make a quashing order without resolving the complex issue as to whether or not this is strictly necessary. This is subject to the case being one in which the court would in any event have granted relief, if this were necessary, in the form of a quashing order.

Claimant's motive

18–060 The claimant's motive in making a claim for judicial review—whether it is commercial or otherwise—is not a relevant consideration in the court's decision to grant or withhold a remedy.[147]

[147] *R. (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346; [2004] C.P. Rep. 12 at [45]–[46] (unless the motive raises questions as to abuse of process).