

Oversight by the Courts

It almost goes without saying that the Government itself, and individual civil servants, must take particular care to obey the law. After all, if the law makers and their servants will not respect the law, why should anyone else? It follows that it is a very serious matter for an individual civil servant to be dishonest, whether in their private or public life.

It is equally important that we apply the utmost good faith in our official dealings with the judicial machine. If we become involved in a legal dispute, we have a duty to assist the court by drawing all appropriate facts and arguments to its attention. There can be no question of hiding or distorting evidence so as to improve the chances of 'success', even if it is felt that such tactics are being deployed by the other side.

Unlike the private sector, we are also subject to judge-made 'Administrative Law' in the form of Judicial Review (JR) of decisions made public bodies, including the Government. As one judge put it: 'Judicial review is about telling the powerful how to behave when they make decisions.' It is therefore a very dynamic part of the law, and decisions are greatly influenced by the judge's perception of whether the powerful have acted fairly (a very subjective concept) in all the circumstances. Future decisions are also likely to be influenced by human rights consideration. Every civil servant should therefore read *The Judge Over Your Shoulder* (www.treasury-solicitor.gov.uk/home_pages/docs/judge.pdf). And you should also consult a lawyer before you, or your Minister, makes any decision which might conceivably be challenged as being in some way unfair.

It is often said that JR is 'merely' all about process, but it is also true that good process will greatly increase the chances of your making a good decision, so JR has value if it persuades you not to cut corners. In addition, however, JR may be brought if there is any appearance of bias, or going beyond Parliamentary authority.

It follows that judges are not supposed to overturn a decision which appears to have been properly and fairly made (even if they personally disagree with it). However, the Courts will intervene 'if no reasonable Minister properly directing himself could have reached the impugned decision'. Although this is a stiff test, decisions are in practice quashed more often than you would expect. So it is well worth stopping and considering whether your actions will appear fair and reasonable to a dispassionate observer well after the event.

Many applicants for Judicial Review claim that a Minister has taken 'irrelevant factors' into account when making a decision. Of course many decisions are essentially political in nature, e.g. the balance to be struck between the needs of the environment and the needs of the economy. Parliament has therefore provided that such decisions must ultimately be taken by or on behalf of Ministers. And Ministers are politicians, not judges. They are therefore expected, and allowed, to make those decisions against the backdrop of their political agenda. But they are not expected, or allowed, to make decisions in a way which is limited by that agenda. Therefore, when advising Ministers in

these cases, you should divide the factors bearing on the decision into three classes:

- A The first are those factors that are specified, in the appropriate legislation, as relevant to the decision. The decision has to be consistent with those factors. In other words, it should be possible to imagine a reasonable person taking a similar decision on the basis of the same facts, without taking into account other factors.
- B Ministers may also take other relevant factors into account, such as the economic needs of a particular region, or the need to be seen to be encouraging competition.
- C But Ministers may not take into account irrelevant factors such as the regional political situation, or recent political donations from the company in question.

The borderline between the categories can sometimes be indistinct. Legal advice should therefore be taken if you are in any doubt.