

# Administrative Law – Judicial Review of Official Actions

*Far more has been accomplished for the welfare and progress of mankind by preventing bad actions than by doing good ones.*

*William Lyon Mackenzie King*

In simple terms, the Rule of Law requires that government operate within the confines of the law; and that aggrieved citizens, whose interests have been adversely affected, be entitled to approach an independent court to adjudicate whether or not a particular action taken by, or on behalf of, the state is in accordance with the law. In these instances, the courts examine a particular decision made by an official, or an official body, to determine whether it falls within the authority conferred by law on the decision-maker. In other words, the courts rule as to whether or not the decision is legally valid. In so doing, the judges do not substitute their own discretion and judgement for that of the government. They simply rule whether the government or its officials have acted within the ambit of their lawful authority. Thus, the judges do not “govern” the country and, do not “displace” the government when government decisions are challenged in the courts.

With the increasing dominance of the private sector in many countries, and the emphasis of government activity shifting from direct participation (through government-owned corporations) to regulation (as often as not, of privatised activities), the role of the courts is, if anything, becoming even more important. Decisions of government regulators impact directly on the private sector interests that they are regulating, and the private sector will look to the courts with greater frequency to shield it from excessive or abusive use of regulatory powers. At times the courts will be expected to go further, and actually review the legality of decisions being made in the private sector itself, applying the principles of administrative law (previously applicable only to official institutions), where these decisions impact significantly on the public interest.<sup>1</sup>

## What is “administrative law”?

In general terms, administrative law is the law governing the administration of government business. It governs both central and local government and public bodies in their exercise of statutory or other public powers, or when performing public duties. In both civil and common

### Correcting abuses of administrative law in Thailand

The Thai bureaucracy designed a vast system of administrative law, creating many opportunities for rent-seeking and other forms of corruption. Under the 1946 Constitution, the final right to interpret the Constitution was vested not in the courts, but in the Parliament. As a result, any judgment against the government could be overturned on the basis that the courts had improperly interpreted the Constitution. The position was softened in 1991, but the Constitutional Tribunal appointed then was part of the Executive, not of the judiciary, and judges found it unwise to raise constitutional issues. The new 1997 Constitution has brought political interference in this way to an end, establishing the Constitutional Court as an independent, full-time body. For the first time in Thai history, judges of the Constitutional Court are considered to be judicial officials rather than political appointees or civil servants.

*1997 Constitution of the Kingdom of Thailand, Article 259.<sup>2</sup>*

<sup>1</sup> This has already happened in the sporting area. Before apartheid ended in South Africa, New Zealand rugby officials decided to send a sporting team to the Republic, in defiance of the world-wide boycott of sporting contacts with the racist regime. In a watershed case, this was challenged by two rugby players. They argued successfully that the courts should review the lawfulness of the decision, applying the principles of

administrative (public) law, on the grounds that such a tour would have widespread negative effects on New Zealand's international standing. The tour was cancelled.

<sup>2</sup> For a review of the new Thai Constitution, see James R. Klein (1998) *The Constitution of the Kingdom of Thailand, 1997: A Blueprint for Participatory Democracy*, The Asia Foundation Working Paper Series, Working Paper #8, March 1998.

law countries in Europe, these types of functions are sometimes called “public law functions” to distinguish them from the “private law functions”, which govern the relationships between individual citizens and some forms of relationships with the state. For example, if a citizen works in a state-owned factory and is injured, he or she would sue as a “private law function”. If residents of the surrounding community were concerned about a decision to enlarge the state-owned factory because of environmental pollution, the legality of the decision may be reviewed by the courts as being a “public law function”.

In terms of administrative review, the basic question asked is not whether a particular decision is “right”, or whether the judge, had he been the minister or the official, would have come to a different decision. The questions are: what the power or discretion which the law has conferred on the official is? And has that power has been exceeded, or otherwise unlawfully exercised? For example, in England, a local authority was given the statutory power to provide wash houses where people could come and do their own laundry. A court decided that this

power was not sufficiently broad to permit a local authority to open a full laundry service which was trading for profit.<sup>3</sup>

The Rule of Law in most countries consists of written constitutions under which the government is required to operate. However, there is inevitably a tension between politicians who are generally interested in exercising power and extending their influence, and constitutions which must seek to contain that power in order to protect the citizen from arbitrariness. In the middle of this tug-of-war are the courts. The courts are asked to decide whether a disputed decision is in accordance with the Rule of Law. Of course, this is resented, at times very deeply, by some elected politicians. They see themselves as being elected by the people, and as having their authenticity (and power) derived from an exercise of political will. When confronted with a critical Judiciary they are inclined to ask: Who appointed you? The answer may well be the elected politicians. However, the role of the courts is not to impose the political views of the majority on minorities, but to protect minorities against the exercise of what some call “majority tyranny.” The majority may, in a political system, have a right to make a decision, but that decision must be in conformity with the law.

**“Putting the ‘service’ into civil service in Latvia: Law gives citizens power to challenge government decisions”**

It does not have the international glamour of European Union accession talks or the charisma of a good political row, but a Bill quietly winding through Parliament that forges the rules between the government and the governed will affect the everyday lives of Latvia’s residents more than the other two combined.

Blandly entitled the Administrative Procedures Act, the Bill will do nothing less than give citizens the right to challenge civil servants, the police and local government officials when they feel they’ve been wronged.

It’s a basic right in most democracies, but flatly repressed under the Soviet government and submerged during the formative years of Latvia’s young democracy under the weight of exorbitant court fees, a slow legal system and plain old graft.

“It is as necessary as the air we breathe,” said Arvids Dravnieks, a Riga attorney who helped write the law. “Sometimes we don’t notice the air, we only notice when we are short of it, when we are choking...”

*The Baltic Times, 11-17 November 1999*

**The formulation of principles of good public administration**

The law expects public officials to exercise their administrative functions justly and fairly. The 1994 Constitution of Malawi states that every person shall have the right to:

- (a) lawful and procedurally fair administrative action, which is justifiable in relation to reasons given where his or her rights, freedoms, legitimate expectations or interests are affected or threatened; and
- (b) be furnished with reasons in writing for administrative action where his or her rights, freedoms, legitimate expectations or interests are threatened, if those interests are known.

In Malawi, not only is good public administration rendered a constitutional rather than just a common law right, it is also made clearly accountable. An unequivocal duty is placed on administrators to provide reasons behind their actions. This last requirement holds the key to

<sup>3</sup> Attorney-General v Fulham Corporation (1921) 1 Ch 440.

good governance; without reasons, decisions can be rendered more difficult to challenge. When reasons are stated – and under the Malawi model they must be – the argument comes out of the shadows and the court can examine the reasons given and judge their legal sufficiency. Given the wide impact administrative decisions can have on broad sections of the community, it is vital that the overall framework exposes public decisions to review as to their legality when citizens are aggrieved or particularly affected by their outcome. Thus, public officials – without exception – must have appropriate training in the principles of good public administration.

A good example of the guiding principles of administrative law can be found in the Lusaka Statement on Government Under the Law (1992) endorsed by both Commonwealth Law Ministers in 1993 and by successive meetings of senior judges in various regions. The statement reads as follows:

An administrative authority, when exercising a discretionary power should:

- pursue only the purposes for which the power has been conferred;
- be without bias and observe objectivity and impartiality, taking into account only factors relevant to the particular case;
- observe the principle of equality before the law by avoiding unfair discrimination;
- maintain a proper balance between any adverse effects which its decision may have on the rights, liberties or interests of persons and the purpose which it pursues;
- take decisions within a time which is reasonable having regard to the matters at stake; and,
- apply any general administrative guidelines in a consistent manner while at the same time taking account of the particular circumstances of each case.

#### **Procedure**

- *Availability of guidelines:* Any general administrative guidelines which govern the exercise of a discretionary power should either be made or communicated (in an appropriate manner and to the extent necessary) to the person concerned, at his or her request, whether before or after the taking of an act concerning the person;
- *Right to be heard:* In respect of any administrative act of such a nature as is likely to affect adversely his or her rights, liberties or interests, the person concerned should be entitled to put forward facts and arguments and, in appropriate cases, submit evidence which should be taken into account by the administrative authority; in appropriate cases the person concerned should be informed, in due time and in an appropriate manner, of these rights;
- *Access to information:* Upon request, the person concerned should be informed, before an administrative act is taken and by appropriate means, of all factors relevant to the taking of that act;
- *Statement of reasons:* Where an administrative act is of such a nature as to affect adversely the rights, liberties or interests of a person, the person concerned should be informed of the reasons on which it is based either by stating the reasons in the act itself or, upon request, by communicating them separately to the person concerned within a reasonable time;
- *Indication of remedies:* Where an administrative act is given in writing and which adversely affects the rights, liberties or interests of the person concerned, it should indicate the specific remedies available to the person as well as any time-limits which may be involved.

### Review

- An act taken in exercise of a discretionary power should be subject to judicial review by a court or other competent body; however this does not exclude the possibility of a preliminary review by an administrative authority empowered to decide both on legality and on the merits;
- Where no time limits for the taking of a decision in exercise of a discretionary power have been set by law and the administrative authority does not take its decision within a reasonable time, its failure to do so should be open to review by a competent authority;
- A court or other independent body which controls the exercise of a discretionary power should possess such powers of obtaining information as are necessary for the proper exercise of its functions.

### Implementation

In their implementation, the requirements of good and efficient administration, the legitimate interests of third parties, and major public interests should be given due weight. But, where these requirements make it necessary to modify these principles in particular cases or specific areas of public administration, every endeavour should be made to conform with these principles and to achieve the highest possible degree of fairness.

## Reasons why a specific decision may be unlawful

A decision may be rendered unlawful in a variety of situations. For example, a statute might give the Minister a very wide discretion, but the question can still arise as to whether or not that discretion was exercised properly. Was it exercised in a manner which promoted the intention and objectives of the statute that created it? Was the power exercised for the purpose for which it was conferred?

However wide a discretion may appear to be on the face of a statute, where administrative law has developed, the courts will try to limit the use of discretionary power to properly reflect the purpose for which it was created. The right questions must have been asked; consultation, where appropriate, must have taken place; and irrelevant considerations must not have been taken into account.

A more contentious situation can occur when a court is asked to upset a decision because it is “irrational.” The courts generally state that administrative powers must be exercised “reasonably” and few would quarrel with that. However, in practice, the courts generally refuse to interfere on the grounds of “reason”, unless a particular decision is outrageous in its defiance of logic or accepted moral standards.<sup>4</sup>

Another common challenge to an administrative decision is “procedural impropriety”. This usually involves a claim that the people affected by a particular decision were not given an adequate or fair hearing. Precisely what does, and what does not, constitute a “fair hearing” will depend on the circumstances. In some cases, an unfair hearing will occur if lawyers are either not retained and or not allowed to cross-examine witnesses at a public hearing. At the other extreme, a fair hearing may comprise no more than the authority placing an advertise-

<sup>4</sup> Lawyers call this “Wednesbury” unreasonableness, after the name of a celebrated common law case which stated this doc-

trine: *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

ment notifying the public that a particular proposal is under consideration, and that any written representations that may be made, will be taken into account.

An administrative decision can also be questioned on the grounds of its being “fettered”; i.e. when a decision is made automatically, and without any consideration of the unique facts of the case. The courts always support - and at times enforce - a policy of equality of treatment, with like cases being treated alike. However, equality does not overrule equity, and equity demands that each case be treated on its individual merits.

Legal “bias” is another common form of challenge to an administrative position, as is “legitimate expectation”. A good example of legitimate expectation occurred in Britain. A trade union claimed, successfully, that it had a legitimate expectation arising from long-established practice, to be consulted in the future, unless and until, it was given reasons for the withdrawal of this right, and the opportunity to make representations against any change in existing practice.

The concept of “abuse of power” involves the courts looking beyond the ways in which a particular decision was reached, and to examine what the decision actually ought to be. This challenge to administrative law occurs only in the rarest of cases. One example involved a taxpayer who claimed that the revenue authorities had told him that, should he withdraw certain claims for tax deductions, they would not pursue another matter against him. The court decided that had there been a proper agreement to this effect (which in the circumstances there was not), it would have been an abuse of power for the revenue authorities to reopen the other matter.<sup>5</sup> In addition, the concept of “proportionality” is currently being given more consideration as an integral component of an administrative decision. Common law has tended to stress remedies rather than principles, and judges have been reluctant to express basic notions of fairness as being fundamental principles of law. Instead, they opt for pragmatism. However, recent trends signal that judges are becoming more adventurous and are prepared to look at whether a particular decision was “wholly out of proportion” to what was required, as for example, in the case of a local council that banned one member of the public from all local authority meetings because of the way he had behaved at various private gatherings.<sup>6</sup>

### Giving reasons for administrative decisions

Public officials are generally not compelled by the courts to give reasons for their decisions. However, the courts will sometimes decide that the relevant statute requires that reasons be given, and at times, a requirement to do so may be written into the law. This can occur, for example, where someone is given a right of appeal against a decision and so must be entitled to know the reasons behind the decision in order to support the appeal. There is also the danger that in the absence of information to the contrary, a court may conclude that there are, in fact, no good reasons for a decision, and a decision is not warranted. To challenge this conclusion, the public official must defend the decision. Thus, providing the reasons for decisions is desirable and should be encouraged. If nothing else, the mere act of writing down the facts and the reasons for a certain decision can help an official see the situation more clearly.

### Decision makers must ask themselves.....

It cannot be said too often that “an ounce of prevention is worth a pound of cure”. Every time an official has to make a decision, he or she must ask themselves a series of questions or else

<sup>5</sup> See *Preston v. IRC* (1985) AC 835.

<sup>6</sup> See Jeffrey Jowell and Anthony Lester QC in *Proportionality: Neither Novel Nor Dangerous*, published in *New Directions in*

*Judicial Review: Current Legal Problems*, Special Issue (Stevens & Sons, London).

run the risk of falling foul of the Judiciary through the process of administrative review. These questions are:

- Have I got the power to do what I want to do? Or am I adopting a particular interpretation of my statutory powers in a way which happens to suit me?
- Am I exercising the power for the purpose for which it was given?
- Am I acting for the right reasons? Have I taken into account all relevant information and excluded all irrelevant considerations?
- If I am to give reasons for the exercise of the power, are these reasons correct and will they withstand independent and informed examination by a judge?
- Will I hear and consider the points of view of people likely to be affected by the decision? Have I sufficiently informed them of what is being proposed so as to ensure that they have had a fair opportunity to make representations if they disagree?
- Have I allowed sufficient time for consultations and representations?
- Have I really made up my mind in advance or given that impression without considering the circumstances of the particular case?
- Do I or anyone else involved in making the decision have any conflicting interest which might lead someone to suppose that there is bias involved?
- Are there any grounds for someone to think that I might not be acting fairly? Have I led anyone to suppose that I will be acting differently from the way in which is now intended?
- Has the decision-making power been wrongly delegated? Should I seek legal advice on this point?
- Do I propose to act in a way which a court might regard as an abuse of power or as being generally so unreasonable that it is likely to rule against me?<sup>7</sup>

A review of administrative law is essential to ensure that anti-corruption efforts can have an impact on the highest levels of corruption within a system of governance, and that reform efforts do not bounce off a virtual brick wall of legal ambiguity.

Above all, the citizen must feel that the administrative law fully supports and enforces transparency and accountability in decision-making on the part of all public officials.

### Indicators as to the effectiveness of judicial review as an integrity tool

- Do courts have the jurisdiction to hear cases in which citizens claim that official decisions have been made unlawfully?
- Is this remedy used?
- Do citizens have confidence in the independence of the judiciary when they are hearing such cases?
- Is there a conscious effort on the part of officials to comply with good administrative practice and make decisions fairly and justly (i.e. seeking the opinions of affected citizens before decisions are taken; affording them an opportunity to be heard; giving due weight to opinions expressed; giving reasons for decisions; staying within the bounds of the powers conferred by law etc.)?
- Are relevant rules and procedures readily available to members of the public?
- Are members of the public aware of their rights?

<sup>7</sup> Adapted from *The Judge over Your Shoulder: Judicial Review of Administrative Decisions*, Cabinet Office/Management and Per-

sonnel Office, HMSO (1987), from which much of the material in this section has been drawn.