CHAPTER 3

Choice of Forum and the Exclusivity of Judicial Review Proceedings in Public Law

A. INTRODUCTION

3–001 The judicial review procedure is a means by which public law issues, as defined in Chapter 2, are brought before the courts for determination. One issue that arises is whether judicial review is now the sole or exclusive means by which such public law issues may be brought before the courts. Prior to the 1977 reforms of the judicial review procedure, there were two separate procedural routes by which the invalidity of a decision or action by a public authority could be established: an individual could either seek one of the prerogative remedies following the special procedure applicable to such remedies, or he could seek a declaration or injunction in an ordinary claim. The two procedures were entirely separate.

3–002 Following the 1977 reforms, declarations and injunctions in public law cases may now be sought alongside the prerogative remedies in an application for judicial review. A claimant may also include a claim for damages or restitution. The House of Lords, in *O'Reilly v Mackman*[1] held that as a general rule, public law issues must be brought by way of judicial review and could not be brought by way of ordinary claim. The precise ambit of the rule is unclear and the rule is subject to exceptions and has been qualified by subsequent case law. This chapter considers when an issue of public law may only be raised by way of judicial review and when such an issue may be raised in other proceedings, whether in an ordinary claim, as a defence in civil or criminal proceedings, or by some other route such as an appeal by case stated.

B. THE RULE IN O'REILLY V MACKMAN

3–003 The House of Lords had to consider the exclusivity of judicial review in *O'Reilly v Mackman*.[2] A number of prisoners were seeking to establish that disciplinary decisions by Boards of Visitors removing remission were ultra vires and a nullity, as the Board had acted in breach of natural justice. The prisoners sought a declaration of nullity by way of ordinary action, instituted in some cases by writ

[1] [1983] 2 A.C. 237.
[2] [1983] 2 A.C. 237.

and in others by originating summons.[3] The issue then arose as to whether it was an abuse of the process of the court to seek a declaration by ordinary action not judicial review. Lord Diplock, giving the unanimous judgment of the House, held that it would[4]:

> "... as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Ord.53 for the protection of such authorities."

3–004 Consequently, the claim for a declaration would be struck out under Ord.18 r.19.[5] Lord Diplock accepted that this was a general rule and that there would be exceptions. He gave two examples: namely where the invalidity of a decision arises as a collateral issue in a claim for an infringement of a right under private law, and where none of the parties objects to the use of the ordinary action. He expressly left open the possibility of other exceptions being developed by the courts on a case-by-case basis.

Rationale for the rule

3–005 There were two strands of thought underlying the exclusivity rule. First, prior to the 1977 reforms, there were certain defects inherent in the procedure for seeking the prerogative remedies, which made it necessary and reasonable to use the alternative procedure of seeking a declaration by ordinary action. In particular, there was no power to grant disclosure Evidence was provided by affidavit and cross-examination on such evidence was virtually unknown. The 1977 reforms removed these and other disadvantages. Provision is made for disclosure[6] and for cross-examination,[7] which although not automatic as in ordinary proceedings, is governed by similar principles.[8] In addition, it is now possible for a claim for a prerogative remedy to be coupled with a claim for a declaration or injunction,[9] and, if appropriate, damages or restitution,[10] in the same application. Thus, all the remedies that might prove necessary could be sought within one and the same procedure.

3–006 Secondly, there are specific protections incorporated into the judicial review procedure for the benefit of public authorities; these include the need to obtain permission which is intended to filter out unmeritorious or frivolous claims.[11] There is a short time-limit for applying for judicial review,[12] and the procedure itself is speedy. This protects the public interest in ensuring that public bodies and third parties are not kept in suspense as to the validity of a decision and the extent

[3] The precursor to the claim procedure introduced by the CPR, see r.8.1.
[4] [1983] 2 A.C. 237 at 285.
[5] The corresponding power now is in CPR Pt 3.4.
[6] CPR Sch.1 Ord.53 r.8. formerly, discovery. See now CPR Pt 31.
[7] CPR Sch.1 Ord.53 r.8. See now CPR Pt 31.
[8] *O'Reilly v Mackman* (see above, fn.1 at 285). But see paras 9–109 to 9–115.
[9] Senior Courts Act 1981 s.31(1) and CPR r.54.3.
[10] Senior Courts Act 1981 s.31(4) and CPR r.54.3.
[11] Senior Courts Act 1981 s.31(3) and CPR r.54.4.
[12] Senior Courts Act 1981 s.31(6) and CPR r.54.5.

to which it could be implemented or relied upon. The fact that disclosure and cross-examination is not automatic, but requires permission, also ensures greater control over the conduct of proceedings by the court to ensure that these are not used to prolong proceedings unnecessarily.[13] These protections do not exist in the ordinary claim procedure. Permission is not required. The ordinary limitation period applies and the process of establishing invalidity may be lengthy. Now that there are no procedural disadvantages for the applicant in proceedings by judicial review, it is no longer justifiable to allow an individual to bring an ordinary claim and thereby to evade the protections afforded to public bodies by the judicial review provisions. To these reasons might be added the fact that judicial review applications are heard by judges on the Crown Office List who have experience and expertise in dealing with public law issues. A specialised procedure also emphasises the uniqueness of public law, in that it is quite unlike private litigation between parties. The courts have a more limited role in judicial review and need to ensure that the wider public interest, frequently present in such cases, is not overlooked.[14]

3–007 One of the results of the rule in *O'Reilly v Mackman*, however, is that there has been a large amount of litigation dealing solely with the question of whether proceedings are to be characterised as public law proceedings and whether the claims have been brought in the right forum rather than focussing on the legal merits of the claims. This litigation has been described as "unprofitable"[15] and has attracted judicial criticism.[16] As a consequence, the courts have recently indicated that the advantages of the judicial review procedure should not be overstated. The desire to have matters of public law determined by specialised Administrative Court judges, for example, needs to be counterbalanced by an awareness of the need not to overburden the Administrative Court and cause delays in the period before cases are heard. Furthermore, there may be instances where it is more appropriate for an issue of public law to be considered by a specialised appeal tribunal than by an application for judicial review.[17] In the past, it was considered that where questions of fact arose in public law matters, the ordinary claim procedure may be more appropriate than judicial review in dealing with these matters.[18] Now, it is recognised that while claims for judicial review do not generally involve determining questions of fact, the procedures can be adopted to deal with such questions when they arise. This consideration is,

[13] See, per Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237 at 284.
[14] See dicta of Lord Bridge in *Cocks v Thanet DC* [1983] 2 A.C. 286 at 291. See Woolf, "Public Law and Private Law: Why the Divide?" [1986] P.L. 220 at 225–227.
[15] per Lord Woolf M.R. in *Trustees of the Denis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840 at 848A–B.
[16] See, e.g. the criticisms of Saville LJ in *British Steel plc v Commissioners of Customs and Excise* [1997] 2 All E.R. 366 and of Henry J. in *Doyle v Northumbria Probation Committee* [1991] 1 W.L.R. 1340 at 1348A–C.
[17] See, e.g. dicta of Lord Bridge in *Chief Adjudication Officer v Foster* [1993] A.C. 754 at 766H–767B.
[18] A consideration referred to in *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 A.C. 624 and by the Court of Appeal in *Trustees of Denis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840. The judicial review procedure can accommodate disputes of facts, particularly where this is necessary to ensure a fair hearing before an independent and impartial tribunal: see, e.g. *R. (Wilkinson) v Broadmoor Special Hospital Authority* [2002] 1 W.L.R, 419. In general, however, judicial review is generally not used as a means of determining disputed facts but rather determining whether actions of public bodies are lawful. See generally para.9–121 below.

therefore, less likely to be a significant consideration.[19] In addition, other values also have to be weighed in the balance in deciding the desirability of a rule of procedural exclusivity. In criminal matters, for example, the courts have emphasised the desirability of individuals being able to raise public law issues as a defence in magistrates' courts and Crown Courts as it may be physically easier and cheaper for them to do so than to institute separate judicial review proceedings.[20]

3–008 For these reasons, the courts are in general less willing at present to allow claims to be struck out on the purely procedural ground that they should not have been brought by an ordinary claim and should have been brought by way of judicial review. They are more prone to emphasise as a minimum that the rule in *O'Reilly v Mackman* is subject to exceptions and there is a need to retain flexibility in applying the rule[21] or to suggest that the scope of the rule still needs to be clarified.[22] Furthermore, where both public law and private law issues arise, the courts at present tend to consider whether in all the circumstances the bringing of a claim by the ordinary claim procedure involves an abuse of process, rather than assuming that the by-passing of the judicial review procedure is an abuse.[23]

Effect of the rule

3–009 It is an abuse of the process of the court to seek a declaration or injunction by ordinary claim in a public law case where the claim should proceed by judicial review. The court may therefore exercise its powers under CPR Pt 3.4, or its inherent jurisdiction, to strike out the claim.

3–010 There is power to transfer a claim to the Administrative Court instead of striking out the claim.[24] However, such a claim would still require permission to proceed as a claim for judicial review.[25] A judicial review claim must be brought promptly and within three months of the date when the grounds for bringing a claim first arose.[26] It is unlikely that permission to continue an ordinary claim transferred into the Administrative Court would be given unless the original claim, too, had been brought promptly or within three months of the date when the grounds for a claim arose. In many instances, an ordinary claim would not have been brought within that time-limit. There is power to extend the time for bringing a claim but that power is usually exercised only when there is good

[19] *Trim v North Dorset DC* [2011] 1 W.L.R. 1001 at [24].
[20] See, e.g. *Boddington v British Transport Police* [1999] 2 A.C. 143.
[21] See, e.g. the observations of Lord Slynn in *Mercury Communications Ltd v Director General of Telecommunications* [1996] 1 W.L.R. 48 at 57C–E.
[22] See, e.g. the observations of Lord Lowry in *Roy v Kensington and Chelsea Family Practitioner Committee* [1992] 1 A.C. 624 at 653E and in *R. v Secretary of State for Employment, Ex p. Equal Opportunities Commission* [1995] 1 A.C. 1 at 34C.
[23] See *Clark v University of Lincolnshire and Humberside* [2000] 1 W.L.R. 1988 discussed below at para.3–027. See, also, as examples of this approach, *Phonographic Performances Ltd v Department of Trade and Industry* [2004] 1 W.L.R. 2893 at [29]–[52]; *Isle of Anglesey and others v Welsh Ministers and others* [2008] EWHC 921 (the point was not taken on appeal). In cases involving public law defences, see *Rhondda Cynon Taff BC v Watkins* [2003] 1 W.L.R. 1864 at [92]–[96].
[24] See CPR Pt 30.
[25] CPR r.54.4.
[26] See CPR r.54.5 and para.9–016 et seq. below.

reason for the delay.[27] Delay resulting from the wrong choice of procedure is unlikely to be accepted as a good reason unless, possibly, the claimant was not at fault in believing that the ordinary claim procedure was available. In practice, there is a real risk that the ordinary claim will be struck out and either no transfer to the Administrative Court ordered or permission to continue the claim as a judicial review claim will be refused. There is, consequently, a real risk that the claimant will never be able to argue the merits of his case and will be denied relief solely on the grounds that he chose the wrong procedure initially and it is too late now to use the right procedure.

3–011 Given this risk, if there is any doubt as to the availability of the ordinary procedure, the wisest course of action is to bring a claim for judicial review first within the three-month time-limit.[28] If it transpires that the claim is not a public law one and cannot be brought by judicial review, the individual will normally still have time to commence his action by ordinary claim (as the usual, much longer time-limits will apply). A claimant may also apply for judicial review and pursue a parallel ordinary claim if there is any risk that the judicial review proceedings may not be determined until after the time-limit for bringing the ordinary claim has expired. The court may, in certain circumstances, direct that a claim begun by judicial review continue as if it had been begun as an ordinary claim.[29]

Scope of the rule

3–012 The precise extent of the rule in *O'Reilly v Mackman*, and the exceptions, raise difficult issues in public law. The rule is said to apply to cases involving the infringement of rights protected by public law.[30] The notion of "public law rights" is a relative newcomer to English law. The difficulty lies in indentifying what constitutes a public law matter for the purpose of the rule. The term "public law" has, in the past, been used in at least two senses. First, it may refer to the substantive principles of public law governing the exercise of public law powers, and which form the grounds for alleging that a public body is acting unlawfully. These are the familiar *Wednesbury* principles. A public law "right" in this sense could be described as a right to ensure that a public body acts lawfully in exercising its public law powers. The rights could be described in relation to the individual heads of challenge, for example, the right to ensure that natural justice is observed, or to ensure that the decision is based on relevant not irrelevant considerations, or is taken for a purpose authorised by statute, or is not *Wednesbury* unreasonable. Secondly, "public law" may refer to the remedies that an individual may obtain to negative an unlawful exercise of power. These are essentially remedies used to set aside unlawful decisions, or prevent the doing of unlawful acts, or compel the performance of public duties. These remedies now include the prerogative remedies of certiorari (now called a quashing order), mandamus (now called a mandatory order) and prohibition (now called a

[27] See CPR r.3.4 and para.9–034 et seq. below.
[28] As suggested by Lord Woolf M.R. in *Trustees of Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 W.L.R. 840 at 848E–F.
[29] CPR r.54.20.
[30] per Lord Diplock in *O'Reilly v Mackman* [1983] 2 A.C. 237 at 285.

prohibiting order), and the ordinary remedies of declarations and injunctions when used for a public law purpose involving the supervisory jurisdiction of the courts over public bodies.

3–013 It must also be remembered that certain private law principles, such as tort and contract, apply to public bodies as well as private individuals. There may, therefore, be occasions when a public body is both subject to the special rules of public law designed to ensure that they use their public law powers lawfully and must also observe private law principles in the exercise of such powers. An individual may be claiming that action is unlawful and should be set aside, and also that the acts of the public body give rise to a private law right to damages as compensation for any loss incurred. A claim may principally involve private law principles such as negligence or breach of contract, but the application of those principles may be influenced by the statutory framework within which a public body operates or may involve questions such as the vires of acts of the public body.

3–014 There are therefore at least four possible questions that can arise in a case involving a public body:

(a) Is the public body violating a principle of public law?
(b) Is the individual seeking a remedy intended to set aside or nullify the unlawful actions of a public body?
(c) Is the public body violating a principle of private law?
(d) Is the individual seeking a private law remedy, principally damages, to compensate for the interference with his private law rights, or a declaration of those rights or an injunction to prevent further unlawful interference with those rights?

3–015 A claim by an individual may involve answering only the first two questions (which are regarded as public law questions) or the last two (which are regarded as private law questions). As there is no clear divide between private and public law, it may be that all four questions arise out of the same facts. It may be that the effect of granting a declaration or an injunction to protect a private law right will have the practical effect of nullifying a public law action.

3–016 There is also the further problem of the relationship between public law and criminal law. An individual may be charged with an offence of contravening subordinate legislation or a decision of a public body, or acting without a relevant licence. He may wish to raise as his defence in those criminal proceedings the invalidity of the measure or decision that he is charged with contravening.

3–017 There is, as yet, no absolute clarity on the basic scope of the rule in *O'Reilly v Mackman*. In one case, the House of Lords discerned two possible interpretations. On one approach, the rule applies to proceedings where only public law issues arise, and does not apply if private law rights are also at stake. On the alternative approach, the rule applies to all proceedings where some public law act or decision is challenged.[31] The general tenor of the decision in *O'Reilly v Mackman* is that the rule is to be understood in accordance with the second interpretation, namely that the rule applied whenever a public law issue arose for determination

[31] See per Lord Lowry in *Roy v Kensington and Chelsea Family Health Practitioner Committee* [1992] 1 A.C. 624 at 653E–H.

and that issue had to be determined by way of judicial review unless the situation fell within one of the exceptions to the rule. The issue of the precise scope of the rule did not, however, arise in *O'Reilly*. There, the claimants, who were prisoners, were challenging a decision to remove remission. The only basis of their claim and their only "rights" were public law rights; there was no possible claim in private law and no question of any private law remedy being available.[32] It was not necessary, therefore, to determine the precise ambit of the rule. The House of Lords has left open the question of the proper scope of the rule.[33] For the reasons set out below, the better approach would be to view the rule as applying where the questions that can be raised are solely public law ones, i.e. to view the rule as requiring an individual to proceed by way of judicial review when he is seeking a public law remedy because a public body has violated a principle of public law (and even then there may be exceptions justifying use of the ordinary claim procedure). An individual who therefore sought to establish that there had been a breach of a principle of public law but was also seeking to vindicate any private law right would be free either to bring a claim for judicial review (and attach a claim for damages) or to proceed by making an ordinary claim.[34] Similarly, an individual could raise the invalidity of an administrative act as a defence to an ordinary claim or a criminal charge or could, if he so wished, bring a claim for judicial review of that act.

Cases raising only public law issues

3–018 Cases where the claim is based solely on substantive principles of public law, and where the only remedy which could be sought is one to quash or set aside the consequences of the decision (and in this sense constitutes a public law remedy) are clearly within the rule. Such cases can only be brought by judicial review and not ordinary claim. *O'Reilly v Mackman*[35] is itself a clear example of such a case. The claimant prisoners were alleging breach of the rules of natural justice, which are part of the body of principles developed by the courts specifically to control the exercise of power by a public body. The remedy they sought was a declaration that the decision of the Board of Visitors to remove their remission was a nullity, and that therefore no remission had ever been removed. In other words, the only issues of law raised and the only relief sought were within the realm of public law. The decision of the Board of Visitors did not affect any private law rights of the prisoners. They had no statutory or other common law rights to remission which could have founded the basis of a claim to be entitled to a private law right. It was accepted that they had no claim in damages arising from the decision so no private law rights were affected and consequently no claim could be made for a remedy in damages (or alternatively for a declaration of such rights or an injunction to prevent interference with such rights).

3–019 Cases where the only issues raised in the pleadings involve the substantive principles of public law, and where the remedy sought is intended to ensure that a

[32] As was pointed out by Lord Hoffmann in *O'Rourke v Camden LBC* [1998] A.C. 188 at 195G–H.
[33] See *Roy v Kensington and Chelsea Family Health Practitioner Committee* [1992] 1 A.C. 624.
[34] As happened in *D. v Home Office (Bail for Immigration Detainees intervening)* [2006] 1 W.L.R. 1003.
[35] [1983] 2 A.C. 237. See also, *Wessex Water Authority v Farris (V.O.)* (1990) 30 R.V.R. 78.

public body exercises its public law powers (as defined in the previous chapter) in accordance with those principles must also be brought by judicial review. This is so even if it might have been possible to have raised some issue of private law. Thus, the Court of Appeal struck out an ordinary claim that a police officer had failed to comply with his statutory obligations to allow copies of documents to be made.[36] The claim was intended to ensure the proper exercise of public law powers by a public body. As such it could only be brought by judicial review. It was uncertain whether damages were available at private law for unlawful interference with goods. However, even if such a claim could be made, it had not been made in this case. The only claim made and the only relief sought related to the supervisory jurisdiction of the court over the exercise of public law powers, and that was a matter for judicial review not ordinary claim. Similarly, a challenge to a notice alleging a breach of a condition attached to a planning permission was a challenge to a public law act on public law grounds. As such, it had to be brought by way of judicial review and an ordinary claim, brought 18 months after service of the notice, was struck out as an abuse of process.[37]

Cases involving only private law issues

3–020 Public bodies, just like individuals, can make contracts, commit torts and own land. The public nature of the body may be entirely incidental to claims arising out of such matters. Cases which raise only issues of private law and where the remedies sought are private law remedies such as damages are clearly outside the scope of judicial review. Thus, an individual cannot enforce a purely contractual right by way of judicial review.[38] Similarly, a tortious claim such as negligence, which raises no issue of public law, should be brought by ordinary claim.[39] The distinction between private law rights and public law issues is clear in principle. As Chapter 2 demonstrated, it is often very difficult in practice to determine in advance whether a particular matter will be classed as private or public.[40] Furthermore, there are numerous situations where questions of public law and private law are closely interwoven. The same set of facts may give rise to claims both in public law and private law. These cases are considered in the following sections.

Cases involving both private and public law

Decisions affecting private law rights

3–021 The same set of facts may give rise to issues of both public and private law. This may occur in a number of ways. A public body may have power to take a decision which will in some way affect or vary a private law right of an individual. Local authorities, for example, have statutory powers to vary the rents payable by their

[36] *Allen v Chief Constable of Cheshire, The Times*, July 7, 1988.
[37] *Trim v North Dorset DC* [2011] 1 W.L.R. 1901.
[38] *R. v East Berkshire Health Authority Ex p. Walsh* [1985] Q.B. 152; *R. v British Broadcasting Corp Ex p. Lavelle* [1983] 1 W.L.R. 23.
[39] See, e.g. *Hotson v East Berkshire Health Authority, sub nom. Hotson v Fitzgerald* [1987] A.C. 750.
[40] See paras 2–132 to 2–133 above.

tenants or Family Practitioner Committees have power to vary the fees payable to a doctor for services provided. The source of the power is statutory and is likely to be sufficiently "public" to be susceptible to judicial review. The substance of a challenge may well be a public law issue, namely whether the power was exercised unlawfully in the public law sense, that is whether the decision or act of the public body was within the powers of the public body concerned. It is equally correct, however, that the individual's private law rights are at stake, i.e. his contractual right to a tenancy at a particular rent or a right to the payment of fees, and the *effect* of a successful challenge would be to vindicate those rights. Thus the issue inevitably arises as to whether such challenges fall within the scope of the rule in *O'Reilly v Mackman* and, if they do, whether such challenges may be brought by way of the ordinary claim procedure as well as by judicial review.

3–022 It is relatively clear that the courts are at present unlikely to strike out private law proceedings as an abuse of process where a private law right is at stake, particularly where it dominates the proceedings, whether or not the actual challenge focuses on an act or decision of a public body which is said to be ultra vires. Thus, it will be possible to raise the public law issues concerning the validity of the act in the ordinary private law claim intended to vindicate the private law right.[41] This will either be because the rule in *O'Reilly v Mackman*, properly understood, does not apply when questions of private law right as well as public law rights are in issue. Alternatively, even if the rule applies, it may be appropriate to recognise an exception to that rule where private law rights are also at issue or where they dominate the proceedings.

3–023 A number of cases demonstrate the current attitude of the courts in these cases. In *Wandsworth LBC v Winder*,[42] a local authority exercised statutory powers to increase the contractual rent payable by its tenants, including Mr Winder. Rather than challenge the decision by way of judicial review, Mr Winder refused to pay. The local authority eventually brought proceedings for possession of the property and arrears of rent. Mr Winder defended the proceedings on the ground that the rent increase was unreasonable in the public law sense of "so unreasonable that no reasonable local authority could have reached such a decision" and counter-claimed for a declaration that the decision was ultra vires. The essence of Mr Winder's claim was, then, a public law issue related to the validity of the decision to exercise the statutory power to increase the rents. The authority applied to have the defence and counter-claim struck out as an abuse of process as they raised issues of public law which should have been brought by way of judicial review. The House of Lords refused to strike out the defence and counter-claim and allowed the public law issues to be raised in the private law proceedings. Lord Fraser, giving the unanimous judgment, held that there was no abuse of process. He distinguished *O'Reilly v Mackman* on two grounds; first the decision here infringed the tenants' private law rights whereas in *O'Reilly* no private law rights were in issue and secondly the public law issues in *O'Reilly* were raised by the plaintiffs who initiated the proceedings whereas here they were raised by way of defence and counter-claim. Lord Fraser did not consider

[41] *D. v Home Office (Bail for Immigration Detainees Intervening)* [2006] 1 W.L.R. 1003.
[42] [1985] A.C. 461. See also *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1986] A.C. 112 (parent able to proceed by way of ordinary claim when seeking to enforce a private law parental right, notwithstanding that the subject matter of the claim was in essence a public law challenge).

CHAPTER 10

Judicial Review and the Upper Tribunal

A. INTRODUCTION

Judicial review by the Upper Tribunal

10–001 While the overwhelming majority of judicial review cases are brought and heard in the Administrative Court, the creation under the Tribunals, Courts and Enforcement Act 2007[1] of the Upper Tribunal has, for the first time, permitted judicial reviews to be determined outside the High Court. Although a creature of statute, the Upper Tribunal has the power to grant the prerogative remedies, as well as injunctions, declarations and awards of damages. In doing so, it must apply the principles which the High Court would apply.

10–002 The judicial review jurisdiction of the Upper Tribunal is limited. There are certain types of cases which must be heard by the Upper Tribunal, and other types of case may be heard by Upper Tribunal. The Administrative Court may transfer some types of case into the Upper Tribunal. The majority of immigration and asylum judicial reviews are now heard in the Immigration and Asylum Chamber of the Upper Tribunal.

10–003 For the most part, where a judicial review claim proceeds in the Upper Tribunal the procedure is substantively the same as that found, in much greater detail, in Part 54 of the CPR and discussed in Chapter 9. However, the CPR does not apply to the Upper Tribunal, and the governing procedural rules are the Upper Tribunal Rules 2008.[2] Although there are minor differences of terminology, and some of detail, the basic two-stage procedure which requires permission to apply for judicial review before the claim is heard is the same. The same time limits and rules of standing apply. The Upper Tribunal has a statutory power to grant all the remedies available on judicial review, including interim relief. The Upper Tribunal does, however, take a more restrictive approach to the award of costs and where the review is of a decision of the First-tier Tribunal will not award costs unless they would have been awarded below. Where there is no express discussion of an issue in this chapter, it may be assumed that the principles set out in Chapter 9 apply.

[1] Referred to in this chapter as the TCEA.

[2] The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), referred to in this chapter as the UT Rules.

Judicial review of the Upper Tribunal

10–004 In relation to decisions of the Upper Tribunal which are not the subject of a right of appeal (predominantly refusals of permission to appeal), the Upper Tribunal is itself subject to judicial review. However, that right of judicial review is narrowly confined. An application for permission must be made in the High Court no later than 16 days after notice of the decision was sent,[3] and there is no right to renew the application for permission at an oral hearing.[4] The judge determining the application on the papers may give permission only where there is an arguable case with a real prospect of success that both the refusal of permission to appeal and the underlying first instance decision were wrong in law, and that there is either an important point of principle or practice, or that there is some other compelling reason.[5]

B. JUDICIAL REVIEW IN THE UPPER TRIBUNAL

The Upper Tribunal

10–005 The Upper Tribunal was created by s.3(2) of the TCEA, and by s.3(5) was designated a superior court of record. As a superior court of record, decisions of the Upper Tribunal will be binding on inferior courts and lower tier tribunals. Decisions of the Upper Tribunal will be persuasive for courts of equal jurisdiction and will not be departed from unless "plainly wrong".[6] It is certainly to be expected that the Upper Tribunal will follow its own consistent line of authority, particularly where the decision on a point of law was handed down by a panel of more than a single judge.[7] However, it is not absolutely bound to do so.

10–006 The Upper Tribunal is comprised of Upper Tribunal judges but may also include judges drawn from the High Court, the Court of Appeal, and the Court of Session and may also include a circuit or district judge.[8]

10–007 The Upper Tribunal is currently divided into four Chambers. The Administrative Appeals Chamber hears appeals from all the First–tier Tribunals (except the Tax Chamber, the Immigration and Asylum Chamber and charities cases from the General Regulatory Chamber), as well as various miscellaneous other matters. The Tax and Chancery Chamber hears appeals from the First-tier Tax Chamber and the charities cases from the General Regulatory Chamber as well as appeals from the Financial Services Authority and appeals from the Pensions Regulator. The Lands Chamber deals with certain disputes concerning land and appeals from the First-tier Property Chamber. The Immigration and Asylum Chamber hears appeals from the Immigration and Asylum Chamber of the First-tier Tribunal in immigration and asylum matters.

[3] CPR r.54.7A(3).
[4] CPR r.54.7A(8).
[5] CPR r.54.7A(7).
[6] *R. v Greater Manchester Coroner Ex p. Tal* [1985] Q.B. 67.
[7] *Dorset Healthcare NHS Trust v MH* [2009] P.T.S.R. 1112 at [38].
[8] TCEA s.6.

Allocation of judicial review within the Upper Tribunal

10–008 Secondary legislation makes provision for the allocation of particular types of judicial review case to the Chambers of the Upper Tribunal.[9]

10–009 The Immigration and Asylum Chamber is allocated judicial review of cases which relate to claims made by a person that they are a minor from outside the United Kingdom challenging a defendant's assessment of that person's age; categories of cases which are directed to be heard in the Immigration and Asylum Chamber; and cases which are transferred to the Immigration and Asylum Chamber by the Administrative Court.[10]

10–010 The Lands Chamber is allocated judicial review cases which relate to a decision of the Property Chamber of the First-tier Tribunal, the Valuation Tribunal in England, or various Welsh leasehold valuation, residential property, Agricultural Land and Valuation tribunals.[11]

10–011 The Tax and Chancery Chamber is allocated judicial review cases which relate to a decision of: the Tax Chamber of the First-tier Tribunal or a charities case in the General Regulatory Chamber; a function of HMRC (with the exception of any function in respect of which an appeal would be allocated to the Social Entitlement Chamber); the exercise by the National Crime Agency of Revenue functions (with the exception of any function in relation to which an appeal would be allocated to the Social Entitlement Chamber); and a function of the Charity Commission, the Financial Compensation Authority, the Bank of England, a person assessing compensation or consideration under the Banking (Special Provisions) Act 2008, or the Pensions Regulator.[12]

10–012 The Administrative Appeals Chamber is allocated all other judicial review cases which are not otherwise allocated to the other Chambers of the Upper Tribunal.[13] The Administrative Appeals Chamber is therefore the primary home of the Upper Tribunal's judicial review jurisdiction, but with certain exceptions for cases in which the subject matter will be most obviously within the expertise of the judges of another Chamber.

The powers and remedies of the Upper Tribunal

10–013 The Upper Tribunal's judicial review jurisdiction is governed by s.15 of the TCEA. This provides that the Upper Tribunal may grant: a mandatory order; a prohibiting order; a quashing order; a declaration; or an injunction. These are the same orders as the Administrative Court is empowered to make in judicial review cases before it. Such orders have the same effect as they would have if granted by the High Court and are enforceable in the same way as they would be if made by the High Court.[14] In deciding whether to make such orders, the Upper Tribunal is required, by s.15(4)–(5), to apply the same principles as the High Court would apply on an application for judicial review.

[9] The First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655).
[10] Art.11(c)–(e).
[11] Art.12(c).
[12] Art.13(g).
[13] Art.10(b).
[14] TCEA s.15(3).

10–014 Where a quashing order is made, the Upper Tribunal may in addition remit the matter concerned to the court, tribunal or authority that made the decision which is the subject of the order, or it may substitute its own decision for the decision in question.[15] However, a substituted decision may only be made where the decision in question was made by a court or tribunal on the basis of error of law and without such error there would only have been one decision that the court or tribunal could have reached.[16]

10–015 The Upper Tribunal has no power to make a declaration of incompatibility under s.4 of the Human Rights Act 1998.

10–016 Although the TCEA makes no express provision for interim remedies, it has been accepted by the Administrative Appeals Chamber of the Upper Tribunal in a special educational needs case, where an appeal was pending before the Health, Education and Social Care Chamber of the First-tier Tribunal, that the Upper Tribunal has the power to order an interim injunction when exercising its judicial review jurisdiction.[17] The statutory requirement in s.15(4)–(5) to apply the same principles as the High Court is just as applicable in interim relief cases. However, the Upper Tribunal indicated that in the context of that case the jurisdiction to order interim relief should be exercised with considerable restraint and only in exceptional circumstances.[18] It seems likely that the jurisdiction to order interim relief would be accepted in respect of any relief mentioned in s.15, which will exclude other forms of relief, such as habeas corpus.

10–017 The Upper Tribunal may also award an applicant damages, restitution, or the recovery of a sum if a claim for such relief has been made, and such an award would have been made by the High Court in the same circumstances.[19]

Circumstances in which judicial review claims must be determined by the Upper Tribunal

10–018 The mandatory judicial review jurisdiction of the Upper Tribunal only arises where certain conditions are satisfied under s.18 of the TCEA or the case has been transferred to the Upper Tribunal from the High Court under s.19 of the TCEA. Cases dealt with under s.18 will arise where the application for permission is made directly to the Upper Tribunal, whereas s.19 applies to claims commenced in the Administrative Court.

10–019 Four conditions are imposed by s.18, each of which must be satisfied. First, the application must be seeking a form of relief listed in s.15; permission to apply for judicial review; an award of damages or restitution under s.16(6); or costs or interest.[20] Secondly, the application must not call into question anything done by the Crown Court.[21] Thirdly, the application must fall within a category of case specified in a direction made by the Lord Chief Justice under Part 1 of Sch.2 to

[15] TCEA s.17(1).
[16] TCEA s.17(2).
[17] *R. (JW) v The Learning Trust* [2010] E.L.R. 115 at [26].
[18] *R. (JW) v The Learning Trust* [2010] E.L.R. 115 at [29]. The Upper Tribunal confirmed that the First-tier Tribunal has no power to order interim relief: at [23].
[19] TCEA s.16(6).
[20] TCEA s.18(4).
[21] TCEA s.18(5).

the Constitutional Reform Act 2005.[22] Those directions are described below. Fourthly, the judge hearing the case must be a High Court or Court of Appeal judge in England, Wales or Northern Ireland or such other person as has been agreed by the Lord Chief Justice and the Senior President of Tribunals.[23]

10–020 For cases commenced in the High Court, the transfer mechanism has been achieved by s.19 of the TCEA, introducing a new s.31A into the Senior Courts Act 1981. Where the first three conditions as those set out above under s.18 apply, the transfer is mandatory.[24] Following the enactment of s.22 of the Crime and Courts Act 2013, there is no longer any restriction on the type of immigration decision which may be transferred to the Upper Tribunal, providing it is the subject of a direction of the Lord Chief Justice.

Relevant judicial review directions

10–021 There are now a number of relevant directions affecting judicial review in the Upper Tribunal in England and Wales, which together have brought a number of different types of case within the jurisdiction of the Upper Tribunal. The judicial review categories for these purposes are as follows:

(1) Any decision of the First-tier Tribunal on an appeal made in the exercise of a right conferred by the Criminal Injuries Compensation Scheme in compliance with s.5(1) of the Criminal Injuries Compensation Act 1995[25];
(2) Any decision of the First-tier Tribunal (other than of the Immigration and Asylum Chamber) made under the Tribunal Procedure Rules or s.9 of the TCEA where there is no right of appeal to the Upper Tribunal and that decision is not an excluded decision within TCEA s.11(5)(b), (c) or (f)[26];
(3) Any decision under the Immigration Acts, under any instrument made under the Immigration Acts, or otherwise relating to leave to enter or remain in the UK[27];
(4) Any decision of the Immigration and Asylum Chamber of the First-tier Tribunal from which no appeal lies.[28]

10–022 In relation to categories (3) and (4), the direction sets out a number of exceptions, which include challenges to the validity of primary or secondary legislation, the lawfulness of detention, a decision concerning UKBA licensed sponsors, any decision as to citizenship, a decision on asylum support, and a decision of the Upper Tribunal or of the Special Immigration Appeals Commission.[29] The effect remains that the vast majority of immigration judicial review cases must now take place in the Upper Tribunal and are routinely heard in the Immigration and Asylum Chamber.

[22] TCEA s.18(6).
[23] TCEA s.18(8).
[24] Senior Courts Act 1981 s.31A(4)–(6).
[25] Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327 at para.2.
[26] Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327 at para.2.
[27] Practice Direction (Upper Tribunal: Judicial Review Jurisdiction), 21 August 2013, para.1(i).
[28] Practice Direction (Upper Tribunal: Judicial Review Jurisdiction), 21 August 2013, para.1(ii).
[29] Practice Direction (Upper Tribunal: Judicial Review Jurisdiction), 21 August 2013, para.3.

10–023 Pursuant to the power conferred by TCEA s.11(5)(f), secondary legislation has prescribed a series of types of decision against which there is no appeal to the Upper Tribunal.[30] Challenges to these decisions now also fall within the scope of the judicial review jurisdiction.

10–024 The directions do not have effect where an application seeks (whether or not alone) a declaration of incompatibility under s.4 of the Human Rights Act 1998.

10–025 Where an appeal is lodged against a decision which is excluded it will be treated as an application for judicial review instead.[31] However, any decision which is not expressly defined as excluded by s.11(5) can and should be appealed rather than judicially reviewed.[32]

Circumstances in which judicial review claims may be determined by the Upper Tribunal

10–026 In circumstances where the third condition set out in s.18(6) is not met (i.e. that there is no specification under a relevant direction) but the other conditions are met, the High Court has a discretion to transfer a judicial review application to the Upper Tribunal where it is just and convenient to do so.[33] There has been limited guidance on the scope of this discretion.

10–027 Relevant considerations may be whether the case calls for a factual determination more suited to the fact-finding experience of the Upper Tribunal—such as age assessment cases[34]—or where there is an existing case in the Upper Tribunal with which the judicial review could be joined.[35]

Effect of transfer of cases as between the High Court and the Upper Tribunal

10–028 Where a judicial review claim for permission has been transferred to the Upper Tribunal the effect of such transfer is that the Upper Tribunal has the function of deciding all subsequent applications and the substantive claim.[36] The claim is treated for all purposes as if it had been brought in the Upper Tribunal.[37] The transfer may occur before or after the grant of permission. Following transfer into the Upper Tribunal, the Upper Tribunal must give directions as to the future conduct of the hearing and notify the parties that the proceedings have been transferred.[38]

[30] Appeals (Excluded Decisions) Order 2009 (SI 2009/275).
[31] *Dorset Healthcare NHS Foundation Trust v MH* [2009] P.T.S.R. 1112.
[32] *LS v London Borough of Southwark (HB)* [2010] UKUT 461 (AAC).
[33] Senior Courts Act 1981 s.31A(3).
[34] Following *R. (FZ) v London Borough of Croydon* [2011] P.T.S.R. 748 age assessment cases are usually transferred to the Immigration and Asylum Chamber.
[35] *R. (Reed Personnel Services) v HM Revenue & Customs* [2009] EWHC 2250 (Admin); *R. (Independent Schools Council) v Charity Commission for England and Wales* [2010] EWHC 2604 (Admin).
[36] TCEA s.19(4).
[37] TCEA s.19(3).
[38] UT Rules r.27(1).

10–029 Where the Upper Tribunal lacks judicial review jurisdiction it is required to transfer the case to the High Court.[39] Where it does so, the application is treated for all purposes as if it had been made to the High Court.[40]

Grounds for seeking judicial review

10–030 The grounds for seeking judicial review in the Upper Tribunal are the same as for any judicial review claim in the Administrative Court. The Upper Tribunal must apply the same principles when considering the grant of relief.[41] It applies the judicial review principles with the same intensity that the Administrative Court would. By analogy, in *British Sky Broadcasting Group Plc v The Competition Commission*[42] the Competition Appeal Tribunal was reviewing a decision of the Competition Commission, in which circumstances it applied the same principles of judicial review as the High Court would.[43] It was argued that the CAT should apply those principles with a greater intensity than an ordinary court would because of the specialist nature of the CAT. The Court of Appeal rejected that argument. It was contrary to the clear wording of the statute; it was contrary to authority;[44] and it sought to engage the CAT in reassessing the weight accorded to the evidence and substituting its own judgment, contrary to the purpose of judicial review. There is no basis for applying any different approach in the Upper Tribunal given the very similar statutory wording.

Judicial review procedure in the Upper Tribunal

10–031 Procedure in judicial review cases in the Upper Tribunal is governed by Part 4 of the UT Rules. The procedure very closely matches that in the Administrative Court under CPR Part 54. However, the UT Rules use slightly different terminology to the CPR. They refer to an "application" rather than a "claim" and to "applicant" rather than "claimant". The public body is referred to as the "respondent" rather than the "defendant".

Pre-action protocol

10–032 As with all other judicial reviews, those taking place in the Upper Tribunal fall within the scope of the judicial review pre-action protocol set out in the CPR.[45] Parties should accordingly comply with it. However, where the judicial review is of the decision of the First-tier Tribunal it will not be necessary to comply as the First-tier Tribunal would not ordinarily be expected to participate in the proceedings.

[39] TCEA s.18(3).
[40] TCEA s.18(9).
[41] TCEA s.15(4)-(5).
[42] [2010] 2 All E.R. 907.
[43] By virtue of s.120 of the Enterprise Act 2002.
[44] *Office of Fair Trading v IBA Health Ltd* [2004] 4 All E.R. 1103 at [90]–[100].
[45] See para.9–004.

Application for permission

10–033 An application for judicial review of a decision must be given permission by the Upper Tribunal before it can proceed to a substantive hearing.[46]

Time limits

10–034 An application for permission must be made in writing to the Upper Tribunal and must be made promptly and in any event received by the Upper Tribunal within three months of the decision, act or omission to which the application relates.[47] This replicates the time limit for bringing a judicial review claim in the Administrative Court and is to be construed in the same way.

10–035 Where the challenge is to a decision of the First-tier Tribunal, the relevant time limit is one month from the date on which the lower Tribunal sent written reasons for its decision, or a notification that an application to set aside the decision was unsuccessful, even if that time is later than the three month limit.[48]

Form of application

10–036 The application must provide the name and address of the applicant, the respondent and any other person whom the applicant considers to be an interested party; the name and address of the applicant's representative (if any); an address where documents for the applicant may be sent or delivered; details of the decision challenged (including the date, the full reference and the identity of the decision maker); that the application is for permission to bring judicial review proceedings; the outcome that the applicant is seeking; the facts and grounds on which the applicant relies; a copy of any written record of the decision in the applicant's possession or control; and copies of any other documents in the applicant's possession or control on which the applicant intends to rely.[49] Any party to challenged proceedings not an applicant or respondent must be named as an interested party.[50] Documents may be filed with the Upper Tribunal by post, document exchange or fax.[51]

10–037 Where an application is made out of time it must include a request for an extension of time and the reason why the time limit has not been complied with. Unless the Upper Tribunal extends the time period in the exercise of its case management powers it must not admit the application.[52]

10–038 Except in immigration judicial reviews (i.e. judicial reviews allocated to the Immigration and Asylum Chamber), when the Upper Tribunal receives the application it must send a copy of the application and accompanying documents

[46] TCEA s.16(2); UT Rules r.28(1).
[47] UT Rules r.28(2).
[48] UT Rules r.28(3).
[49] UT Rules r.28(4), (6).
[50] UT Rules r.28(5).
[51] UT Rules r.13(1).
[52] UT Rules r.28(7). The Upper Tribunal has held that it will generally apply a less strict approach to time limits (particularly in the context of Tribunal orders or directions) than would apply under the CPR: *Leeds City Council v Revenue and Customs Commissioners* [2014] UKUT 350 (TCC).

to any other party.[53] This is a distinction from the Administrative Court, in which the claimant is required to serve the other parties himself. In immigration cases, it is for the applicant to serve the application and accompanying documents on each named respondent and interested party within nine days of making an accepted application, and he must provide the Upper Tribunal with a written statement of when and how this was done.[54] The application in immigration cases must not be accepted by the Upper Tribunal until the required fee is paid or an undertaking to pay the fee is accepted.[55]

10–039 The Upper Tribunal has a "Request for Urgent Consideration" form which may be used for judicial review applications which are urgent.

Acknowledgement of service

10–040 Any party wishing to take part in the permission proceedings must, on receipt of the documents sent by the Upper Tribunal, ensure that the Tribunal receives an acknowledgement of service within 21 days.[56] The acknowledgement of service must state whether permission is opposed or supported, the grounds for support or opposition, any other information which may assist the Tribunal, and the name and address of any person not named which the party considers may be an interested party to the proceedings.[57] An acknowledgement of service in immigration cases must also be provided to the applicant and to any other person named in the application or the acknowledgment of service within the same 21 days.[58]

10–041 If a party decides not to take part in the permission proceedings it need not supply an acknowledgement of service and this does not bar it from taking part in the substantive hearing if permission is granted.[59] A failure to serve the acknowledgement of service within the time limit is a failure which can be waived or time can be extended.[60]

The permission decision

Standing

10–042 The Upper Tribunal may not grant permission unless the applicant has a "sufficient interest" in the matter.[61] This is the same test of standing as in judicial review claims in the Administrative Court: see Chapter 11 below.

[53] UT Rules r.28(8).
[54] UT Rules r.28A(2).
[55] UT Rules r.28A(1).
[56] UT Rules r.29(1).
[57] UT Rules r.29(2).
[58] UT Rules r.29(2A).
[59] UT Rules r.29(3).
[60] UT Rules rr.7(2)(a) and 5(3)(a).
[61] TCEA s.16(3).

Test

10–043 Section 16(4)–(5) of the TCEA provides that permission may be refused where the Tribunal considers that there has been undue delay in making the application; or that granting the relief sought on the application would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. The former essentially replicates the promptness requirement. The latter is essentially the same as s.31(6) of the Senior Courts Act 1981.

10–044 Applicants in the Upper Tribunal will also need to show that their claim is arguable. Although TCEA s.16 does not refer to that matter, the fact that arguability is part of the process of determining whether permission should be granted is reflected in r.8(3)(c) of the UT Rules which gives the Upper Tribunal power to strike out judicial review proceedings where the Tribunal considers that "there is no reasonable prospect" of the applicant's case, or part of it, succeeding. This mirrors the test set out in *Sharma v Brown-Antoine*,[62] although the terminology of striking out is not normally used in judicial review proceedings.

Procedure on permission decisions

10–045 The Upper Tribunal must send to all parties a written notice of its decision on permission, and the reasons for any refusal of permission or conditions applied to the grant of permission.[63] As in the Administrative Court, the decision is usually likely to have been taken on the papers only.

Renewal hearing

10–046 If the decision on the papers is to refuse permission, or to grant permission only on conditions, the applicant may apply to have that decision reconsidered at an oral hearing. Such an application must be made in writing and received by the Tribunal within 14 days of the date on which its written reasons were sent to the applicant.[64] In an immigration case, the application for an oral renewal hearing must be made within 9 days of the same date.[65]

10–047 In any immigration case, or in an application for which the Upper Tribunal has refused to extend time, the Upper Tribunal may certify the application as totally without merit. Where it does so, there is no right to request an oral renewal hearing.[66]

Procedure following the grant of permission

10–048 As in all proceedings in the courts and tribunals system, the UT Rules contain an overriding objective that cases be dealt with fairly and justly.[67]

[62] [2007] 1 WLR 780. See above 9-057.
[63] UT Rules r.30(1).
[64] UT Rules r.30(3)–(5).
[65] UT Rules r.30(5).
[66] UT Rules r.30(4A).
[67] UT Rules r.2(1).

The response

10–049 Where permission has been granted, any party notified of the grant of permission may provide detailed grounds in writing to the Upper Tribunal for supporting or contesting the substantive application, and may raise additional grounds not considered at the permission stage.[68] That response must be received by the Upper Tribunal within 35 days of date on which the notice of permission was sent.[69]

The hearing

10–050 The successful applicant may not rely at the substantive hearing on grounds other than those put forward in support of permission unless the Upper Tribunal has consented.[70]

10–051 Each party (and any other person with the Upper Tribunal's permission) may submit evidence, make representations at a hearing and make written representations where the case will be decided without a hearing.[71]

10–052 Where any hearing is held (either on permission or substantively) the Upper Tribunal must provide a minimum of 2 working days' notice.[72]

10–053 There is no requirement in relation to bundles of documents, and the UT Rules provide no equivalent to CPR PD54. Procedural requirements in the Immigration and Asylum Chamber have been set out in Immigration Judicial Review Practice Directions, as amended by the Senior President on 1 November 2013.

10–054 It is not uncommon for the Upper Tribunal, in the exercise of its appellate jurisdiction, to hear oral evidence. It is an experienced fact-finding body. As a result, it is far more likely than the Administrative Court to be willing to hear oral evidence in the course of a judicial review hearing. Indeed, the deliberate informality of the Tribunal structure means that it is not uncommon for the Upper Tribunal to ask to hear evidence from a person present without having seen witness statements or a formal application to do so.

10–055 The Upper Tribunal hearing the judicial review will usually be comprised of one judge, but cases of greater significance will be heard by a panel of three judges. A case which falls under TCEA s.18 must be heard by a High Court or Court of Appeal Judge.[73]

Remedies

10–056 The forms of remedy available and the principles applicable have been discussed above.[74]

[68] UT Rules r.31(1).
[69] UT Rules r.31(2).
[70] UT Rules r.32.
[71] UT Rules r.33.
[72] UT Rules r.36(2)(a).
[73] TCEA s.18(8).
[74] See para.10–013 above.

Costs

10–057 One significant potential area of difference between judicial review proceedings in the Upper Tribunal and in the Administrative Court is in relation to the award of costs. Ordinarily, the Upper Tribunal is a no-costs jurisdiction, with awards being made only where a party has acted unreasonably.[75] However, in addition to unreasonable conduct of the proceedings, a further express exception to the bar on making a costs order is in judicial review proceedings.[76] This provision might be thought to be an indication that costs in judicial review proceedings are likely to follow the event, and match the approach of the Administrative Court. The potential justification of principle for this is to avoid costs-led forum shopping, particularly where a party has had a case transferred into the Upper Tribunal, perhaps against their preference.

10–058 The award of costs in judicial review proceedings was the subject of detailed consideration in *R. (LR) v First-tier Tribunal (HESCC) & Hertfordshire CC*.[77] In that case, the Upper Tribunal was considering a judicial review of a decision of the First-tier Tribunal against which there was no right of appeal and which had been mandatorily transferred by the High Court. The Upper Tribunal held that there was no general principle in r.10 that costs should follow the event in judicial review proceedings in the Upper Tribunal. Instead, they held that where the judicial review was linked to the jurisdiction of the lower tribunal, it would not be appropriate to make an award of costs unless the First-tier Tribunal could have done so.[78] The Upper Tribunal should be generally wary of reading in principles from the CPR.[79] The Upper Tribunal expressly stated that it was not deciding that this approach was also appropriate for discretionary transfer cases, or categories of judicial review (principally in the Immigration and Asylum Chamber) which were not reviews of First-tier Tribunal decisions.[80] There are some indications that in those cases the Immigration and Asylum Chamber will take the conventional approach whereby the losing party pays the costs of the successful party.[81]

10–059 Any application for costs must be made in writing, although a simple sentence to that effect in the pleadings or skeleton should suffice, and the application must include a schedule of the costs claimed so that summary assessment can be made.[82] Detailed assessment is, however, available.[83] A costs application may not be made later than one month after the Upper Tribunal sends its decision or the withdrawal notice.[84] A paying person must have the opportunity to make

[75] UT Rules r.10(3)(d).
[76] UT Rules r.10(3)(a).
[77] [2013] UKUT 294 (AAC). The Upper Tribunal consisted of Sullivan LJ (the Senior President of Tribunals), UT Judge Ockleton and UT Judge Ward.
[78] *R. (LR) v First-tier Tribunal (HESCC) & Hertfordshire CC* [2013] UKUT 294 (AAC) at [25]–[26], [31]–[35].
[79] *R. (LR) v First-tier Tribunal (HESCC) & Hertfordshire CC* [2013] UKUT 294 (AAC) at [30].
[80] *R. (LR) v First-tier Tribunal (HESCC) & Hertfordshire CC* [2013] UKUT 294 (AAC) at [26], [34] and [36].
[81] *R. (ES) v London Borough of Hounslow* [2012] UKUT 138 (IAC).
[82] UT Rules r.10(5).
[83] UT Rules r.10(8)–(10).
[84] UT Rules r.10(6).

representations if costs are to be ordered, and any individual must have their financial circumstances considered by the Tribunal.[85]

Appeals

10–060 The refusal of permission to apply for judicial review may be appealed to the Court of Appeal.[86] Permission to appeal must be sought from the Upper Tribunal first,[87] following the provision of its written reasons,[88] and if refused may be sought from the Court of Appeal. In immigration cases, where a decision which disposes of proceedings is given at an oral hearing, permission to appeal must be determined at that oral hearing.[89] The time limit for making a written application for permission is one month from the date the reasons were sent,[90] or seven days where an immigration claim has been certified as totally without merit.[91]

10–061 When the Court of Appeal grants an application for permission to appeal against the Upper Tribunal's refusal of permission to apply, it has no jurisdiction at that stage to grant permission to apply but is required to proceed to hear the appeal against the refusal of such permission.[92] It has an inherent jurisdiction to stay the effects of decision being appealed pending the resolution of permission to appeal.[93]

10–062 An appeal against a substantive judicial review decision of the Upper Tribunal also lies to the Court of Appeal upon the grant of permission by either the Upper Tribunal or the Court of Appeal. The same procedure applies as set out in the preceding paragraph.

10–063 Permission to appeal to the Court of Appeal in England and Wales shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the Court of Appeal, considers that (a) the proposed appeal would raise some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal.[94] The procedure applicable in the Court of Appeal has been discussed in Chapter 9.[95]

[85] UT Rules r.10(7).
[86] TCEA s.16(8).
[87] TCEA s.13(5).
[88] UT Rules r.44(4).
[89] UT Rules r.44(4A).
[90] UT Rules r.44(4). Where permission is refused by the Upper Tribunal, permission must be sought from the Court of Appeal within 28 days of the date on which the notice refusing permission was sent by the Upper Tribunal: CPR PD52D, para.3.3.
[91] UT Rules r.44(4C).
[92] *R. (NB (Algeria)) v Secretary of State for the Home Department* [2013] 1 W.L.R. 31. See CPR r.52.15(3).
[93] *R. (NB (Algeria)) v Secretary of State for the Home Department* [2013] 1 W.L.R. 31. This means that an application to the Court of Appeal for permission to appeal in an immigration deportation case may include an application for a stay of the removal directions as soon as the Upper Tribunal refuses permission to appeal.
[94] TCEA s.13(6) and the Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834) art.2.
[95] See paras 9–146 to 9–151.

Judicial acts

16–043 A judicial act of a court or tribunal alleged to be a breach of Convention rights contrary to s.6(1) of the HRA can only challenged by way of appeal, judicial review, or in such other forum as may be prescribed.[133] A court or tribunal which would not otherwise be amenable to judicial review is not rendered amenable by virtue of the HRA.[134] A judicial act for these purposes means a judicial act of a court and includes an act done on the instructions of, or on behalf of, a judge.[135]

Time limits

16–044 Section 7(5)(a) imposes a time limit for bringing proceedings under s.7(1) of one year beginning with the date on which the act complained of took place. This is subject to two qualifications. First, the court has the power to extend time to such longer period as is considered "equitable in all the circumstances".[136] Secondly, s.7(5) makes the time limit of one year subject to "any rule imposing a stricter time limit in relation to the procedure in question". This has the effect that where the claim is brought by way of judicial review the three month time limit, and the requirement of promptitude, will apply.

16–045 The highest court has considered the power to extend time under s.7(5) three times. In *Somerville v Scottish Ministers*[137] the House of Lords applied the concept of a continuing act familiar from discrimination law, to be distinguished from a one-off act with continuing consequences,[138] to breaches of the HRA and held that time only began to run when the breach ended. In *A v Essex CC* the Supreme Court upheld and approved the trial judge's refusal to extend time because the claim was brought some time after the breach had ended, and even if an award of damages was made it was likely to be modest and disproportionate to the costs of the proceedings.[139] In *Rabone v Pennine Care NHS Trust* Lord Dyson held that the court has a wide discretion and that the principles contained in s.33 of the Limitation Act 1980 may be helpful where the claim concerns, as in that case, personal injury or death, but that s.7 should not be read as if it included the s.33 factors.[140] Lord Dyson held that time should be extended because the required extension was short (four months); the defendant had suffered no prejudice; the claimants had acted reasonably in holding off proceedings in waiting for a particular report; and, most importantly, there was a good claim for breach of Art.2 of the Convention.[141]

[133] HRA s.9(1).
[134] HRA s.9(2).
[135] HRA s.9(5).
[136] HRA s.7(5)(b).
[137] [2007] 1 W.L.R. 2734.
[138] Contrast: *R. (Cockburn) v Secretary of State for Health* [2011] Eq.L.R. 1139 with *Mohammed v Home Office* [2011] 1 W.L.R. 2862.
[139] [2011] 1 A.C. 280 at [167]–[169].
[140] [2012] 2 A.C. 72 at [75].
[141] *Rabone v Pennine Care NHS Trust* [2012] 2 A.C. 72 at [79].

CHAPTER 17

Remedies for the Enforcement of European Union Law in National Courts

A. THE SIGNIFICANCE OF THE LAW OF THE EUROPEAN UNION

17–001 The importance and impact of EU law has grown immeasurably since the accession of the UK in 1973 to the three Treaties creating the European Community, the European Atomic Energy Community and the European Steel and Coal Community. These three Treaties, and in particular the Treaty of Rome creating the European Community, created a Community with its own institutions and legal capacity and endowed those institutions with legislative, executive and judicial powers within the field of competences covered by the Treaties. The Treaties and the secondary legislation enacted thereunder constitute an important and ever growing source of law. The major legislative and other measures constituting a source of rights and obligations are regulations, directives and decisions. The Member States have now created a European Union with legislative competence in a wide variety of areas and an institutional framework comprising the Council, the Parliament, the Commission and the Court of Justice of the European Union based on two treaties, the Treaty on European Union and the Treaty on the Functioning of the European Union. The treaties are referred to in this work as the TEU and the TFEU respectively.

17–002 The principal source of specific rights and obligations, however, is the TFEU and the legislation made under that treaty. In addition, Art.6 TFEU provides that the European Union recognises the rights set out in the Charter of Fundamental Rights of the European Union. That Charter guarantees a series of rights which apply to the institutions of the European Union and also to the Member States, but only when they are implementing European Union law.[1]

17–003 The case law of the Court of Justice[2] has ensured that the rights and obligations created by European Union law,[3] although originating in treaties

[1] See Art.51(1) of the Charter of Fundamental Rights of the European Union (referred to in this work as the Charter).
[2] The name given to the judicial body by the TEU and the TFEU is the Court of Justice of the European Union. The European Communities Act 1972 refers to it as the European Court. The name used in this work is the Court of Justice (to distinguish between the Court dealing with the law of the European Union which sits in Luxembourg and the different court, the European Court of Human Rights, dealing with the interpretation of the European Convention on Human Rights which sits in Strasbourg).
[3] The term "EU law" is used in this book to describe the law derived from the TEU and the TFEU and the secondary legislation made under it, together with the jurisprudence of the Court of Justice. In the

between states, have effect not just on relations between Member States on the international plane but also penetrate the national legal systems of the Member States, and are enforceable in national courts. The two main principles originally developed by the Court of Justice to achieve this were the concept of direct effect and the supremacy of EU law over national law. Direct effect means that provisions of EU law may confer rights on individuals. Such rights may be enforced in the national courts of Member States. The supremacy of European Union law means that EU law takes precedence over conflicting national law. National courts are also under a duty to construe national law in accordance with EU law. The Court of Justice has added a third fundamental principle, namely the obligation on national courts to ensure the full and effective protection of rights derived from EU law.[4] The courts within the United Kingdom are working out which remedies are appropriate for dealing with a breach of EU law. In addition, the TFEU provides that national courts and tribunals may, and in certain circumstances must, refer questions of EU law to the European Court for determination. This system of making references to the European Court for a preliminary ruling on a question of European law is discussed in Chapter 18.

17–004 This work deals only with remedies available in national courts, where national authorities or individuals violate EU law. The Court of Justice has jurisdiction to hear actions against Member States accused of violating EU law, as well as to review of acts of the institutions of the EU, to award damages against such institutions. These matters are outside the scope of this work.[5]

B. DIRECT EFFECT—THE POSITION UNDER EU LAW

Treaty provisions

17–005 The European Court has consistently held that provisions of the TFEU may have direct effect. By direct effect, the European Court means that such a provision gives rise to rights and obligations which an individual can enforce in legal proceedings before national courts.[6] Directly effective provisions of the TEU or the TFEU are enforceable against a public authority or against another individual, as is the case, for example, with Art.157 TFEU which guarantees the principle of equal pay for equal work and which is enforceable against private employers[7] or

case law, the term "Community law" is frequently used to describe the law derived from the former Treaty creating the European Community (and, sometimes, to embrace the law derived from the Treaties creating the Coal and Steel Community and the European Atomic Energy Community). Given the creation of an EU, the terminology of "European Union law" and "European Union" or "EU" is generally used in this work rather than "Community law" and "Community".

[4] See, e.g. Joined Cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1990] E.C.R. I-5357, at [31] to [33] of the judgment; Case C-213/89 *R. v Secretary of State for Transport Ex p. Factortame (No.2)* [1991] 1 A.C. 603 at 643-644, [18] and [19].

[5] See Arts 256 to 266 TFEU. For a discussion, see Hartley, *Foundations of European Union Law* (8th edn, 2014).

[6] *Van Gend en Loos v Nederlandse Administratie der Belastingen* Case 26/62 [1963] E.C.R. 1.

[7] Formerly, Art.119 and then 141 of the EC Treaty: see *Defrenne (Gabrielle) v SABENA* Case 43/75 [1976] E.C.R. 547 and see case C-256/01 *Allonby v Accrington and Rossendale College* [2004] I.C.R. 1328.

Art.101 TFEU prohibiting anti-competitive agreements.[8] Rights derived from the Charter are similarly capable of being directly effective and relied upon by individuals in areas of national law falling within the scope of EU law.[9] Article 6 of the TFEU recognises the rights guaranteed by the Charter and gives them the same legal value as TFEU.

Test for direct effect

A provision of the TEU or TFEU will be directly effective if the obligation it imposes is sufficiently precise, clear and unconditional.[10] The precise phrasing used by the Court of Justice in different judgments and by academic commentators[11] to describe the requirements varies, and to an extent the requirements are overlapping, but in essence they reflect the idea that the provision is capable as it stands of judicial enforcement. The case law gives an indication on the types of factors that are relevant. **17–006**

Provisions which lay down general objectives will not be sufficiently precise to be directly effective. Provisions setting out the objectives of the European Union expressed with a very high degree of generality, for example, ensuring the progressive approximation of economic policies and promoting balanced development, will not be directly effective.[12] The predecessor of Art.4(3) of the TEU, which imposes a general duty on Member States to facilitate the achievement of the tasks of the European Union and to refrain from jeopardising the attainment of its objectives, has in the past been held to be too imprecise to be directly effective.[13] However, there may be situations where Art.4(3) of the TEU, **17–007**

[8] Case C-453/99 *Courage Ltd v Crehan* [2001] 3 W.L.R. 1646.

[9] Case C-617/10 *Aklagaren v Fransson* [2013] 2 C.M.L.R. 46; *R. (NS) v Secretary of State for the Home Department* [2013] Q.B. 102 (Art.4 of the Charter, prohibiting torture and inhuman or degrading treatment, in terms similar to Art.3 of the European Convention on Human Rights, could be relied upon to prevent the return of an asylum seeker to another Member State). See also *R. (NS (Afghanistan)) v Secretary of State for the Home Department* [2013] Q.B. 102 at [116]–[122] (provisions of the Charter capable of direct effect in areas where national law implementing EU law; Protocol 30 to the TFEU providing that the Charter does not extend the ability of the Court of Justice or the UK courts does not preclude this conclusion as the Charter gives effect to general principles of EU law already recognised by EU law and does not create new rights or extend the jurisdiction of the courts). The Supreme Court in the United Kingdom has held that provisions of the Charter can be directly effective: see *Rugby Football Union v Consolidated Information Services Ltd. (formerly Viagogo Ltd.)* [2012] 1 W.L.R. 3333 at [26]–[28]: see below at para.17–038.

[10] See, e.g. *Hurd v Jones (Inspector of Taxes)* Case 44/84 [1986] Q.B. 892 at 947, [47] and for a similar formulation in relation to the provisions of directives, see case C-62/00 *Marks & Spencer Plc v Customs and Excise Commissioners* [2003] Q.B. 866 at [25].

[11] Hartley, *Foundations of European Union Law* (8th edn, 2014).

[12] See Arts 2 and 3 of the former Treaty of Rome (containing obligations now contained in part in Art.3 TEU): see Case C-339/89 *Alsthom Atlantique SA v Compagnie de Construction mecanique Sulzer SA* [1991] E.C.R. I-107; Joined Cases C-78/90 and C-83/90 *Compagnie commerciale de l'Ouest v Receveur principal des douanes de la Pallice-Port* [1992] E.C.R. I-1847 and see Case C-9/99 *Echirolles* [2003] 2 C.M.L.R. 506 at [25]. The Court of Appeal considered that Arts 198 and 199 TFEU, setting out the objective of promoting the economic and social development of overseas territories and countries, were not directly effective: *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3)* [2014] 1 W.L.R. 2921 at [142]–[143].

[13] *Hurd v Jones (Inspector of Taxes)* Case 44/84 [1986] Q.B. 892. For a similar conclusion by a domestic court, the Court of Appeal, see *R. (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3)* [2014] 1 W.L.R. 2921 at [142]–[143].

read with other specific provisions of the TFEU or secondary legislation, may be capable of producing direct effects.[14] Furthermore, the Court of Justice has recognised that Art.4(3) of the TEU may require the national authorities to exercise any powers they may have to remedy a breach of EU law and that obligation may be enforceable in the national courts[15]; and may prevent a Member State from adopting legislation to restrict the effect of a judgment of the Court of Justice.[16] A provision that is conditional, particularly on legislative action by the Member State to implement the provision, will not be directly effective. An obligation that is conditional may, however, become unconditional. In particular where the provision imposes an obligation on the Member State to implement the provision within a particular time, the obligation, if sufficiently precise, will become unconditional on the expiry of the time-limit.[17]

17–008 A provision which does not specify how an objective is to be achieved, but leaves the Member State a discretion as to the appropriate means for achieving an objective, will not be directly effective.[18] The application of a provision may involve the evaluation of economic or other factors by institutions of the EU, such as the prohibition on state aids that are incompatible with the Common Market. Such provisions may be unsuitable for judicial enforcement and may not therefore be directly effective.[19]

17–009 A provision may confer a right on an individual but permit a Member State to derogate from that right in certain circumstances—such as the provision permitting limitation of the right to free movement on grounds of public policy and security.[20] Such a provision can be directly effective. The creation of the right is not dependent on the implementation of the measure by the Member State, and the exercise of discretion to derogate can be controlled by the national courts to ensure that no irrelevant factors are taken into account.[21] Similarly, where EU law provided for certain exemptions to be applied in relation to liability to tax under conditions laid down by the Member State, an individual who could demonstrate that his case fell within the scope of the exemption was entitled to rely on the

[14] See, e.g. Case C66/86 *Ahmed Saeed Flugreisen v Zentrale zur Bekampfung unlauteren Wettberwebs* [1989] E.C.R. 803; the question was considered and left unanswered in *R. v HM Treasury Ex p. Shepherd Neame Ltd* (1999) 11 Admin. L.Rep. 517. See also Lewis, *Remedies and the Enforcement of European Community Law* (1996) at 28–29.

[15] Case C-201/02 *R. (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] 1 C.M.L.R. 1027 (failure by planning authority to carry out environmental impact assessment under Dir.85/337; authorities obliged to take all general or particular measures within their powers to remedy the failure and for national court to determine if planning consent can be revoked or suspended).

[16] See, e.g., Case C-147/01 *Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien* [2003] E.C.R. I-11365.

[17] *Defrenne v SABENA* [1976] E.C.R. 547.

[18] Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfahlen* [1984] E.C.R. 1891.

[19] See Case 77/72 *Capolongo v Maya* [1973] E.C.R. 611 holding that what is now Art.101 TFEU is not directly effective in the absence of a decision by the Commission. The final sentence of what is now Art.108(3) TFEU which prohibits Member States from putting a measure granting State aid into effect until the Commission has been informed of the measures and ruled on their legality, is directly effective.

[20] Art.48(3) and Dir.64/221.

[21] Case 41/74 *Van Duyn v Home Office* [1975] Ch 358 and Case C-374/97 *Feyrer v Landkreis Rottal-Inn* [1999] E.C.R. I-5153 and see, e.g. Joined Cases C-397/01 and C-403/01 *Pfeiffer* [2004] ECR I-8835 at [103].

provisions of the Directive and the Member State could not rely on its own failure to lay down the conditions in order to avoid the provisions having direct effect.[22]

17–010 Other provisions of EU law may be intended to govern relations between Member States or between EU institutions and Member States and may not be intended to confer rights or obligations on individuals and may not, therefore, be directly effective. Procedural obligations imposed on Member States, such as obligations to consult[23] or to provide information to the European Commission, may be imposed to enable the relevant European institutions to monitor or co-operate with the Member States. If so, they are unlikely to confer rights on individuals enforceable in the national courts. It is uncertain whether the provisions governing responsibility for processing asylum claims as between different Member States is intended to regulate relations between Member States and, so are not directly effective,[24] or are intended to give rise to rights enforceable by individuals. The Court of Justice considered that a provision conferring a discretion on Member States to assess an asylum claim, rather than returning the asylum seeker to the Member State responsible for dealing with his claim, did not give rise to any obligation to do so.[25]

17–011 There are, however, a very large number of articles of the TFEU and provisions of secondary legislation which are sufficiently precise and are intended to give individuals rights which they can rely upon in national courts. These include rights in the area of free movement of workers, freedom of establishment and freedom to provide services, competition law, employment equal rights for men and women, agriculture, and many other areas.

Partial direct effect

17–012 The Court of Justice has, on occasions, held provisions to be partially directly effective. The Court has done this where some part of the provision is capable of application in certain areas by national courts, but where further implementing measures are necessary for the provision to be enforceable over the whole range of its contemplated application. In *Defrenne*[26] the Court of Justice accepted that what is now Art.157 TFEU guaranteeing equal pay for equal work was directly

[22] See, e.g. Case C-141/00 *Kugler Gmbh v Finanz for Korperschaften I in Berlin* [2002] ECR I-6833; Case C-45/01 *Christoph-Dornier-Stiftung fur Klinische Psychologie v Finanzamt Giessen* [2003] ECR I-12911.

[23] See, e.g. Case 6/64 *Costa v ENEL* [1964] E.C.R. 585 at 595 (obligation on Member States imposed by Art.97 (ex Art.102) to consult with the Commission before taking action which might distort competition was relevant to relations between the Member States and the Commission and did not create individual rights).

[24] That is how the domestic courts in England and Wales understand the position: see, e.g., *R. (MK (Iran)) v Secretary of State for the Home Department* [2010] EWCA Civ 116.

[25] Case C-4/11 *Germany v Puid* [2014] 2 W.L.R. 98. It is less clear whether this conclusion was based on the view that the particular provision in question, on its proper interpretation, conferred a discretion on the Member State not a right on the individual, or whether the Court of Justice saw the provisions of the Regulation as regulating relations between Member States.

[26] *Defrenne v SABENA* [1976] E.C.R. 547. The Court of Justice has subsequently accepted that Art.157 TFEU (ex Art.119 EC) is directly effective in relation to indirect discrimination, that is in relation to measures which appear to affect both men and women but in practice have a disproportionate adverse impact on women which cannot be objectively justified on grounds unconnected with sex: see Case 96/82 *Jenkins v Kingsgate (Clothing Productions) (UK) Ltd* [1981] E.C.R. 911. It seems that Art.141 (ex Art.119) will only fail to produce direct effect in relation to

effective in so far as direct discrimination was concerned. That Article was not directly effective in so far as indirect or disguised discrimination was concerned, as further implementing measures would be necessary to set out criteria for identifying such discrimination.

Temporal limitations and prospective direct effect

17–013 A provision is usually directly effective from the date on which the obligation came into force, not merely from the date on which the Court of Justice holds that the provision is directly effective.[27] A ruling of the Court of Justice is declaratory of the law and does not create new rights. The interpretation given by the Court of Justice to a provision of EU law clarifies and defines its meaning and scope as it should have been understood from the time of its entry into force.[28] The Court of Justice may in exceptional circumstances limit the temporal effect of a provision of European law, by holding that it is only directly effective from the date of the judgment.[29] The provisions will then be given prospective effect only. The Court of Justice may hold that the provision only applies to the instant case (and others already pending before national courts) and future cases; the provision will not be directly effective so far as factual situations arising before the date of the judgment are concerned.[30]

17–014 The Court of Justice will only impose a temporal limitation where two conditions are satisfied.[31] First, the national authorities concerned must have acted in good faith so that, in essence, that they have been led into adopting national rules which did not comply with EU law because, for example, there was, objectively, significant uncertainty as to the proper meaning or application of EU law. Secondly, the application of the ruling of the Court of Justice without any temporal limitation would be likely to lead to severe harm to the interests of those who relied in good faith upon the previous understanding of EU law. Both conditions must be satisfied. The financial implications of a ruling will not in itself justify imposing temporal limitations on a ruling of the Court of Justice.[32] Furthermore, in the absence of sufficient, detailed information as the financial consequences of a ruling, the Court of Justice may not accept that the second condition is satisfied.[33] In *Barber*,[34] for example, the Court of Justice ruled for

"disguised discrimination", that is discrimination which requires the adoption of further national measures to identify the discrimination and cannot be identified simply from a consideration of the facts and relevant legal provisions.

[27] Case 309/85 *Barra v Belgian State and The City of Liège* [1988] E.C.R. 355. See also Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1991] Q.B. 344.

[28] See, e.g. Case C-481/99 *Heininger v Bayerische Hypo-und-Veriensbank AG* [2003] 2 C.M.L.R. 1291 at [51] of the judgment.

[29] [2003] 2 C.M.L.R. 1291 at [51].

[30] See, e.g. Case 24/86 *Blaizot v University of Liège* [1988] E.C.R. 379. See also Case 112/83 *Societè des Produits de Mais SA v Administration des Douanes et Droits Indirects* [1985] E.C.R. 719 (in declaring regulation invalid, the Court of Justice even held it could limit the effect of its judgment to future cases only and need not apply the judgment to the case in which it declares the regulation invalid).

[31] See, e.g. Case C-209/03 *R. (Bidar) v Ealing London Borough* [2005] Q.B. 812; Case C-73/08 *Bressol v Gouvernement de la Communaute francaise* [2010] 3 C.M.L.R. 20 at [89]–[95].

[32] See, e.g. Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] E.C.R. I-3585.

[33] See, e.g. Case C-313/05 *Brezinski* [2007] E.C.R. I-513 at [59]–[61]; Case C-209/03 *R. (Bidar) v Ealing London Borough* [2005] Q.B. 812 at [69]–[70].

the first time that the definition of pay in what is now Art.157 TFEU included contracted-out occupational pensions and required the elimination of different pension ages for men and women. Member States and employers and pension funds had reasonably believed that that provision of EU law did not apply to this situation, not least because secondary European legislation (wrongly) expressly authorised the deferment of equal treatment with regard to pension ages in occupational pensions. Further, applying the ruling retrospectively would upset the financial balance of many occupational pension schemes. The ruling would therefore only apply to pensions payable in respect of years of service after the date of the judgment.[35] In another case, the Court of Justice extended the principle of non-discrimination against EU nationals to fees charged for university education. They limited the effect of that judgment by holding that higher fees paid by EU nationals before the date of the judgment were not recoverable. There, the European Commission had written to the Belgian government indicating that the imposition of different university fees for non-nationals did not contravene European law. The Belgian authorities were therefore justified in considering that the relevant Belgian legislation was compatible with European law. Further, the Court of Justice was concerned about the financial effects on universities of allowing retrospective claims.[36] In another case, the Court of Justice limited the principle of equal pay for equal work to claims arising after the judgment because of the potentially devastating effect on employers of allowing retrospective claims.[37]

17–015 The Court of Justice alone can determine that the temporal effect of its judgment is to be limited. National courts cannot limit the effects of a judgment in this way and must regard a judgment as being declaratory and applicable retrospectively to claims arising during the period before the judgment, unless the Court of Justice expressly rules otherwise.[38] Even if a temporal limitation is not imposed, national law will generally have procedural rules prescribing the time limits within which a claim, including a claim for breach of EU law, must be made. National time-limits are compatible with EU law provided that they meet certain conditions.[39] Temporal limitations need to be distinguished from national time limits. A temporal limitation is imposed by the Court of Justice and provides that a right derived from EU law may only be relied upon and, therefore, only creates rights, from the date of the judgment of the Court of Justice. A time-limit in national law applies when a right derived from EU law exists but national law requires that a claim to enforce that right be brought within a prescribed period.[40]

[34] [1991] Q.B. 344.

[35] As clarified in Case C-200/91 *Coloroll Pension Trustees v Russell* [1995] I.C.R. 179; Case C-152/91 *Neath v Hugh Steeper Ltd* [1995] I.C.R. 158; see also Case C-128/93 *Fisscher v Voorhuis Hengelo BV* and Case C-57/93 *Vroege v N.C.I.V. Insituut voor Volkshuivesting B.V.* [1995] I.C.R. 635.

[36] *Blaizot v University of Liège* [1988] E.CR. 379.

[37] *Defrenne v SABENA* [1976] E.C.R. 547

[38] *Barra v Belgian State and The City of Liège* [1988] E.C.R. 355.

[39] See below on need for such rules to comply with the principle of effectiveness and equivalence.

[40] See Case C-231/96 *Edis v Ministero delle Finanze* [1998] E.C.R. I-4951.

Regulations

17–016 Article 288 TFEU provides that the institutions of the European Union may make regulations, issue directives and take decisions. The TFEU itself contains specific provisions authorising the institutions to take legislative or executive action in the various areas of economic activity covered by the TFEU and will usually specify which of the various measures may be used. Article288 TFEU also sets out the legal effect of each measure.

17–017 Article 288 TFEU provides that regulations are binding in their entirety and are directly applicable in all Member States. One of the consequences of direct applicability is generally taken to be that the provisions of regulations enter national law without any need for implementing measures by the Member State. Regulations are capable of being directly effective in the same way as provisions of TFEU, that is, they may confer rights and obligations on individuals which they may enforce in legal proceedings before national courts.[41] The same test for direct effect applies, that is the, provision of the Regulation must be sufficiently precise, clear and unconditional to be capable of judicial enforcement as it stands.[42]

Directives

17–018 Article 288 TFEU provides that a directive "... shall be binding as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form of methods". In other words, directives set out the objectives that are to be achieved, but leave the precise method of implementation to the individual Member States. They constitute a direction to the Member States to bring about the changes in national law or administrative practice necessary to achieve the stated objectives. As such, directives expressly contemplate further implementing measures by national authorities. They invariably set a time-limit within which Member States are to implement the directive. Although directives contemplate further implementing action by a Member State, the Court of Justice has held that the provisions of a directive may have direct effect if they are sufficiently precise and unconditional and the time-limit for implementing the directive has passed.[43] Furthermore, even if the directive has been implemented into national law, the provisions of a directive may still be relied in the national courts if, in fact, the full and effective

[41] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.* [1978] E.C.R. 629 and see, e.g. Case C-253/00 *Munoz y Cia SA v Frumar Ltd* [2003] 3 W.L.R. 58 (provisions of EU Regulation enforceable in civil proceedings in national courts).

[42] See, e.g. in a domestic court, *R. (Jaspers (Treburley) Ltd. v Food Standards Agency* [2013] P.T.S.R. 1271 at [29]–[45] (EU Regulation part of domestic law but did not create an enforceable obligation on individuals to pay charges for meat inspections).

[43] See, e.g. case C-9/81 *Becker v Finanzamt Munster-Innenstadt* [1982] E.C.R. 53 at [25] of the judgment; Case C-62/00 *Marks & Spencer Plc v Customs and Excise Commissioners* [2003] Q.B. 866 at [25] of the judgment.

application of the directive is not ensured by the implementing measures or if the implementing measures are not understood or applied in a way which achieves the results required by the directive.[44]

17–019 The Court of Justice clarified the position in relation to directives in the *Marshall* case.[45] The provisions of a directive may be relied on by an individual in legal proceedings before national courts, but only against the State or an emanation or organ of the State. Directives cannot impose obligations on individuals and, therefore, neither an individual nor the State can rely on the provisions of a directive as against another individual. The fact that enforcing the provisions of a Directive against the organs of the state may have an adverse effect on third parties does not, however, prevent the directive being directly effective and capable of being relied upon in the national courts. Thus, obligations in the planning field, such as the obligation not to grant planning consent without consideration of an environmental impact assessment, are obligations imposed on the organs of the state in respect of the exercise of their planning functions. The obligations are capable of being directly effective and enforced in the national courts notwithstanding the fact that enforcing that obligation against the authorities may have adverse implications for individuals.[46] Directives are therefore regarded as having "vertical" direct effect but not "horizontal" direct effect. The reasoning underlying this limitation is akin to English law notions of equity and estoppel. Directives impose obligations on Member States to achieve certain objectives and grant certain rights to their individual citizens. It would be inequitable for Member States which had failed to take action to confer rights in national law to take advantage of that failure by claiming that no rights in national law existed, and that provisions of directives were not directly effective and could not grant individual rights enforceable in national courts. Member States would be profiting from their own failure to implement the directive in national law.

17–020 The position has been complicated by recent decisions of the Court of Justice. The Court has held that provisions of a Directive may in fact reflect a specific implementation of a general principle of EU law. That general principle may be enforceable in a national court to preclude the application of a national law which contravenes the general principle even in a case involving only individuals and even where the provisions of the Directive itself could not be enforced by one individual against another. Thus, in one case, an individual brought a claim against a private employer contending that, under domestic law, she should have been given a certain number of months' notice of dismissal based on years of service. The national law, however, excluded years of service prior to the age of 25 from the calculation. The individual could not enforce the provisions of the

[44] See Case C-62/00 *Marks & Spencer Plc v Customs and Excise Commissioners* [2003] Q.B. 866 at [27] of the judgment.

[45] Case 152/84 *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] Q.B. 401. The Court of Justice reaffirmed that position in Case C-91/92 *Paola Faccini Dori v Recreb Srl* [1994] E.C.R. I-3325 at 3355–3358, [19]–[30]. National courts are, however, under a duty to interpret national law so far as possible in a way that achieves the result required by a directive: see below at 17-033.

[46] See Case C-201/02 *R. (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] 1 C.M.L.R. 1027 at [54]–[58] and to like effect in the Court of Appeal *R. v Durham CC Ex p. Huddleston* [2000] 1 W.L.R. 1484.

Directive prohibiting discrimination on grounds of age against the employer. She could, however, rely on the general principle of non-discrimination, which was part of the general principles of EU law, to preclude the application of the provision in the national legislation excluding years of service prior to the age of 25 in calculating the amount of notice to which she was entitled.[47]

Definition of emanation of the State

17–021 Directives are only enforceable against organs or emanations of the State or public authorities. The Court of Justice has held that a body is an emanation of the State for these purposes if "...the body was subject to the authority or control of the State or had special powers beyond those which result from the normal rules applicable to relations between individuals".[48] Thus, the Court of Justice has ruled that national tax authorities,[49] local or regional authorities,[50] public authorities providing health services[51] and constitutionally independent authorities responsible for maintaining public order such as the police,[52] are organs of the State. The Court of Justice has referred to a number of factors in reaching these conclusions, including the fact that a body's functions and composition were governed by legislation,[53] its members were appointed by the State[54]; it performed functions not normally performed by ordinary individuals[55] and it was funded by the State.[56]

17–022 In the context of publicly owned corporations, the Court of Justice has ruled that such a body will be an organ of the State if, whatever its legal form, it has been made responsible pursuant to a measure adopted by the State for providing a public service under the control of the State and has special powers over and above those powers enjoyed by ordinary individuals.[57] In applying that ruling, the House of Lords had held that British Gas was an emanation of the State in the period prior to privatisation when it was still a publicly owned corporation.[58] The House attached significance to the fact that it had a statutory duty to provide gas supplies and did so under the control of the State. Its members were appointed by the minister, it was responsible to the minister who could issue directions as to how it performed its functions and could require the payment of surplus revenue to the minister. Statute also provided that no other person could supply gas. British Gas therefore enjoyed powers over and above those enjoyed by ordinary individuals.

17–023 Two questions still remain to be determined. First, are all other publicly owned industries also emanations of the State? The Court of Appeal has held that Rolls

[47] See Case C-557/07 *Kucukdeveci v Swedex GmbH & Co.* [2011] 2 C.M.L.R. 27 at [48]–[56].
[48] Case C-188/89 *Foster v British Gas Corp.* [1991] 2 A.C. 306 at [18] of the judgment.
[49] Case 8/81 *Becker v Finanzamt Munster-Innenstadt* [1982] E.C.R. 53.
[50] Case 103/88 *Fratelli Constanza S.p.A. v Commune di Milano* [1989] E.C.R. 1839.
[51] *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] QB. 401.
[52] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1987] Q.B. 129.
[53] See Case 31/87 *Beentjes BV v Holland* [1988] E.C.R. 4635.
[54] [1988] E.C.R. 4635 and see *Marshall* [1986] QB. 401
[55] *Johnston v Chief Constable of the RUC* [1987] Q.B. 129.
[56] *Beentjes BV v Holland* [1988] E.C.R. 4635.
[57] *Foster v British Gas Corp.* [1991] 2 A.C. 306.
[58] *Foster v British Gas Corp.* [1991] 2 A.C. 306.

Royce prior to privatisation was not an emanation of the State.[59] The ruling is surprising as publicly owned utilities would, in the light of the ruling of the Court of Justice in *Foster*, appear to fall within the definition of organs of the State. Secondly, what is the position of the newly privatised utilities? Many of the features referred to by the House of Lords in *Foster* are absent, such as the power of ministers to give directions, to require payment of surplus and the enjoyment by the company of a statutory monopoly over the provision of services. The public utility companies are still regulated by the State and need to be authorised by the State to provide service. Once licensed, they are subject to certain duties and have certain powers in respect of providing the service. On one occasion,[60] the High Court has held that a newly privatised water company was an emanation of the State, applying the tripartite test set out in *Foster v British Gas*,[61] namely, whether the body has been made responsible for providing a public service, has special powers over and above those enjoyed by an individual and is subject to State control. The first was satisfied as the relevant statute imposed a duty on every water undertaker to develop an efficient system of water supply. The second was met as the privatised company had special powers including powers to enter land and lay pipes. The third was satisfied as the Secretary of State had sufficient control over the company; he appointed them as a water undertaker and could terminate the appointment and he and the regulator had wide regulatory control.

17–024 The Court of Appeal has emphasised that the courts ought not to adopt the rigid, three-fold classification applied in cases involving commercial undertakings to other types of bodies. Rather there are a number of indicia which point to the appropriateness of treating a body as an emanation of the State none of which is conclusive.[62] In that case, the Court of Appeal was dealing with a voluntary-aided school, that is a body which was originally a purely private school established by the church, but which was now "voluntary aided" in that a large amount of its funding was provided by the State and the school had, to a large measure, been integrated into the state education sector. The Court held that the three-fold test applied in cases of commercial undertakings was not appropriate in considering the status of governing bodies of such schools and concluded that the governing body was an emanation of the State.

17–025 Directives may be invoked against a body which is an organ of the State, regardless of the particular capacity in which it is acting in the particular case. It is not necessary for an organ of the State to be acting in a public capacity for a directive to be enforceable against it. Public authorities acting as employer rather than as public bodies have had directives relating to equality in employment matters enforced against them.[63] This raises an anomaly in that employees of public bodies may be entitled to enforce rights derived from EU law but employees of private employers are not so entitled. As the Court of Justice has

[59] *Doughty v Rolls Royce* [1992] I.C.R. 358.
[60] *Griffin v South West Water Services Ltd* [1994] I.R.L.R. 15.
[61] [1991] 2 A.C. 306.
[62] *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] I.C.R. 334.
[63] *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] Q.B. 401; *Johnston v Chief Constable of the Royal Ulster Constabulary* [19897] Q.B. 129.

pointed out,[64] the anomaly can be easily rectified by the Member State implementing the directive in national law as it is required to do.

Test for direct effect

17–026 Directives must also satisfy the same test as Treaty provisions in order to be directly effective. Directives will usually provide a time-limit within which Member States are required to implement the directive. Provisions of a directive will only be directly effective once that time-limit has expired.[65]

Decisions

17–027 Article 288 TFEU provides that decisions are to be binding in their entirety on those to whom they are addressed. Decisions are used for a variety of purposes. They may be addressed to Member States and require the Member State to take action such as abolishing an unlawful state aid, or they may authorise the Member State to take particular action such as imposing import restrictions.

17–028 Decisions addressed to Member States are directly effective providing they are sufficiently clear and precise to enable judicial enforcement.[66] In principle, a decision addressed to an individual would also seem to be directly effective and enforceable against the individual addressee.

Agreements between the EU and non-Member States

17–029 The TFEU expressly provides that the European Union has treaty-making powers in certain fields.[67] More importantly, the Court of Justice has held that where the TFEU confers power on the institutions of the EU to take action within the European Union in a particular area, the institutions have an implied power to conclude international agreements with non-EU countries in respect of such matters.[68] The internal powers or jurisdiction of the EU carry with them implied jurisdiction on the external plane.

17–030 The provisions of agreements with non-Member States can have direct effect.[69] It is irrelevant that the provisions may not be directly effective within the non-Member State. The test for determining whether Treaty provisions and regulations are directly effective applies.[70] The Court of Justice has emphasised that the approach to interpretation of provisions in an agreement with

[64] In *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] Q.B. 401 at 422, [51].
[65] Case 148/78 *Pubblico Ministero v Ratti* [1979] E.C.R. 1629; Case 62/00 *Marks & Spencer Plc v Customs and Excise Commissioners* [2003] Q.B. 866. A Member State must also refrain from taking measures during the period for implementation which would seriously compromise the result intended to be achieved by a directive: see Case C-129/96 *Inter-Environnement Wallonie ASBl* [1997] E.C.R. 7411 and Case C-144/04 *Mangold v Helm* [2005] E.C.R. I-9981.
[66] Case 9/70 *Grad (Franz) v Finanzamt Traunstein* [1970] E.C.R. 825.
[67] See Arts 216 to 218 TFEU.
[68] Opinion 1/76 on the *Laying-up Fund for Inland Waterways* [1977] E.C.R. 741.
[69] *Hauptzollamt Mainz v Kupferberg (CA) & Cie KGaA* Case 104/81 [1982] E.C.R. 3641.
[70] See, e.g. Case C-37/98 *R. v Secretary of State for the Home Department Ex p. Savas* [2000] 1 W.L.R. 1828 at [41]–[44]; Case C-268/99 *Jany v Staatssecretaris van Justitie* [2003] 1 C.M.L.R. 1 at [26]–[28].

non-Member States differs from that used in interpreting the TFEU and even where the same words are used in both they may mean different things.[71] The reason for this is that provisions of the TFEU have to be interpreted against the general objectives set out in the TEU and the TFEU which aim at uniting the different national markets into one common market. Agreements with non-Member States will not necessarily have similar aims and will be interpreted accordingly.

C. SUPREMACY OF EUROPEAN LAW—THE POSITION UNDER EU LAW

17–031 The Court of Justice has consistently and unequivocally held that, as a matter of EU law, directly effective European Union law is supreme and takes precedence over any conflicting provisions of national law. The supremacy of European Union law requires that national courts apply EU law in preference to national law, whether that national law was enacted before or after the relevant provision of EU law.[72] Every national court is required to give immediate precedence to EU law, and may not wait for the inconsistent national law to be repealed,[73] or set aside by a higher court or a constitutional court. The position is conveniently summarised in *Simmenthal*,[74] where the Court of Justice held that the Italian court had to give precedence to European Union law, which prohibited import charges, over subsequent Italian legislation authorising the levying of such charges. The Court said[75]:

> "[E]very national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

17–032 This principle was re-affirmed by the Court of Justice in *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.2)*.[76] In that case, the European Court ruled that the English courts were required to set aside the rules of English law prohibiting the grant of interlocutory injunctions against the Crown and the grant of interim relief which would have the effect of suspending the operation of an Act of Parliament. The Court of Justice held that these rules impaired the full effectiveness of EU law and prevented the protection, albeit on a temporary basis, of rights claimed under EU law. The House of Lords accepted that English Courts must give precedence to EU law, even over Acts of Parliament.[77]

[71] *Polydor and R.S.O. Records Inc. v Harlequin Record Shops and Simons Records* Case 270/80 [1982] E.C.R. 329 at 349–350.
[72] See Joined Cases 10-22/97 *Ministere delle Finanze v In. Co.GE.'90 Srl* [2001] 1 C.M.L.R. 800.
[73] There is, however, also an obligation on Member States to repeal the legislation to avoid confusion: see Case 167/73 *Commission v France* [1974] E.C.R. 359.
[74] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.* [1978] E.C.R. 629.
[75] *Amministrazione delle Finanze dello Stato v Simmenthal S.p.A.* [1978] E.C.R. 629 at 644. See, in the context of the Charter, Case C-617/70 *Aklargen v Fransson* [2013] 2 C.M.L.R. 46 at [45].
[76] Case C-213/89 [1991] 1 A.C. 603.
[77] See below at para.17–045.