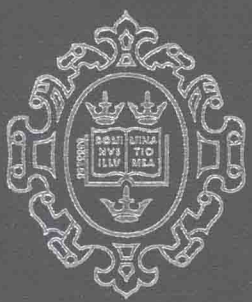
EC LAW IN JUDICIAL REVIEW

RICHARD GORDON QC



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For Jane and Oonagh

FOREWORD

By Sir Konrad Schiemann
Judge of the Court of Justice of the European Communities

This is an outstanding book unlike any other that I have read. I would have welcomed it in earlier incarnations as a practitioner and as a judge in the Administrative Court and the Court of Appeal. I shall certainly have use for it at the ECJ.

The light in which a lawyer views a set of facts and the way he formulates the legal problem is very much conditioned by the legal system which he is applying. In this country the courts are now often in a position where they can apply one or more of four legal systems which are interacting—public international law, the law of the European Union, the law of the European Convention on Human Rights and the common law as modified by Equity and statute.

Problems can appear in different contexts and can often be seen through the spectacles of more than one of those systems. The analytical tools which have been developed by the courts as an aid to their solution have not always been the same. Even when the same word is used in more than one system to describe an analytical tool the meaning of that word can vary depending on context.

A great virtue of this book is that problems confronting society in general and lawyers in particular are analysed from the different perspectives of more than one of these legal systems. This stimulates thought and should in due course result in more principled and more elegant expositions by practitioners and the courts. Since the English rules on standing are so much more generous than those prevailing in the ECJ and in many European countries we are already seeing preliminary references from England in proceedings which might more naturally have been commenced elsewhere. All this and the generally first-class quality of British advocacy provides great opportunities for the legal profession here to suggest elegant structures which the ECJ and indeed our national courts may adopt for their future judgments. This book should be of use to them.

The analysis is detailed and careful. The footnotes and further references show breadth of reading but the author refrains from gratuitous exhibitionism and tendentious didacticism. The intellectual enthusiasm of the academic has been disciplined by the needs of the practitioner.

This is a book having a clear intellectual framework, a book which one can either read with profit from cover to cover or used as a treasure trove in which quickly to access new lines of thought when confronted by seemingly insoluble conundrums. It is to be welcomed.

Konrad Schiemann
Luxembourg
June 2006

PREFACE

There are many works on EC law. My reason for adding to the pile is that EC law is rarely seen for what it is—an increasingly necessary and hugely important part of a public lawyer's armoury.

Those practising in the area of judicial review have had to become aware of the growing deluge of human rights law as a result of the fanfare that accompanied the passing of the Human Rights Act 1998 on 2 October 2000. The Act was delayed because judges and practitioners had to be trained, and the anticipated resource implications of a new system of law had to be carefully thought through.

EC law has had no such sound effects (or training). It came in with barely a whisper more than 30 years ago. But at that stage there was no developed system of public law in this country. It is the growth of judicial review in the mid-1980s, augmented by its junior human rights partner, which should give EC law a new and distinctive voice in the administrative law arena.

Much has been made, for example, of the subtle and nuanced differences between traditional public doctrines ('good old *Wednesbury*') and the more sophisticated notion of proportionality relevant to the infringement of Convention rights. Little, however, has been made of the differences between proportionality under the European Convention on Human Rights and EC proportionality. An EC law-based judicial review challenge may sound similar to other grounds of review but there are significant differences both in terms of the grounds but also in terms of the available remedy. For EC law judicial review cases, at least, we have a truly Constitutional Court in the Administrative Court because, like the US Supreme Court, judges have the power to disapply Acts of Parliament. That is true of no other domestic public law jurisdiction.

The aim, especially in Parts I and II of the book, has been to focus on EC law in judicial review but also to attempt some integration and comparison between our three public law jurisdictions. The relationship between the Luxembourg and Strasbourg Courts and between those courts and the Administrative Court is of fundamental importance to English public law and is stressed in these pages. Of equal significance is the rapid expansion of EC general principles of law. It is through such principles that EC law now recognizes fundamental rights that go beyond those in the European Convention on Human Rights.

But, although the 'big picture' is critical, it is in the practice areas that public lawyers—not versed in EC law—can come unstuck. Part III of this book focuses on key areas that play a large part in judicial review. This has not been an easy task because the law changes at a frantic pace and there have been very recent developments in the EC procurement regime (a raft of new implementing regulations effective in 2006) as well as (see the Citizens' Directive) in the law on free movement. My objective here has been to make those areas

comprehensible in terms of relevant principle and to illustrate the EC principles, where possible, with domestic case analyses. There are practical and important lessons to be learned from the way in which our courts interpret and apply EC law in different contexts and I have tried to draw attention to these where appropriate.

In preparing the manuscript I have a number of debts. I thank Roxanne Selby and Sarah McGrath at OUP who have had the patience of saints and given deferred gratification a new name. A number of fellow members of Brick Court Chambers have assisted with practical answers to queries that have saved me much time. I thank, in particular, Jemima Stratford and Martin Chamberlain who read some of the chapters in transition. Thanks are also due to James Flynn QC and Kelyn Bacon. Colleagues at UCL have also helped and, of those, specific thanks are due to Professor Richard Macrory who alerted me to some important features of EC Environmental Law. Last but not least, I thank my wife Jane and children Edmund and Adam who have given invaluable support.

Needless to say any errors in law or exposition are entirely mine. I have endeavoured to state the law as at 23 June 2006.

Richard Gordon QC
Brick Court Chambers
London
June 2006

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