



世界法学精要

Textbook on Administrative Law (5th edition)

英国行政法教科书

(第五版)

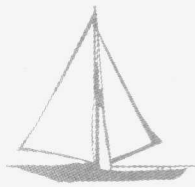


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杨伟东 译



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《英国行政法教科书》第五版于2005年在英国出版。本中译本经牛津大学出版社授权在中国大陆地区出版发行。

中文版序

欢迎中国读者走入英国行政法世界。在此,我们尝试通过简要分析英国行政法的显著特点和重要的发展趋势,为读者理解本书提供一个宏观背景。

(一)

欧陆多数国家的行政法制度是以法国行政法为基础的,这种行政法制度的特点是拥有专门的行政法院体系、专业性的法官、独有的程序和原则。从历史上看,英国行政法与之迥然不同。戴西这位或许是英国最具有影响力的公法理论学家,在1885年首次出版的《宪法研究导论》一书中所阐发的法治理念,强调法律面前人人平等和不得享有专横权力。戴西之所以提出这一法治理念,部分出于面对行政国家权力的不断扩张,需要保护公民个人权利的考虑。在戴西看来,这一理念比法国的行政法制度优越。其结果是,英国行政法的核心内容一直循着戴西的正统理论思路快速发展起来的,只不过这一切都是在没有全面规划背景下进行的。例如,由法官确立的司法审查原则,就是通过普通法以个案为基础逐步呈现出来的,而在今天这些原则已成为控制行政权行使的重要方面。与此同时,行政裁判所和如监察专员等其他法定救济途径的快速扩展,也满足了人们对行政正义的追求。当今,它们已遍及补救金、住房、社会保障、教育、移民等众多领域。本书视各类行政救济途径为完整的救济链条,范围从替代性救济方式、公民宪章、监察专员、裁判所到作为最终手段的司法审查。

(二)

与多数国家不同,英国没有成文宪法,英国的宪政很大程度上是由制定法、普通法、宪法性条约等构成,且相当倚重宪政传统。在此重要意义上,英国宪法与行政法,是不可

分割的统一体。例如,长期以来,议会主权原则被视为英国宪政的基本原则,从理论上看议会有权制定或废除授予国家行政机关权力的任何法律,不受任何限制。虽然到目前为止英国尚未建立可以宣布议会立法无效的宪法法院,但以公认的权力分立原则为基础的法治是与议会主权原则几乎同等重要的原则,为英国宪政的支柱之一,在行政法上法治具体体现为合法性原则。在捍卫法治之时,尽管法官无权推翻议会立法,但却负有保证行政机关合法行使议会授予的权力的职责。同样,法官有权监督特权的合法行使(目前主要由各部大臣行使),且保证行政机关遵循程序公正要求。因此,在一些法官和学者看来,应当从消极意义上对行政法进行狭义的界定,即行政法是有关控制行政权的法律。

然而,近几十年来,英国已超越了狭窄的普通法传统。自20世纪70年代早期英国成为欧洲经济共同体的成员国以来,英国法受到欧洲法的影响越来越大。欧洲法不仅通过欧盟法对英国国内法院产生的约束力限制了议会主权这一核心原则,而且推进了本书所探讨的行政法原则的发展,例如合法预期原则和比例原则相继在英国法上确立。

(三)

1997年以来政府推行的宪政改革,对英国行政法产生了相当重大的影响。于2000年10月全面实施的1998年《人权法》,大体相当于英国国内的人权法案,它把《欧洲人权公约》所确立的权利转化为英国国内法。根据《人权法》的规定,英国公民若认为其受《欧洲人权公约》保护的权利被侵犯,即可直接向英国国内法院寻求救济。虽然《人权法》并未授予英国国内法院宣布基本法律无效的权力,但却要求法官以与《欧洲人权公约》相一致的方式解释基本法律,从而大大提升了法院的地位。事实上,2005年通过的《宪政改革法》,明确规定组建新的最高法院承担上议院的司法职能。可以认为,这一举措连同该法确立的更为独立、更为开放的法官任命制度,是对宪政上更为牢固的权力分立要求的再次肯认。除此之外,还有其他许多改革举措。苏格兰、威尔士和北爱尔兰,各自均获得了相应的下放权力;作为立法机关的上议院的组成,得以调整;2000年出台的《信息公开法》,确立公民享有普遍的知情权,除法定的免于公开的情形外,公共部门的决定应更为透明公开。而就行政司法领域而言,根据Legatt的建议和2007年《裁判所、法院和执行法》(Tribunals, Courts and Enforcement Act)的规定,政府对裁判所进行重组,形成统一的裁判所体系,从而实现裁判所的管理和程序的协调一致。所有这一切,已逐步形成了英国宪政成文化的重要内容。

(四)

自 20 世纪 80 年代中期以来,英国政府开始推行自由市场创新方案,以此提高行政效率。与此相适应,行政国家开始从过去的所谓福利国家(由全民健康服务、补助金、住房、教育等方面组成)转型。在此过程中,新的治理方式——如新公共管理方式、原有企业的私有化及其规制、公众参与、咨询和电子政府——层出不穷。而至关重要的是,很明显,先前由政府直接负责公共服务的提供,而现在在契约国家中,则经常是由私营部门或自主性组织根据合同的约定代表中央或地方政府提供公共服务。在迈向当今通常称之为的治理方向过程中进行的变革所带来的后果之一,是要想明确划分公法与私法之间的界限变得愈来愈困难。

(五)

或许,当前英国行政法面临的重大争议,是有关议会、行政与司法各自的作用问题。一些学者和法官认为,在个人的权利和自由面临威胁时,法院应当运用普通法主张权力推翻立法规定。之所以会形成这一观点的原因主要在于,某一政党一旦在大选中获胜,在英国议会中获得多数席位,并组建政府,便几乎总能使用多数席位实现自己的立法目标(有时被称为“选举独裁”),议会中的立法审查机制可能无力改变政府有失偏颇的立法措施。这一缺陷的存在意味着,法院可以被视为现有唯一的可以纠偏的可行机制。然而,一些赞同 Griffith 教授称之为政治性宪法观点的学者,对由非民选产生的法官经常性介入政治过程的做法的正当性,提出了强烈的质疑,他们把民选政府的权力置于优先地位。

最后,我们对杨伟东教授表示诚挚的谢意,他是位富有才气的学者,由他翻译必使本书增色不少。我们也对北京大学出版社表示感谢,正是她的努力使本书的中文版能够在中国面世。

彼得·莱兰和戈登·安东尼

2007 年 3 月

英文版序

自2002年本书第四版出版发行以来,政府的宪政改革计划又有了重要进展。2000年《信息公开法》全面实施,2005年《宪政改革法》出台。同时,政府对裁判所的运作进行了一系列改革,而2005年《调查法》已获得御准。此外,法院在人权法、司法审查和公共机关侵权责任领域中又作出许多重要判决。

为对上述发展作出阐释,并提高本书的内在逻辑性,本版以前四版的变化为基础,重新安排本书的结构和内容。第一章是对行政法的总体分析,第二章则是对构成行政法基础的关键性理念的阐释。第三、四章勾勒出现代行政国家的结构,并以行政法为视角探讨了欧盟的组织框架和法理基础。尔后,本书延续了前几版的框架模式,以所谓的“救济链条”为线索探讨责任机制这一核心问题。在对议会、各类监察专员、裁判所和调查为公民提供的救济方式逐一进行评价之后,本书将焦点转向详细分析司法审查和法院更为宏观的作用之上。鉴于《欧洲人权公约》和1998年《人权法》显而易见的重要性,本版新增两个独立章节专门分析行政法与人权问题,其中一章放在全面分析司法审查理由之前,而另一章则置其后,其目的在于试图能对这一日益具有扩散性影响的法律领域进行更为全面的整体性探讨和分析。

本书进而详细分析了司法审查的明示和默示限制以及司法审查程序所能提供的救济方式,并探讨了公共机关签订合同问题和公共机关*的侵权责任问题。最后一章以简要评价当前行政法的发展状况作为全书的结语。

* 本书将 public authority 统一译为“公共机关”,不取“公共当局”、“行政机关”。不译为“公共当局”,是因为它无法清楚指明机关或机构的行政性(不过,因“local authority”代表某一地方政府整体,实行议行合一,译为“地方当局”是恰当的);不译为“行政机关”,在于它无法反映英国公共职能的变迁和不能涵盖现代英国承担公共职能主体的范围。目前,英国的公共管理已远超越了行政机关的范围,大量公共职能是由非行政机关承担的。本书中,“公共机关”泛指传统意义上的行政机关和承担公共职能的公、私团体。——译者注

工党在 2005 年大选中再度获胜,而英国行政法的最新发展与之同步。

早在 1992 年, Terry Woods 就与 Peter 一同构思本书简明版的框架结构。但在经历了繁重的研究之后, Terry Woods 最近提出不愿继续从事本书的创作。数年来, Terry 对本书作出了巨大贡献。在此, 我们对他表示特别的感谢, 尤其感谢他以慷慨的方式移交自己的权利。

Haris Kountouros 曾参与本书第四版欧盟法一章的撰写工作, 对此我们表示感谢。本版对欧盟法一章进行了全面修改。

在此我们要对牛津大学出版社的 Kate Whetter, Jasmin Naim, Gabriella La Cava, Gillian Wright 和 Dan Leissner 为本书的出版所付出的辛劳、给予的鼓励、帮助和支持表达深深的谢意。同时, 我们也对供职于高等法院王座庭行政分庭办公室的 David Brupbacher 深表感谢, 是他为本书提供了有关司法审查最新统计资料。

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xii
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本书所涉及的法律截至 2005 年 5 月 10 日。

Peter Leyland 和 Gordon Anthony

判例一览表

- A v B Plc [2002] EWCA Civ 337 ... 228
- A v East Sussex CC [2003] All ER (D) 233 ... 91
- A & Ors v Home Secretary [2004] UKHL 56 ... 3, 20, 223, 317, 365, 367, 405, 406, 412, 522
- A v Secretary of State for the Home Department [2002] Lawtel, 2 August 2002 ... 223
- A's Application for Judicial Review, Re [2001] N.I. 335 ... 405
- Agricultural, Horticultural and Forestry Industry Training Board v Aylesbury Mushrooms [1972] 1 All ER 280 ... 315, 342, 485
- Agricultural, Horticultural and Forestry Industry Training Board v Kent [1970] 1 All ER 304 ... 342, 386
- Air Canada v Secretary of State for Trade (No.2) [1983] 1 All ER 910 ... 450, 458
- Aican v Commission (C69/69) [1970] ECR 221 ... 92
- Aiconbury Developments Ltd v Secretary of State for the Environment, Transport and the Regions [2001] 2 WLR 1389, HL ... 219, 221, 314, 335, 396, 408, 415, 416
- Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No.2) [1974] AC 405 ... 451
- Ali (Mohram) v Tower Hamlets LBC [1993] QB 407 ... 253
- Al-Mehdawi v Secretary of State for the Home Department [1989] 3 All ER 843 ... 373
- Allen v Gulf Oil Refinery Ltd [1981] AC 1001 ... 507
- American Cyanamid Co v Ethicon Ltd [1975] AC 396 ... 482
- Amministrazione delle Finanze dello Stato v Simmenthal SpA (No.2) (106/77) [1978] ECR 629 ... 99
- Anisminic Ltd v Foreign Compensation Commission (No.2) [1969] 2 AC 147 ... 14, 232, 236, 240, 260, 286, 420, 422, 423, 424, 426, 427, 429, 430
- Anns v Merton LBC [1978] AC 728 ... 508
- Anufrijeva v Southwark LBC [2003] EWCA Civ 1406 ... 226
- Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 3 All ER 371 ... 311
- Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 ... 6, 88, 213, 255, 259, 260, 262, 268, 273, 287, 298, 299, 301, 313, 320-336, 403, 408, 409, 414, 416, 505
- Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2001] 3 All ER 393; [2003] UKHL 37; [2003] 3 WLR 283 ... 251, 252
- Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 ... 361
- Attorney General v BBC [1980] 3 All ER 161 ... 184
- Attorney General v Crayford Urban DC [1962] 2 All ER 147 ... 265
- Attorney General v Fulham Corp [1921] 1 Ch 440 ... 262, 263, 265
- Attorney General v Guardian Newspapers Ltd (No.2) [1988] 3 All ER 545 ... 216, 217
- Attorney General v London CC [1907] AC 131 ... 263
- Attorney General v Manchester Corp [1906] 1 Ch 643 ... 483
- Attorney General v Ryan [1980] AC 718 ... 386
- Attorney General v Wilts United Dairies (1921) 37 TLR 884 ... 316
- Attorney General's Reference (No.3 of 1999) [2001] 2 AC 91 ... 347
- Ayr Harbour Trustees v Oswald (1882-83) LR 8 App Cas 623 ... 306
- B v Harrow LBC (No.1) [2000] 1 WLR 223 ... 282
- B v Secretary of State for the Home Department [2000] UKHRR 498 ... 331
- BBC v Johns [1965] Ch 32 ... 436
- B Johnson & Co (Builders) Ltd v Minister of Health [1947] 2 All ER 395 ... 198
- Bagg's Case (1615) 11 Co Rep 93b ... 212, 350
- Barnard v National Dock Labour Board [1953] 1 All ER 1113 ... 308
- Barraclough v Brown [1897] AC 615 ... 486
- Barrett v Enfield LBC [2001] 2 AC 550 ... 505, 509, 512, 516
- Begum (Runa) v Tower Hamlets LBC [2002] 2 All ER 668 ... 397
- Bellinger v Bellinger [2003] 2 AC 467 ... 222
- Berkeley v Secretary of State for the Environment, Transport and the Regions (No.1) [2000] 3 WLR 420, HL ... 340
- Bickel and Franz (C274/96) [1998] ECR I-7637 ... 106
- Birkdale District Electric Supply Co Ltd v Southport Corp [1926] AC 35 ... 306, 496
- Blackburn v Attorney General [1971] 2 All ER 1380 ... 436
- Board of Education v Rice [1911] AC 179 ... 351
- Boddington v British Transport Police [1998] 2 WLR 639, HL ... 37, 256

- Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582 ... 505
- Bolitho v Hackney Health Authority** [1997] 3 WLR 1151 ... 505
- Bradbury v Enfield LBC** [1967] 1 WLR 1311 ... 340, 341, 481
- Brasserie du Pêcheur SA v Germany (C46/93) joined cases R v Secretary of State for Transport, ex p Factortame Ltd (No.4) (C48/93)** [1996] ECR I-1029 ... 102, 103
- British Airways Board v Laker Airways Ltd** [1984] 3 All ER 39 ... 325
- British Oxygen Co Ltd v Minister of Technology** [1971] AC 610 ... 289
- British Steel Plc v Customs and Excise Commissioners (No.1)** [1997] 2 All ER 366, CCA ... 255
- British Transport Commission v Westmorland CC** [1957] 2 All ER 353 ... 306
- Brooks v Commissioner of the Police for the Metropolis** [2005] UKHL 24 ... 510, 514
- Bromley LBC v Greater London Council** [1983] 1 AC 768 ... 3, 271, 273, 286, 287
- Brown v Board of Education (1954)** 347 US 483 ... 24
- Browne v The Queen (1999)** The Times, 11 May (PC) ... 22
- Brunner v European Union Treaty** [1994] 1 CMLR 57 ... 100
- Bryan v UK (1996)** 21 EHRR 342 ... 396
- Buckinghamshire CC v Secretary of State for the Environment, Transport and the Regions** [2001] 1 PLR 38 ... 302
- Bugdaycay v Secretary of State for the Home Department** [1987] AC 514 ... 214, 328, 406
- Bugg v DPP** [1993] QB 473 ... 255, 256
- Burmah Oil v Bank of England** [1980] AC 1090 ... 449
- Burmah Oil Co (Burma Trading) Ltd v Lord Advocate** [1964] 2 All ER 348 ... 437
- Burn v National Amalgamated Labourers Union of Great Britain and Ireland** [1920] 2 Ch 364 ... 349
- Button v Jenkins** [1975] 3 All ER 585 ... 342
- Calvin v Carr** [1979] 2 All ER 440 ... 386
- Campbell v Mirror Group Newspapers Ltd** [2002] EWHC 499; [2004] 2 All ER 995 ... 227, 228
- Caparo Industries Plc v Dickman** [1990] 2 AC 605 ... 504
- Carltona Ltd v Commissioners of Works** [1943] 2 All ER 560 ... 41, 110, 115, 309
- Carty v London Borough of Croydon** [2005] EWCA Civ 19 ... 515
- Carvel v Council of the European Union (T194/94)** [1995] ECR II-2765 ... 135
- Case of Proclamations (1611)** 12 Co Rep 74 ... 11, 433
- Cassidy v Minister of Health** [1951] 2 KB 343 ... 504
- Chandler (Terence Norman) v DPP** [1964] AC 763 ... 30, 31, 437, 439
- Chester v Bateson** [1920] 1 KB 829 ... 266
- Chief Adjudication Officer v Foster** [1993] AC 754; [1993] 1 All ER 705 ... 184, 342
- Churchward v R (1865-66)** L.R. 1 QB 173 ... 495
- Cinnamond v British Airports Authority** [1980] 1 WLR 582 ... 3, 360, 365, 372
- City of London v Wood (1701)** 12 Mod 669 ... 212, 350
- Clark v University of Lincolnshire and Humberside** [2000] 1 WLR 1988, CA ... 257, 258, 464
- Clarke v Secretary of State for the Environment, Transport and the Regions** [2002] EWCA Civ 819; Lawtel, 20 May 2002 ... 414
- CNTA SA v Commission (Case 74/74)** [1975] ECR 533 ... 90
- Cocks v Thanet DC** [1983] 2 AC 286 ... 253
- Coco v AN Clark (Engineers) Ltd** [1969] RPC 41 ... 227
- Coleen Properties v Minister of Housing and Local Government** [1971] 1 WLR 433 ... 311, 312
- Commission v Council of Ministers of the European Communities (C300/89)** [1991] ECR I-2867 ... 80
- Commission v Ireland (C45/87)** [1988] ECR 4929 ... 45
- Commission v Italy (C39/72)** [1973] ECR 101 ... 97-98
- Coney v Choyce** [1975] 1 All ER 979 ... 340, 341
- Congreve v Home Office** [1976] 1 All ER 697 ... 266, 269
- Conway v Rimmer** [1968] AC 910 ... 26, 240, 448, 449, 456, 459
- Cooper v Wandsworth Board of Works (1863)** 14 CB NS 180 ... 213, 349, 350, 487
- Cooper v Wilson** [1937] 2 KB 309 ... 399
- Costa v Ente Nazionale per l'Energia Elettrica (ENEL)** [1964] ECR 585 ... 99
- Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374 ... 36, 233, 260, 295, 297, 320, 331, 358, 404, 432, 438
- Covent Garden Community Association v Greater London Council** [1981] JPL 183 ... 468
- Crédit Suisse v Allerdale BC** [1997] QB 306 ... 55, 234, 307, 498, 499
- Cullen v Chief Constable of the Royal Ulster Constabulary** [2003] 1 WLR 1763 ... 506
- Customs and Excise Commissioners v Cure & Deeley** [1962] 1 QB 340 ... 316
- D (Minors) (Adoption Reports: Confidentiality), Re** [1996] AC 593 ... 377

- D v East Berkshire Community Health Trust [2004] 2 WLR 58 ... 511, 514, 516
- D v National Society for the Prevention of Cruelty to Children (NSPCC) [1978] AC 171 ... 449
- Darker v Chief Constable of the West Midlands [2001] 1 AC 435; [2000] 3 WLR 747 ... 514
- Davidson v Scottish Ministers [2004] HRLR 34 ... 23, 395, 398
- Davy v Spelthorne BC [1984] AC 262 ... 253
- Daymond v South West Water Authority [1976] AC 609 ... 316
- de Freitas v Benny [1976] AC 239 ... 441
- De Keyser's Royal Hotel Ltd, Re [1920] AC 508 ... 432, 434, 440, 443
- Defrenne v SABENA (C43/75) [1976] ECR 455 ... 89
- Dennis Rye Pension Fund v Sheffield City Council [1998] 1 WLR 840 ... 256
- Dillenkofer v Germany (C178/94) [1996] ECR I-4845 ... 102
- Dimes v Grand Junction Canal Proprietors (1852) 3 HL Cas 759 ... 389, 393
- Dormer v Newcastle upon Tyne Corporation [1940] 2 KB 204 ... 507
- Dorset Yacht Co Ltd v Home Office [1970] AC 1004 ... 510
- Douglas v Hello! Ltd [2001] 2 WLR 992 ... 227
- Dowty Boulton Paul Ltd v Wolverhampton Corp (No.1) [1971] 2 All ER 277 ... 306
- DPP v Hutchinson [1990] 2 AC 783 ... 318
- DPP v Jones (Margaret) [1999] 2 WLR 625 ... 23, 318
- DPP v Jones [2002] EWHC 110; (2002) Lawtel, 22 January 2002 ... 319
- Dr Bonham's Case (1610) 8 Co Rep 113a ... 212, 350, 388
- Duke v GEC Reliance Ltd [1988] 2 WLR 359, HL ... 105
- Duncan v Cammell Laird & Co Ltd [1942] AC 624 ... 446, 447, 448, 454
- Dunkley v Evans [1981] 3 All ER 285 ... 317
- Dunlop v Woollahra Municipal Council [1982] AC 158 ... 489
- Duport Steels v Sirs [1980] 1 All ER 529 ... 22
- Dyson v Attorney General (No.1) [1911] 1 KB 410 ... 115, 244
- E v Secretary of State for the Home Department [2004] 2 WLR 1351 ... 237, 314
- Edge v Pensions Ombudsman [1999] 4 All ER 546 ... 165
- Edwards (Inspector of Taxes) v Bairstow [1956] AC 14 ... 188
- Ellen Street Estates v Minister of Health [1934] 1 KB 590 ... 18
- Ellis v Home Office [1953] 2 QB 135 ... 447
- Enderby Town Football Club v Football Association [1971] 1 All ER 215 ... 378
- Entick v Carrington (1765) 19 St Tr 1030 ... 26, 27, 266
- Errington v Minister of Health [1935] 1 KB 249 ... 352, 375
- Errington v Wilson 1995 SLT 1193 ... 379
- European Parliament v Commission (C156/93) [1995] ECR I-2019 ... 94
- European Parliament v Council of Ministers of the European Communities (13/83) [1987] ECR 1513 ... 81
- European Parliament v Council of the European Union (C21/94) Road Taxes, Re [1995] ECR I-1827 ... 93
- Faccini Dori v Recreb Srl (C91/92) [1994] ECR I-3325 ... 98
- Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865 ... 376
- Findlay, Re [1984] 3 All ER 801 ... 290, 330
- Findlay v Secretary of State for the Home Department [1985] AC 318 ... 297
- Fleet Street Casuals Case *see* Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd
- Fletcher's Application, Re [1970] 2 All ER 527 ... 150
- Foster v British Gas Plc (C188/89) [1990] ECR I-3313 ... 98, 497
- Francovich v Italy (C6/90) Joined Cases: Bonifatti v Italy (C9/90) [1991] ECR I-5357 ... 101, 103, 488
- Franklin v Minister of Town and Country Planning [1948] AC 87 ... 395
- Fraser v Mudge [1975] 3 All ER 78 ... 378
- Friends Provident Life & Pensions Ltd v Secretary of State for Transport, Local Government and Regions [2002] 1 WLR 1450 ... 397
- Furnell v Whangarei High Schools Board [1973] AC 660 ... 349
- GCHQ *see* Council of Civil Service Unions v Minister for the Civil Service
- Ghaidan v Godin-Mendoza [2004] UKHL 30; [2004] 3 All ER 411 ... 220
- Garland v British Rail Engineering Ltd [1983] 2 AC 751 ... 216
- General Medical Council v Spackman [1943] AC 627 ... 371
- Germany v European Parliament and Council (Tobacco Advertising Directive) (C376/98) [2000] ECR I-8419 ... 89, 93
- Gill and Goodwin v Chief Constable of Lancashire (1992) The Times, 3 November ... 452
- Gillick v West Norfolk and Wisbech AHA [1986] AC 112; [1985] 3 All ER 402 ... 35, 294, 467, 485

- Glasgow Corp v Central Land Board 1956 SC (HL) 1 ... 447
- Glossop v Copnall Lawtel 5 July 2001 ... 165
- Glynn v Keele University [1971] 1 WLR 487 ... 377
- Gomez CAA Lyons, 21 December 1990 ... 489
- Goodwin v UK (2002) The Times, 12 July ... 91, 222
- Gorringe v Calderdale MBC [2004] 1 WLR 1057, HL ... 515, 517
- Gouriet v Union of Post Office Workers [1977] QB 729, CA; [1978] AC 435, HL ... 437, 483
- Grad (Franz) v Finanzamt Traunstein (C9/70) [1970] ECR 825 ... 98
- Griffin v South West Water Services Ltd [1995] IRLR 15 ... 98
- Grosvenor Hotel, London (No.2), Re [1965] Ch 1210
- Grunwick Processing Laboratories Ltd v Advisory, Conciliation and Arbitration Service (ACAS) [1978] AC 655 ... 342
- Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve (C184/99) [2001] ECR I-6193 ... 106
- HK (An Infant), Re [1967] 1 All ER 226 ... 356, 371, 374
- Halford v Sharples [1992] 1 WLR 736 ... 453
- Hall & Co Ltd v Shoreham by Sea Urban DC [1964] 1 All ER 1 ... 235, 275
- Hamar v Pensions Ombudsman (1997) The Times, 24 March ... 165
- Handyside v United Kingdom (A/24) (1979-80) 1 EHRR 737 ... 333
- Hanks v Ministry of Housing and Local Government [1963] 1 QB 999 ... 272, 274, 276
- Hannam v Bradford City Council [1970] 2 All ER 690 ... 391
- Hanratty v Lord Butler of Saffron Walden (1971) 115 SJ 386 ... 436
- Haringey LBC v Awaritefe (1999) The Times, 3 June ... 340
- Hauer v Land Rheinland-Pfalz (44/79) [1979] ECR 3727 ... 88
- Hazell v Hammersmith and Fulham LBC [1992] 2 AC 1; [1991] 1 All ER 545 ... 55, 58, 236, 499
- Healey v Minister of Health [1955] 1 QB 221 ... 485
- Hill v Chief Constable of West Yorkshire [1989] AC 53 ... 509
- Hoefner v Macrotron GmbH (C41/90); Elser v Macrotron GmbH [1991] ECR I-1979 ... 106
- Hoekstra v HM Advocate (No.5) [2001] 1 AC 216 ... 397
- Howard v Bodington (1876-77) LR 2 PD 203 ... 338, 345
- Howard v Secretary of State for the Environment [1974] 1 All ER 644 ... 339
- Howell v Falmouth Boat Construction Co Ltd [1951] AC 837 ... 303
- Hughes v Lord Advocate [1963] AC 837 ... 504
- International Fruit Co NV v Commission (Cases 41-44/70) [1971] ECR 411 ... 92
- Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle fur Getreide und Futtermittel (11/70) [1970] ECR 1125 ... 100
- Islam v Secretary of State for the Home Department; R v Immigration Appeal Tribunal, ex p Shah (Consolidated Appeals) [1999] 2 WLR 1015, HL ... 267-268
- JD v East Berkshire Health NHS Trust [2005] UKHL 23 ... 511, 515
- Jasper v United Kingdom; Fitt v United Kingdom [2000] Crim LR 586 ... 457, 459
- Jefferies v New Zealand Dairy Production and Marketing Board [1967] 1 AC 551 ... 308
- Jégo-Quéré & Cie SA v Commission (T177/01) [2002] 2 CMLR 44 ... 92
- Job Centre Coop arl, Re (C55/96) [1997] ECR I-7119 ... 106
- John v Rees [1970] Ch 345; [1969] 2 WLR 1294 ... 355
- Jordan v UK (2003) 37 EHRR 2 ... 381
- Kaye v Robertson [1991] FSR 62 ... 227
- Kent v Griffiths [2001] QB 36 ... 504
- Kinsella v Chief Constable of Nottinghamshire (1999) The Times, 24 August ... 514
- Kleinwort Benson Ltd v Lincoln City Council [1998] 3 WLR 1095, HL ... 236, 500
- Kruse v Johnson [1898] 2 QB 91 ... 324
- Kuddus v Chief Constable of Leicestershire Constabulary [2001] 3 All ER 193 ... 507
- L (A Child) v Reading BC [2001] EWCA Civ 346; [2001] 1 WLR 1575 ... 514
- Laboratoires Pharmaceutiques Bergaderm SA v Commission (C352/98) [2000] ECR I-5291 ... 102
- Laker Airways v Department of Trade [1977] QB 643 ... 286, 293, 436, 438, 444
- Law v National Greyhound Racing Club [1983] 3 All ER 300 ... 291, 477
- Lawal v Northern Spirits Ltd [2003] UKHL 35; [2004] 1 All ER 187 ... 395, 398
- Lawrence v Texas 123 S Ct 2472 (2003) ... 24
- Leary v National Union of Vehicle Builders [1970] 2 All ER 713 ... 386
- Lee v Showmen's Guild of Great Britain [1952] 2 QB 329 ... 250
- Leech v Deputy Governor of Parkhurst Prison [1988] 1 All ER 485 ... 370
- Lever (Finance) Ltd v Westminster Corp [1971] 1 QB 222 ... 304, 305

- Lewis v Attorney General of Jamaica [2001] 2 AC 50 ... 441
- Liversidge v Anderson [1942] AC 206 ... 238, 310, 325, 366, 367, 412
- Lloyd v McMahon [1987] AC 625 ... 358, 359, 361, 371
- Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, CA ... 393, 394, 397
- London and Clydeside Estates Ltd v Aberdeen DC [1980] 1 WLR 182 ... 339, 342, 346
- Lonrho Plc v Tebbit [1992] 4 All ER 280 ... 509
- Lord Advocate v Dumbarton DC [1990] 1 All ER 1 ... 440
- Luby v Newcastle under Lyme Corp [1964] 2 QB 64 ... 325
- Lustig-Prean v United Kingdom (No.1) (2000) 29 EHRR 548 ... 443
- M v Home Office [1992] QB 270; 1 AC 377 ... 3, 22, 31, 482, 484
- Maaouia v France (2001) 33 EHRR 42 ... 387
- Macarthy's Ltd v Smith [1979] 3 All ER 325 ... 220
- Madan v General Medical Council [2002] ACD 3 ... 387
- Madzimbamuto v Lardner-Burke [1969] 1 AC 645 ... 18
- Maizena GmbH v Council of Ministers of the European Communities (C139/79) [1980] ECR 3393 ... 81
- Makanjuola v Commissioner of Police of the Metropolis [1992] 3 All ER 617 ... 452, 453
- Malloch v Aberdeen Corp (No.1) [1971] 1 WLR 1578 ... 355, 372
- Malone v United Kingdom (A/82) (1985) 7 EHRR 14 ... 217
- Manchester Corp v Farnworth [1930] AC 17 ... 507
- Marcic v Thames Water Utilities Ltd [2004] 1 All ER 135 ... 507, 516
- Maritime Electric Co Ltd v General Dairies Ltd [1937] 1 All ER 248 ... 302
- Marleasing SA v La Comercial Internacional de Alimentacion SA (C106/89) [1990] ECR I-4135 ... 99
- Marshall v Southampton and South West Hampshire AHA (No.1) (C152/84) [1986] ECR 723 ... 98
- Marshall v Southampton and South West Hampshire AHA (No.2) (C271/91) [1994] QB 126 ... 187
- Martinez Sala [1998] ECR I-2691 ... 106
- Matthews v Ministry of Defence [2002] EWCA Civ 773; [2003] AC 1163 ... 516
- McCarthy & Stone (Developments) Ltd v Richmond upon Thames LBC [1991] 4 All ER 897 ... 58
- McEldowney (AP) v Forde [1971] AC 632, HL ... 316
- McInnes v Onslow Fane [1978] 3 All ER 211 ... 213, 250, 357, 360, 361, 385, 440
- McKerr Re, [2004] 1 WLR 807 ... 224, 225, 229
- McNab v United States 318 US 332 (1943) ... 348
- Meade v Haringey LBC [1979] 2 All ER 1016 ... 3, 272, 273
- Medicaments and Related Classes of Goods (No.2), Re [2001] 1 WLR 700 ... 394, 395
- Medicaments and Related Classes of Goods (No.4), Re [2001] EWCA Civ 1217; [2002] 1 WLR 269 ... 224
- Mennitto v Italy (2002) 34 EHRR 48 ... 387
- Meravale Builders v Secretary of State for the Environment 77 LGR 365 ... 274
- Merchandise Transport Ltd v British Transport Commission (No.1) [1961] 3 All ER 495 ... 190
- Mercury Communications Ltd v Director General of Telecommunications [1996] 1 WLR 48 ... 254, 257, 463
- Meroni and Co. Industrie Metalurgiche SpA v ECSC (9/56) [1957-8] ECR133 ... 93
- Metropolitan Properties Ltd v Lannon [1968] 3 All ER 304 ... 391, 392
- Miret v Fondo de Garantia Salarial (C334/92) [1993] ECR I-6911 ... 99
- Mountview Court Properties Ltd v Devlin (1970) 21 P & CR 689 ... 344
- Mulder v Council [2000] ECR I-203 ... 103
- Mulder v Minister van Landbouw en Visserij (C120/86) [1988] ECR 2321 ... 90, 296
- Murphy v Brentwood DC [1991] 1 AC 398 ... 509
- Murray v United Kingdom (1996) 22 EHRR 29 ... 379
- Nakkuda Ali v MF de S Jayaratne [1951] AC 66 ... 14, 353, 355, 375
- Neilson v Laugharne [1981] QB 736 ... 452, 453
- New South Wales v Bardolph (1934) 52 CLR 455 ... 495
- Newbold v Leicester City Council [1999] ICR 1182 ... 307
- Nicolo, Re [1990] 1 CMLR 173 ... 100
- Nixon v United States 418 US ... 459
- Nold (J) v Commission (C4/73) [1974] ECR 491 ... 94
- Noordwijks Cement Accoord (Nos. 8-11/66), Re [1967] ECR 75 ... 91
- Norwest Holst Ltd v Secretary of State for Trade [1978] Ch 201 ... 374
- Nwabueze v General Medical Council [2000] 1 WLR 1760 ... 394
- O'Reilly v Mackman [1983] 2 AC 237 ... 14, 91, 240, 245, 246, 247, 253-258, 463, 472, 498, 524
- O'Rourke v Camden LBC [1998] AC 188 ... 253, 256, 506

- Osman v United Kingdom [1999] 1 FLR 193; (2000) 29 EHRR 245 ... 509, 510, 512, 513, 516
- Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 ... 240, 269, 270, 324, 329, 379, 428, 429, 480
- Parochial Church Council of Aston Cantlow v Wallbank [2003] UKHL 37 ... 224
- Partie Ecologiste Les Verts v European Parliament (C294/83) [1986] ECR 1339 ... 81
- Peach (Janet Getrude) v Commissioner of Police of the Metropolis [1986] QB 1064 ... 452
- Pearlberg v Varty (Inspector of Taxes) [1972] 2 All ER 6 ... 374
- Pearlman v Keepers and Governors of Harrow School [1979] QB 56 ... 419, 420, 422, 423, 430
- Pergamon Press, Re [1971] Ch 388; [1970] 3 All ER 535 ... 356, 374
- Pett v Greyhound Racing Association (No.1) [1969] 1 QB 125; [1968] 2 WLR 1471; [1968] 2 All ER 545 ... 377
- Phelps v Hillingdon LBC [2001] 2 AC 619; [2000] 3 WLR 776 ... 511, 513, 515
- Phonographic Performance Ltd v Department of Trade and Industry [2004] 1 WLR 2893 ... 103
- Pickering v Liverpool Daily Post and Echo [1990] 1 All ER 335 ... 184
- Pickin v British Railways Board [1974] AC 765 ... 33
- Pickwell v Camden LBC [1983] 1 All ER 602 ... 285
- Plaumann v Commission (C25/62) [1963] ECR 95 ... 92
- Poplar Housing & Regeneration Community Association Ltd v Donoghue [2001] EWCA Civ 595; [2002] QB 48 ... 224, 251, 257, 405
- Porter v Magill [2001] UKHL 67; [2002] 1 All ER 467, HL ... 58, 269, 276, 394, 395, 398, 417
- Powell v Chief Constable of North Wales (2000) The Times, 11 February ... 454
- Prescott v Birmingham Corp [1955] Ch 210 ... 466
- Prohibitions del Roy (1607) 12 Co Rep 63 ... 11, 433
- Provident Mutual Life Assurance Association v Derby City Council [1981] 1 WLR 173; 79 LGR 297 ... 310
- Pubblico Ministero v Tullio Ratti (148/78) [1979] ECR 1629 ... 98
- Public Service Board of New South Wales v Osmond [1986] ALR 559 ... 380
- Punton v Ministry of Pensions and National Insurance (No 2) [1964] 1 WLR 226; [1964] 1 All ER 448 ... 486
- Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260 ... 486
- R (on the application of A) v Lord Saville of Newdigate (Bloody Sunday Inquiry) (2001) The Times, 21 December ... 203
- R (on the application of A) v Partnerships in Care Ltd [2002] 1 WLR 2610 ... 252
- R (on the application of Agnello and others) v Hounslow LBC [2003] EWHC 3112 ... 250, 398
- R (on the application of Aggregate Industries UK Ltd) v English Nature [2002] ACD 67 ... 396
- R (on the application of Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 ... 217, 292, 382
- R (on the application of Anufrijeva) v Secretary of State for the Home Department [2004] 1 AC 604 ... 235, 516
- R (on the application of Association of British Civilian Internees (Far East Region)) v Secretary of State for Defence [2003] QB 1397 ... 335, 416
- R (on the application of Bancoult) v Secretary of State for the Foreign and Commonwealth Office [2001] QB 1067; [2001] 2 WLR 1219 ... 264, 437
- R (on the application of Beer t/a Hammer Trout Farm) v Hampshire Farmers Markets Ltd [2003] EWCA 1056 ... 250, 252
- R (on the application of Bennion) v Chief Constable of Merseyside [2001] EWCA Civ 638 ... 399
- R (on the application of Bibi) v Newham LBC [2002] 1 WLR 237 ... 299, 302, 364
- R (on the application of Bono) v Harlow DC [2002] 1 WLR 2471 ... 404
- R (on the application of Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (C173/99) [2001] 1 WLR 2313 ... 90
- R (on the application of Bulger) v Secretary of State for the Home Department [2001] EWHC Admin 119 ... 468
- R (on the application of Cappenhurst) v Leicester City Council [2004] EWHC 2124 ... 343
- R (on the application of Clays Lane Housing Cooperative Ltd) v Housing Corp [2004] EWCA Civ 1658 ... 415
- R (on the application of Cowl) v Plymouth City Council [2001] EWCA Civ 1935; [2002] 1 WLR 803, CA ... 258
- R (on the application of Daly) v Secretary of State for the Home Department [2001] 2 WLR 1622; [2001] UKHL 26; [2001] 3 All ER 433 ... 3, 214, 293, 332, 335, 405, 406, 407, 408
- R (on the application of Dawkins) v Standards Committee of the District Council of Bolsover Lawtel 10 December 2004 ... 345
- R (on the application of Edwards) v Environment Agency [2004] 3 All ER 21 ... 469

- R (on the application of Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606 ... 413, 414
- R (on the application of Friends of the Earth Ltd) v The Environment Agency [2004] Env LR 31 ... 285
- R (on the application of Gillan) v Commissioner of Police of the Metropolis [2003] EWHC Admin 2545 ... 521
- R (on the application of H) v Mental Health Review Tribunal for North and East London Region [2001] 3 WLR 512 ... 222
- R (on the application of Heather) v Leonard Cheshire Foundation [2002] 2 All ER 936 ... 251, 252, 258
- R (on the application of Holub) v Secretary of State for the Home Department [2001] 1 WLR 1359 ... 470
- R (on the application of Hoverspeed Ltd) v Customs and Excise Commissioners; R (on the application of Andrews) v Customs and Excise Commissioners [2002] EWHC 1630 ... 88
- R (on the application of Howson-Ball) v Canterbury Crown Court [2001] Env. L.R. 639 ... 383
- R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department [2002] EWCA Civ 158; [2002] 1 CMLR 52; [2003] QB 728 ... 3, 317, 409, 412, 416
- R (on the application of Isiko) v Secretary of State for the Home Department [2001] 1 FLR 930 ... 407
- R (on the application of Lees-Sandey) v Chichester Crown Court [2004] All ER (D) 151 ... 279
- R (on the application of Limbuela) v Home Secretary [2004] 3 WLR 561 ... 267
- R (on the application of J) v Newham LBC [2001] EWHC Admin 992 ... 481
- R (on the application of Jackson) v Attorney-General [2005] EWCA Civ 126; [2005] All ER (D) 233 ... 20
- R (on the application of Javed) v Secretary of State for the Home Department [2001] EWCA Civ 789; [2001] 3 WLR 323, CA ... 316
- R (on the application of Kathro) v Rhondda Cynon Taff CBC [2002] Env LR 15 ... 396
- R (on the application of McNally) v Secretary of State for Education and Employment [2001] EWCA Civ 332 ... 399
- R (on the application of Mahmood (Amjad)) v Secretary of State for the Home Department [2001] 1 WLR 840 ... 407
- R (on the application of Mahmood) v Royal Pharmaceutical Society of Great Britain [2001] EWCA Civ 1245; [2002] 1 WLR 879 ... 37
- R (on the application of Marchiori) v Environment Agency (2001) The Times 29 March ... 437
- R (on the application of Nash) v Chelsea College of Art and Design [2001] EWHC Admin 538 ... 383
- R (on the application of Oxford Study Centre Ltd) v British Council [2001] EWHC Admin 207; [2001] ELR 803 ... 247
- R (on the application of P) v Secretary of State for the Home Department; R v Secretary of State for the Home Department, ex p Q [2001] EWCA Civ 1151 ... 292
- R (on the application of Pretty) v DPP [2001] UKHL 61; [2002] 1 AC 800; [2001] 3 WLR 1598; [2002] 1 All ER 1 ... 411
- R (on the application of Pro-life Alliance) v BBC [2002] 2 All ER 756; [2003] UKHL 23; [2003] 2 WLR 1403; [2004] 1 AC 185 ... 283, 410, 413, 414
- R (on the application of Purja) v Ministry of Defence [2004] 1 WLR 289 ... 406
- R (on the application of Q and others) v Home Secretary [2003] 3 WLR 365 ... 267, 406
- R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs (No.2) [2003] EWHC 1743 ... 502
- R (on the application of Quintavalle) v Secretary of State for Health [2002] EWCA Civ 29; [2002] 2 WLR 550, CA ... 34
- R (on the application of RBNB) v Warrington Crown Court [2002] UKHL 24 ... 279
- R (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC [2002] UKHL 8, HL ... 305
- R (on the application of Rusbridger) v Attorney General [2004] 1 AC 357 ... 224
- R (on the application of Stennett) v Manchester City Council [2002] UKHL 34 ... 282
- R (on the application of Structadene Ltd) v Hackney LBC [2001] 2 All ER 225 ... 287
- R (on the application of Sivakumar) v Home Secretary [2003] 2 All ER 1097 ... 268
- R (on the application of Vary and Ors) v Home Secretary [2004] EWHC 2251 ... 300
- R (on the application of Tucker) v Director General of the National Crime Squad [2002] EWHC 832 ... 381
- R (on the application of Wagstaff) v Secretary of State for Health [2001] 1 WLR 292 ... 379
- R (on the application of Wainwright) v Richmond upon Thames LBC [2001] EWCA Civ 2062 ... 343
- R (on the application of West) v Lloyd's of London [2004] EWCA Civ 506; [2004] 3 All ER 251 ... 247, 252
- R (on the application of Wooder) v Feggetter and Another [2002] 3 WLR 591 ... 384

- R (on the application of Zeqiri) v Secretary of State for the Home Department [2002] UKHL 3; [2002] Imm AR 296, HL ... 363
- R v A [2001] 2 WLR 1546 ... 219, 222
- R v Admiralty Board of the Defence Council, ex p Coupland [1996] COD 147 ... 309, 332
- R v Amber Valley DC, ex p Jackson [1984] 3 All ER 501 ... 395
- R v Army Board of Defence Council, ex p Anderson [1991] 3 All ER 375; [1992] QB 169 ... 358, 372, 478
- R v Aston University Senate, ex p Roffey [1969] 2 All ER 964 ... 250, 365
- R v Attorney General, ex p Imperial Chemical Industries plc [1987] 1 CLMR 72, CA ... 466
- R v BBC, ex p Lavelle [1983] 1 All ER 241 ... 477
- R v Barnet LBC, ex p Shah (Nilish) [1983] 2 AC 309 ... 478
- R v Barnsley MBC, ex p Hook [1976] 3 All ER 452 ... 332, 398, 488
- R v Bentley (Derek William) (Deceased) [1999] Crim LR 330 ... 441
- R v Bexley LBC [1995] ELR 42 ... 291
- R v Birmingham City Council, ex p Mohammed [1999] 1 WLR 33 ... 281
- R v Board of Education [1910] 2 KB 165 ... 277
- R v Board of Visitors of Frankland Prison, ex p Lewis [1986] 1 All ER 272 ... 292, 399
- R v Board of Visitors of Hull Prison, ex p St Germain (No.2) [1979] 1 WLR 1401; [1979] 3 All ER 545 ... 370, 378, 478
- R v Board of Visitors of the Maze Prison, ex p Hone [1988] AC 379 ... 378
- R v Boundary Commission for England, ex p Foot [1983] 1 All ER 1099 ... 279
- R v Bournemouth Community and Mental Health NHS Trust, ex p L [1998] 3 WLR 107 ... 334
- R v Bow Street Metropolitan Stipendiary Magistrate, ex p DPP [1992] COD 267 ... 329
- R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.2) [2000] 1 AC 119 ... 393, 397, 523
- R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No.3) [1999] 2 WLR 827 ... 3
- R v Brent LBC, ex p Gunning 84 LGR 168 ... 343
- R v Brent LBC, ex p Miyanger (1997) 29 HLR 628 ... 481
- R v Bristol City Council, ex p Penfold (1997-98) 1 CCL Rep 315 ... 282
- R v Broadcasting Complaints Commission, ex p Owen [1985] 2 All ER 522 ... 278
- R v Cambridge DHA, ex p B (No.1) [1995] 1 WLR 898; [1995] 25 BMLR 5; [1995] 1 All ER 129 ... 212, 214, 282, 328
- R v Cambridgeshire Health Authority, ex p B [1995] 1 FLR 1055 ... 334
- R v Camden LBC, ex p Gillan (1989) 21 HLR 114 ... 480
- R v Chancellor of the University of Cambridge (1723) 1 Str 557 ... 348, 370
- R v Cheltenham Commissioners [1841] 1 QB 467 ... 419
- R v Chief Constable of Merseyside, ex p Calveley [1986] QB 424 ... 471, 489
- R v Chief Constable of North Wales, ex p AB [1999] QB 396 ... 292
- R v Chief Constable of North Wales, ex p Evans [1982] 1 WLR 1155 ... 365, 376
- R v Chief Constable of Sussex ex p International Trader's Ferry Ltd [1998] QB 477 ... 283, 334
- R v Chief Constable of the West Midlands, ex p Wiley [1995] 1 AC 274 ... 452, 453, 454
- R v Chief Immigration Officer, Heathrow Airport, ex p Bibi (Salamat) [1976] 3 All ER 843 ... 38, 216
- R v City of London Corp, ex p Matson [1997] 1 WLR 765, CA ... 380
- R v Civil Service Appeal Board, ex p Cunningham [1992] ICR 817 ... 380, 383
- R v Commission for Racial Equality, ex p Cottrell and Rothon [1980] 3 All ER 265 ... 358, 379
- R v Commission for Racial Equality, ex p Hillingdon LBC [1982] AC 779 ... 355
- R v Commissioner for Local Administration, ex p Croydon LBC [1989] 1 All ER 1033 ... 143, 150, 160
- R v Commissioner for Local Administration, ex p H (A Minor) (1999) The Times, 8 January ... 143
- R v Commissioner of Police of the Metropolis, ex p Blackburn (No.1) [1968] 2 QB 118 ... 284
- R v Commissioner of Police of the Metropolis, ex p Blackburn (No.3) [1973] QB 241 ... 117, 284
- R v Commissioner of Police of the Metropolis, ex p Parker [1953] 2 All ER 717 ... 353, 375
- R v Cornwall CC, ex p Huntington [1994] 1 All ER 694 ... 427
- R v Cotswold DC, ex p Barrington Parish Council (1998) 75 P & CR 515 ... 472
- R v Coventry City Council, ex p Phoenix Aviation [1995] 3 All ER 37 ... 334
- R v Criminal Injuries Compensation Board, ex p A [1999] 2 AC 330, HL ... 314, 373, 472
- R v Criminal Injuries Compensation Board, ex p Cobb [1995] PIQR P90; [1995] COD 126 ... 379
- R v Criminal Injuries Compensation Board, ex p Lain [1967] 2 All ER 770 ... 249, 438, 439, 478
- R v Criminal Injuries Compensation Authority, ex p Leatherland [2001] ACD 13 ... 381
- R v Cumbria CC, ex p Cumbria Professional Care Ltd (2000) 3 CCL Rep 79 ... 294
- R v Customs and Excise Commissioners, ex p Eurotunnel Plc [1995] COD 291 ... 474