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Applications for Judicial Review

Law and Practice

Butterworths

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London
Butterworths
1985

England	Butterworth & Co (Publishers) Ltd, 88 Kingsway, LONDON WC2B 6AB
Australia	Butterworths Pty Ltd, SYDNEY, MELBOURNE, BRISBANE, ADELAIDE, PERTH, CANBERRA and HOBART
Canada	Butterworth & Co (Canada) Ltd, TORONTO and VANCOUVER
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Singapore	Butterworth & Co (Asia) Pte Ltd, SINGAPORE
South Africa	Butterworth Publishers (Pty) Ltd, DURBAN and PRETORIA
USA	Butterworth Legal Publishers, ST PAUL, Minnesota, SEATTLE, Washington, BOSTON, Massachusetts, AUSTIN, Texas and D & S Publishers, CLEARWATER, Florida

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British Library Cataloguing in Publication Data

Aldous, Grahame

Applications for judicial review: law and practice.

1. Judicial review of administrative acts—

Great Britain

I. Title II. Alder, John

344.102'66 KD4902

ISBN 0 406 27320 0

Printed in Great Britain by Thomson Litho Ltd, East Kilbride, Scotland

Applications for Judicial Review

Law and Practice

Preface

‘The citizenry of this country ought to appreciate better that the Divisional Court of the High Court of Justice provides the means of obtaining speedy assistance if they think that they are oppressed by authority or that they are failing to receive the assistance which Parliament has required authorities to afford to them.’

Thus stated the present Master of the Rolls, Sir John Donaldson, when giving judgment with his predecessor, Lord Denning, in *Parr v Wyre BC* [1982] 2 HLR 71. This book—a collaboration between a practising barrister and an academic lawyer—is intended to encourage just such an appreciation. Its scope extends to the law and practice of applications for judicial review under Ord 53 of the Rules of the Supreme Court. The Ord 53 procedure, and the remedies available thereunder, have been given a dramatic new significance as a result of the House of Lords’ decision in *O’Reilly v Mackman* [1983] 2 AC 237. Although their Lordships refrain from saying that Ord 53 is an exclusive remedy for cases concerning issues of public law that will in many cases be the practical result. For this reason ch 9 is devoted in particular to the issue of the correct forum for seeking judicial review and considers the authorities which have followed *O’Reilly v Mackman*.

The law of judicial review comprises a fragmented and diffuse body of concepts, doctrines and presumptions of statutory interpretation. These emerged from a disparate range of historical contexts and operate within a bewildering variety of procedural mechanisms. When Ord 53 was reformed in 1977 the Government’s aim was to simplify and rationalise the procedure relating to the remedies but leave the substantive law relating to the grounds for judicial review and the scope of the various individual remedies largely untouched. The new procedure (as reinforced by the Supreme Court Act 1981) can thus only be understood in the light of the pre-existing law. For this reason we have included, where necessary, the historical background to the existing law.

We have attempted to place the Ord 53 machinery in its context and to present the law from the perspective of the remedies available under Ord 53. We have placed particular stress upon matters of practice and procedure which are not discussed in detail in other texts. Even though the relevant remedies are now available in the same court a litigant is still faced with the need to select the remedy or remedies best suited to his case from the menu available under Ord 53. We have therefore examined the substantive law from the perspective of choice of remedy and have included where appropriate a discussion of remedies available apart from Ord 53.

Although administrative law has over the last 20 years become markedly more sophisticated, and the volume of litigation has enormously increased, this branch of the law remains notoriously confused and uncertain and some of the most fundamental concepts are controversial and mysterious. The confusion is increased by a persistent failure even to define the terms used in the

analysis of conceptual problems. It is increasingly arguable that the ultra vires doctrine which provides the conceptual under-pinnings of the law is inadequate to deal with many of the issues of control of public administration which now regularly present themselves to the courts. Indeed in recent years there has been a tendency for the courts to rely upon an ad hoc discretionary approach to matters of governmental illegality based upon nebulous notions such as 'fairness' and upon the courts' discretion to refuse a remedy. Since the scope of public law concerns the demarcation between the courts and the executive, however, a clear conceptual framework is a desirable objective. We therefore offer no apology for essaying into such unfashionable matters as the distinction between void and voidable decisions.

Because the law is so ill-defined by the courts we have tried to emphasise general principles and to draw attention to competing arguments in areas where to state dogmatic propositions may mislead. It is hoped that this approach will be useful to practitioners and those working in local and central government who are less well served with works on administrative law than are students and teachers of law. However, it is hoped that this book will also be of interest to the latter because of its emphasis on the law of judicial review remedies.

We have attempted to state the law on the basis of materials to hand on 1 April 1985.

We should like to extend the customary but no less heartfelt thanks to those who have helped us in writing this book. These include Dorothy Choules, Lily Douglas, Rosemary Sookias and Elizabeth Bowman who shared the tedious and frustrating task of typing and retyping the manuscript from an extremely jumbled original.

We are also grateful to Vanessa Knapp, Colin Munro, Gordon Goldberg and Mr Hermon and the staff of the Crown Office who patiently read and commented upon individual draft chapters.

*Grahame Aldous
John Alder*

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