

RELEVANCE AND REASONS IN PLANNING MATTERS

The identification of relevant considerations is fundamental to any decision-making process, since power must be exercised for the purposes for which it was conferred. (1) Judicial review imposes a duty on planners to consider only relevant matters and to ensure irrelevant ones are ignored. What is relevant is ultimately a matter for the court. The judicial determination of relevance can profoundly alter an administrator's perception of the range of permissible policy choices falling within the scope of their statutory powers. (2) Controversy arises where judicial values seem to infiltrate the interpretative process exposing the courts to the charge of making political choices for administrators. (3) Unfortunately the indeterminacy of the relevancy/irrelevancy ground for judicial review does little to remove the sting of such reproaches. Leading academic commentators have lamented that "The range and flexibility of this judicial technique are obvious, and equally obvious is the difficulty of reducing it to precise rules". (4)

Recent planning decisions have attempted to offer an innovative analysis of the nature and significance of "relevant" considerations. The new tests have also been extended to the duty to give reasons, and each of these matters will be considered below. In relation to the relevancy/irrelevancy ground for review two issues have been conflated. The first is whether a matter is legally relevant. This is the first task facing an administrator or, indeed, the reviewing judge. The second issue is whether a remedy should be available by way of judicial review (5) if the decision is defective. The problem is that tests once used to determine whether relief should be granted are now deployed to determine the logically prior question: what is a relevant consideration? This may have the unfortunate consequences discussed below. In the context of the duty to give reasons, the courts have drawn freely upon the innovative, and controversial, relevancy/irrelevancy test to interpret the extent of the duty to give reasons. This will restrict the information available to interested parties in planning matters.

Identifying Relevant Matters.

In the *Wednesbury* case, the *locus classicus* on the grounds for judicial review Lord Greene MR stated that

"(The decision maker) must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider." (6)

"The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matters they ought to take into account." (7)

This recognises that decision makers have a duty to consider all relevant matters. In planning law this has been accepted as trite law. (8) The questions which this duty poses are "what is relevant"? and "what are the consequences where a relevant consideration is ignored?" These issues will be considered in turn.

Relevancy

Constitutional principle holds that relevance is a matter to be assessed by reference to the purposes of the decision-making power and the policy of the legislation under which the power is conferred. (9) This is no more than an expression of the subordinate relationship of the executive to Parliament, for the expressed or presumed intentions of Parliament should always prevail. (10)

Statutes sometimes identify which matters must be taken into account and occasionally even indicate how great an importance is to be attached to those matters. (11)

There is some authority that statute may permit the administrator to distinguish two different kinds of relevant consideration. This was suggested in *Ashby v. Minister of Immigration* (12) in which Cooke J. observed that there might be "obligatory considerations", which according to the express and implied intention of Parliament had to be considered, and "permissible" considerations to which regard could properly be paid, but which the decision maker was not obliged to consider. This distinction was accepted by Glidewell L.J. in the first *Bolton* case (13) where his lordship cited extensively from another judgment of Cooke J. in *CREEDNZ Inc v. Governor General* (14) In that

judgment Cooke J. stated: "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid....It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision." (15) This appears to mean that judicial review is only available where an express or implied statutory obligation to consider the matter arises. In the absence of such an obligation, the administrator may be permitted to consider a matter, but review is unavailable if he or she chooses not to do so.

Subsequently, in his own judgment (16) Glidewell L.J. expressly accepted the distinction in *CREEDNZ Inc.*, but the principles he subsequently formulated as deriving from the general body of precedent do not appear to be so clear. These principles seem to reject the notion that judicial review should not be available where "permissible matters" have been ignored; indeed, Glidewell L.J. stated that the significant distinction would be between matters which the statute expressly required the administrator to consider and those other matters which the court identified as relevant from the statutory context. Even in the latter case there would be an implied obligation to take account of such matters. On the question of invalidity Glidewell L.J. continued that the decision would be invalid if the matter not considered was "fundamental to the decision" or there was a real possibility that it would have made a difference to the decision. It is thus unclear whether in English law categories of non-binding relevant matters can be recognised, unless "permissible" is synonymous with "non-fundamental and non-influential". It is suggested, however, that even this interpretation would be contrary to principle. (17)

Courts also have regard to the significance of the matter within the statutory context: if a matter is judged to be important in that sense it is relevant. In *R v. Hillingdon ex p Goodwin* (18) Woolf J stated that a factor which was "so fundamental that it would be quite wrong as a matter of law for the authority not to have regard to its existence" was a relevant factor. (19) As we have seen, when Glidewell J. formulated a series of principles from the body of precedent he envisaged that an examination of the possible the "fundamental" nature of the matter would be an alternative approach to the causation question in establishing its relevance. (20) He also stated: "The relative importance of

a matter which has not been taken into account, is an aspect, and a very major aspect, of the question "was that consideration relevant?". (21)

Further, the courts undoubtedly have a creative role in determining the limits of administrative decision-making. Relevancy/irrelevancy is a key tool in designing the architecture of judicial supervision of administrative action. It is unrealistic to regard statutory interpretation as the result of objective scientific investigation, particularly where unfettered subjective discretion has ostensibly been conferred. Moreover, an administrator's statutory discretion remains subject to common law rules unless the statutory context demands otherwise. The courts enforce their interpretation of enacted words rather than the words themselves. As Laski observed the courts can enact into law a particular system of social philosophy which may be altogether different from that espoused by administrators. (22) This means that relevance can be influenced by common law values as much as legislative ones, most famously perhaps, the sanctity of private property (23) or the value which the common law attaches to upholding legitimate expectations and promises. (24) Accordingly, *intervention* (a separate issue from establishing relevance) may be more likely where rights/expectations are at stake. (25) This is considered below.

The Consequences of Failing to Consider Relevant Matters

Recent planning jurisprudence draws upon earlier and complex strands of authority which hold that failure to consider a relevant matter is not necessarily fatal to the decision, even if such a failure constitutes an error of law. Judicial intervention is not *de cursu*.

At the level of general principle the circumstances in which intervention is possible remain somewhat ill-defined. Where the material consideration wrongly omitted is "insignificant" the court is unlikely to grant relief. (26) But the court's discretion to refuse relief is not confined merely to cases where the error is trivial. (27)

It is important at the remedial stage to examine whether the failure to consider a relevant matter has had some causative influence on the decision itself. If the

decision-maker would have reached the same decision notwithstanding the defect the court is unlikely to intervene. The emphasis upon causative consequences, which is now well supported by authority, thus assists the court in determining whether to exercise its jurisdiction to quash a decision tainted by an error of law. (28) This appears, for example, in the judgment of Sir John Donaldson MR in the *Wellcome Foundation* case (29) where his lordship observed: "The Jurisdiction of the court to entertain applications for judicial review is a supervisory jurisdiction of an essentially practical nature designed to protect the citizen from breaches by decision makers of their public law duties. That there will be such a breach if the decision maker takes account of relevant matters in the sense that his decision is affected thereby is not in doubt. But, if his decision is not affected thereby, there is not good reason why the jurisdiction of the court should be exercised and every good reason why it should not."

This causation issue betrays some indecision about the function of judicial review itself. It is evident that our constitutional system does not see the purpose of judicial review as the control of administrative action *per se*: proof of illegality is by itself insufficient and legality is subordinate to considerations of good administration and the perceived need to protect individual rights. If dominant purpose of the supervisory jurisdiction were the maintenance of the Rule of Law, or, more prosaically, a quality control mechanism for administrative decision making, (30) the courts would intervene in cases where the decision was tainted by any kind of irrelevance. However, it is significant that judicial review is not triggered by illegality *per se*; it is only available where leave is obtained, and remedies remain discretionary. Yet the requirement that government observe the law must be a constitutional priority which the courts should recognise unless principled reasons exist to justify the *status quo*. However, it is possible that the courts may be more willing to intervene where individual rights are at issue and, accordingly, may be more willing to demand a higher standard in planning matters. (31)

According to well established principles the causation issue is normally used to refuse a remedy and not to define what is a material consideration. (32) Apart from the decisions discussed below, there is no authority for using the causation principle to identify a relevant consideration. Thus the first *Bolton* case and *MJT Securities* represent a significant departure from established precedent. (33)

Some conclusions might be ventured at this point: (i) decision-makers have a duty to respect the express or presumed intention Parliament as identified in the proper construction of enacted words. They should inform themselves of *all* considerations which Parliament actually identified as relevant and take them into account; (ii) the importance of the matter within the statutory context is evidence of Parliament's intention that it ought to be considered; (iii) if the decision-maker fails to take a relevant matter into account the court may intervene to quash the decision if the consideration is not insignificant and (*quaere*) if it is of an "obligatory" rather than merely a "permissible" nature; (iv) if the decision would have been the same even if the defect were cured the court can decide that the defect has had no causative effect and may decline to exercise its jurisdiction; (v) the court may be more willing to intervene where private rights are involved; (vi) it is important to note at this stage, however, that if Parliament intended a matter to be relevant, it does not cease to be relevant simply because little or no weight is ultimately attached to it. This is an important matter to which reference will be made below.

Recent Developments

Recent planning jurisprudence has conflated the primary question: what is a relevant consideration with the subsequent remedial question. Relevancy itself is now in part to be determined by reference to the causation principle. Moreover, whilst it is judicially acknowledged that relevancy/irrelevancy is a separate question from the duty to give reasons, the latter duty is now also interpreted by reference to the new test for identifying material issues. This, it will be argued, is illegitimate and likely to somewhat undermine the duty to give reasons.

The New Approach to Materiality

It has now been decided that a matter's relevance partly depends upon its likely causative effect on the decision. If the matter is one which would not be likely to influence the outcome of the decision it is not a consideration which is relevant (provided it is not "fundamental"). This approach controversially identifies relevant matters in a manner quite distinct from the orthodox *Wednesbury* approach and transposes the causation question from the remedial

stage to the definition of relevance itself. The effect of this will be to marginalise matters which, according to the construction of the Act, were relevant and which, according to *Wednesbury*, ought to have been taken into account. This is so because under *Wednesbury*, a matter which would have been identified as relevant according to the proper construction of the statute would not necessarily be so identified under *Bolton* where it lacked influence over the decision. This confuses relevance with the separate issue which asks much weight should be attributed to a relevant matter.

This new approach was adopted in the first *Bolton* case, *Bolton MBC v. Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (34) which is now frequently cited. Here, the Court of Appeal held that the decision maker must take into account a matter which *might* cause him to reach a different conclusion to that which he would reach if he did not take it into account. By the verb "might" Glidewell L.J. stated that he meant a *real possibility* that the decision maker would reach a different conclusion if he did take that consideration into account.

If a matter was trivial or of small importance that if it were taken into account there would be a real possibility that it would make no difference to the decision, *it was not a matter which the decision maker ought to take into account.* (Italics supplied).

Glidewell L.J. then went on to hold that if the reviewing judge concludes that the matter was fundamental to the decision or that there was a real possibility that consideration of the matter would have made a difference to the decision the judge is enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect he does not have the material before him to conclude that the decision was invalid.

If the judge decides that he could hold the decision invalid there remains a discretion not to grant relief.

The decision in *Bolton* raises some interesting questions. These affect both administrators and the courts. First, it requires an administrator to determine the relevance of a matter by asking whether there is a real possibility that it would affect the outcome of the decision. This appears to require a deliberate

decision on the part of the decision maker either to include or to exclude a matter from account. It would not be enough simply to ignore or overlook the matter because there would not be the necessary assessment that the matter was (or was not) likely to affect the outcome. Further, if the decision maker goes on to make the necessary causative evaluation he is probably to be understood as taking the matter into account in reaching his decision. If he decides that it will not actually influence the decision, the decision maker is simply deciding to accord the factor no weight. (35) In other words, the matter has been considered, but no importance has been attached to it in the context of that decision. Thus the assessment of the likely influence of the matter on the outcome fulfils the obligation to consider relevant matters. For practical purposes the *Wednesbury* mandate to consider all relevant matters appears unaltered so far as the decision maker is concerned.

Subject to the above, however, there may be dangers that relevant matters are rejected (as irrelevant in the *Bolton* sense) at too early a stage of the decision-making process. This is so because the relevancy/irrelevancy assessment must occur at a preliminary stage. An administrator may exclude from consideration a matter which *at that preliminary stage* appears unlikely to be influential. Under *Bolton* the matter is then judged to be irrelevant and there is a duty to ignore it. However, it may be premature to exclude it since the decision as to what weight to attach to a matter can only be made when all relevant matters have been identified and can be considered together. The approach under *Wednesbury* is to be preferred because a matter which at first appears to be unimportant nevertheless remains relevant; it is not excluded at this early stage. If relevant it must be considered when the weight to be attached to relevant matters is determined. At this stage matters which once appeared unlikely to be unimportant may prove to be otherwise. To dismiss the matter at the preliminary stage risks pre-judgment.

Other difficulties affect a reviewing court which is invited to determine the relevance of a particular consideration. After *Bolton* the court is required to make an assessment of the likely effect a consideration might have had on the decision. This involves a hypothesis which the courts - which lack administrative expertise - might find difficult to undertake. This is so because the court can only undertake an assessment of the likely impact of a particular matter if it is prepared also to examine and balance other matters, including questions of policy. It seems that the causation issue runs perilously close to

asking a court to substitute its views on the weight to be attached to a consideration, a task which has long been accepted as a matter for the exclusive determination of the administrator. (36)

It is also difficult to understand how evidential problems can be avoided since the court's task involves it in hypothetical findings of fact as to what might have happened had a matter been considered. As Browne-Wilkinson P. (as he then was) observed in *Sillifant v. Powell Dyffryn*, (37) there is a perilous borderline between drawing fair inferences from fact and pure guess work.

Further, the reasonableness of the administrator's actions can only be assessed at the time the decision was made and not in the light of *ex post facto* speculation about what an administrator might have done if he had acted differently. (38) For example, lack of consultation was at issue in *R v. Hillingdon ex p Goodwin*. (39) How in practice could a court assess what might be the outcome of a consultation exercise which did not actually take place?

Duty to Give Reasons (40)

The extent of the duty to give reasons in planning matters has also been influenced by the new reliance on causation in defining materiality. This, as will be discussed below, is not without difficulty and may serve to limit the reasons which have to be given when, paradoxically, Brooke J. (as he then was) in *MJT Securities* seemed concerned to strengthen the duty as an important quality control mechanism for administrative decision making. (40)

The duty to take into account relevant considerations is designed to ensure that administrators have proper reasons for their decisions. Apart from the value in open government and administrative candour, the giving of reasons may instil confidence in the decision making it more palatable to those affected. This reduces the likelihood of appeal. Having reasons for a decision is, however, distinct from the duty to communicate those reasons to the parties affected by that decision. The importance of this distinction is judicially acknowledged, (42) but it may nevertheless be a matter to which insufficient regard may have been paid in *MJT Securities* (see further below). The difficulty is to identify

the extent of the duty to give reasons and, in particular, to identify the point at which reasons are so inadequate as to justify judicial intervention..

The duty binding the Secretary of State to give reasons in a decision letter following a planning appeal is not distinct from that binding inspectors where they determine planning appeals. A similar duty binds planning authorities which refuse planning permission. (43) The following discussion in the context of decision-letters is therefore of general application.

The first question is whether a decision letter must refer to *all* material considerations. This has been resolved in the negative. (44) Lord Bridge of Harwich in *Save Britain's Heritage v. No. 1 Poultry Ltd* (45) decided that whilst the Secretary of State had to have *regard* to all material considerations, reference need not be made to all of them in the decision letter. But this only begs the question: to which material considerations should reference be made?

The House of Lords examined this issue in *Save Britain's Heritage v. No. 1 Poultry Ltd* and *Bolton MDC v. Secretary of State for the Environment* (46) and resolved it by upholding the "classical" exposition of Megaw J in *Re Poyser and Mills' Arbitration* (47) that "proper, adequate reasons should be given which deal with the "substantial points that have been raised." A similar formulation states that there is a breach of the duty if reasons given were so spare and unexpressed as to leave in the mind of the informed reader a real and substantial doubt as to the reasons for the decision. (48) In essence, this means that the appellant must have sufficient information to understand on what grounds the appeal has been decided. (49) However the formulation which Lord Bridge in *Save* found "particularly well expressed " (50) was that offered by Phillips J. in *Hope v. Secretary of State for the Environment* (51) which stated that reasons have to be given in sufficient detail to allow the recipient to know what conclusions the inspector has reached on the principal controversial issues. This test was also approved and applied by Lord Lloyd of Berwick in the House of Lords in the second *Bolton* case. (52)

However, this approach is open to criticism in so far as it reduces the possibility of seeking a judicial review on the relevancy ground. This is so because the failure to refer to a material consideration (which did not relate to one of the principal controversial issues) could not lead to an inference that

the Secretary of State had omitted to consider that matter. He might have considered it, but was simply not obliged to refer to it in his letter. This could be seen as qualifying the rule in *Padfield v. Minister of Agriculture and Fisheries* (53) that where an administrator fails to state reasons for a decision it may suggest that the decision is irrational if all *prima facie* reasons seem to point in favour of a particular decision, but the administrator has adopted a contrary decision without seeking to justify such a course by the giving of reasons. It seems that this inference is not possible since there might be reasons which are simply unstated in the decision letter.

Moreover, it has been settled that the court cannot interfere where there are reasons that might have supported the decision even if no reasons were actually stated. Accordingly, in such cases, the court should assume that there were reasons to justify the decision (54) The second *Bolton* decision has thus had a significant and restrictive effect on the duty to give reasons. This may explain why Brooke J. was concerned to qualify its effects in *MJT Securities v. Secretary of State for the Environment and Chelmsford BC.* (55) The case for doing so, according to Brooke J., rested essentially on two arguments. According to the first, the principles laid down in the second *Bolton* case should be confined to major public inquiries which have endured for many months (as was the case in *Bolton*). Brooke J. stated: "the members of the House of Lords (in the second *Bolton* case) would be very anxious if anything they said to alleviate the burden on the Secretary of State and to cut down delay in relation to very major planning proposals was taken as a green light to Inspectors to omit references in their reports or decision-letters in much smaller applications to issues where it was clear, to quote Glidewell L.J. in the first *Bolton* case, (56) that the matter in question was fundamental to the decision or that there was a real possibility that the consideration of it would have made a difference to the decision."

This means that the legitimacy of confining the reasons to the "principal controversial issues" is confined to decision letters following major inquiries. In lesser inquiries (57) Brooke J. seems to favour Glidewell L.J.'s view in the Court of Appeal in the second *Bolton* case that reference to *all* material considerations should be made in the decision letter. (58) This is no doubt a laudable attempt to restrain the erosion of the important quality control function served by the duty to give reasons after the House of Lords' decision in the second *Bolton* case. This means that the statement of reasons in smaller

inquiries could embrace a reference to all material considerations as understood in the first *Bolton* case, whereas in a major inquiry the statement need only refer to the "principal controversial issues".

However, in requiring a reference to be made to all material considerations Brooke J's formulation does rely on the controversial definition of what is a material consideration. This definition (which was not applied in the second *Bolton* case) is Brooke J's second ground for limiting *Bolton*. The essence of Brooke J.'s judgment on this issue is that materiality is not exclusively identified by a process of statutory construction (the orthodox *Wednesbury* approach). A relevant consideration is to be identified according to the first *Bolton* case discussed above. Accordingly it is one which is "fundamental", or, more controversially, one where there is a real possibility that it influenced the decision. (59)

The limitation that the decision maker need only refer to those matters which had real influence on the decision marginalises some matters which were relevant under *Wednesbury* principles. This would most affect cases where the decision maker has had regard to a matter (which was not fundamental) and actually resolved to give it little or no weight. Here there is no duty to refer to that in the decision letter, because that consideration (by its actual treatment) ceases to be a relevant consideration. It is neither fundamental nor causatively significant and so ceases to qualify as relevant.

This may restrict opportunities for appeal or review because the *Wednesbury* perversity principle may apply where the decision-maker acts unreasonably in attaching little or no weight to a relevant matter. (60) However, the omission of a reference to that consideration in the decision letter would almost certainly not lead to an inference of perversity. This is so because Glidewell L.J.'s formulation, which Brooke J adopted, permits the decision maker to omit reference to matters which are not "fundamental" as well as those which were not influential. A court faced with an omission in a decision letter would then encounter the uncertainty of not knowing which of these alternatives might furnish the explanation for the omission. The difficulty would be that a decision-maker might quite properly resolve that a matter is non-fundamental and yet act perversely in according it no weight.

Further, the appellant's perception of the importance of a matter may differ significantly from that of the inspector or the Secretary of State. An appellant may have attached great weight in submissions to a matter which ultimately had little influence on the final decision. *Ex hypothesi* no reference need be made to it in the decision letter. If this is correct it must mean that the parties will sometimes lack sufficient information to understand on how matters they regarded as important *in argument* have been resolved. This may actually encourage appeals.

Conclusion

It is argued that relevancy should be determined by the traditional *Wednesbury* principles. This is dependent on a process of statutory construction to determine the purposes for which power was conferred. If the administrator fails to consider a matter which under this approach is judged to be relevant the decision is tainted by an error of law. Causation should play no role in distinguishing relevant from irrelevant matters.

The causation question should only arise (if at all) at the point where the court considers whether or not it ought to grant relief. It may even be preferable to abandon reliance on causation altogether since it invites the court to make a hypothetical assessment which in the absence of clear evidence may be little more than guesswork. The judiciary should also be wary of venturing the hypothesis that an administrator might have reached the same decision even if the defect had not occurred.

It is tentatively suggested that the court should retain a broad discretion to refuse relief. One ground upon which this discretion could be exercised would be where the relevant matter ignored is "insignificant" within the statutory context, regardless of its actual causative effect. This possibility differs from the causation test since even matters which might normally have carried little weight may be decisive in cases where all relevant considerations, both for and against a particular proposal, are balanced. This is perhaps a case where the courts should defer to the administrator's decision and not intervene. (61) Nevertheless, under the first *Bolton* tests the matter would seem to invite review because of the causative effect of that particular consideration.

The duty to give reasons should be observed to the extent that the recipient should understand the administrator's decision on the principal arguments advanced by the parties, and the main grounds on which the decision is founded. This is a different approach from that upheld in *MJT Securities* since the latter decision does not leave scope in the decision letter (even in small inquiries) for the important information that little or no weight was attached to an argument advanced by the parties. The courts should ensure that tests to identify relevance are not inappropriately used to interpret the extent of the statutory duty to give reasons.

FOOTNOTES.

(1) *Padfield v. Minister of Agriculture, Fisheries and Foods* [1968] AC 997. It has recently been suggested that there is a public interest in the due consideration of objections to a local development plan. This public interest may extend to a due consideration of all relevant matters: *R v. Hinckley & Bosworth BC ex p F L Fritchett* [1997] JPL 756, esp 759.

(2) *R v. Manchester City Council ex p King* (1991) 89 LGR 696, for example.

(3) Most notoriously perhaps in *Roberts v. Hopwood* [1925] AC 578.

(4) Wade & Forsythe, *Administrative Law*, 7th edition, at p 407. See esp. pp 405-411.

(5) Or an appeal under s.288 of the Town and Country Planning Act 1990.

(6) *Associated Provincial Picture Houses Ltd v. Wednesbury Corpn.* [1948] 1 KB 223, 229.

(7) *Id.* at pp. 233-234. After Lord Diplock's re-statement of these grounds in *Council of Civil Service Unions v. Minister of the Civil Service* [1985] 1 AC 374 the relevancy/irrelevancy ground can be considered to be "illegality", or sometimes "irrationality".

(8) See, for recent statements, *Save Britain's Heritage v. No. 1 Poultry Ltd* [1991] 1 WLR 153; *Bolton MDC v. Secretary of State for the Environment* [1995] JPL 1043 (the second *Bolton* case); and see also n (1) above.

(9) E.g., *Roberts v. Hopwood* [1925] AC 578.

(10) Lord Reid once stated that the courts do not search for the intention of Parliament, but for the meaning of enacted words: *Black-Clawson International Ltd v. Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 613. However, the legal meaning of enacted words is taken to correspond to the legislative intention: see F. Bennion, *Statutory Interpretation* 2nd edition (1992) Butterworth, pt VIII esp p. 345.

(11) The Town and Country Planning Act 1990, 54A, is an example of this. It enacts :

"Where in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise."

The section directs the authority's attention to the development plan and seeks to give this *prima facie* pre-eminence. On the effect of s.54A see generally Purdue [1994] JPL 399 Herbert-Young [1995] JPL 292.

(12) [1981] 1 NZLR 222, 224 following *CREEDNZ Inc v. Governor-General* (below n.14) in which the court gave judgment on the same day as *Ashby*.

(13) *Bolton MBC v. Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (1991) 61 P & CR 343, at 351 (the first *Bolton* case).

(14) [1981] 1 NZLR 172, 182-183.

(15) Cooke J.'s remarks were made in the context of a ministerial decision involving policy questions affecting the national interest. The court was aware that it was not its function to decide where the national interest might

lie. The passage quoted continues: "And when the tests are whether a work is likely to be in the national interest it is not easy to assert of a particular consideration that the Ministers were legally bound to have regard to it". This may suggest that the idea of a "permissible consideration" simply re-states the familiar principle that certain questions of central government policy are not amenable to judicial review: *Nottinghamshire CC v. Secretary of State* [1986] 1 All E.R. 199. If this interpretation is correct it raises some doubt as to whether, in English law, non-binding relevant considerations can exist outside the realm of policy decisions of central government, and so undermines the permissible/obligatory distinction to that extent.

(16) (1991) 61 P & CR 343, at 353.

(17) See n. (15) above.

(18) [1984] ICR 800, at 808.

(19) In this case the consideration in question concerned the notice provisions in the contracts of employment of doctors employed by a health authority. The authority had decided upon an immediate temporary closure of the cottage hospital where the doctors were employed. Woolf J. identified this consideration as a relevant one because consultation was given great emphasis in the statutory context. The decision of Woolf J. was followed and applied by Hodgson J in *R v. Bent LBC ex p Gunning* (1985) 84 LGR 168.

(20) See point 6. (1991) 61 P & CR 343, at 353.

(21) *Id.* at 352. Cooke J. emphasised the same point in *CREEDNZ Inc.* (above n. 14) where he stated at 183 "But it is safe to say that the more general and the more obviously important the consideration, the readier the Court must be to hold that Parliament must have meant it to be taken into account".

(22) H J Laski, *Studies in Law and Politics* (London, 1932). *Roberts v. Hopwood* [1925] AC 578, which was the subject of Laski's remarks, is a much cited example See also *Bromley v. GLC* [1982] 1 AC 768.

(23) *Id.*

(24) See e.g., for a recent statement *R v. Secretary of State for the Environment ex p Hargreaves* [1997] 1 All ER 397.

(25) *R v. Barnet and Camden Rent Tribunal ex p Fry Investments Ltd* [1972] 2 QB 342.

(26) Megaw J. in *Hanks v. Minister of Housing and Local Government* [1963] 1 QB 999, 1020, followed in *R v. Broadcasting Complaints Commission ex p Owen* [1985] QB 1153; *R v. Inner London Education Authority ex p. Westminster City Council* [1986] 1 WLR 28; *Save Britain's Heritage v. No. 1 Poultry Ltd* [1991] 1 WLR 153 and *Bolton MDC v. Secretary of State for the Environment* (above n.8).

(27) *Per* Hodgson J in *R v. Secretary of State for the Environment ex p Bolton Metropolitan BC* [1991] JPL 32, 35. (Decision appealed but appeal dismissed other grounds.

(28) See e.g., *R v. Broadcasting Complaints Commission ex p Owen* [1985] QB 1153; *R v. Secretary of State for Social Services ex p Wellcome Foundation Ltd* [1987] 1 WLR 1166.

(29) *R v. Secretary of State for Social Services ex p Wellcome Foundation Ltd* [1987] 1 WLR 1166 Steven Brown and Croom-Johnson L.J.J concurred in the judgment of Sir John Donaldson MR.

(30) *MJT Securities v. Secretary of State for the Environment and Chelmsford BC* [1997] JPL 43 at 48.

(31) See the interpretation placed upon the second *Bolton* case, *Bolton MBC v. Secretary of State for the Environment* (above n.8), in *MJT Securities v. Secretary of State for the Environment and Chelmsford BC* (above n. 28).

(32) *R v. Secretary of State for Social Services ex p Wellcome Foundation Ltd.*, above note (29). P. Craig also infers that causation is relevant only to the remedial issue: *Administrative Law*, 3rd edition, (1994) Sweet & Maxwell

at p 408. Contrast the first Bolton case, *Bolton MBC v. Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (1991) 61 P & CR 343 discussed below.

(33) *Bolton MBC v. Secretary of State for the Environment and Greater Manchester Waste Disposal Authority* (above n.13); *MJT Securities v. Secretary of State for the Environment and Chelmsford BC* (above n. 30).

(34) (Above n. 13). The leading judgment was delivered by Glidewell L.J. with whom McCowan and Cumming-Bruce L.J.J concurred.

(35) *Tesco Stores v. Secretary of State* [1995] 2 All ER 636.

(36) *Id.* , although this would be subject to the usual perversity caveat.

(37) [1983] IRLR 90, 96. This was an employment case.

(38) *Id.* at 90.

(39) [1984] ICR 800.

(40) See generally Geneva Richardson [1986] Public Law 437; Javan Herberg [1991] PL 340; Heap and Thomas [1991] JPL 707; Allan (1994) 53 CL.J. 207; Campbell [1994] PL 184.

(41) *MJT Securities v. Secretary of State for the Environment and Chelmsford BC* (above n.30).

(42) *Save Britain's Heritage v. No. 1 Poultry Ltd* (above n.8).

(43) This was settled by the House of Lords in *Save Britain's Heritage v. No. 1 Poultry Ltd* [1991] 1 WLR 153, esp. 166 which must be read as overruling earlier conflicting authority, for example, *West Midlands Co-operative Society v. Secretary of State* [1988] JPL 121. In the case of the Secretary of State the duty is derived from rule 17 (1) of the Town and Country Planning (Inquiries Procedure) Rules 1992 SI 1992 No 2038 which states: "17.-(1) The Secretary of State shall notify his decision on an application or appeal, and his reasons for

it, in writing to all persons entitled to appear at the inquiry who did appear, and to any other person who, having appeared at the inquiry, has asked to be notified of the decision". Rule 18 (1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1992 SI 1992 No 2039 requires Inspectors to give reasons for their decisions where they determine a planning appeal is enacted in terms which are practically identical. A local authority is also bound to give reasons where it resolves (inter alia) to deny planning permission: art. 22 of the Town and Country Planning (General Development Procedure) Order 1995 SI 1995 No. 419. The principles governing the extent of the duty to give reasons also appear to apply to cases where a local planning authority refuses planning permission: *Save Britain's Heritage v. No. 1 Poultry Ltd* [1991] 1 WLR 153, Esp. 167. For a recent statement on the duty to give reasons on preparing and adopting a development plan, see *House Builders Federation Ltd v. Berkshire CC* [1997] JPL 317

(44) *Save Britain's Heritage v. No. 1 Poultry Ltd* (above n.8), followed and approved in *Bolton MBC v. Secretary of State for the Environment* [1995] JPL 1043, 1046 per Lord Lloyd of Berwick, disapproving Glidewell L.J.'s contrary formulation in the Court of Appeal 69 P & CR 324, 357.

(45) [1991] 1 WLR 153.

(46) *Bolton MDC v. Secretary of State for the Environment* (above n.8).

(47) [1964] 2 QB 467, 478, approved by their lordships in *Westminster CC v. Great Portland Estates* [1985] 1 AC 661, 673.

(48) Graham Eyre QC in *West Midlands Co-operative Society v. Secretary of State for Environment and Dudley BC* [1988] JPL 121.

(49) It was further emphasised in *Save* that no relief will be afforded to an applicant who has not suffered substantial prejudice as a result of the defect: [1991] 1 WLR 153 at 167. This was stated, however in the context of a s.288 appeal and may derive from the requirement in that section that a person be aggrieved. Accordingly, the rule may differ on applications for judicial review. However, the requirement to demonstrate prejudice may apply generally. This issue also poses the broader question of the purposes of judicial

review (see above text for note (31). For the circumstances in which prejudice is suffered where reasons are inadequate: see *per* Lord Bridge at p. 167.

(50) [1991] 1 WLR 153, at 165.

(51) (1975) 31 P & CR 120, 127.

(52) *Bolton MBC v. Secretary of State for the Environment* (above n.8).

(53) [1968] AC 997.

(54) *Cannock Chase DC v. Kelly* [1978] 1 WLR 1.

(55) [1997] JPL 43.

(56) (1991) 61 P & CR 343 at 353.

(57) Of course, there are problems of certainty in this issue.

(58) 69 P & CR 324, 357, *per* Glidewell L.J.

(59) Brooke J. actually expounds the test as follows: that there was a real possibility that the consideration of it "*would have made* a difference to the decision." Since he was considering cases in which a matter was considered but to which no reference was made in the decision letter, the passage might perhaps read "that there was a real possibility that the consideration of it *actually made* a difference to the decision".

(60) E.g., *South Oxfordshire DC v. Secretary of State for the Environment* [1981] 1 WLR 1092.

(61) Because if that consideration were precluded the administrator would be in a dilemma if all other considerations *pro* and *con* balanced.

7, 158 words

