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# ADMINISTRATIVE LAW IN ENGLAND: THE EMERGENCE OF A NEW REMEDY

D.G.T. WILLIAMS\*

## I. INTRODUCTION

A new remedy, the "application for judicial review," came into operation in England and Wales early in 1978 through adoption of the new Order 53 of the Rules of the Supreme Court.<sup>1</sup> Order 53 is not the only remedy available for judicial control of executive action. Parties may seek the private remedies of declarations and injunctions, special statutes in a variety of contexts provide either for processes of appeal to the courts or for other prescribed avenues of access to the courts, and parties may challenge executive action collaterally in ordinary civil proceedings or as part of the defence to a criminal prosecution.<sup>2</sup> The House of Lords, however, ruled in *O'Reilly v. Mackman*<sup>3</sup> that whenever possible parties should employ the application for judicial review provided under Order 53. Lord Denning M.R., in the Court of Appeal, stated that an Order 53 application "should be the normal recourse in all cases of public law where a private person is challenging the conduct of a public authority or a public body, or of anyone acting in the exercise of a public duty."<sup>4</sup> Perhaps more firmly, Lord Diplock said during consideration by the House of Lords:

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1. The Rules of the Supreme Court (Amendment No. 3), STAT. INST., 1977, No. 1955, § 5. Two later amendments have been made to Order 53. See Supreme Court Act, 1981, ch. 54, § 31; The Rules of the Supreme Court (Amendment No. 4), STAT. INST., 1980, No. 2000, §§ 2-7.

2. For descriptions of remedies available in English administrative law, see P. BIRKINSHAW, GRIEVANCES, REMEDIES AND THE STATE 163-86 (1985); P. CRAIG, ADMINISTRATIVE LAW 527-625 (1983); S. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 379-583 (4th ed. 1980); C. HARLOW & R. RAWLINGS, LAW AND ADMINISTRATION 284-310 (1984); H. WADE, ADMINISTRATIVE LAW 319-409 (5th ed. 1982).

3. [1983] 2 A.C. 237 (1982).

4. *Id.* at 256.

[I]t would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.<sup>5</sup>

This doctrine of "exclusivity"<sup>6</sup> is entirely judge-made and, in fact, is contrary to the view expressed by the Law Commission in its report of 1976 which led to the adoption of the new remedy.<sup>7</sup>

Before *O'Reilly*, judicial views concerning the desirability of exclusivity conflicted,<sup>8</sup> and these conflicting views were reflected in the decisions of the lower courts considering *O'Reilly*. The judge at first instance in *O'Reilly* emphasised that, because the law offered a litigant a choice between the application for judicial review procedure under Order 53 and the private remedies of declarations and injunctions, a suggestion that the litigant is abusing the process of the court "because he exercises the choice in the way he thinks best in his own interest" would be "an abuse of language."<sup>9</sup> The House of Lords was unimpressed with this view, but the application of the doctrine of exclusivity nonetheless has not been an easy process.

5. *Id.* at 285.

6. See Forsyth, *Beyond O'Reilly v. Mackman: The Foundations and Nature of Procedural Exclusivity*, 44 CAMBRIDGE L.J. 415 (1985) [hereinafter cited as Forsyth, *Procedural Exclusivity*]; Forsyth, *The Principle of O'Reilly v. Mackman: A Shield But Not a Sword?*, 1985 PUB. L. 355; McBride, *The Doctrine of Exclusivity and Judicial Review: O'Reilly v. Mackman*, 2 CIV. JUST. Q. 268 (1983).

7. LAW COMMISSION, REPORT ON REMEDIES IN ADMINISTRATIVE LAW, 1976, CMD. 6407, No. 73, ¶ 34 [hereinafter cited as REPORT ON REMEDIES]. The Law Commission, which was set up by the Law Commissions Act, 1965, earlier had published a working paper stating a provisional view in favour of exclusivity. LAW COMMISSION, REMEDIES IN ADMINISTRATIVE LAW, 1971, WORKING PAPER No. 40, ¶¶ 75-82.

8. See, e.g., *Uppal v. Home Office*, [1978] T.L.R., No. 719 (C.A. Nov. 11, 1978); *Bousfield v. North Yorkshire County Council*, [1982] T.L.R., No. 126 (Q.B. Mar. 4, 1982) (Dillon J.); *Irlam Brick Co. Ltd. v. Warrington Borough Council*, [1982] T.L.R., No. 50 (Q.B. Feb. 5, 1982) (Woolf J.); *Heywood v. Hull Prison Bd. of Visitors*, [1980] 1 W.L.R. 1386 (Ch.). See generally J. BEATSON & M. MATTHEWS, ADMINISTRATIVE LAW: CASES AND MATERIALS 335 (1983) (setting out many other such cases).

9. [1983] 2 A.C. at 250 (Peter Pain J.). Similar views also were expressed in the Court of Appeal by Ackner L.J. and O'Connor L.J. See *id.* at 260-66 (Ackner L.J.); *id.* at 266-67 (O'Connor L.J.).

One case concerning the important question of parliamentary constituency boundaries,<sup>10</sup> in which legal argument already had occupied four days in the Chancery Division of the High Court, was transferred to and restarted in the Queen's Bench Division,<sup>11</sup> and an immediate decision of the House of Lords endorsing *O'Reilly* may have given the impression that differences of view and difficulties of application were at an end.<sup>12</sup> Subsequent litigation, however, suggests otherwise. Rulings of the House of Lords and other courts tend to the conclusion that, while *O'Reilly* unquestionably established a presumption that litigants should use the application for judicial review, the availability of exceptions to that presumption of exclusivity will have to be worked out on a case-by-case basis.<sup>13</sup> In particular, courts have expressed an uneasiness about the "newly fledged distinction in English law between public and private law,"<sup>14</sup> warning that terms such as "public law" and "private law" should "be used with caution, for, typically, English law fastens, not upon principles but upon remedies."<sup>15</sup>

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10. *R. v. Commissioners of the Boundary Comm'n for England, ex parte Gateshead Borough Council*, [1983] T.L.R., No. 7 (Q.B. Div'l Ct. Jan. 5, 1983), *aff'd sub nom. R. v. Boundary Comm'n for England, ex parte Foot*, [1983] Q.B. 600 (C.A.).

11. *See* The Times of London, Dec. 7, 1982, at 4; The Times of London, Nov. 26, 1982, at 2.

12. *See Cocks v. Thanet Dist. Council*, [1983] 2 A.C. 286 (1982).

13. *See Gillick v. West Norfolk & Wisbech Area Health Auth.*, [1986] 1 A.C. 112 (1985); *Wandsworth London Borough Council v. Winder*, [1985] A.C. 461 (1984); *Davy v. Spelthorne Borough Council*, [1984] A.C. 262 (1983); *R. v. East Berkshire Health Auth., ex parte Walsh*, [1985] Q.B. 152 (C.A. 1984); *Law v. National Greyhound Racing Club Ltd.*, [1983] 1 W.L.R. 1302 (C.A.); *R. v. Secretary of State, ex parte Benwell*, [1985] 1 Q.B. 554 (1984) (Hodgson J.); *R. v. British Broadcasting Corp., ex parte Lavelle*, [1983] 1 W.L.R. 23 (Q.B. 1982) (Woolf J.).

14. *Gillick v. West Norfolk & Wisbech Area Health Auth.*, [1986] 1 A.C. 112, 178 (1985) (Lord Scarman). *Gillick* concerned a departmental circular giving advice about the propriety of a doctor at a family planning clinic prescribing contraceptives for a girl under 16 years of age, with the issue of parental consent at the heart of the dispute. *See id.* at 162-63 (Lord Fraser).

15. *Davy v. Spelthorne Borough Council*, [1984] A.C. 262, 276 (1983) (Lord Wilberforce). Lord Wilberforce went on to say:

We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove.

*Id.*; *see Forsyth, Procedural Exclusivity, supra* note 6, at 423-32.

## II. THE BACKGROUND OF ORDER 53 AND THE DOCTRINE OF EXCLUSIVITY

### A. Availability of Private Remedies

The overriding purpose behind *O'Reilly* is to ensure that, when litigants challenge executive action in the courts within the accepted scope of judicial review,<sup>16</sup> they normally should not enjoy the option of seeking a declaration or an injunction. The decision does not affect special statutory remedies. Prior to the reforms that began with the amendment of Order 53 in 1977, a litigant had an unquestioned option either to follow the route of the prerogative orders or to follow the route of the private remedies. The latter option had developed through the twentieth century as an alternative to the prerogative orders, which at least in theory were weighed down with outdated, often artificial rules and requirements. In a lecture delivered in 1949, Lord Denning stated that the prerogative orders were "not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions, and actions for negligence."<sup>17</sup> An American scholar spoke in a similar vein in urging that the entire set of prerogative orders be thrown "into the Thames River, heavily weighted with sinkers to prevent them from rising again."<sup>18</sup>

The procedural limitations associated with the prerogative orders before these reforms included complex rules concerning locus standi, an absence of specific provisions for discovery and interrogatories, an opportunity to cross-examine on affidavits only in the most exceptional circumstances, a six-month time limit for seeking certiorari, and a rule that applications for prerogative orders could not be joined with any other remedies. In addition, litigants had to

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16. For discussions of the scope of, and grounds for, judicial review of administrative action, see S. DE SMITH, *supra* note 2, at 93-376; H. WADE, *supra* note 2, at 213-409. In Australia, the grounds for review, most of which are familiar in English law, have been enumerated by statute at the federal level. Administrative Decisions (Judicial Review) Act, 1977, §§ 5-6; see G. FLICK, *FEDERAL ADMINISTRATIVE LAW* 183-205 (1983); S. HOTOP, *PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW* 327-54 (6th ed. 1985).

17. A. DENNING, *FREEDOM UNDER THE LAW* 126 (1949) (quoted in *O'Reilly*, [1983] 2 A.C. at 259).

18. Davis, *The Future of Judge-Made Public Law in England: A Problem of Practical Jurisprudence*, 61 COLUM. L. REV. 200, 204 (1961).

obtain leave to apply for a prerogative order.<sup>19</sup> These limitations did not apply, and still do not apply, to ordinary private actions, save that the rules governing locus standi for declarations and injunctions were at least as strict as those that applied to prerogative orders prior to the reforms.<sup>20</sup> The use of declarations and injunctions was subject to other limitations, including the rule that interim declaratory orders are not recognised in law<sup>21</sup> and the rule that injunctions do not lie against the Crown.<sup>22</sup> The private remedies, however, seemed less inhibited by the restrictions and assumptions of the past, and many observers, including Lord Denning, regarded them as the possible focus for a reform of remedies in administrative law. Instead, the reforms were built around the prerogative orders.

### *B. Reform of Administrative Law Remedies: The New Order 53*

The application for judicial review under the new Order 53, issued in 1977, allows litigants to choose one or more of five remedies—orders of certiorari, orders of prohibition, orders of mandamus, declarations, and injunctions. The court also may award damages if the litigant could have received them in a private action.<sup>23</sup> The High Court may grant a declaration or injunction if it regards that remedy as just and convenient after it considers “the

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19. For a brief summary of these limitations, see REPORT ON REMEDIES, *supra* note 7, ¶¶ 12-21; see also B. SCHWARTZ & H. WADE, *LEGAL CONTROL OF GOVERNMENT* 216-20 (1972) (discussing these limitations).

20. See REPORT ON REMEDIES, *supra* note 7, ¶¶ 22-30 (concerning declarations and injunctions generally).

21. See *International Gen. Elec. Co. v. Commissioners of Customs & Excise*, [1962] Ch. 784 (C.A.). More recently, the Law Commission has favoured the introduction of a form of interim declaratory order. See REPORT ON REMEDIES, *supra* note 7, ¶¶ 51-52. Judicial views, however, remain divided. See *Inland Revenue Comm'rs v. Rossminster Ltd.*, [1980] A.C. 952 (1979) (House of Lords reversed decision of the Court of Appeal allowing interim declaratory order); *Codelfa-Cogefar (N.Z.) Ltd. v. Attorney-General*, [1981] 2 N.Z.L.R. 153, 160-62 (H.C.) (White J.).

22. This rule, and the meaning of “the Crown,” were discussed in *Town Invs. Ltd. v. Department of the Env't*, [1978] A.C. 359 (1977), in which Lord Simon said: “[T]he Crown’ and ‘Her Majesty’ are terms of art in constitutional law. . . . ‘Crown’ includes all the departments of the central government.” *Id.* at 398 (quoting E. WADE & G. PHILLIPS, *CONSTITUTIONAL LAW* 264 (3d ed. 1946)).

23. Supreme Court Act, 1981, ch. 54, § 31(4). For a discussion of the difficult and evolving law governing damage awards in administrative law, see H. WADE, *supra* note 2, at 673.

nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition and certiorari," "the nature of the persons and bodies against whom relief may be granted by such orders," and "all the circumstances of the case."<sup>24</sup> Order 53 does not expressly affect the private remedies of declarations and injunctions obtained by writ or originating summons, which, of course, operate in wide areas of "private" as well as "public" law. For declarations and injunctions under the application for judicial review, however, the statutory guidance indicates that courts should use them broadly only in "the same sphere as that in which the prerogative remedies themselves operate."<sup>25</sup> In other words, declarations and injunctions issued under Order 53 are custom-built for the purposes of judicial review of administrative action.

Any application for a prerogative order clearly has to be brought under Order 53. The language of the primary and subordinate legislative provisions applicable to Order 53, however, seems to allow a prospective litigant the option of seeking a declaration or an injunction either under Order 53 or by writ or originating summons. The availability of such an option evidently troubled some judges more and more after Order 53 became effective, and this uncertainty eventually led to the decision in *O'Reilly*.

The ruling of the House of Lords in *O'Reilly* does much to explain the underlying difficulties and constraints of administrative law. Order 53, as amended, is designed both to simplify the procedure for individual citizens and organisations seeking relief against public authorities and to protect public authorities from harassment or obstruction through the process of judicial review. Because it embodies safeguards from each direction, courts now regard Order 53, in light of the decision in *O'Reilly*, as the appropriate medium for case-by-case development of the law, and the onus rests on those who seek as an alternative to pursue other remedies.

This onus may be discharged, however, in cases of considerable complexity.<sup>26</sup> The nature of the subject matter of a case also may influence the attitude of the courts, which are exploring the range

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24. Supreme Court Act, 1981, ch. 54, § 31(2).

25. H. WADE, *supra* note 2, at 573.

26. In *O'Reilly*, Lord Denning M.R. gave the example of *Air Canada v. Secretary of State*, [1983] 2 A.C. 394. *O'Reilly*, [1983] 2 A.C. at 258-59.

of possible exceptions to the presumption in favour of exclusivity. *O'Reilly* itself was the latest in a series of cases concerning prisoners' rights, and Lord Denning M.R. referred in his judgment to areas such as homelessness and immigration, in which litigants had sought to move otherwise than through Order 53.<sup>27</sup> Designation of the exceptions is important, especially to enable lawyers to advise clients about appropriate remedies. With the presumption in favour of exclusivity, however, the task of identifying the outstanding features of Order 53 is equally important.

The discretionary nature of Order 53 remedies, and of the two main private remedies of declarations and injunctions, continues to be important. Indeed, the judge at first instance in *O'Reilly* regarded the exercise of judicial discretion in granting or rejecting a remedy at the conclusion of a trial as the means to correct a plainly inappropriate remedy choice.<sup>28</sup> Lord Diplock, who spoke for a unanimous House of Lords, saw judicial discretion to deal with such a choice summarily at the outset, by ruling it an abuse of the process of the court, as essential to the interests of public policy.<sup>29</sup> One should not interpret Lord Diplock's view, however, as denying the general importance of judicial discretion exercised at the conclusion of proceedings.<sup>30</sup> As one commentator recently indicated, "the courts have not attempted to lay down firm guidelines" for the exercise of that discretion,<sup>31</sup> perhaps meaning that a significant element of unpredictability concerning judicial discretion is inevitable and that the reforms achieved in Order 53 have not made any difference in this regard.<sup>32</sup>

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27. [1983] 2 A.C. at 257. Lord Denning expressed concern about giving these litigants broad remedial options: "Nearly all these people are legally-aided. If they were allowed to proceed by ordinary action, without leave, I can well see that the public authorities of this country would be harassed by all sorts of claims—long out of time—on the most flimsy of grounds." *Id.* at 257-58.

28. *Id.* at 245-46.

29. *Id.* at 284.

30. See, e.g., *R. v. Diggines, ex parte Rahmani*, [1985] 1 Q.B. 1109 (C.A. 1984); *R. v. St. Edmundsbury Borough Council, ex parte Investors in Indus. Comm'l Properties Ltd.*, [1985] 1 W.L.R. 1168 (Q.B.); *R. v. Broadcasting Complaints Comm'n, ex parte Owen*, [1985] 1 Q.B. 1153.

31. C. HARLOW & R. RAWLINGS, *supra* note 2, at 285.

32. Order 53 has made little or no difference in some other respects as well. For example, some limitations on the individual remedies, such as the understanding that certiorari and



One of the objectives behind the reforms was to inject into Order 53 procedural advantages previously enjoyed only by those pursuing the private remedies. In the area of discovery, for instance, the Law Commission was anxious that a specific power be vested in the court to order such discovery as it considered appropriate. Discovery, then, would not be automatic as in ordinary actions, to avoid "unnecessary delay and expense" in straightforward cases. The Commission recommended a similar specific power for interrogatories and for cross-examination of persons making affidavits.<sup>33</sup> The Law Commission's proposals were adopted in the new Order 53.<sup>34</sup> Lord Diplock explained the importance of this rule in his speech in *O'Reilly*, urging, for example, that courts allow cross-examination of deponents on their affidavits "whenever the justice of the particular case so requires."<sup>35</sup> Ironically, in the Court of Appeal Lord Denning M.R. saw the provision for a special power to cover these interlocutory applications as a restraint on the abuse of judicial review. Cross-examination, he said, "can roam unchecked in ordinary actions, but is kept within strict bounds in judicial review. It is rarely allowed."<sup>36</sup>

More obviously designed as a restraint is the provision of a time limit for applications under Order 53. The six-month period applying to certiorari prior to 1971 now has been reduced to three months for Order 53 proceedings, unless the court finds a "good reason for extending the period within which the application shall be made."<sup>37</sup> Even within the three-month period, the applicant must act promptly, and the court must exercise judicial discretion in this area with the interests of the applicant and of the administration in mind.<sup>38</sup> As an Australian judge recently noted:

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prohibition apply only to "judicial" functions of the administration, to a large extent have evaporated without any legislative prompting. See H. WADE, *supra* note 2, at 551-58.

33. See REPORT ON REMEDIES, *supra* note 7, ¶ 49.

34. The Rules of the Supreme Court (Amendment No. 3), STAT. INST., 1977, No. 1955, § 5, rule 8.

35. [1983] 2 A.C. at 283.

36. *Id.* at 257.

37. The Rules of the Supreme Court (Amendment No. 3), STAT. INST., 1977, No. 1955, § 5, rule 4.

38. For a careful analysis of this provision in Order 53, see *R. v. Stratford-on-Avon Dist. Council, ex parte Jackson*, [1985] 1 W.L.R. 1319 (C.A.) (Ackner L.J.) (delay caused by the time taken to obtain legal aid). For recent examples of this discretion in action, see *R. v.*

It is in the public interest that the administration of the law should not be inappropriately hampered by the extension of indulgences to undeserving persons, but it is in accordance with justice and the public interest that a citizen should not lose an entitlement by delay which is neither reprehensible or excessive.<sup>39</sup>

Both the three-month time limit and the urgency that attaches to an application under Order 53 once it is launched reflect the concern for speed in the process of judicial review. In an important 1984 case concerning subordinate legislation, which involved issues of European Economic Community law, parliamentary privilege, and judicial restraint, Sir John Donaldson gave this description of the stages in the application for review in that case:

On 28 November 1984 Mr. Smedley obtained leave from Hodgson J. to apply for relief by way of judicial review. His application came before Woolf J. on 6 December and was dismissed on 7 December. His appeal to this court was heard on 12 and 13 December and, but for the fact that we received a message to the effect that a judgment given today would be as satisfactory as one given earlier and we welcomed the opportunity to put our judgments into writing, we had intended to give judgment on 14 December. Bearing in mind that at each stage the matter has been fully argued, there can be and is no complaint that the courts or the practitioners have been dilatory. Indeed in some other jurisdictions the timetable would be regarded with some surprise, not to say envy. I mention the matter not in any spirit of complacency, but merely in order to counterbalance the

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British Rys. Bd., *ex parte* Great Yarmouth Borough Council, [1983] T.L.R., No. 188 (Q.B. Mar. 15, 1984) (grant of time extension in *ex parte* application may be revoked at inter partes hearing); *R. v. Chester Justices, ex parte Holland*, [1984] T.L.R., No. 81 (Q.B. Feb. 18, 1984) (allowing time extension); *R. v. Greenwich Borough Council, ex parte Cedar Transp. Group Ltd.*, [1983] T.L.R., No. 555 (Q.B. Div'l Ct. Aug. 3, 1983) (stressing the need for promptness within the three months); *R. v. Swansea City Council, ex parte Main*, *The Times of London*, Dec. 23, 1981, at 17, col. 4 (C.A. Dec. 18, 1981) (rejecting time extension).

39. *Intervest Corp. Pty. Ltd. v. Commissioner of Taxation*, 3 F.C.R. 591, 599 (Austl. Fed. Ct. 1984) (Smithers J.); *see also Hunter Valley Devs. Pty. Ltd. v. Cohen*, 3 F.C.R. 344, 348-49 (Austl. Fed. Ct. 1984) (Wilcox J.) (explaining the criteria that the courts might adopt in considering applications for time extensions).

well justified complaints which are sometimes made of the law's delays.<sup>40</sup>

The "new face of judicial review" that has emerged since 1977 is based to no small extent on the active determination of the judges to avoid unnecessary delay. In a variety of ways, which have been explained fully by a leading Queen's Counsel,<sup>41</sup> a new streamlined machinery manned by a corps of specialised judges in the Queen's Bench Division<sup>42</sup> has led to a state of affairs in which "as soon as the application for leave [is] made it provide[s] a very speedy means, available in urgent cases within a matter of days rather than months, for determining whether a disputed decision was valid in law or not."<sup>43</sup> In his speech in *O'Reilly*, Lord Diplock was prepared to concede that prior to 1977 a litigant concerned about the procedural handicaps associated with prerogative orders properly might have chosen to pursue the private remedies instead, "despite the fact that, by adopting this course, the plaintiff evaded the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law."<sup>44</sup> Since 1977, his Lordship stressed, those handicaps largely had been overcome by changes of law and practice, and the presumption of exclusivity hence should apply.

An assessment of the principal features of the new Order 53, however, must include a discussion of two other relevant procedural requirements—leave to apply for judicial review, and standing. Standing is a concept shared by all common law jurisdictions, and therefore it is relatively familiar to American readers. Leave to apply for judicial review, on the other hand, is a distinctive feature of the English system of judicial review. The very existence of a leave requirement in England is intimately bound up with judicial

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40. *R. v. H.M. Treasury, ex parte Smedley*, [1985] Q.B. 657, 664-65 (C.A. 1984). For a summary of Sir John Donaldson's contributions to the acceleration of administrative law cases, see Blom-Cooper, *The New Face of Judicial Review: Administrative Changes in Order 53*, 1982 PUB. L. 250, 257.

41. See Blom-Cooper, *supra* note 40.

42. See *O'Reilly*, [1983] 2 A.C. at 259 (Lord Denning).

43. *Id.* at 281 (Lord Diplock).

44. *Id.* at 282. Lord Diplock also discussed other procedural features of Order 53 in the course of his speech. See *id.* at 282-85.

attitudes toward standing, and it ultimately may prove to provide a more effective and realistic check on litigation in administrative law than ever can be achieved through rules of standing.

### III. STANDING AND LEAVE REQUIREMENTS IN THE WAKE OF THE NEW ORDER 53

#### A. *The Requirement of Leave*

##### 1. *In General*

The requirement of leave to apply for judicial review applied to the prerogative orders even before 1977, and the Law Commission, taking into account the preliminary findings of an empirical study concerning the working of the Queen's Bench Divisional Court, favoured its retention in any revised Order 53: "[A] procedure which provides an expeditious method whereby the Court can sift out the cases with no chance of success at relatively little cost to the applicant and no cost to any prospective respondent would seem at first impression worthy of retention."<sup>45</sup> The Commission explained that from 1971 to 1975 inclusive the proportion of cases in which courts refused leave to apply for a prerogative order amounted to just over one-third of the applications made.<sup>46</sup> In civil cases<sup>47</sup> under Order 53 in 1982, leave was granted in 347 cases and refused in 168; in 1983, it was granted in 494 cases and refused in 176; in 1984, it was granted in 542 cases and refused in 161; and in 1985, it was granted in 644 cases and refused in 304.<sup>48</sup>

The revised Order 53, as amended in 1980, requires an application for leave in civil matters to be *ex parte* to a single judge, with very little documentation. Unless otherwise asked, the judge may determine the application without a hearing. If the judge refuses or

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45. REPORT ON REMEDIES, *supra* note 7, ¶ 38.

46. *Id.* ¶ 37.

47. A large number of applications for judicial review relate to criminal matters, especially proceedings before magistrates' courts. See 461 PARL. DEB., H.L. (5th ser.) 443-44 (1985) (Lord Hailsham) (noting that about one-third of all leave applications are in criminal matters).

48. LAW COMMISSION, JUDICIAL STATISTICS, 1985, CMD. 9864, at 18 (Table 1.15); LAW COMMISSION, JUDICIAL STATISTICS, 1984, CMD. 9599, at 18 (Table 1.15); LAW COMMISSION, JUDICIAL STATISTICS, 1983, CMD. 9370, at 19 (Table 1.15); LAW COMMISSION, JUDICIAL STATISTICS, 1982, CMD. 9065, at 17 (Table 1.14); see P. BIRKINSHAW, *supra* note 2, at 173.

grants leave on terms, the applicant may renew the application before a single judge in open court or, if the court so directs, before a divisional court. From a refusal of leave at this stage, an applicant may further appeal, or renew application, to the Court of Appeal, but no further.<sup>49</sup> Until recently, the Court of Appeal, if minded to grant leave, often proceeded to determine at that stage the application for judicial review on its merits rather than referring the application back to the High Court. On several occasions, Lord Denning took advantage of this option while presiding over or participating as a member of the Court of Appeal.<sup>50</sup> The availability of this option, however, ended with a Practice Direction of the Queen's Bench Division in 1983,<sup>51</sup> thus stopping what Lord Hailsham L.C. described as a "quite illegal assumption of a jurisdiction at first instance."<sup>52</sup>

Some individuals contend that an appeal from refusal to grant leave should not lie in any circumstances. In the Administration of Justice Bill, 1985, when that bill came before the House of Lords in its legislative capacity, clause 43 initially purported to remove the right of appeal. The introduction of the clause was criticised in several quarters, including the Court of Appeal itself, where one judge spoke of "the merits of the present rules which allow unrestricted access to the Court of Appeal, in this field, where so much of the litigation is directed to preventing alleged abuses of power."<sup>53</sup> In response to this opposition, a compromise clause was

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49. *See In re Poh*, [1983] 1 W.L.R. 2 (H.L. 1982).

50. The final such occasion was in the context of Canadian constitutional issues and the alleged treaty rights of Indian peoples in Canada. *See R. v. Secretary of State, ex parte Indian Ass'n*, [1982] Q.B. 892 (C.A.). Lord Denning gave other examples in 459 *PARL. DEB.*, H.L. (5th ser.) 942-43 (1985).

51. [1983] 1 W.L.R. 925, 926 (addressing delay in applying for leave to apply for judicial review).

52. 461 *PARL. DEB.*, H.L. (5th ser.) 461 (1985). Lord Hailsham added: "I know that the noble Lord, Lord Denning, thinks he was not committing a constitutional monstrosity by making the Court of Appeal a court of first instance; but he was." *Id.*

53. *R. v. Commissioner for the Special Purposes of the Income Tax Acts, ex parte Stipplechoice Ltd.*, [1985] 2 All E.R. 465, 467 (C.A.) (Ackner L.J.). The Court of Appeal also expressed similar sentiments in *R. v. Beverley County Ct., ex parte Brown*, [1985] T.L.R., No. 40 (C.A. Jan. 25, 1985) (Purchas L.J.). In his capacity as Lord Chancellor, Lord Hailsham countered by saying that "when a matter is passing through Parliament it is utterly improper in my judgment for a Court of Appeal judge or any other judge speaking on the Bench to criticise matters passing through Parliament." 459 *PARL. DEB.*, H.L. (5th ser.) 945 (1985).

introduced, described by one peer as "in form a cosmetic amendment which has been introduced for some face saving reason."<sup>54</sup> Lord Denning and others ensured that the proposal was finally rejected in a vote of ninety-seven to eighty-two in the House of Lords.<sup>55</sup>

This interlude in the House of Lords demonstrates the measure of concern about existing procedures and safeguards associated with the leave requirement. The retention of a leave requirement, however, has been defended on various grounds. From the point of view of the applicant, refusal of leave may be a blessing in disguise, enabling him to discover speedily and at small cost to himself that a particular case is very unlikely to succeed at a full hearing.<sup>56</sup> From the point of view of administration, the leave requirement serves as a useful device in a number of ways. First, the application must be supported by, among other things, an affidavit demonstrating "uberrima fides," or the "most perfect good faith," "so that a knowingly false statement of fact would amount to the criminal offence of perjury," as Lord Diplock pointed out.<sup>57</sup> Second, the court has power to impose terms as to costs or security upon applicants who are granted leave.<sup>58</sup> Third, and more broadly, the requirement of leave acts as a sieve, designed to ensure that public authorities and third parties are not delayed "for any longer period than is absolutely necessary in fairness to the person affected" by an administrative decision.<sup>59</sup> In debate in the House of Lords, Lord Hailsham L.C., after describing the process of judicial review as "a very remarkable development of English law, mainly since the war," referred to the need for a sieve or filter, drawing attention to the burgeoning of case law in such countries as the United States

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54. 461 PARL. DEB., H.L. (5th ser.) 454 (1985) (Lord Hutchinson).

55. *Id.* at 443-64. For a brief account of the background to the parliamentary proceedings, see Council on Tribunals, *Annual Report for 1984/85*, H.C. JOUR., Nov. 28, 1985, §§ 2.27-29.

56. See REPORT ON REMEDIES, *supra* note 7, ¶ 38. An application made ex parte, however, may be adjourned to enable the prospective respondent to be represented. The Rules of the Supreme Court (Amendment No. 3), STAT. INST., 1977, No. 1955, § 5, rule 5(7).

57. *O'Reilly*, [1983] 2 A.C. at 280. Lord Diplock added: "[T]he requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity." *Id.* at 281.

58. *Id.* at 281.

59. *Id.*

and India.<sup>60</sup> Courts have seen that the purpose behind the leave requirement

is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.<sup>61</sup>

## 2. Contrast With Standing Requirements Applicable in Ordinary Actions

No leave requirement, of course, applies to ordinary actions for declarations and injunctions. The "filter" recognised for such actions arises from the strict rule of standing that requires a plaintiff to "show either an interference with some private right of his or an interference with a public right from which he has suffered damage peculiar to himself."<sup>62</sup> Counsel in one case argued that the filter, almost as a parallel to the exercise of the court's discretion to grant leave in Order 53 proceedings, is provided by the Attorney-General's prerogative discretion to allow a case to proceed even in the absence of standing.<sup>63</sup>

Advising a prospective plaintiff who wishes to sue a public authority on some recognised ground of judicial review of administrative action is not easy. In the first place, the scope of the rule of standing is unclear, as recent Australian as well as English cases

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60. 459 PARL. DEB., H.L. (5th ser.) 946 (1985).

61. *Inland Revenue Comm'rs v. National Fed'n of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617, 643 (1981) (Lord Diplock); *see also id.* at 653 (Lord Scarman) (stating that the leave requirement "enables the court to prevent abuse by busybodies, cranks, and other mischief-makers"). A recent example of a case in which the Divisional Court refused leave is *R. v. Secretary of State, ex parte Swati*, [1986] T.L.R., No. 29 (Q.B. Div'l Ct. Jan. 30, 1986), which arose in the context of a person being refused leave to enter the United Kingdom.

62. *Barrs v. Bethell*, [1982] Ch. 294, 306 (1981) (Warner J.) (citing *Boyce v. Paddington Borough Council*, [1903] 1 Ch. 109 (1902) (Buckley J.), and *Collins v. Lower Hutt City Corp.*, [1961] N.Z.L.R. 250 (McGregor J.)); *see also Steeples v. Derbyshire County Council*, [1985] 1 W.L.R. 256, 290-92 (Q.B. 1981) (Webster J.) (discussing the requirement of a private right or special damage to a public right).

63. *See Barrs v. Bethell*, [1982] Ch. 294, 306 (1981) (Warner J.).

have shown.<sup>64</sup> In one of the leading Australian decisions, the High Court declined an invitation from counsel to disregard existing authorities and to devise a rule "allowing standing to any private citizen to enforce public duties, unless the court in its discretion considered it inadvisable that the action should be allowed to proceed."<sup>65</sup> The invitation itself was tantamount to a request to introduce a leave requirement. In the second place, the Attorney-General's power to overcome problems of standing provides another source of difficulty. The courts hitherto have been reluctant to question this power, especially since a controversial case in 1977 in which the House of Lords overrode the Court of Appeal and strongly endorsed the absolute nature of the Attorney-General's discretion.<sup>66</sup>

The restiveness about the strict rule of standing applying to ordinary actions is not surprising because of the move toward a greater liberalisation of the standing requirements in several jurisdictions and in various contexts. In England, for instance, where the term "person aggrieved" has been used with regard to certain special statutory remedies,<sup>67</sup> "a clearly discernible trend" away from a strict view of standing has occurred.<sup>68</sup> In Australia, where the term "a person who is aggrieved" appears in a major federal statute on judicial review,<sup>69</sup> one judge has argued that the words "should not in my view be given a narrow construction."<sup>70</sup> Despite

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64. See *Onus v. Alcoa of Austl. Ltd.*, 149 C.L.R. 27 (Austl. H.C. 1981); *Australian Conservation Found. Inc. v. Commonwealth of Austl.*, 146 C.L.R. 493 (Austl. H.C. 1980) (discussing, among other cases, *Sierra Club v. Morton*, 405 U.S. 727 (1972)); REPORT ON REMEDIES, *supra* note 7, ¶¶ 22, 27 (summarising English law concerning the subject).

65. *Australian Conservation Found. Inc. v. Commonwealth of Austl.*, 146 C.L.R. 493, 528 (Austl. H.C. 1980) (Gibbs J.).

66. *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 (1977). For a discussion of the political and legal background of *Gouriet*, see J. EDWARDS, *THE ATTORNEY GENERAL, POLITICS AND THE PUBLIC INTEREST* 138-76 (1984).

67. See, e.g., *Town and Country Planning Act*, 1959, 7 & 8 Eliz. 2, ch. 53, § 31(1).

68. See S. DE SMITH, *supra* note 2, at 412 (citing, among other cases, *Turner v. Secretary of State*, 28 P. & C.R. 123 (Q.B. 1974)). For an earlier and more restrictive interpretation of "person aggrieved," see *Buxton v. Minister of Housing and Local Gov't*, [1961] 1 Q.B. 278 (1960).

69. *Administrative Decisions (Judicial Review) Act*, 1977, § 5(1).

70. *Tooheys Ltd. v. Minister for Business & Consumer Affairs*, 54 F.L.R. 421, 437 (Austl. Fed. Ct. 1981) (Ellicott J.).



frequent judicial support for more liberalised rules of standing,<sup>71</sup> however, a certain uneasiness underlies any attempt to eliminate rules of standing altogether. More liberal standing rules seemingly would make judicial discretion as to remedy awards more important,<sup>72</sup> but a late check at the conclusion of a trial is unlikely to be an acceptable substitute for a filter at the outset. This is when a leave requirement, irrespective of its other features and advantages, is significant, because the existence of this filter offers a reassurance for those who would wish to liberalise the rules of standing. Moreover, a leave requirement is a more flexible, less technical device than the rules of standing. The experience with the new Order 53 in England and Wales suggests that the judges have been prepared to accept a substantial weakening of restrictions of locus standi in the context of a remedy that requires leave to apply at the threshold of litigation.

### *B. The Rules of Standing*

In deciding whether to grant leave to apply for judicial review, the High Court is obliged to consider whether the applicant "has a sufficient interest in the matter to which the application relates."<sup>73</sup> Different rules of standing existed for each of the prerogative orders prior to 1977, but the move toward liberalisation of standing rules, typified by Lord Justice Lawton's observation that "courts have come a long way . . . in allowing grievances against persons performing public duties and exercising statutory powers to be given a hearing in the courts,"<sup>74</sup> had affected prerogative orders as

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71. In the Irish Supreme Court, for example, Justice Walsh noted that "restrictive rules about standing are, in general, inimical to a healthy system of administrative law." *State (Lynch) v. Cooney*, [1982] I.R. 337, 368 (Ir. S.C.). Courts in several other Commonwealth jurisdictions have shared this view. See, e.g., *Rowley v. New S. Wales Leather & Trading Co. Pty. Ltd.*, 46 L.G.R.A. 250 (N.S.W. Land & Env't Ct. 1980) (Cripps J.); *In re Energy Probe & Atomic Energy Control Bd.*, 8 D.L.R.4th 735 (Can. Fed. Ct. 1984); *Environmental Defence Soc'y Inc. v. South Pac. Aluminum Ltd. (No. 3)*, [1981] 1 N.Z.L.R. 216, 220-21 (N.Z.C.A.).

72. *Rowley v. New S. Wales Leather & Trading Co. Pty. Ltd.*, 46 L.G.R.A. 250, 256-57 (N.S.W. Land & Env't Ct. 1980) (Cripps J.).

73. Supreme Court Act, 1981, ch. 54, § 31(3).

74. *R. v. Inland Revenue Comm'rs, ex parte National Fed'n of Self-Employed & Small Businesses Ltd.*, [1980] Q.B. 407, 428 (C.A.) (Lawton L.J.), *rev'd*, [1982] A.C. 617 (1981); see B. SCHWARTZ & H. WADE, *supra* note 19, at 291-96.

well as some other remedies. A striking example of this liberalisation was *Regina v. Greater London Council, ex parte Blackburn*,<sup>75</sup> in which the Court of Appeal, in a case concerning cinema licences and allegedly indecent films, held that the applicants had standing to seek an order of prohibition. In his judgment, Lord Denning M.R. emphasised that one of the applicants "is a citizen of London. His wife is a ratepayer. He has children who may be harmed by the exhibition of pornographic films. If he has no sufficient interest, no other citizen has."<sup>76</sup> Lord Denning repeated his assertion in an earlier case about the constitutional importance of ensuring access to the courts when "a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects."<sup>77</sup>

The reform of Order 53 and the introduction of the concept of "sufficient interest" created questions about the position of standing rules after 1977. The legal community regarded revival of the older technical limitations on locus standi as inconceivable, and the Law Commission intended the new formula to be one that allowed "for further development of the requirement of standing by the courts having regard to the relief which is sought."<sup>78</sup> Despite this guidance, the provision in the new Order 53 concerning standing provided no clear answers to several important questions, including what test of "sufficient interest" should be adopted in the courts, whether that test should apply in a similar fashion to all five remedies incorporated in the application for judicial review, and whether standing should be resolved solely at the stage of seeking leave or at the inter partes hearing of an application at both stages. The opportunity to seek answers to such questions came early on, in *Regina v. Inland Revenue Commissioners, ex*

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75. [1976] 1 W.L.R. 550 (C.A.).

76. *Id.* at 558-59.

77. *Id.* at 559 (quoting Attorney-General *ex rel.* McWhirter v. Independent Broadcasting Auth., [1973] Q.B. 629, 646 (C.A.)). Lord Diplock associated himself with this assertion in *Inland Revenue Comm'rs v. National Fed'n of Self-Employed & Small Businesses Ltd.*, [1982] A.C. 617, 641 (1981).

78. REPORT ON REMEDIES, *supra* note 7, ¶ 48. The Commission further stated: "[A]ny attempt to define in precise terms the nature of the standing required would run the risk of imposing an undesirable rigidity" in the law. *Id.*

*parte National Federation of Self-Employed & Small Businesses Ltd.*,<sup>79</sup> which is commonly known as the *Fleet Street Casuals* case.

The National Federation of Self-Employed and Small Businesses, "good men and true who pay their taxes,"<sup>80</sup> raised the complaint in that case that the revenue authorities had acted unlawfully in granting what was in effect an amnesty to some casual employees working for national newspapers. These casual employees apparently had been evading taxes by supplying fictitious names and addresses when receiving their pay, including, in one instance, "Mickey Mouse of Sunset Boulevard." When the extent of the wide-scale practice had been discovered, the revenue authorities had come to a special arrangement with the employers and trade unions, which had entailed a strict requirement as to true names for the future and an amnesty for past violations. The federation saw this settlement as preferential treatment, perhaps inspired by union pressure and the possibility of industrial action, and it sought judicial review.<sup>81</sup> Leave to apply was granted, but the question of standing was raised as a preliminary issue to be determined ahead of a hearing of the merits of the application.

At first instance, the Divisional Court ruled against the federation. One judge touched on the familiar "floodgates" argument, suggesting that, if the applicants in this case were entitled to apply under Order 53, "then so [were] any one of the other 25 million persons in this country who pay tax. If the court adopted that approach it would be swamped with applications by persons who were aggrieved with the administration."<sup>82</sup> In the Court of Appeal, Lord Justice Lawton expressed similar sentiments. With a glancing claim that "the courts should be slow to listen to the barking of the dog in the manger,"<sup>83</sup> Lord Justice Lawton drew attention to "the mischief which was likely to arise if public officers could be sued by anyone with a grievance".<sup>84</sup>

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79. [1980] 2 All E.R. 378 (Q.B. Div'l Ct.), *rev'd*, [1980] Q.B. 407 (C.A.), *rev'd*, [1982] A.C. 617 (1981).

80. [1980] Q.B. at 419 (Lord Denning).

81. *Id.* at 418-19.

82. [1980] 2 All E.R. at 387 (Griffiths J.).

83. [1980] Q.B. at 427.

84. *Id.* at 428.

A line has to be drawn somewhere. If this application is put on the side of the line where the federation want [sic] it to be, anyone's genuine concern for good and lawful government, whether at a national or local level, would be a sufficient interest to justify a judicial review. This would entangle the courts with administration in a way which would be inconvenient and unconstitutional. Such is the flexibility of our unwritten constitution that the lack of a remedy in the courts does not mean that justice may not be done elsewhere.<sup>85</sup>

The majority of the Court of Appeal, however, adopted a different stance, holding as a preliminary issue that the federation had standing. Lord Denning M.R. reviewed the authorities on standing, assessed the facts and statutory context of the case, and said:

[I]f the Revenue authorities are found to be exercising a dispensing power—not given to them by Parliament—then it is open to a representative body of taxpayers—representative of the whole—to come to the courts to complain of it: and to seek a declaration as to the rights or wrongs of it.<sup>86</sup>

The House of Lords overruled this divided decision of the Court of Appeal but, not surprisingly given the admission in the Court of Appeal that “the law as to who can ask the courts to set in motion remedies for public grievances is confused and in need of clarification,”<sup>87</sup> the speeches in the House of Lords reflected differences of approach. Broadly speaking, the House of Lords held that the statutory framework in which the revenue authorities operated was not appropriate for the grant of standing in this case. The Lords emphasised the “total confidentiality of assessments and of negotiations between individuals and the revenue,”<sup>88</sup> and the absence of any evidence to suggest that the revenue authorities acted other than “in the bona fide exercise of the wide managerial discretion conferred on them by statute.”<sup>89</sup> The individual speeches of the five members of the House of Lords who spoke contained surveys or summaries of the older law governing standing, particularly the

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85. *Id.*

86. *Id.* at 424.

87. *Id.* at 425 (Lawton L.J.).

88. [1982] A.C. at 633 (Lord Wilberforce).

89. *Id.* at 637 (Lord Diplock).

law relating to the prerogative orders, and they generally recognised that many of the older decisions concerning standing were now of little relevance. The Lords differed, however, concerning whether any distinctions between the five remedies had survived with respect to standing. Lord Diplock thought not,<sup>90</sup> but Lord Wilberforce spoke of the different character of the relief sought in the five remedies, urging that "we should be unwise in our enthusiasm for liberation from procedural fetters to discard reasoned authorities" concerning different rules of standing.<sup>91</sup> This apparent divergence of views probably is not important, however, given Lord Wilberforce's realisation that the process of judicial review cannot stand still, and the apparent assumption of both Lord Wilberforce and Lord Diplock that courts still would take various approaches to standing through a case-by-case, statute-by-statute development.

The importance of another divergence of opinion also can be overstated. Lord Diplock and Lord Scarman saw standing as bound up in the merits of the case, and they deemed that the federation did not have standing because it had failed to show *ultra vires* action on the part of the revenue authorities. Lord Diplock declared:

It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.<sup>92</sup>

The other members of the House of Lords were more hesitant, subscribing instead to the view "that in general it is not open to individual taxpayers or to a group of taxpayers to seek to interfere between the [revenue] and other taxpayers."<sup>93</sup> This attempt firmly to discourage interference by other taxpayers, however, by seeing the standing issue as a matter of principle rather than as something to emerge from a consideration of the specific allegations of

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90. *See id.* at 638.

91. *Id.* at 631.

92. *Id.* at 644.

93. *Id.* at 663 (Lord Roskill).

illegality, was seriously weakened by acceptance of a major exception. According to the three Lords who advocated this position, the principle could have been waived if the case had been "of sufficient gravity,"<sup>94</sup> if it had involved "some exceptionally grave or widespread illegality,"<sup>95</sup> or if the revenue authorities had failed in their duty because of "some grossly improper pressure or motive."<sup>96</sup> A rule that would require courts to differentiate between degrees of illegality when making determinations on standing, however, would be unfortunate.<sup>97</sup> A simple acceptance of the merging of standing and merits would seem the preferable approach.

Although the decision of the House of Lords was not directed principally to the requirement of leave, the statutory provision governing standing for Order 53 does state that a court ought not to grant leave unless it considers the applicant to have a sufficient interest in the matter related to the application.<sup>98</sup> In spite of this express linking of standing to the application for leave, the House of Lords effectively has indicated that the scope for consideration of standing at that stage should be narrow. Leave might be refused to prevent "the courts being flooded and public bodies harassed by irresponsible applications,"<sup>99</sup> "to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error,"<sup>100</sup> and "to prevent abuse by busybodies, cranks, and other mischief-makers."<sup>101</sup> A more specific example, which involved one of the applicants in *Blackburn*,<sup>102</sup> was given by

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94. *Id.* at 633 (Lord Wilberforce).

95. *Id.* at 647 (Lord Fraser).

96. *Id.* at 662 (Lord Roskill). In *R. v. Commissioners of the Boundary Comm'n for England, ex parte Gateshead Borough Council*, [1983] T.L.R., No. 7 (Q.B. Div'l Ct. Jan. 5, 1983), *aff'd sub nom. R. v. Boundary Comm'n for England, ex parte Foot*, [1983] 1 Q.B. 600 (C.A.), the court also referred to an exception for "a matter of sufficient gravity," *id.*, and Lord Justice Oliver also articulated an exception for cases involving "a clear and grave breach of duty," *id.* On appeal, however, the Court of Appeal expressed no view concerning locus standi. See [1983] 1 Q.B. at 624-25, 634. For very useful discussions of the merging of standing and merits, see P. CRAIG, *supra* note 2, at 418-60; Cane, *Standing, Legality and the Limits of Public Law*, 1981 PUB. L. 322.

97. See Case and Comment, *Mickey Mouse and Standing in Administrative Law*, 41 CAMBRIDGE L.J. 6, 8 (1982).

98. Supreme Court Act, 1981, ch. 54, § 31(3).

99. *Fleet Street Casuals*, [1982] A.C. at 630 (Lord Wilberforce).

100. *Id.* at 643 (Lord Diplock).

101. *Id.* at 653 (Lord Scarman).

102. See *supra* notes 75-77 and accompanying text.

Lord Justice Ackner in *Fleet Street Casuals*: "[I]f Mr. Blackburn had lived, for example in Penzance or Newcastle, it might well be contended that he could not reasonably assert that he had a genuine grievance, because he was so remote from where the alleged breach of statutory duty was said to have occurred."<sup>103</sup> Another example comes from a case in New South Wales,<sup>104</sup> which concerned a statute that included a provision allowing "any person" to bring proceedings for a breach.<sup>105</sup> In that case, a judge referred to "the interesting argument" as to "whether a Norwegian who has never set foot in New South Wales and who owned no property would have the standing to seek an order. . . ."<sup>106</sup> In England, such a person doubtless would fall foul of the leave requirement under Order 53, even given the greater proximity of Norway to the United Kingdom.

The very existence of the leave requirement in England seems to deflect worry either about trivial or irresponsible proceedings or, more generally, about opening the floodgates in judicial review, even for those who accept the concept that the "idle and whimsical litigant," "a dilettante who litigates for a lark," is "a specter which haunts the legal literature, not the courtroom."<sup>107</sup> In the words of one English judge:

[T]he fact that leave was required in judicial review proceedings and was required before prerogative orders prior to the new [Order 53], was a significant factor to be taken into account in the approach to *locus standi*, since the requirement of leave provided a necessary filter to prevent frivolous actions by persons who had no sufficient interest in the result of the proceedings.<sup>108</sup>

103. [1980] Q.B. at 432 (citing *R. v. Greater London Council, ex parte Blackburn*, [1976] 1 W.L.R. 550 (C.A.)); see also *R. v. Oxford, ex parte Levey*, [1985] T.L.R., No. 711 (Q.B. Div'l Ct. Dec. 18, 1985) (Watkins L.J.) (disallowing leave because applicant "did not live in Toxeth, had no business there, nor did the incident take place there").

104. *Rowley v. New S. Wales Leather & Trading Co. Pty. Ltd.*, 46 L.G.R.A. 250 (N.S.W. Land & Env't Ct. 1980) (Cripps J.).

105. Environmental Planning and Assessment Act, 1977, § 123.

106. *Rowley v. New S. Wales Leather & Trading Co. Pty. Ltd.*, 46 L.G.R.A. 250, 256 (N.S.W. Land & Env't Ct. 1980) (Cripps J.).

107. See PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE, NEW ZEALAND, *STANDING IN ADMINISTRATIVE LAW*, 1978, No. 11, ¶¶ 9-13; LAW REFORM COMMISSION, AUSTRALIA, *ACCESS TO COURTS I—STANDING: PUBLIC INTEREST SUITS*, 1978, WORKING PAPER No. 7, at 6-8.

108. *Notes of Cases, Covent Garden Community Ass'n Ltd. v. Greater London Council (Queen's Bench Division, Woolf J., April 2, 1980)*, 1981 J. OF PLAN. & ENV'T L. 183, 184.

After leave is granted, one is closer to a situation involving "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends."<sup>109</sup> Even so, "the provisional finding" or *prima facie* showing of sufficient interest is "subject to revisal later on,"<sup>110</sup> when standing can be assessed fully "together with the legal and factual context" of the case.<sup>111</sup>

Lord Denning M.R. claimed, ahead of the House of Lords' decision in *Fleet Street Casuals*, that the decision of the divided Court of Appeal "showed that a public-spirited citizen was entitled to come to court to be heard if he could point to a failure by a public authority to do the duty which in the public interest should be remedied."<sup>112</sup> This claim in the end has been justified. The case law since the ruling of the House of Lords has confirmed both the merging of standing and merits and a sustained liberalising approach toward standing, akin to that expressed by Lord Denning and by Lord Diplock.<sup>113</sup>

Even taxpayers have been permitted their say in court. In one decision in which the revenue authorities allegedly were adopting a wrong approach to the valuation of ethane, Woolf J. said: "It would be regrettable if a court had to come to the conclusion that in a situation where the need for the intervention of the court had been established that intervention was prevented by rules as to standing."<sup>114</sup> In another case, a citizen unsuccessfully sought judicial review with regard to an important draft Order in Council.<sup>115</sup> Sir John Donaldson M.R. went out of his way, however, to say that he would have been "extremely surprised" if rules of standing had

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109. *Baker v. Carr*, 369 U.S. 186, 204 (1962) (Brennan, J.).

110. *Fleet Street Casuals*, [1982] A.C. at 645 (Lord Fraser).

111. *Id.* at 630 (Lord Wilberforce).

112. *R. v. Metropolitan Police Comm'r, ex parte Blackburn*, *The Times* of London, Mar. 7, 1980, at 10, col. 5 (C.A. Mar. 6, 1980). At the conclusion of the case, the unsuccessful applicant referred to Lord Denning as the "greatest living Englishman." *Id.* Lord Denning replied: "Tell that to the House of Lords." *Id.* col. 8.

113. See, e.g., *Cane*, *supra* note 96; C. HARLOW & R. RAWLINGS, *supra* note 2, at 284-310.

114. *R. v. Attorney General, ex parte Imperial Chem. Indus. plc*, [1985] T.L.R., No. 90 (Q.B. Feb. 12, 1985); see also *R. v. Secretary of State, ex parte Ward*, [1984] 1 W.L.R. 834, 843-46 (Q.B. 1983) (Woolf J.) (discussing the right of an applicant to seek relief by way of judicial review).

115. *R. v. H.M. Treasury, ex parte Smedley*, [1985] Q.B. 657 (C.A. 1984).



stood in the way of the applicant,<sup>116</sup> and one of his appellate colleagues said:

If the court had taken the view that Mr. Smedley's application was of a frivolous nature, the wide discretion given it by R.S.C., Ord. 53 would have enabled it to dispose of it appropriately. There has, however, been no suggestion that it is of this nature. It raises a serious question as to the powers of Her Majesty in Council to make an Order in Council in the form of the draft now before Parliament. The making of any such Order would be likely to be followed automatically by the expenditure by the government of substantial sums from the Consolidated Fund. . . . I do not feel much doubt that Mr. Smedley, if only in his capacity as a taxpayer, has sufficient locus standi to raise this question by way of an application for judicial review. . . .<sup>117</sup>

Other cases in a variety of contexts show the relaxation of the old rules of standing. In a case involving the functions of the Registrar of Companies, for example, the trial judge looked at issues of standing "now that all the evidence is in and the matter has been fully argued,"<sup>118</sup> and both he and the Court of Appeal were disinclined to revert to any of the older rigidities.<sup>119</sup> One legitimately could ask, then, whether this same approach should not apply outside the ambit of Order 53. If the liberal rules apply to declarations and injunctions within Order 53, why not to declarations and injunctions sought in ordinary actions? In a 1981 decision issued just before the ruling of the House of Lords in *Fleet Street Casuals*, one judge, anxious not to make "an ass of the law,"<sup>120</sup> held

116. *Id.* at 667.

117. *Id.* at 669-70 (Slade L.J.); see also *In re Preston*, [1985] A.C. 835 (allowing taxpayer standing to challenge action by the Inland Revenue Commissioners).

118. *R. v. Registrar of Companies, ex parte Esal (Commodities) Ltd. (in liq.)*, [1985] 2 W.L.R. 447, 467 (Q.B. 1984) (Mervyn Davies J.), *rev'd sub nom. R. v. Registrar of Companies, ex parte Central Bank of India*, [1986] 2 W.L.R. 177 (C.A. 1985).

119. See *R. v. Registrar of Companies, ex parte Central Bank of India*, [1986] 2 W.L.R. 177, 184-85 (C.A. 1985) (Dillon L.J.). For general discussions of standing under Order 53, see *R. v. Secretary of State, ex parte Child Poverty Action Group*, [1985] T.L.R., No. 512 (C.A. Aug. 8, 1985); *R. v. Independent Broadcasting Auth., ex parte Whitehouse*, [1984] T.L.R., No. 243 (Q.B. Div'l Ct. Apr. 14, 1984), *rev'd*, [1985] T.L.R., No. 228 (C.A. Apr. 4, 1985); *R. v. Hammersmith & Fulham London Borough Council, ex parte People Before Profit Ltd.*, 80 Knight's Local Gov't R. 322 (Q.B. Div'l Ct. 1981); P. BIRKINSHAW, *supra* note 2, at 171.

120. *Steeple v. Derbyshire County Council*, [1985] 1 W.L.R. 256, 296 (Q.B. 1981) (Webster J.).

that the same rules now should apply. This view, however, was firmly rejected by another judge, who declared that "the crucial difference" between the two types of remedies is that ordinary actions can be brought as of right, whereas an application for judicial review requires the leave of the court.<sup>121</sup> These cases provide yet another reminder of the central importance in the English administrative law system of the requirement of leave at the threshold of Order 53 proceedings.

#### IV. CONCLUSION

One of the most difficult problems in any system of administrative law is drawing a line to indicate how far the courts may go in intervening in administrative decisionmaking. Such decisions implicate issues of judicial restraint, of sensible enumeration of the grounds of review, and of administrative reaction to judicial review. Hitherto, at least in England and Wales, the procedural rules governing remedies have been treated as virtually irrelevant to wider arguments about the scope of judicial review. Now that many of the older technical limitations have been abandoned, either by the courts themselves or through the direct impact of the new Order 53, the importance of the remedies can be more readily appreciated.

Administrative law in England and Wales is being entrusted more and more to judges who are familiar with and versed in administrative law. The new, streamlined remedy under Order 53 is looked upon more and more as the overriding avenue of access in judicial review of administrative action. Within Order 53 proceedings, the requirement of leave has enabled the courts to be more confident in relaxing the rules on *locus standi*, and the existence of a leave requirement perhaps has served as a reassurance to administrators as well. These advantages do not necessarily indicate that the requirement of leave, or any of the other procedural devices in Order 53, could be transplanted easily to another legal system. The leave requirement, however, has been a vital element in the machinery of English administrative law during the first decade of the new application for judicial review.

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121. *Barrs v. Bethell*, [1982] Ch. 294, 313 (1981) (Warner J.).