The application for judicial review/ public-private divide

Introduction

rule of law /access to effective remedy

Wide range of grounds of JR little use if not allowed to argue (standing); or must use ineffective procedure

1. The pre-Order 53 problem

Historical and uncertain division between 'private law' and 'public law'

Private law remedies
Contract; tort;
False imprisonment
Declaration/injunction through writ
Damages

'Public law' remedies
Certiorari
Mandamus
Prohibition

The benefits (to claimant) of private law proceedings

longer time limits;
discovery/cross-examination;
no leave requirement; damages

The drawback (to claimant) of private law proceedings

high standing test

ISSUE IS ACCESS TO EFFECTIVE REMEDY AND SO VERY SIGNIFICANT TO RULE OF LAW

***Barnard v NDLB* (1953)** — **writ allowed as certiorari a useless remedy**

Craig (2003) *Administrative law* — strict standing rules restrict declaration/injunction use

2. The Order 53 rationalisation.

Blom-Cooper (1982) *Public Law* — **practical problems main motive**

Rules of the Supreme Court Order 53.
(Supreme Court Act 1981)

introduces 'AJR'

all 5 remedies + damages
3 month maximum time limit
Discovery and cross examination

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2.1 Early cases

De Falco [(1980) — homelessness; applicants have a choice

Heywood (1980) — prison remission; only AJR

3. *O'Reilly v Mackman*

prison remission

First instance — Peter Pain J — Claimant has choice
'would require very clear words…'
cf link *Gilmore* and ouster clause

Court of Appeal — Denning LJ — Reverses
Abuse of process; remission not a right

House of Lords — Lord Diplock — Upholds CoA
Abuse of process
Public law issues via AJR
Order 53 is there to protect public bodies
Exceptions
- Private right collateral
- Parties agree
- Other exceptions may arise

McBride (1983) *Civil Justice Quarterly*

Craig (1983) *Administrative law*

How do we distinguish 'public' and private?
Source of power? Or nature of power? Or scope of prerogative remedies?

O'REILLY IS AN EXCELLENT ILLUSTRATION OF HARLOW AND RAWLINGS' (1984 – *LAW AND ADMINISTRATION*) 'RED LIGHT VS GREEN LIGHT' ANALYSIS OF ADMINISTRATIVE LAW

4. After *O'Reilly* : the initial cases

Cocks (1983) — Diluting *O'Reilly*? Divides housing legislation into public and private parts

Law v Natl Greyhd (1983) — *O'Reilly* not affect contract action
`But for' test tried and rejected

Davy v Spelthorne (1984) — *O'Reilly* not affect tort action

Wandsworth v Winder (1984) — Private right; shield not sword

Woolf (1986) *Public Law* — Strong criticism of *Winder*

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5. The reach of 'public' law.

***Benwell* (1984)**	AJR available if not contract in employment context
Datafin (1987)	Takeover Panel; not statutory or prerogative body Governmental function; 'But for' test tried and accepted; 'No Alsatia in England……'
Forsyth (1987) *Public Law*	"public duty" not "source of power"' Cf link to ***GCHQ***

6. Availability of discovery/cross examination

***O'Reilly* (1983)**	**Lord Diplock – assumes more readily available**
***Air Canada* (1983)**	**Discovery only sparing in AJR**
***Pergau Dam* (1995)**	**Presumption against remains strong**

Conclusion – the end of *O'Reilly* ?

***Roy* (1992)**	**Lord Lowry contractual echoes/bundle of rights** **Disapproval of protracted litigation re procedure**
Cane (1992) *Public Law*	***Roy* severely weakens *O'Reilly*?** **More forceful version of rule of law?**
***Boddington* (1999)**	**Lord Irvine on rule of law in abstract sense** **Stresses links between substantive and procedural components of rule of law**

Links

Standing	**abstract + s.31 policy**
Ouster clauses	**abstract cf green light**
Rule of law	**green light or red light**

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