

Chapter 11: Judicial review: illegality

Problem scenario

The Food Distribution Act 2024 (fictitious), at section 2 states the following:

- (1) A Local Authority may operate a market which sells food. A market established under this section shall be referred to as a 'Food Market'.
- (2) To operate a Food Market, a Local Authority may grant a licence to operate a stall at a Food Market to those who apply.
- (3) A Local Authority can consider applications to operate a stall as they see fit and in their absolute discretion.
- (4) Any decision made by a Local Authority under this section cannot be challenged in any court of law.

Ever since the Act was passed, Nanchester District Council have operated a market in the centre of Nanchester. It has been very popular, and Kendrick, Francesca, Callum, and Unusual Fruits Ltd have all recently applied for a licence.

- Kendrick applied for a licence for a stall that would sell a range of foods including pies, sausage rolls, and pastries. Kendrick's application was rejected. This was because the Council is concerned that the market is quiet after lunchtimes, and so they want to encourage stalls that sell products other than food, because believing that this will attract shoppers later in the day.
- Francesca made an application for a stall to sell sandwiches. The Council instructed Francesca to send her application to the Market Manager, who was employed by Country Markets Ltd, the company that manages the market on behalf of the Council. Francesca has just heard from the Market Manager that her application has been rejected.
- The Council has accepted Callum's application for a licence on the condition that Callum, at his own expense, will spend his Friday afternoons driving pensioners to the local supermarket so they can do their grocery shopping. This is following the Council's decision to cut the budget for bus services in the area, with the effect that buses no longer stop at the supermarket. Callum is surprised by this condition.



- Unusual Fruits Ltd has applied for a licence, however their application was refused. Unusual Fruits Ltd specialise in rare fruits from around the world and wished to have a stall in the market. Their application was refused by the Council because there are already three fruit stalls, and it was the policy of the Council not to have more than three stalls of the 'same type' in the market. Unusual Fruits Ltd explained that they sold types of fruit that are not currently sold at the market, but the Council representative told them, 'I'm sorry but that's our policy'.

Imagine that you are presented with this problem scenario and asked to advise Kendrick, Francesca, Callum, and Unusual Fruits Ltd.

This problem scenario shows how the different elements of the ground of illegality can apply in practice and how these different elements relate to each other. They all show that the courts can ensure that Parliament's intention be enforced. With Kendrick's application, we can see how Nanchester District Council took into account an irrelevant consideration. The 2024 Act is clear that local authorities can establish a market that sells food and can grant licences to those who apply for one. Kendrick has applied for a licence, but was not granted a licence because the Council wants to encourage stalls that sell products other than food. The Council's consideration is that the market is quiet after lunchtimes. This may well be the case, but this is irrelevant to Kendrick's application which is for a food stall at a Food Market. Indeed, should the Council go on to issue licences for non-food products, this would go against the wording of the statute and the intention of Parliament. It would be an example of 'simple' or 'narrow' ultra vires as explained in 11.3.

The Council has used their powers for an improper purpose when granting Callum's application for a stall, but subject to a condition that Callum, at his own expense must drive pensioners to the local supermarket on Fridays. This is an improper purpose because the issue of pensioner's being able to access the local supermarket is unconnected with the issue of Callum's application for a stall at the local market. It would be appropriate for the Council to issue licences subject to conditions; however, these conditions should relate to the purposes for which the power has been granted, which in this case is the maintenance and running of the food market. *Wheeler v Leicester City Council*,¹ discussed in 11.8, would be directly relevant to these issues as, in that case, the powers to manage a park were used to effectively punish a rugby club because it had taken a

¹ [1985] AC 1054.

different view to the Council over a rugby tour to South Africa. Similarly, with Callum's application it is difficult to establish the connection between the condition and the legal power under which that condition has been imposed on Callum.

Both improper purposes and irrelevant considerations ensure that public authorities make decisions within the scope of their powers and ensures that discretion is kept within reasonable bounds. If the courts did not do this, a discretionary power, framed in as broad a way, as that in section 2 (3) of the 2024 Act would appear to have no limitations on it. As discussed in 11.2 the courts interpret such legislation to comply with the principle of the rule of law, avoiding the possibility of arbitrary government so feared by Dicey.

Both Francesca's and Unusual Fruit Ltd's claims against the Council both reflect the way that the courts interpret legislation that gives a discretionary power to a public authority. The principles can be summarised succinctly as follows. When Parliament grants a discretionary power to a public authority, Parliament intends that that specific public authority makes a genuine exercise of their discretion when making a decision under the discretionary power. The challenges of both Francesca and Unusual Fruits Ltd rely on different elements of that principle. First, Francesca's challenge is based on the first part of this principle, that Parliament has granted the discretionary power to local authorities. Unless expressly allowed to do so, or by necessary implication when interpreting the statute, it is local authorities who must exercise the discretion. With Francesca's application, the Council have unlawfully delegated their power to the Market Manager, who is an employee of Country Markets Ltd, which is separate from the Council. Consequently, the decision can be challenged on this basis alone as discussed in 11.7.

The claim of Unusual Fruits Ltd is based on the second element of the principle discussed, in that they can argue that the Council by sticking to their policy has not made a genuine exercise of their discretion. Instead, they are said to have fettered their discretion, essentially giving it up, in favour of the policy they have drawn up. The problem here is not in having a policy, but in rigidly sticking to it. As discussed in 11.6.2 it is perfectly proper to adopt a policy to guide how discretion should be exercised, but if it is applied rigidly to every case, it is no longer an exercise of discretion. With Unusual Fruits Ltd's application, they have simply adopted the policy, and have not considered what Unusual Fruits Ltd have said about the fruits they propose to sell on their stall, that they will sell fruit not already available on the market.

In these ways, and the others discussed in Chapter 11, the courts ensure that appropriate boundaries exist to regulate how discretionary power is exercised. These boundaries can be

justified on the basis that they ensure that the intention of Parliament is maintained and the rule of law as a constitutional principle is fulfilled.