A House of Lords

*Regina (Burkett) *v* Hammersmith and Fulham London Borough Council and another

[2002] UKHL 23

B 2002 March 4, 5; May 23

Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead, Lord Millett and Lord Phillips of Worth Matravers MR

House of Lords — Leave to appeal — Judicial review — Application for permission to apply for judicial review — Dismissal by High Court and Court of Appeal — Whether jurisdiction to grant leave to appeal to House of Lords — Appellate Jurisdiction Act 1876 (39 & 40 Vict c 59), s 3[1] *— RSC Ord 59, r 14(3)*[2]

C *Planning — Planning permission — Judicial review — "Date when grounds for the application first arose" — Whether date of grant of permission — RSC Ord 53, r 4(1) — CPR r 54.5(1)*[3]

In February 1998 a developer applied to the respondent local planning authority for outline planning permission for development of a 32-acre site. The applicants, who lived adjacent to the site, were concerned about the environmental effects of the D development, including the creation of dust, and in July 1999 their solicitors wrote to the local planning authority saying that the developers' environmental statement was inadequate. On 15 September 1999 the local planning authority resolved that outline permission for the development should be granted subject to, inter alia, completion of a satisfactory agreement under section 106 of the Town and Country Planning Act 1990. In February 2000 the Government Office for London decided not to call in the application. On 6 April 2000 the applicants sought permission to apply E for judicial review of the local planning authority's resolution of 15 September 1999. On 12 May 2000 the section 106 agreement was completed and outline planning permission was granted. On 18 May 2000 Newman J refused the applicants permission to apply for judicial review on the merits and also on the ground of their delay in applying. On 29 June 2000 Richards J on a renewed application accepted, as to the merits, that the grounds for judicial review were arguable but refused permission to apply on the ground of delay, holding that the date when grounds for F the application had first arisen had been the date of the local planning authority's resolution of 15 September 1999. The Court of Appeal gave the applicants permission to appeal from his decision but dismissed the appeal and refused the applicants permission to appeal. The Appeal Committee of the House of Lords gave the second applicant leave, the first applicant having died in the meantime.

On the appeal—

Held, allowing the appeal and remitting the matter to the High Court for decision G on the substantive issues, (1) that a renewed application to the Court of Appeal under RSC Ord 59, r 14(3) for leave to apply for judicial review was a true appeal; and that, where the Court of Appeal had granted leave to appeal, heard the appeal and refused leave to apply, the House of Lords had jurisdiction to entertain an appeal (post, paras 7, 13–14, 55, 57–58, 67–68).

H [1] Appellate Jurisdiction Act 1876, s 3: "Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the courts following; that is to say, (1) of Her Majesty's Court of Appeal in England . . ."

[2] RSC Ord 53, r 4(1): see post, para 17.

Ord 59, r 14(3): "Where an ex parte application has been refused by the court below, an application for a similar purpose may be made to the Court of Appeal ex parte within seven days after the date of the refusal."

[3] CPR r 54.5(1): see post, para 17.

In re Housing of the Working Classes Act 1890, Ex p Stevenson [1892] 1 QB 609, CA and *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1, PC applied.

Lane v Esdaile [1891] AC 210, HL(E) distinguished.

In re Poh [1983] 1 WLR 2, HL(E) not followed.

(2) That under RSC Ord 53, r 4(1) and CPR r 54.5(1) the grounds for the application or claim, in relation to an application for judicial review of a grant of planning permission, first arose on the date when permission was actually granted; that the application could be amended to substitute that date for that of the local planning authority's resolution; and that, accordingly, it was not out of time (post, paras 4–5, 31, 51, 55, 67–68).

R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd [1998] Env LR 415 overruled.

Decision of the Court of Appeal [2001] Env LR 684 reversed.

The following cases are referred to in the opinions of their Lordships:

Berkeley v Secretary of State for the Environment [2001] 2 AC 603; [2000] 3 WLR 420; [2000] 3 All ER 897, HL(E)

Bett Properties Ltd v Scottish Ministers 2001 SLT 1131

Brown v Hamilton District Council 1983 SC(HL) 1, HL(Sc)

Clark v University of Lincolnshire and Humberside [2000] 1 WLR 1988; [2000] 3 All ER 752, CA

Housing of the Working Classes Act 1890, In re, Ex p Stevenson [1892] 1 QB 609, CA

Kemper Reinsurance Co v Minister of Finance [2000] 1 AC 1; [1998] 3 WLR 630, PC

Lane v Esdaile [1891] AC 210, HL(E)

O'Reilly v Mackman [1983] 2 AC 237; [1982] 2 WLR 1096; [1982] 3 All ER 1124, HL(E)

Poh, In re [1983] 1 WLR 2; [1983] 1 All ER 287, HL(E)

R v Ceredigion County Council, Ex p McKeown [1998] 2 PLR 1

R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell [1990] 2 AC 738; [1990] 2 WLR 1320; [1990] 2 All ER 434, HL(E)

R v Rochdale Metropolitan Borough Council, Ex p B, C and K [2000] Ed CR 117

R v Secretary of State for Trade and Industry, Ex p Eastaway [2000] 1 WLR 2222; [2001] 1 All ER 27, HL(E)

R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd [1998] Env LR 415

R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd [2000] Env LR 221

R v West Oxfordshire District Council, Ex p C H Pearce Homes Ltd (1985) 26 RVR 156

Singh v Secretary of State for the Home Department 2000 SLT 533

Sunday Times v United Kingdom (1979) 2 EHRR 245

Swan v Secretary of State for Scotland 1998 SC 479

Uprichard v Fife Council 2000 GWD 14–514

West v Secretary of State for Scotland 1992 SC 385

World Wildlife Fund (WWF) v Autonome Provinz Bozen (Case C-435/97) [1999] ECR I-5613, ECJ

The following additional cases were cited in argument:

Amministrazione delle Finanze dello Stato v Simmenthal SpA (Case 106/77) [1978] ECR 629, ECJ

Amministrazione delle Finanze dello Stato v SpA San Giorgio (Case 199/82) [1978] ECR 3595, ECJ

de la Pradelle v France 16 December 1992, Publications of the European Court of Human Rights, Series A no 253-B

Director of Public Prosecutions v Marshall [1998] ICR 518, EAT

A *Fantask A/S v Industriministeriet (Erhvervsministeriet)* (Case C-188/95) [1997] ECR I-6783, ECJ
Halley v Watt 1956 SC 370
Kraaijeveld BV, Aannemersbedrijf P K v Gedeputeerde Staten van Zuid-Holland (Case C-72/95) [1996] ECR I-5403, ECJ
Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521, ECJ
Manibardo v Spain (Application No 38695/97) (unreported) 15 February 2000, ECHR
B *Matra Communications SAS v Home Office* [1999] 1 WLR 1646; [1999] 3 All ER 562, CA
Nichol v Gateshead Metropolitan Borough Council (1988) 87 LGR 435, CA
Peterbroeck, Van Campenhout & Cie SCS v Belgian State (Case C-312/93) [1995] ECR I-4599, ECJ
R v Cambridge City Council, Ex p Warner Village Cinemas Ltd [2001] 1 PLR 7
C *R v Leicester City Council, Ex p Safeway Stores* [1999] JPL 691
R v London Borough of Hammersmith and Fulham, Ex p CPRE London Branch [2000] Env LR 532
R v North West Leicestershire District Council, Ex p Moses [2000] Env LR 443, CA
R v Selby District Council, Ex p Samuel Smith Old Brewery (unreported) 29 November 1999, Sullivan J
R v Somerset County Council, Ex p Dixon [1997] JPL 1030
D *R (Lichfield Securities Ltd) v Lichfield District Council* [2001] PLCR 519, CA
Stichting Greenpeace Council (Greenpeace International) v Commission (Case C-321/95) [1999] Env LR 181, ECJ
van Schijndel v Stichting Pensioenfonds voor Fysiotherepeuten (Joined Cases C-430/93 and C-431/93) [1995] ECR I-4705, ECJ

APPEAL from the Court of Appeal

E This was an appeal by the first applicant, Sonia Maria Burkett, by leave of the House of Lords (Lord Bingham of Cornhill, Lord Steyn and Lord Hope of Craighead) given on 23 July 2001 from a decision of the Court of Appeal (Ward, Sedley and Jonathan Parker LJJ) on 13 December 2000 dismissing an appeal by the second applicant and her husband, Robert Richard Burkett, since deceased, from Richards J, who had on 29 June 2000 refused their renewed application for permission to apply for judicial review of a grant of
F outline planning permission by the respondent local planning authority, the Hammersmith and Fulham London Borough Council, to the interested party, St George West London Ltd.

The facts are stated in the opinion of Lord Steyn.

Robert McCracken, Richard Harwood and *Angela Ward* for the second applicant.

G *Timothy Straker QC* and *Andrew Tabachnik* for the local planning authority.

Robin Purchas QC and *Joanna Clayton* for the interested party.

Their Lordships took time for consideration.

23 May. **LORD SLYNN OF HADLEY**

H 1 My Lords, this appeal raises an important question in the context of planning law. The facts and the issues are set out in the speech of my noble and learned friend Lord Steyn to which I gratefully refer.

2 In summary, a committee of the local planning authority decided on 15 September 1999 that planning permission should be granted for a large

scale development in Fulham subject to certain conditions being fulfilled. On 6 April 2000 the appellant applied for leave to move for judicial review of that decision. On 12 May 2000 planning permission was actually granted.

3 At that time RSC Ord 53, r 4(1) provided that an application for leave to apply for judicial review should be made "promptly and in any event within three months from the date when grounds for the application first arose". If the relevant date was 15 September 1999 the application was clearly out of time. Richards J and the Court of Appeal refused permission on the ground that the application was out of time.

4 It is clear that if the challenge is to the resolution (as it may be) time runs from that date, but the question on the present appeal is whether, if the application is amended to challenge the grant of planning permission rather than the resolution, time runs from 15 September 1999 or 12 May 2000.

5 In my opinion, for the reasons given by Lord Steyn, where there is a challenge to the grant itself, time runs from the date of the grant and not from the date of the resolution. It seems to me clear that because someone fails to challenge in time a resolution conditionally authorising the grant of planning permission, that failure does not prevent a challenge to the grant itself if brought in time, i e from the date when the planning permission is granted. I realise that this may cause some difficulties in practice, both for local authorities and for developers, but for the grant not to be capable of challenge, because the resolution has not been challenged in time, seems to me wrongly to restrict the right of the citizen to protect his interests. The relevant legislative provisions do not compel such a result nor do principles of administrative law prevent a challenge to the grant even if the grounds relied on are broadly the same as those which if brought in time would have been relied on to challenge the resolution.

6 The question whether an obligation to apply "promptly" is sufficient to satisfy European Community law or Convention rights as to certainty does not arise in this case and I do not comment on it.

7 As to the preliminary objection to the House's jurisdiction this case is plainly distinguishable from *In re Poh* [1983] 1 WLR 2 since the Court of Appeal here gave leave to appeal from the judge and heard the appeal. It is wholly unacceptable that the House should not have jurisdiction to hear such an appeal. I consider in any event that the dictum in *In re Poh* which is relied on for the contrary result should be laid to rest.

8 I would accordingly allow the appeal and remit the substantive question to the High Court for decision.

LORD STEYN

9 My Lords, this appeal raises important questions of law in regard to delay in launching judicial review proceedings. The context is town planning. The proposal concerns a large development at Imperial Wharf, Fulham, London. The appellant is Mrs Burkett who lives in a ground floor maisonette adjoining the site. She believes that the development will have an adverse effect on her quality of life and the health of her family. The respondent is the London Borough of Hammersmith and Fulham ("the local authority"). St George West London Ltd is the developer and is joined in the proceedings as an interested party ("the developer"). It will be necessary to explain the circumstances of the case in some detail. There is, however, an anterior legal question to be considered.

I. Jurisdiction

10 The issue arises in this way. Mrs Burkett and her late husband applied for judicial review. The matter came before Richards J. He refused permission on the grounds of delay. The Court of Appeal granted permission to the applicants to appeal from the decision of Richards J. After a full inter partes hearing the Court of Appeal refused permission to seek judicial review on grounds of delay and dismissed the appeal. The Court of Appeal refused leave to appeal to the House of Lords. An Appeal Committee granted leave to appeal.

11 Relying on the decision of the House of Lords in *In re Poh* [1983] 1 WLR 2 counsel for the local authority submitted that the House does not have jurisdiction to hear an appeal from a decision by the Court of Appeal refusing permission to seek judicial review. In *In re Poh* the judge had refused leave to apply for judicial review. The applicant appealed ex parte by originating motion to the Court of Appeal who refused leave. The applicant sought leave to appeal to the House. The House ruled that there was no jurisdiction to grant leave. Giving the brief reasons of the House Lord Diplock observed, at p 3:

> "Their Lordships are not concerned with the procedure whereby this application moved from the Divisional Court to the Court of Appeal, because the question we have to consider is whether this House has jurisdiction to entertain the application. Counsel instructed by the Treasury Solicitor has taken the preliminary point that the House has no jurisdiction under the Appellate Jurisdiction Act 1876 to entertain an appeal from refusal of leave to apply for judicial review under RSC Ord 53. He relies upon the construction of section 3 of the 1876 Act, which was approved by this House in *Lane v Esdaile* [1891] AC 210 . . ."

Three points need to be noted about this statement. First, *Lane v Esdaile* is only authority for the general proposition that whenever a power is given to a court or tribunal by legislation to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive: see *In re Housing of the Working Classes Act 1890, Ex p Stevenson* [1892] 1 QB 609. Secondly, Lord Diplock extended this rule to an appeal from a refusal of leave to apply for judicial review. Thirdly, Lord Diplock gave no reasons for this extension of the *Lane v Esdaile* principle.

12 The decision in *In re Poh* [1983] 1 WLR 2 has proved troublesome. In *Kemper Reinsurance Co v Minister of Finance* [2000] 1 AC 1 the Privy Council cast doubt on the reasoning in *In re Poh*. Lord Hoffmann observed, at p 18B, that a renewed application to the Court of Appeal under RSC Ord 59, r 14(3) is a true appeal with a procedure adapted to its ex parte nature. Referring to *In re Poh* Lord Hoffmann stated:

> "It would not be right for their Lordships to make any comment upon this decision in its application to appeals from the English Court of Appeal to the House of Lords. But the judgment expressly disclaimed any expression of view upon the nature of 'the procedure whereby this appeal moved from the Divisional Court to the Court of Appeal'. The decision is therefore not inconsistent with their Lordships' opinion that the application to the Court of Appeal is a true appeal, not excluded by the

principle in *Lane v Esdaile*. Their Lordships accept that this conclusion makes it difficult to identify the reasoning by which the House of Lords decided that the principle applied to a further appeal to the House of Lords . . ."

In *R v Secretary of State for Trade and Industry, Ex p Eastaway* [2000] 1 WLR 2222 the House considered *In re Poh* but did not have to rule on its status. The *Eastaway* case is only authority for the proposition that when the Court of Appeal has refused permission to appeal in the face of a first instance refusal of permission to seek judicial review the House has no jurisdiction to give leave to appeal: see p 2228A–B.

13 Counsel for the developer submitted that the decision in *In re Poh* [1983] 1 WLR 2, read with the observation that "Their Lordships are not concerned with the procedure whereby this application moved from the Divisional Court to the Court of Appeal", appears to deprive the House of jurisdiction to entertain the present appeal. A material difference, however, is that in the present case the Court of Appeal granted leave to appeal and heard the appeal. It would be extraordinary if in such a case the House had no jurisdiction. Nothing in statute law or in *Lane v Esdaile* [1891] AC 210 provides any support for such a view. Moreover, as Lord Hoffmann pointed out in the *Kemper* case [2000] 1 AC 1, 18B–C, it has never been suggested either before or after the decision in *In re Poh* that appeals to the Court of Appeal against refusal by the High Court of leave to apply for judicial review is caught by the rule in *Lane v Esdaile*. In my view the conclusion is inescapable that Lord Diplock's extempore observation was not correct. It follows that the House has jurisdiction to grant leave to appeal against a refusal by the Court of Appeal of permission to apply for judicial review.

14 The jurisdictional objection to the hearing of the appeal must be rejected.

II. The legal background

15 In order to make the case intelligible it is necessary to set out some of the legal background to the planning application. Environmental assessment pursuant to Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC) is a fundamental instrument of European Community policy. The preambles of the Directive include the following:

> "Whereas . . . the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; whereas they affirm the need to take effects on the environment into account at the earliest possible stage in all technical planning and decision-making processes; whereas to that end they provide for the implementation of procedures to evaluate such effects . . . Whereas development consent for public and private projects which are likely to have significant effects on the environment should be granted only after proper assessment of the likely significant effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question."

Article 2(1) (as replaced by Council Directive 97/11/EC of 3 March 1977, article 1(1)) provides:

> "1. Member states shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects."

Article 5 (as replaced by Council Directive 97/11/EC, article 7(1)) provides:

> "2. The information to be provided by the developer in accordance with paragraph 1 shall include at least: a description of the project comprising information on the site, design and size of the project; a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects . . ."

The Directive creates rights for individuals enforceable in the courts: *World Wildlife Fund (WWF) v Autonome Provinz Bozen* (Case C-435/97) [1999] ECR I-5613, 5660-5661, paras 69–71; *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603. There is an obligation on national courts to ensure that individual rights are fully and effectively protected: see the *Berkeley* case, at pp 608D (Lord Bingham of Cornhill) and 618B–H. The Directive seeks to redress to some extent the imbalance in resources between promoters of major developments and those concerned, on behalf of individual or community interests, about the environmental effects of such projects.

16 It is unnecessary to describe the familiar planning regime enshrined in the Town and Country Planning Act 1990. For present purposes it is sufficient to point out that there is a general prohibition on the grant of planning permission without consideration of environmental information: Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988/1199), regulation 4.

17 Persons aggrieved by planning decisions may seek permission to apply for judicial review. Rules of court govern the making of judicial review applications. For present purposes provisions dealing with delay are directly relevant. At the relevant time RSC Ord 53, r 4(1), was in force. It provided:

> "(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

It has now been replaced by CPR r 54.5(1). It provides in respect of applications for judicial review: "The claim form must be filed— (a) promptly; and (b) in any event not later than three months after the grounds to make the claim first arose."

18 It is also necessary to draw attention to section 31(6) of the Supreme Court Act 1981. It provides:

> "Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant— (a) leave for the making of the application; or (b) any relief sought on the

application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration."

The differences between the rules of court and section 31(6) are analysed in *Craig, Administrative Law*, 4th ed (1999), pp 791–793. Pertinent to the present context is the fact that section 31(6) contains no date from which time runs and accordingly no specific time limit. It is, however, a useful reserve power in some cases, such as where an application made well within the three month period would cause immense practical difficulties. An illustration is *R v Rochdale Metropolitan Borough Council, Ex p B, C, and K* [2000] Ed CR 117. Having referred to section 31(6), Mr David Pannick QC (sitting as a deputy judge of the High Court) stated, at p 120:

"In my judgment, it is absolutely essential that, if parents are to bring judicial review proceedings in relation to the allocation of places at secondary school for their children, the matter is heard and determined by a court, absent very exceptional circumstances, before the school term starts. This is for obvious reasons relating to the interests of the child concerned, the interests of the school, the interests of the other children at the affected school and, of course, the teachers at that school."

The good sense of this approach is manifest.

19 Finally, for the sake of completeness, I refer to the statement by *Wade & Forsyth, Administrative Law*, 8th ed (2000), p 688 that the most active remedies of administrative law—declaration, injunction, certiorari, prohibition, mandamus—are discretionary and the court may therefore withhold them if it thinks fit. On the other hand, as the same authors point out, "The true scope for discretion is in the law of remedies, where it operates within narrow and recognised limits . . ."

III. The planning application

20 Imperial Wharf is a site comprising some 32 acres. It had formerly been used by British Gas for operational purposes, and parts of the site had been let out for industrial use. On 26 February 1998 the developer applied to the local authority for outline planning permission for:

"A mixed use development comprising 1,803 residential units (1303 private flats and 500 affordable dwellings in the form of flats and houses), an hotel, class A1 retail, class A3 restaurant, class D community uses, health and fitness club, class B1 offices, public open space and riverside walk, together with associated car parking, landscaping and access road."

It is one of the largest current development sites in London. The application for outline planning permission proposed that design, external appearance and landscaping of the whole development were to be reserved for later determination. The proposed scheme was not in accordance with the development plan. On 16 March 1998 the local authority asked the developer to submit an environmental statement with the planning application. On 27 May 1998 the developer submitted a document described as an environmental statement.

21 The agreed statement of facts and issues explains the potential impact of the development on Mrs Burkett and her daughter. Mrs Burkett

A lives with her asthmatic daughter. Their home and garden are immediately adjacent to the site. Her husband died after the Court of Appeal decision. He had been a chronic diabetic with a liver disorder and had been housebound for much of the time. Works have regularly caused dust to cover all the surfaces in the maisonette. A particular concern has been the effect of the development on the health of the family. In 1999, at a tenants' association meeting, Mr and Mrs Burkett were advised that B they could not remove the paving blocks from their garden and replace them with lawn because of problems of contamination. This was apparently due to previous contamination of the land. On 30 July 1999 Mrs Burkett's solicitors, Richard Buxton, then assisting a pressure group on a pro bono basis, wrote to the local authority warning that the environmental statement was inadequate and that it would be unlawful to C approve the planning application. This letter was drawn to the attention of the relevant committee when it came to consider the planning application.

22 On 15 September 1999 the local authority's planning and traffic management committee considered the application. The committee resolved to refer the application to the Secretary of State as a departure from the development plan. It further resolved to authorise the director of the D environment department of the local authority to grant outline permission subject to (i) completion of a satisfactory agreement enforceable pursuant to section 106 of the 1990 Act and (ii) there being no contrary direction on behalf of the Secretary of State from the Government Office for London. On 5 October 1999 the Government Office for London imposed a direction pursuant to article 14 of the Town and Country Planning Act (General E Development Procedure Order) 1995 (SI 1995/419) prohibiting the grant of permission. On 24 February 2000 the Government Office for London decided not to call in the application and lifted the prohibition under article 14. On 28 March 2000 Richard Buxton wrote to the local authority expressing concerns about the inadequacies of the environmental statement and inviting reconsideration by the local authority. On 29 March 2000 the local authority replied asking for further particulars of the claimed F inadequacies.

IV. The judicial review application

23 On 6 April 2000 Mr and Mrs Burkett submitted an application for permission to apply for judicial review. Form 86A identified the decision to be challenged as the resolution of 15 September 1999. It described the G substantive relief sought as "An order for certiorari to quash the above resolution". It will be observed that the application was made more than six months after the resolution of 15 September 1999. On 17 April 2000 Richard Buxton sent a copy of the application for judicial review to the local authority again inviting them to reconsider the resolution for the grant of planning permission. On 19 April 2000 the local authority told the Crown Office that it might wish to make representations both on delay and on the H substantive grounds of challenge. The local authority told the developer of the application. On 25 April 2000 Richard Buxton reminded the local authority that it had a complete copy of the application for permission to apply for judicial review. In early May 2000 the developer and the local authority lodged representations with the court.

V. Grant of planning permission

24 On 12 May 2000 the local authority and the developer completed an agreement under section 106 of the 1990 Act in respect of the developer's planning obligations. Acting on the authority of the resolution of 15 September 1999 the director of the environment department of the local authority granted outline planning permission on the same day.

VI. The decision at first instance and in the Court of Appeal

25 On 18 May 2000 Newman J refused permission to apply for judicial review on the papers in respect of both delay and merits. On 29 June 2000 Richards J accepted after reading what he described as detailed skeleton arguments from the local authority and the developer, but without hearing oral arguments from them, that the grounds for judicial review were, on the merits, arguable but refused permission on the grounds of delay. In an unreported judgment Richards J addressed the critical question as follows:

> "When did grounds for the application first arise? [Counsel for the applicants] submits that it was reasonable to wait until the Secretary of State's decision not to call the application in. Alternatively, he would, if necessary, contend that the relevant date is the date when planning permission was actually granted. In my judgment, however, the relevant date was the date when the respondent passed its resolution to grant outline planning permission. That was the operative decision. That—not some later event—is what is challenged in the Form 86A. The fact that there were still a number of contingencies before the formal grant of planning permission does not mean that grounds for the application arose only at some later date. The existence of those contingencies is a matter to be considered in relation to the discretion to extend time, if there was a failure to apply promptly. It does not, in my view, lead to the conclusion that time did not begin to run at the date of the resolution."

In the circumstances, and particularly in the absence of a clear warning by the applicants to the local authority, the judge refused to extend time.

26 On 20 November 2000, the Court of Appeal granted permission to appeal and heard the appeal. The Court of Appeal did not examine the merits of the substantive issues. It concentrated on the issue of delay. Counsel for the applicants had argued that the final grant of planning permission is the single event from which all rights and obligations flow and it is therefore the date from which time runs against the citizen. In the judgment of the court (Ward, Sedley and Jonathan Parker LJJ), given on 13 December, this argument is dismissed on the following ground, at paragraph 8:

> "The applicants' argument, as [counsel for the local authority] amply demonstrated, faces two initial hurdles. One is that their Form 86A, lodged on 6 April 2000, specifies the resolution of 15 September 1999 as the decision to be challenged. The other is that, on the face of it, it is right to do so, since RSC Ord 53, r 4(1), which were then in force, in terms required an application for leave to be 'made promptly and in any event within three months from the date when grounds for the application first arose'. Since the impugned environmental impact statement was as

A necessary to the resolution as to any subsequent steps, the logic of measuring time from the resolution seems inescapable."

Acknowledging "that nothing in a resolution is irrevocable until planning permission is actually granted" (paragraph 10) the Court of Appeal observed, at paragraph 11:

B "We do not doubt the legal accuracy of any of this, but it fails in our judgment to disturb the proposition that where the same objection affects the initial resolution as will affect the eventual grant of permission, it is as a simple matter of language at the date of the resolution that the objection and therefore the grounds for the application first arise. We do not accept [counsel for the applicants'] submission that to give effect to this construction of RSC Ord 53, r 4(1),
C any more than to its successor provision in CPR Pt 54, disrupts the statutory environmental impact regime. What it does is require an objector to strike at the earliest reasonable moment at a process which, if the objection is sound, will otherwise end in an unlawful grant of planning permission. By doing so it supports the objectives of Council Directive 85/337/EEC and the 1988 Regulations and attempts to keep
D disruption to a minimum."

On this basis the Court of Appeal concluded that the judge's refusal to extend time was a decision open to him. The Court of Appeal [2001] Env LR 684 dismissed the appeal and refused leave to appeal to the House of Lords.

27 On 23 July 2000 an Appeal Committee of the House of Lords
E granted leave to appeal.

VII. The principal issues

28 For the purposes of the appeal to the House it must be assumed—as Richards J and the Court of Appeal had done—that Mrs Burkett has an arguable case on the substantive merits of her judicial review application. The only issues on this appeal relate to the matters of delay.
F

29 Richards J and the Court of Appeal held that the three months time limit for seeking judicial review ran from the date of the resolution of 15 September 1999 and not from the date of the decision not to call in the planning application on 24 February 2000 or the decision to grant planning permission on 12 May 2000. The local authority and developer submit that the decisions below were correct as a matter of domestic law and are
G unaffected by European law. Mrs Burkett's primary contention is that the time limit of three months only ran against her from the date of the actual grant of planning permission. Alternatively, she contends that time only runs from the time that the Secretary of State decided not to call in the application. She relies in the first place on the proper construction of the rules of court as a matter of domestic law. But she also prays in aid the European principles of legal certainty and effective enforcement of
H Community law in support of her contention.

30 It will be convenient first to consider the principal issue of the interpretation of the rules of court under domestic law. In my view oral argument convincingly showed that the real choice is between holding that under RSC Ord 53, r 4(1) the grounds for the application first arose on (a) the

date of the resolution or (b) the date of the actual grant of planning permission, the latter being the first date by which rights and obligations were created. The date when the Secretary of State decided not to call in the application has little to commend it as the operative date. So far as finality is relevant, that date left the planning decision in suspense. I will therefore concentrate on what I regard as the real choice before the House.

VIII. A procedural point

31 Richards J and the Court of Appeal regarded it as a serious obstacle that the application for judicial review was directed against the resolution of 15 September 1999. That was the case because the application had been made before the grant of permission. If this is an insuperable obstacle, the important points of law involved in this appeal would have to await decision in another case. In my view this difficulty can be overcome. In public law the emphasis should be on substance rather than form. If the correct construction of the rules is that in respect of a challenge to planning permission time only runs from the date of the grant of permission, it would be unjust to dismiss the appeal on this ground. Counsel for Mrs Burkett put forward a suitable amendment directed to the grant of permission on 12 May 2000. In my view there is no reason why such an amendment, and any other consequential amendments, cannot be granted. In this way any procedural difficulty can be cured. It is therefore possible to put this technical point to one side and to concentrate on the legal issues before the House.

IX. The status of the resolution

32 The resolution of 15 September 1999 gave authority to a designated council official to grant planning permission subject to (i) there being no call in decision by the Secretary of State and (ii) completion of a satisfactory agreement enforceable pursuant to section 106 of the 1990 Act. There were therefore two conditions precedent to a binding planning permission coming into existence. It is common ground that the resolution by itself created no legal rights. Only upon the fulfilment of both conditions precedent, and the grant of planning permission, did rights and obligations as between the local authority, the developer and affected individuals come into existence. Until all these things had happened the resolution was revocable not by the designated official but by the local authority itself.

33 The first condition precedent was fulfilled on 24 February 2000 when the Secretary of State decided not to call in the application. The second condition was fulfilled on 12 May 2000 when the section 106 agreement was concluded. Only on that date was it possible to grant planning permission giving rise to rights and obligations. It is this second condition which requires some further explanation.

34 The resolution of 15 September 1999 was adopted by the committee against the background of a supplementary agenda which informed members:

> "Critical to the assessment of this application is the proposed 106 agreement which needs to be understood as part of the overall proposal. Without this proposal this proposal would be wholly unacceptable."

The proposal for which members of the committee voted on 15 September 1999 was therefore inchoate. It would be wrong to assume that the

A negotiation and conclusion of the agreement of the section 106 agreement was a formality. It was only completed eight months after the initial resolution, and three months after the Secretary of State's decision not to call in the application. It was a complex agreement running to about 190 pages. Some of the provisions were apparently in planning terms of major importance. While the House has not examined the agreement, counsel for Mrs Burkett pointed out that it included provisions regarding highway B improvements, work on a roundabout nearby, the provision of 60 units of housing for a social landlord, and other material provisions. I did not understand this to be a matter of dispute.

35 The position is therefore that until 12 May 2000 it was uncertain whether the resolution of 15 September 1999 would be implemented.

C *X. The interpretation and application of the Rules of Court*

36 I have already drawn attention to the provisions of section 31(6) of the 1981 Act. Nobody has suggested that the outcome of the appeal in the present case can be affected by section 31(6). The debate has centred on the correct interpretation and application of the rules of court. That is how I will approach the matter. There is no material difference between the provisions D of RSC Ord 53, r 4(1) and CPR r 54.5(1). I will address the language of the former.

37 The case was decided by the Court of Appeal not on the ground of a lack of promptitude in making the judicial review application but on the ground that more than three months had elapsed after the resolution of 15 September 1999. Whether that is the correct date depends on the interpretation and application of the words "from the date when grounds for E the application first arose". If in respect of a challenge to the actual grant of permission time runs (to use convenient shorthand for the statutory words) from the date of the resolution, the decisions below were correct. On the other hand, if in respect of a challenge to the actual grant of permission time runs from the date of the grant, the decisions below were wrong. This is the critical issue. In considering this question one must bear in mind that F RSC Ord 53, r 4(1) (and for that matter CPR r 54.5(1)) are not specifically targeted at town planning applications. These provisions apply across the spectrum of judicial review applications. Making due allowance for the special features of town planning applications, an interpretation is to be preferred which is capable of applying to the generality of cases.

38 Leaving to one side for the moment the application of Ord 53, r 4(1) on the running of time against a judicial review applicant, it can G readily be accepted that for substantive judicial review purposes the decision challenged does not have to be absolutely final. In a context where there is a statutory procedure involving preliminary decisions leading to a final decision affecting legal rights, judicial review may lie against a preliminary decision not affecting legal rights. Town planning provides a classic case of this flexibility. Thus it is in principle possible to apply for judicial review in respect of a resolution to grant outline permission and for prohibition even H in advance of it: see generally *Wade & Forsyth, Administrative Law*, p 600; *Craig, Administrative Law*, pp 724–725; *Fordham, Judicial Review Handbook*, 3rd ed (2001), para 4.8.2. It is clear therefore that if Mrs Burkett had acted in time, she could have challenged the resolution. These propositions do not, however, solve the concrete problem before the House

which is whether in respect of a challenge to a final planning decision time runs under Ord 53, r 4(1) from the date of the resolution or from the date of the grant of planning permission. It does not follow from the fact that if Mrs Burkett had acted in time and challenged the resolution that she could not have waited until planning permission was granted and then challenged the grant.

39 As a matter of language it is possible to say in respect of a challenge to an alleged unlawful aspect of the grant of planning permission that "grounds for the application first arose" when the decision was made. The ground for challenging the resolution is that it is a decision to do an unlawful act in the future; the ground for challenging the actual grant is that an unlawful act has taken place. And the fact that the element of unlawfulness was already foreseeable at earlier stages in the planning process does not detract from this natural and obvious meaning. The context supports this interpretation. Until the actual grant of planning permission the resolution has no legal effect. It is unlawful for the developer to commence any works in reliance on the resolution. And a developer expends money on the project before planning permission is granted at his own risk. The resolution may come to nothing because of a change of circumstances. It may fall to the ground because of conditions which are not fulfilled. It may lapse because negotiations for the conclusion of a section 106 agreement break down. After the resolution is adopted the local authority may come under a duty to reconsider its decision if flaws are brought to its attention: *R v West Oxfordshire District Council, Ex p C H Pearce Homes Ltd* (1985) 26 RVR 156. Moreover, it is not in doubt that a local authority may in its discretion revoke an outline resolution. In the search for the best contextual interpretation these factors tend to suggest that the date of the resolution does not trigger the three-month time limit in respect of a challenge to the actual grant of planning permission.

40 The contrary argument is that it is disruptive of good administration for a citizen to delay his application until the actual grant of planning permission. This is the view which Richards J and the Court of Appeal adopted. It was also a view forcefully expressed by Laws J in the Divisional Court in *R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd* [1998] Env LR 415. In the context of a challenge to the award of North Sea licences he said, at p 424:

> "a judicial review applicant must move against the substantive act or decision which is the real basis of his complaint. If, after that act has been done, he takes no steps but merely waits until something consequential and dependent upon it takes place and then challenges that, he runs the risk of being put out of court for being too late."

This observation was cited with approval by Richards J and the Court of Appeal adopted this reasoning. It is necessary to point out, however, that the judge in the *Greenpeace* case based his decision not only on the rules of court but also on broader considerations of his view of the function of the court in upholding the rule of law: see p 422.

41 The decision in the *Greenpeace* case was subsequently followed in a number of lower court decisions. There were also decisions to a contrary effect and there are cases where the court treated time as running from the date of the actual grant of planning permission without any examination of

A the issue. There is some discussion of such cases in two articles: Jones and Phillpot, "When He Who Hesitates is Lost: Judicial Review of Planning Permissions" [2000] JPL 564 and Roots and Walton, "Promptness and Delay in Judicial Review—an update on the continuing saga" [2001] JPL 1360. These cases involve judgments on applications for permission to apply for judicial review. Such cases are *generally* not regarded as authoritative: see
B *Clark v University of Linconshire and Humberside* [2000] 1 WLR 1988, 1998–1999 paras 40–43, per Lord Woolf MR. For my part the earlier decisions, other than the important judgment of Laws J in the *Greenpeace* case, can be regarded as overtaken by the Court of Appeal decision in the present case. It is therefore on the reasoning in the *Greenpeace* case and in the Court of Appeal judgment that I must concentrate.

42 The core of the reasoning of the Court of Appeal is that "the
C impugned environmental impact statement was as necessary to the resolution as to any subsequent steps [and] the logic of measuring time from the resolution seems inescapable". In my view there is no such inevitable march of legal logic. In law the resolution is not a juristic act giving rise to rights and obligations. It is not inevitable that it will ripen into an actual grant of planning permission. In these circumstances it would be curious if,
D when the actual grant of planning permission is challenged, a court could insist by retrospective judgment that the applicant ought to have moved earlier for judicial review against a preliminary decision "which is the real basis of his complaint" (the *Greenpeace* case, at p 424). Moreover, an application to declare a resolution unlawful might arguably be premature *and be* objected to on this ground. And in strict law it could be dismissed. The Court of Appeal was alive to this difficulty and observed that "an
E arguably premature application can often be stayed or adjourned to await events". This is hardly a satisfactory explanation for placing a burden on a citizen to apply for relief in respect of a resolution which is still devoid of legal effect. For my part the substantive position is straightforward. The court has jurisdiction to entertain an application by a citizen for judicial review in respect of a resolution before or after its adoption. But it is a jump
F in legal logic to say that he *must* apply for such relief in respect of the resolution on pain of losing his right to judicial review of the actual grant of planning permission which does affect his rights. Such a view would also be in tension with the established principle that judicial review is a remedy of last resort.

43 At this stage it is necessary to return to the point that the rule of court applies across the board to judicial review applications. If a decision-maker
G indicates that, subject to hearing further representations, he is provisionally minded to make a decision adverse to a citizen, is it to be said that time runs against the citizen from the moment of the provisional expression of view? That would plainly not be sensible and would involve waste of time and money. Let me give a more concrete example. A licensing authority expresses a provisional view that a licence should be cancelled but indicates
H a willingness to hear further argument. The citizen contends that the proposed decision would be unlawful. Surely, a court might as a matter of discretion take the view that it would be premature to apply for judicial review as soon as the provisional decision is announced. And it would certainly be contrary to principle to require the citizen to take such premature legal action. In my view the time limit under the rules of court

would not run from the date of such preliminary decisions in respect of a challenge of the actual decision. If that is so, one is entitled to ask: what is the qualitative difference in town planning? There is, after all, nothing to indicate that, in regard to RSC Ord 53, r 4(1), town planning is an island on its own.

44 In *R v Secretary of State for Trade and Industry, Ex p Greenpeace Ltd* [1998] Env LR 415 and in the Court of Appeal in the present case the view was taken that the selection of the date of the resolution as the appropriate date would facilitate good administration. There are two sides to this proposition. It contemplates time running against a citizen before his rights are affected, thereby potentially involving a loss of a right to challenge what may perhaps be an abuse of power which in the interests of good administration should be exposed. Undoubtedly, there is a need for public bodies to have certainty as to the legal validity of their actions. That is the rationale of Ord 53, r 4(1). On the other hand, it is far from clear that the selection of the actual grant of planning permission as the critical date would disadvantage developers and local authorities. In their careful article Jones and Phillpot, "When He Who Hesitates is Lost: Judicial Review of Planning Permissions" [2000] JPL 564, 588 argue:

> "There would be a greater incentive for both the planning authority and the developer to move to ensure that the formal grant of planning permission is issued more speedily. This could be of advantage to developers wishing to progress the development of the site. From a public policy point of view it is important that speedy progress is made to issue the formal planning permissions for appropriate development."

For my part the arguments in favour of time running from the date of resolution in the present case have been given undue weight by the Court of Appeal. In any event, there are a number of countervailing policy considerations to be considered.

45 First, the context is a rule of court which by operation of a time limit may deprive a citizen of the right to challenge an undoubted abuse of power. And such a challenge may involve not only individual rights but also community interests, as in environmental cases. This is a contextual matter relevant to the interpretation of the rule of court. It weighs in favour of a clear and straightforward interpretation which will yield a readily ascertainable starting date. Entrusting judges with a broad discretionary task of retrospectively assessing when the complaint could first reasonably have been made (as a prelude to deciding whether the application is time barred) is antithetical to the context of a time limit barring judicial review.

46 Secondly, legal policy favours simplicity and certainty rather than complexity and uncertainty. In the interpretation of legislation this factor is a commonplace consideration. In choosing between competing constructions a court may presume, in the absence of contrary indications, that the legislature intended to legislate for a certain and predictable regime. Much will depend on the context. In procedural legislation, primary or subordinate, it must be a primary factor in the interpretative process, notably where the application of the procedural regime may result in the loss of fundamental rights to challenge an unlawful exercise of power. The citizen must know where he stands. And so must the local authority and the developer. For my part this approach is so firmly anchored in domestic law

A that it is unnecessary, in this case, to seek to reinforce it by reference to the European principle of legal certainty.

47 Unfortunately, the judgment in the *Greenpeace* case [1998] Env LR 415 and the judgment of the Court of Appeal, although carefully reasoned, do not produce certainty. On the contrary, the proposition in the *Greenpeace* case, at p 424, "that a judicial review applicant must move against the substantive act or decision which is the real basis of his B complaint" leaves the moment at which time starts to run uncertain. This is illustrated by the way in which Laws J in a lengthy judgment proceeded retrospectively to assess the various dates by which the applicants could have applied for judicial review. In a case note on the *Greenpeace* case, "All Litigants are Not Equal: Delay and the Public Interest Litigant" [1998] JR 8, Dr Forsyth (co-author of the standard textbook) commented, at p 10, para 8:

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> "This obligation resting upon applicants to apply for judicial review as soon as the real basis of their complaint had been identified is onerous and uncertain. It may be pointed out that notwithstanding that he had the luxury of being able to view each event in its proper context as revealed by subsequent events, the judge found it difficult to decide what the precise date was. How much more difficult must it be for the applicant D who lacks this perspective and to whom the significance of each event is obscure to judge when the real basis of their complaint has come to the fore? In truth, the basis of a complaint is often constructed ex post facto, but the judgment ignores this reality."

Laws J saw it as a matter of the court imposing "a strict discipline in proceedings before it" and administering justice "case by case". The E difficulty with this approach is, however, that it does not provide the relative certainty in respect of the operation of the time limit under Ord 53, r 4(1), which a citizen might be entitled to expect.

48 While I must avoid distraction from the main point, it is of passing interest that the sequel to the *Greenpeace* case as decided by Laws J was a decision by Maurice Kay J in the same ongoing dispute in which a rather different approach on a number of public law points prevailed: *R v Secretary* F *of State for Trade and Industry, Ex p Greenpeace Ltd* [2000] Env LR 221.

49 There is appended to the appellant's printed case a list of dates which on the Court of Appeal judgment may be held to be the operative dates even where the challenge is to the grant of planning permission. For my part I would not necessarily be willing to accept the realism of all the suggested dates. But on the reasoning of the Court of Appeal and the arguments of the G respondents dates earlier than the resolution (e g a recommendation to the planning committee) may in future have to be treated as operative dates. Indeed, on the rationale of the Court of Appeal judgment, and the argument for the respondents, time could start to run when a planning authority, before the adoption of any resolution, accepted a deficient environmental statement and placed it on the register pursuant to regulation 14(2) of the 1988 Regulations. Almost certainly there will be other potential dates even H where the challenge is to the final decisions. Not surprisingly, the practice in the Divisional Court has been inconsistent. There has been criticism in professional journals of the failure of the Court of Appeal in the present case to bring a measure of certainty to this corner of the law: Edwards and Martin, "Time gentleman, please" (2001) Estates Gazette, No 0103,

20 January 2001, p 128; comment on the Court of Appeal decision by Edwards [2001] JPL 775, 785–786; Roots and Walton, "Promptness and Delay in Judicial Review—an update on the continuing saga" [2001] JPL 1360; compare also the earlier article of Jones and Phillpot, "When He Who Hesitates is Lost: Judicial Review of Planning Permissions" [2000] JPL 564. At present there now appears to be a confusing number of different potential starting points. They involve the court retrospectively assessing when it was reasonable for an individual to apply for judicial review. The lack of certainty is a recipe for sterile procedural disputes and unjust results. By contrast if the better interpretation is that time only runs under Ord 53, r 4(1), from the grant of permission the procedural regime will be certain and everybody will know where they stand.

50 Thirdly, the preparation of a judicial review application, particularly in a town planning matter, is a burdensome task. There is a duty of full and frank disclosure on the applicant: *The Supreme Court Practice 1999*, vol 1, p 916, para 53/14/57. The applicant must present to the court a detailed statement of his grounds, his evidence, his supporting documents in a paginated and indexed bundle, a list of essential reading with relevant passages sidelined, and his legislative sources in a paginated indexed bundle. This is a heavy burden on individuals and, where legal aid is sought, the Legal Services Commission. The Civil Procedure Rules and Practice Direction—Judicial Review supplementing Part 54 contain similar provisions: see also the Pre-Action Protocol for Judicial Review. An applicant is at risk of having to pay substantial costs which may, for example, result in the loss of his home. These considerations reinforce the view that it is unreasonable to require an applicant to apply for judicial review when the resolution may never take effect. They further reinforce the view that it is unfair to subject a judicial review applicant to the uncertainty of a retrospective decision by a judge as to the date of the triggering of the time limit under the rules of court.

51 For all these reasons I am satisfied that the words "from the date when the grounds for the application first arose" refer to the date when the planning permission was granted. In the case before the House time did not run therefore from the resolution of 15 September 1999 but only from the grant of planning permission on 12 May 2000. It follows that in my view the decisions of Richards J and the Court of Appeal were not correct.

XI. The European law issues

52 Given the conclusion I have reached it is unnecessary in this case to consider the arguments on European law. And there is no need for a reference to the European Court of Justice pursuant to article 234 of the EC Treaty.

XII Promptitude

53 This case has not turned on the obligation of a judicial review applicant to act "promptly" under the rules. In these circumstances I confine my observations on this aspect to two brief matters. First, from observations of Laws J in *R v Ceredigion County Council, Ex p McKeown* [1998] 2 PLR 1 the inference has sometimes been drawn that the three months limit has by judicial decision been replaced by a "six weeks rule". This is a misconception. The legislative three months limit cannot be contracted by a

judicial policy decision. Secondly, there is at the very least doubt whether the obligation to apply "promptly" is sufficiently certain to comply with European Community law and the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a matter for consideration whether the requirement of promptitude, read with the three months limit, is not productive of unnecessary uncertainty and practical difficulty. Moreover, *Craig, Administrative Law*, has pointed out, at p 794:

> "The short time limits may, in a paradoxical sense, increase the amount of litigation against the administration. An individual who believes that the public body has acted ultra vires now has the strongest incentive to seek a *judicial resolution* of the matter immediately, as opposed to attempting a *negotiated solution,* quite simply because if the individual forbears from suing he or she may be deemed not to have applied promptly or within the three month time limit."

And in regard to truly urgent cases the court would in any event in its ultimate discretion or under section 31(6) of the 1981 Act be able to refuse relief where it is appropriate to do so: see *Craig, Administrative Law*, p 794. The burden in such cases to act quickly would always be on the applicant: see Jones and Phillpot, "He Who Hesitates is Lost: Judicial Review of Planning Permissions" [2000] JPL 564, 589.

XIII. Disposal

54 For these reasons, as well as the reasons given by my noble and learned friend Lord Slynn of Hadley, I would allow the appeal and remit the matter for decision by the High Court on the substantive issues.

LORD HOPE OF CRAIGHEAD

55 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. Subject only to some observations which I should like to add to what he has said on the questions of jurisdiction and promptitude, I agree with it. I too would allow the appeal.

Jurisdiction

56 In my opinion the principle upon which the decision of this House in *Lane v Esdaile* [1891] AC 210 proceeded was correctly identified by Lord Esher MR in *In re Housing of the Working Classes Act 1890, Ex p Stevenson* [1892] 1 QB 609, 611 when he said:

> "I am, on principle and on consideration of the authorities that have been cited, prepared to lay down the proposition that, wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that authority is, from the very nature of the thing, final and conclusive and without appeal, unless an appeal from it is expressly given. So, if the decision in this case is to be taken to be that of the judge at chambers, he is the legal authority to decide the matter, and his decision is final; if it is to be taken to be that of the High Court, then they are the legal authority entrusted with the responsibility of deciding whether there shall be leave to appeal, and their decision is final. In either case there is no appeal to this court. What was said in *Lane v Esdaile* [1891] AC 210 supports the view that I am taking."

57 There is no doubt that this rule was extended in *In re Poh* [1983] 1 WLR 2 when it was applied to an appeal from a refusal of leave to apply for judicial review. I also think that Lord Diplock's observation, at p 3, that this House is not concerned with the procedure by which the application in question moved to the Court of Appeal is difficult to reconcile with what was said in *Ex p Stevenson.* The fact that the Court of Appeal granted permission to the applicants to appeal from the decision of Richards J shows that the decision of the judge to refuse permission was not treated as final and conclusive and without appeal in that court.

58 For these reasons I do not think that there is any sound basis for holding that, where the Court of Appeal has granted leave to appeal against a refusal of permission to apply for judicial review and then heard the appeal, this House has no jurisdiction to entertain a further appeal against a refusal of permission by the Court of Appeal.

Promptitude

59 I share my noble and learned friend's doubt as to whether the provision in CPR r 54.5(1) that the claim form must be filed "promptly" is sufficiently certain to comply with the right to a fair hearing within a reasonable time in article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, in that respect, also with European Community law. But, as his point may have some implications for the law and practice of judicial review in Scotland and as the current state of the law and practice in Scotland might be of some interest if rule 54.5(1) were to be reformulated, I should like to add these comments.

60 The principle of legality, which covers not only statute but also unwritten law, requires that any law or rule which restricts Convention rights must be formulated with sufficient clarity to enable the citizen to regulate his conduct: *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 270–271, paras 47, 49. He must be able, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The problem is that the word "promptly" is imprecise and the rule makes no reference to any criteria by reference to which the question whether that test is satisfied is to be judged.

61 As Lord Clyde and Denis Edwards, *Judicial Review* (W Green, 2000), para 13.14 point out, there is no specific time limit for the making of an application for judicial review in Scotland nor is it thought that there is any need for one. The explanation for the absence of a specific statutory time limit is to be found in the history of the supervisory jurisdiction of the Court of Session which preceded the introduction of a new procedure for judicial review by rule 260B of the Rules of the Court of Session 1965 (SI 1965/321). A full account of it is set out in the opinion of the court in *West v Secretary of State for Scotland* 1992 SC 385, 393–401. It had long been recognised that the Court of Session had jurisdiction to control any excess or abuse of power or a failure to act by an inferior body or tribunal. But this jurisdiction was of little use in practice, as it took so long under the existing procedure to obtain a decision from the court. What was needed, as Lord Fraser of Tullybelton pointed out in *Brown v Hamilton District Council* 1983 SC(HL) 1, 49, was a reform of the procedure for obtaining judicial review of decisions by public bodies which would provide litigants in

A Scotland with ready access to the court for the obtaining of the appropriate remedies.

62 The reforms introduced by rule 260B of the 1965 Rules are now to be found in Chapter 58 of the Rules of the Court of Session 1994 (SI 1994/1443). They were essentially procedural in nature. It was not the intention to narrow the supervisory jurisdiction from what it had previously been. One aspect of that jurisdiction was that it had never been subject to any specific statutory time limit. A research study was carried out into the operation in practice of judicial review of administrative action in Scotland by staff at the School of Law at the University of Glasgow. They concluded that there was no case for the introduction of a strict time limit within which a petition must be brought: "Judicial Review Research", 1996 SLT (News) 164–165. Rule 58.3 of the 1994 Rules, which provides for the making of applications for judicial review, says nothing about the time within which such applications must be made.

63 The principal protection against undue delay in applying for judicial review in Scotland is not to be found therefore in any statutory provision but in the common law concepts of delay, acquiescence and personal bar: see *Clyde & Edwards, Judicial Review*, para 13.20. The important point to note for present purposes is that there is no Scottish authority which supports the proposition that mere delay (or, to follow the language of CPR r 54.5(1), a mere failure to apply "promptly") will do. It has never been held that mere delay is sufficient to bar proceedings for judicial review in the absence of circumstances pointing to acquiescence or prejudice: *Singh v Secretary of State for the Home Department* 2000 SLT 533, 536, para 8, per Lord Nimmo Smith; *Uprichard v Fife Council* 2000 GWD 14–514, per Lord Bonomy (transcript, paragraph 16); *Bett Properties v Scottish Ministers* 2001 SLT 1131, 1136–1137, paras 9–10, per Lord Macfadyen, although he reserved his opinion on this point, at p 1137E. As Lord Nimmo Smith said in the *Singh* case, at p 536, none of the cases in Scotland provide support for a plea of unreasonable delay, separate and distinct from a plea of mora, taciturnity and acquiescence, in answer to an application for judicial review.

64 On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237, 280–281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision; see also *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell* [1990] 2 AC 738. But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in *Swan v Secretary of State for Scotland* 1998 SC 479, 487:

> "It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

65 In *Ex p Caswell* [1990] 2 AC 738, 749–750 Lord Goff of Chieveley said that he did not think that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. As he pointed out, the interest in good administration lies essentially in a regular flow of consistent decisions and in citizens knowing where they stand and how they can order their affairs. Matters of particular importance, apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened. These observations, which were made in the context of an application to extend the period under RSC Ord 53, r 4(1), are consistent with the Scottish approach to the question whether the application should be allowed to proceed. The question whether the delay amounts to acquiescence or would give rise to prejudice such as to bar the remedy is inevitably one of fact and degree.

66 There is clearly much force in the point which my noble and learned friend makes that the obligation to apply "promptly" is, without more, too uncertain to satisfy the requirements of Convention law. But in my opinion the factors which are relevant to a plea of mora, acquiescence and taciturnity in Scottish practice provide an appropriate context for the taking of decisions on this point. They provide a sufficiently clear and workable rule for the avoidance of undue delay in the bringing of these applications, as experience of the operation of judicial review in Scotland has shown. I do not think that it would be incompatible with his Convention rights for an applicant who must be taken to have acquiesced in the decision which he seeks to bring under review, or whose delay has been such that another interested party may be prejudiced, to be told that his application cannot proceed because he has delayed too long in bringing it.

LORD MILLETT

67 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Slynn of Hadley and Lord Steyn. For the reasons they give I too would allow the appeal.

LORD PHILLIPS OF WORTH MATRAVERS MR

68 My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Slynn of Hadley and Lord Steyn. For the reasons they give I too would allow the appeal.

Appeal allowed with costs in House of Lords and Court of Appeal.
Cause remitted to Queen's Bench Division.

Solicitors: Richard Buxton, Cambridge; Head of Legal Services, Hammersmith and Fulham London Borough Council; Masons.

M G