



Francis Taylor Building

## Webinar: Aspects of Public Authority Decision-Making

7 May 2020



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## Public decision making: the relationship between common law principles and statute

Melissa Murphy



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## Contents

- ❖ **Theme:** there is an evolving legal system in this country, with continuity provided by the common law. Recourse to common law principles offers scope to restrain abuses of power and uphold the rule of law, in a modern context in which statutory law regulates, arguably dominates, public decision making.
- ❖ **Statutory interpretation.** Examples of the common law having a significant impact on the interpretation of statutory provisions in a public law context.
- ❖ **Freestanding public law principles?** Are there common law principles which operate independent of statutory context?

## Checks & balances?





## Statutory interpretation: examples

1. Decision making should be in accordance with the policy & objects of the Act (***Padfield***; ***Spath Holme***; ***Palestine Solidarity Campaign Ltd***).
2. There is a presumption against interference with fundamental common law principles (***Pierson***; ***Jhuti v. Royal Mail Group***).
1. It is also to be assumed that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or anomalous or illogical; or futile or pointless (***Edison***; ***LM Homes***).



## (1) Purposive interpretation: background

- The courts should be prepared to offer a remedy in circumstances in which a Ministerial decision thwarts or runs counter to the policy and objects of the Act (***Padfield and Others v. Minister of Agriculture, Fisheries and Food and Others*** [1968] A.C. 997, per Lord Reid at 1030).
- What is the statutory purpose? “An appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute” (***Spath Holme*** [2001] 2 AC 349 per Lord Bingham at 397B).



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### **Palestine Solidarity Campaign Ltd v Secretary of State for Housing, Communities and Local Government[2020] UKSC 16**

- Supreme Ct case (judgment given 29.4.20) which turned on the application of the **Padfield** principle.
- Outcome – aspects of guidance issued by the Government in relation to local authority pensions investment (which attempted “to enforce the government’s foreign and defence policies”) were outside the scope of the governing 2013 Act & regulations and therefore unlawful. Government was not entitled under the legislation to forbid local authorities from pursuing investment policies “contrary to UK foreign policy or UK defence policy”.

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### **Palestine Solidarity Campaign ctd**

- The law of England and Wales does not have any equivalent of the Chevron doctrine in the United States (where a statute directed to a government agency is ambiguous, the court will follow any permissible reading adopted by the agency). See **Palestine Solidarity Campaign Ltd** at [67] (Lady Arden & Lord Sales’ dissenting judgment).
  - Ascertain statutory purpose is a matter of law for the court to decide.
  - Divergence judicial thinking HC v. CofA & split in SC itself – as to statutory purpose – principle simpler to explain than apply?

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## (2) Fundamental common law principles

“...statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions... Parliament is presumed not to have intended to change the common law unless it has clearly indicated such intention either expressly or by necessary implication. This presumption has been applied in many different fields including the construction of statutory provisions conferring wide powers on the executive.” (**R. v. Secretary of State for the Home Department, ex parte Pierson** [1998] AC 539 at 573-4 per Lord Browne-Wilkinson).

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## Fundamental principles ctd

- Important aspect of the principle of legality: “Parliament must squarely confront what it is doing and accept the political cost” (per Lord Hoffmann, **R. (Simms) v Secretary of State for the Home Department** [2000] 2 AC 115 at p 131F).

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## Candidate principles?

- Natural justice & fair procedures (*Pierson; R. v. Secretary of State for the Home Department, Ex parte Doody* [1994] 1 A.C. 531).
- Access to justice – eg appointment of a litigation friend (*Jhuti v. Royal Mail Group* [2018] I.C.R. 1077).
- Availability of judicial review (& hostility to ouster clauses eg *R. (On the application of Privacy International) v. Investigatory Powers Tribunal* [2019] UKSC 22).
- Consistency in administrative decision making eg *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] EWCA Civ 1305; *North Wiltshire DC v. SSE* (1993) P.& C.R. 137.

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## Public decision making: the relationship between common law principles and statute

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# Coronavirus and the impact on adult and social care provision

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## Overview

- Coronavirus Act 2020 legislative changes
- Recent case law on removing persons from care homes



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## Coronavirus Act 2020

- S. 16 and Sch 12 provide for suspension / modification of several duties under the Care Act 2014, to prioritise care and support to the most urgent / serious cases
- Duties to assess needs, determine eligibility for care and support and prepare care and support plans are suspended for 6 months
- Similar modifications made to the Social Services and Wellbeing (Wales) Act 2014

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- Government guidance, 'What the Coronavirus Act Will Do' (updated 26 March 20), states that such powers would: *"only be used if demand pressures and workforce illness during the pandemic meant that local authorities were at imminent risk of failing to fulfil their duties and only last during the duration of the emergency"*
- Prioritisation decisions may need to be made

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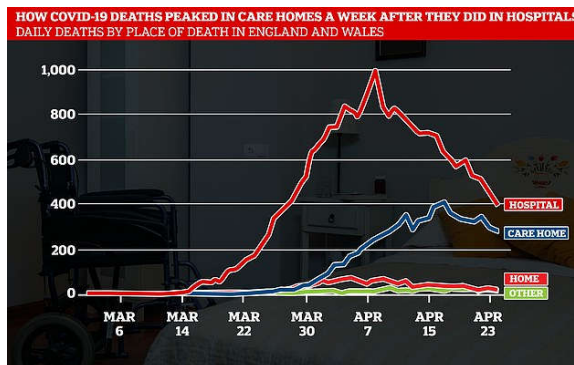
- Duty to have regard to the Guidance: ‘Responding to COVID-19: the ethical framework for adult social care’ issued by the Department of Health and Social Care
- 8 themes: Respect, Reasonableness, Minimising Harm, Inclusiveness, Accountability, Flexibility, Proportionality, Community
- Guidance acknowledges: “you may encounter tension between the principles which will require a judgement to be made on the extent that a particular value or principle can be applied in the context of each particular decision” – scope for challenge?

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## Removing the Vulnerable from Care Homes



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- Mental Capacity Act 2005
- Deprivation of Liberty Safeguards – set of checks to ensure that any care that restricts a person’s liberty is both appropriate and in their best interests
- Two (very) recent decisions of the Court of Protection have looked at the issue



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### BP v Surrey CC [2020] EWCOP 17 (Hayden J)

- » Application by daughter for an 83 year old to go home and live with her
- » Care home had stopped all family visits, in accordance with Government guidance
- » Plans for BP to return to home were not, in truth, a realistic option, so Court focussed on contact with family



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- » ECHR Art 5 (right to liberty and security) and Art 8 (right to respect for private and family life) infringed
- » But Art 15 permits derogation from Arts 5 and 8 in situations of public emergency, threatening the life of a nation
- » Hayden J: undoubtedly a public emergency within Art 15
- » Proposals by the care home for indirect contact were proportionate given the extraordinary circumstances of the pandemic

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### AO v RB Greenwich [2020] EWCOP 23 (Lieven J)

- » AO was living in a care home with terminal ovarian cancer
- » No family visits were allowed and video calls were not an effective way of maintaining contact
- » Application made by her daughter under s. 21A Mental Capacity Act 2005 to challenge the deprivation of her liberty, but the real issue was whether it was in AO's best interests (s. 4 MCA 2005) to be moved to her daughter's home to die

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- » Lieven J distinguished BP on the basis that BP was not terminally ill
- » The ability to die with one's family is one of the most fundamental parts of any right to private and family life and interference requires a particularly high degree of justification
- » Held that it was in AO's best interests to live with her family and appropriate care could be provided at home



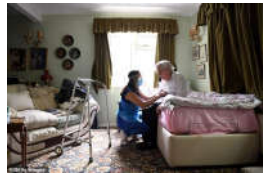
- » Re Coronavirus:
- » It was not argued that there was any public health reason to prevent AO leaving the care home to live with her family
- » The risk of AO contracting Covid-19 in the care home was argued in support of it being in her best interests to go home. However, Lieven J said it was not possible to quantify that risk and it was not a matter she had to consider
- » Family member collecting AO from care home would have a 'reasonable excuse' for leaving home



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» Scenario to Consider:

- » Patient is not terminally ill
- » Adequate care can (or could) be provided for patient at home
- » Risk of contracting Covid-19 in the care home is the sole basis for the proposed move



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## The Duty to Give Reasons for Public Authority Decisions

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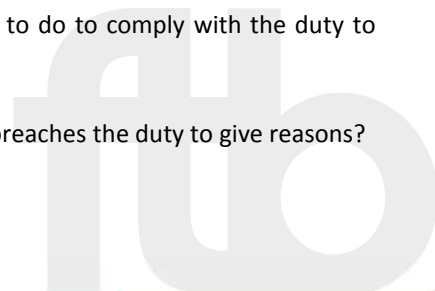
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## Three Questions to Consider

- When is a public authority under a duty to give reasons?
- What is a public authority required to do to comply with the duty to give reasons?
- What happens if a public authority breaches the duty to give reasons?



## Existence of a Duty to Give Reasons

- There are broadly speaking three potential sources of a duty to give reasons:
  1. Statutory Duty to Give Reasons (Either Express or Implied Statutory Duty)
  2. Procedural Fairness (The Common Law Requires Reasons to be Given on Grounds of Procedural Fairness in Some Circumstances);
  3. Legitimate Expectation (Legitimate Expectation of Reasons Arising from Express Promise or Implied Conduct).

## Existence of a Duty to Give Reasons — Express Statutory Duty

- Relatively straightforward source of the duty to give reasons — where statute expressly requires reasons to be given there is a duty on decision-makers to do so in accordance with the express terms of the statute:
  - Reg 7(3)(b) Openness of Local Government Bodies Regulations 2014 (Delegated Decisions)

## Existence of a Duty to Give Reasons — Implied Statutory Duty

- If a field is occupied by a statute but there is no express duty to give reasons contained in the statute, the next question to consider is whether there is an implied duty to give reasons contained in the statute
- It is ‘... beyond question that such a duty may in appropriate circumstances be implied ...’ on grounds of fairness (*R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 534)
- The court will carefully consider the statutory framework against familiar considerations of fairness (*R v Civil Service Appeal Board ex parte Cunningham* [1991] 4 All ER 310).

## Existence of a Duty to Give Reasons — Common Law (1)

- The starting point is clear under the common law — there is no general public law duty to give reasons but fairness may require reasons to be given in some circumstances:

*‘... public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed ...’*

**Lord Carnwath**

***Dover District Council v CPRE Kent* [2017] UKSC 79 at [51]**



## Existence of a Duty to Give Reasons — Common Law (2)

- But important to recognise that ‘... *there is a trend towards an increased recognition of the duty upon decision-makers of many kinds to give reasons ...*’ (*R (Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312 at [19])
- Elias LJ suggested that it may be more accurate to say we are moving to a position where reasons are required ‘... *unless there is a proper justification for not doing so ...*’ (*R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71 at [30])
- Public authorities would be well-advised to ‘... *consider carefully whether in the circumstances of the case reasons should be given ...*’ due to this trend in favour of giving reasons (*De Smith* at 7–092).

## Existence of a Duty to Give Reasons — Common Law (3)

- The question is whether fairness requires reasons to be given (*Dover* at [51]). Some relevant factors to consider:
  - the likely impact and importance of the decision, including whether the decision will have any lasting relevance beyond the confines of the particular case under consideration (*Dover* at [59]);
  - whether the decision is aberrant or otherwise cries out for an explanation by way of reasons (*R v HEFC ex parte Institute of Dental Surgery* [1994] 1 WLR 242);
  - whether reasons are necessary in order to give practical effect to a right of appeal (*Norton Tool Co Ltd v Tewson* [1973] 1 WLR 45);
  - the nature of the decision-making process (*Cunningham*).

## Existence of a Duty to Give Reasons — Common Law (4)

- Some important cases which are of general applicability:
  - a duty to give reasons when departing from policy (*Gransden v Secretary of State for the Environment* [1986] JPL 519);
  - a duty to explain inconsistent decisions (*Dunster Properties Ltd v the First Secretary of State and Another* [2007] EWCA Civ 236);
  - a duty to give reasons for frustrating a legitimate expectation (*R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607);
  - a duty to give reasons for rejecting expert evidence (*R (C) v Merton London Borough Council* [2005] EWHC 1753 (Admin)).

## Existence of a Duty to Give Reasons — Legitimate Expectation

- Individuals may have a legitimate expectation that reasons will be given — a legitimate expectation can arise from either an express promise or through past practice (*In the Matter of an Application by Geraldine Finucane for Judicial Review* [2019] UKSC 7)
- Recent example in *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2019] 1 WLR 929 where the Court of Appeal held that there was a legitimate expectation that reasons would be given by the Secretary of State when deciding whether to call-in a planning application ([40]).

## Content of the Duty to Give Reasons (1)

*' ... the legal principles relating to the adequacy of reasons are well known. In short, the reasons must show that the decision maker successfully came to grips with the main contentions advanced by the parties, and must tell the parties in broad terms why they lost or, as the case may be, won. Reasons must be both adequate and intelligible. They must therefore both rationally relate to the evidence in the case, and be comprehensible in themselves ... '*

**Supperstone J**

**Davies v Bar Standards Board [2015] EWHC 2927 (Admin) at [9]**

## Content of the Duty to Give Reasons (2)

*' ... the reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved [ ... ] the reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law [ ... ] reasons need refer only to the main issues in dispute, not to every material consideration ... '*

**Lord Brown**

**South Buckinghamshire DC v Porter (No 2) [2004] 1 WLR 1953 at [36]**

## Content of the Duty to Give Reasons (3)

- Reasons do not need to be lengthy or elaborate — ‘... *the length of reasons [ ... ] is not itself necessarily a reflection of their quality ...*’ (*R (Nottingham Healthcare NHS Trust) v Mental Health Review Tribunal* [2008] EWHC 2445 (Admin) at [15])
- Courts will adopt a sensible and straightforward approach when assessing adequacy — will not take part in the ‘... *kind of scrutiny appropriate to the determination of the meaning of a contract or statute ...*’ (*Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26)
- They will be willing to forgive ‘... *glaring miscalculations or obvious clerical errors ...*’ which are unlikely to have misled anyone (*Elmbridge BC v Secretary of State for the Environment* (1980) 39 P & CR 543)

## Content of the Duty to Give Reasons (4)

- Beware that the same standards apply irrespective of whether there was a duty to give reasons or whether reasons were instead given voluntarily:

*‘ ... since reasons were given in the present case, it is not necessary to decide whether there was a legal obligation to give them. Once given, their adequacy falls to be tested by the same criteria as if they were obligatory ... ’*

**Sedley J (as he then was)**

***R v Criminal Injuries Compensation Board ex p Moore* [1999] 2 All ER 90**

## The Consequences of a Breach of the Duty to Give Reasons (1)

- Often a fertile ground for arguments about judicial discretion — whether the court should grant a remedy following a finding that the duty has been breached
- Arguments are sometimes successful such as in *Rogers v Wycombe Borough Council* [2017] EWHC 3317 (Admin) where Lang J declined relief under s. 31(2A) SCA 1981 in a reasons challenge relying in part on reasons supplied in a witness statement prepared during the litigation ([66] – [76])
- The court may grant a mandatory order requiring reasons to be given (*R (Richardson) v North Yorkshire CC* [2014] 1 WLR 1920)

## The Consequences of a Breach of the Duty to Give Reasons (2)

- Generally a court will ‘... exercise caution before accepting reasons for a decision which were not articulated at the time of the decision but were only expressed later, in particular after the commencement of proceedings ...’ (*R (D) v Secretary of State for the Home Department* [2003] EWHC 155 at [18])
- Quashing order will ordinarily follow where the defect in reasoning goes to the heart of the decision (*Dover* at [68]) — particularly so where there has been a failure to provide reasons pursuant to a statutory duty (*R (Nash) v Chelsea College of Art and Design* [2001] EWHC 538 (Admin) at [34])



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## Thank You

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## Implied powers of public authorities to withdraw their reports or decisions

James Pereira QC and Horatio Waller  
7 May 2020



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## Introduction

- If a public body realises its decision is unlawful it might consent to a quashing order in judicial review / instigate proceedings itself.
- Court proceedings may be unnecessary if the decision can be lawfully withdrawn.
- What if the decision was lawful but the public body wishes to change its mind because of a change of circumstances or new policy?
- We will explore the principles determining when a power exists to withdraw a decision / report.

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## Examples in the case-law

Areas where this issue has arisen:

- Statutory nuisance;
- Planning;
- Police powers;
- Language schemes.

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## Statutory Nuisance

- Local authorities have a duty/ power to serve an abatement notice where satisfied that a statutory nuisance exists in their area: s80 EPA 1990.
- *R v Bristol City Council* [1999] 1 WLR 1170. Served an abatement notice on housing association in relation to steep staircase.
- Then purported to withdraw AN when came to the view this did not amount to a statutory nuisance.



- Held an implied power exists to withdraw an abatement notice where the LA decides that the requirements for a notice are no longer satisfied.
- Richards J “It seems senseless that an authority should be unable to withdraw an abatement notice which, for whatever reason, it no longer considers to be appropriate”.
- Upheld on appeal [1999] 1 WLR 1170.





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## Local plans

- Now there is an express power to withdraw local development documents under the Planning and Compulsory Purchase Act 2004, s22.
- No express power before under the Town and Country Planning Act 1990 provisions.
- *R. (Persimmon Homes (Thames Valley) Ltd) v North Hertfordshire DC* [2001] 1 W.L.R. 2393.
- NHDC withdrew a draft local plan after new national planning policy published.

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- Held an implied power exists.
- Collins J: “The existence of the power is necessary to prevent carrying out expensive procedures for no sensible purpose”.
- Followed in *R (Martin Grant Homes Ltd) v Wealden DC* [2006] 1 P&CR 24 (CA)

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## Call-in decisions

- 1990 Act, s77 confers power on SoS to call-in planning applications.
- *R (Trustees of the Friends of the Lake District) v Secretary of State for the Environment* [2002] 1 P & CR 306.
- SoS purported to withdraw call-in direction when it became clear the application only raised matters of local importance.
- Held SoS has an implied power to withdraw.

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Harrison J:

- “In my view, there are sound practical reasons why the Secretary of State should have the power to withdraw a call in direction if there are justifiable reasons for doing so....”
- “I have borne in mind that the power to call in a planning application is a procedural step which determines who the decision-maker will be, not what the decision will be. In other words, it confers a procedural rather than a substantive right.”

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## LA/Police Powers

- Police constables and LAs have powers to issue community protection notices under s43 of the Anti-Social Behaviour Act 2014 in relation to ASB.
- *Stannard v CPS* [2019] 1 WLR 3229. Held a police constable has an implied power to vary or discharge a notice, which someone subject to the notice could request is exercised.

## Language scheme

- Welsh Language Act 1993 established the Welsh Language Board to promote and facilitate use of the Welsh language.
- Duty on every "public body" providing services in Wales to prepare a language scheme.
- Public authorities, except for Crown body, have an express power to withdraw language scheme.





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- *R (Welsh Language Commissioner) v National Savings and Investments* [2014] EWHC 488 (Admin).
- NS&I in 2013 purported to withdraw scheme created in 1998 due to cost.
- Held a Crown body must have an implied power to withdraw a language scheme but withdrawal here was vitiated by breach of legitimate expectation.

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### *Cases where no implied power has been found*

- Refusal to imply a power where the decision / document creates substantive rights or where the legislation already provides a mechanism to withdraw the decision or document in question.
- No implied power to withdraw a planning permission once issued under the TCPA 1990: *R (Gleeson Developments Ltd) v SoS* [2014] PTSR 1226.
- No implied power to withdraw consent to install bus shelters under s104 of the London Passenger Transport Act 1935: *R v Hillingdon LBC Ex P. London Regional Transport* [1999] DLGR 543.

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## Identifying whether an implied power exists

Important questions to ask:

- Does the decision create substantive or merely procedural rights? Substantive = less likely a power can be implied.
- How widely is the administrative body's discretion drawn? The wider the more likely a power of withdrawal can be implied.
- Does the statutory regime already provide for withdrawal? If so, that suggests no wider power can be implied.
- Would refusing to recognise the implied power lead to absurdity?

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## If an implied power exists

- Creates an opportunity to a disgruntled interested party to request that the decision be re-considered.
- May allow a public authority to reverse decisions in light of new facts / policy or to reverse decisions that are considered to be unlawful.
- The exercise of the power is subject to challenge in judicial review.

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## Judicial review of withdrawal

- May encounter arguments around breach of legitimate expectation, as in *R (Welsh Language Commissioner) v National Savings and Investments* [2014] EWHC 488 (Admin).
- Potentially relevant considerations for the exercise of the discretion: length of time that has elapsed, potential prejudice to interested parties etc..

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