Hypothetical, academic and premature challenges

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Introduction - scope

1. It might be considered that the primary function of the courts is to resolve disputes or issues which have arisen in particular factual circumstances. However, circumstances do arise when the courts are asked to rule on issues which may be based on hypothetical facts or where there is no longer a dispute of practical relevance. There are understandable practical constraints, not the least that Court time and resources are finite and, unsurprisingly, judges tend consider to that their efforts should be directed principally to what are issues of practical relevance.

2. It does not follow that all issues which fall for determination will be rooted in actual facts and, in the course of litigation, it may prove helpful or necessary to express a view on hypothetical issues or to determine a legal question on the basis of hypothetical facts.

3. Consideration of the cases does not reveal an entirely consistent picture and there is no consistent terminology applicable to those issues which the courts will hear and those which it will not. In reality, certain issues are unlikely to be determined, such as cases where the issue has simply become irrelevant (e.g. where the dispute has ceased to be of practical relevance) and in others, where there may be good reasons for the court expressing an opinion, a wide spectrum of responses is possible. Unsurprisingly, the issue tends to be approached as a matter of discretion rather than one of jurisdiction. The factors which have lead the court to determine what is essentially an hypothetical or abstract issue are not wholly clear. Such issues will not be determined simply because one or more parties are keen for a resolution or consider the issue to touch directly upon their own interests.

4. However, there have been attempts to order the terminology to seek to distinguish the issues which it may be appropriate to determine and those which it may not. Sir John Laws (*Judicial Remedies and the Constitution* (1994) 57 MLR 213) has suggested distinguishing between "academic" and "hypothetical" issues:

> "I should first expose a distinction which seems to me to possess some significance. It is between what may be regarded as a "hypothetical" question and what may be regarded as an "academic" question. The courts have tended to use these phrases indifferently. I do not think that they have been right to do so. We should understand an academic question to be one which does not need to be answered for any visible practical purpose at all: thus, if I were a legal antiquarian, and interested in the construction of a statute long since repealed and not replaced, I could not bring proceedings to ask the court to construe it for me, so as to satisfy my intellectual curiosity: the court will not deploy its resources so as to provide authoritative backing for one or other view being canvassed in the lecture hall or the tutorial. A hypothetical question is quite different: it is a question which may need to be answered for real

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[1] Landmark Chambers. I am grateful to Richard Moules of Landmark Chambers for his assistance with this paper.

practical purposes; it connotes only a situation in which the events have not yet happened which will clothe the answer to the question with immediate practical effects…"

5. Even so, this distinction would not determine which issues would be heard since it is clear that not all hypothetical issues so defined would find favour with the court.

6. *Zamir & Woolf,* in *The Declaratory Judgment* (Sweet & Maxwell, 2002), similarly define hypothetical challenges by reference to the factual context of the matter (para. 4.055):

> "The absence of a dispute based on concrete facts is critical. This is the missing element which makes a case hypothetical"

They consider that hypothetical cases may be divided in to four categories[2]:

(1) where there is no dispute in existence;

(2) where the dispute is divorced from the facts;

(3) where the dispute is based on hypothetical facts;

(4) where the dispute has ceased to be of procedural significance[3].

In terms of Sir John's use of terminology, category (4) at least would be regarded as "academic".

7. The objections to hearing such hypothetical or academic disputes are:

(1) The courts need the facts of a real case to assist their decision-making. If they adjudicate on hypothetical issues, they may be embarrassed if the same issue comes before them in a concrete form and they reach a different conclusion;

(2) Parties whose rights may be affected by the outcome of such disputes may not be before the court;

(3) The absence of a genuine fact-based dispute may mean that the Court does not receive as much assistance as it should since there may not be full argument on opposing sides;

(4) The opinion of a court on a hypothetical issue may be merely obiter and not be binding subsequently;

(5) A decision on hypothetical issues may not to take account of facts which subsequently occur or may involve a judgment on issues which are highly fact-sensitive;

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[2] *Op. cit.*

[3] See also Lewis *Judicial Remedies in Public Law (*4th ed. 2004) who regards a question as being *hypothetical* if: (i) facts have not yet arisen; (ii) declaration is sought at an early stage if the administrative decision-making process. A question is *academic* if the claimant no longer actually needs a remedy as a practical matter.

(6) It is an inefficient use of court resources and judicial time because there are already plenty of concrete cases to occupy the judges in the Administrative Court.

8. It should be borne in mind when considering this area of the law that the courts' approach to hypothetical questions raises much broader questions about their constitutional function generally:

> "…There has for many years been a strong tradition in the law that the courts will only decide question on which a live dispute turns; they will not entertain issues which they perceive as being merely hypothetical or academic. I use the word "tradition" advisedly; it is not a matter of jurisdiction, but of judicial choice. I think that the effects of this tradition are in some respects harmful to the proper development of public law, in which context it needs to be severely modified. I do not consider this theme to be one of merely peripheral importance, so as to command the attention only of specialists who might understandably find interest in any aspect of public law, however dry or marginal. It engages a question going to the very nature of the role which the judicial are of government is to play in the State: how far should the judges act proactively, rather than merely reactively?"
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> Sir John Laws, *Judicial Remedies and the Constitution* (1994) 57 M,L,R, 213.

> "The primary role of the courts is, and always has been, to resolve existing disputes between the parties where the courts' decision will have immediate and practical consequences for at least one of the parties. There are more than enough cases of this sort fully to occupy the time of the courts and, not unnaturally, the judges have vigorously objected to attempts made from time to time to divert them from what they regard as their task, that of deciding real issues, into deciding theoretical or hypothetical issues."
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> Zamir & Woolf *The Declaratory Judgment* (Sweet & Maxwell, 2002, para 4.032).

9. The objections mentioned above are clearly illustrated in the following views:

> "It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter dicta, expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future."
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> ***R v Secretary of State for the Home Department, ex p Wynne*** [1993] 1 WLR 115, 119120, per Lord Goff

> "The courts – including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy, however intellectually interesting or jurisprudentially important the problem and however fierce the debate which may be raging in the ivory towers or amongst the dreaming spires."
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> ***R (Smeaton) v Secretary of State for*** [2002] 2 F.L.R. 146 at para. 240, *per* Munby J

> "The Administrative Court nowadays has to deal with many issues which even in the comparatively recent past would not have troubled the courts at all and which would probably have been thought by many to be simply non-justiciable. That is an entirely wholesome development. But making every allowance for this, the fact remains that the courts – including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance. Judges do not sit as umpires on controversies in the Academy. Nor is the task of a judge when sitting judicially – even in the Administrative Court – to set out to write a textbook or practice manual or to give advisory opinions."
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> ***R (the Howard League for Penal Reform) v Secretary of State for the Home Department*** [2003] 1 F.L.R. 484 at para. 140, *per* Munby J

> "Unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum. They know that, while hard cases may indeed make bad law, the particular facts of the case before them do cast a particularly bright light upon the issues and may throw up important

> questions which no rehearsal of the legal arguments in the abstract can ever do. Why, after all, do the best legal examination papers require candidates to answer problems based upon a precise, though imaginary set of facts? Because that is the way in which our case law has developed over the centuries. It is only legislators who make legal rulings in general and without reference to a specific set of facts…Both [questions] raise important policy issues of a kind which courts should not have to resolve by reference to legal rather than policy arguments. Above all, if we give an answer to these questions, it will be taken as binding – not only on the parties before us not but on all future parties before any future court, including a criminal court, because the way in which we state the law will be binding upon all judges who decide those cases.
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> My lords, as an academic lawyer and examiner of students, I would see nothing wrong in essaying an answer to those questions, secure in the knowledge that if I turned out to have overlooked some important consideration which emerged in a later case, a court could and would ignore my views. As a judge, I see every objection to answering those questions. The fact that all parties and all courts have so far proceeded on the basis that we both can and should answer them does not to my mind outweigh the formidable objections to the other questions on the examination paper."
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> ***Oxfordshire County Council v Oxfordshire City Council*** [2006] 2 W.L.R. 1235 paras. 136-137, per Baroness Hale

10. Judicial antipathy towards hypothetical questions is also, in part, a product of history as Craig notes (*Administrative Law*, Sweet & Maxwell, 5th ed p. 775):

> "Our courts have long set themselves against deciding hypothetical questions for a number of reasons, one being historical. The dislike of such hypothetical, abstract or academic questions stems from the close association between them and advisory opinions. Such opinions were once commonly asked for and given but, like much else, this practice was abused by the Stuarts. Since the judges could be dismissed by the Crown, the responses to those royal interrogatives were not always accompanied by Olympian detachment on the part of the judiciary."

11. However, these objections do not apply in all cases and in a number of instances, it can be said that there is a public interest in the determination of an issue which is not rooted in an existing, concrete set of facts. Such cases may include:

    (1) Where the case may nonetheless be an appropriate test case;

    (2) there might be an urgent need for certainty as to what the law is; and

    (3) the lack of "concrete facts" may not actually matter in the particular circumstances.

12. Moreover, the types of objection described at para. 7 above are not necessarily determinative or decisive:

    (1) A number of issues may be hypothetical and abstract in the sense that issues of law may arise which are less fact-specific e.g. the pre-emptive challenges to the compatibility with article 6 of various administrative decision making processes by the Secretary of State in ***R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*** [2003] 2 A.C. 295 which were concerned with principle far more than the detailed circumstances of the four test cases;

(2) Test cases, or simply cases raising points of general importance, may often be determined without the attendance or representations of all parties whose interests may be affected;

(3) The Court can ensure that full argument exploring sufficiently different perspectives is secured e.g. by the appointment of an advocate to the court in appropriate cases;

(4) The determination of issues in principle may provide important advance guidance to the planning of future conduct and save considerable time and public money if future litigation is avoided or public authorities are guided as to what may be lawful or unlawful action[4]. Nonetheless, the risk which exists here is that an advisory opinion does not fully anticipate the nature of facts which may arise or the arguments which may subsequently be deployed.

13. There are in any event circumstances where a degree of hypothesis and abstraction exists and yet the courts frequently do determine issues such as in actions to restrain future, anticipated unlawful action on a *quia timet* basis or cases where the issue is of some abstraction and principle and turns little on specific facts such as ***Alconbury*** but where the determination of the court is necessary to future conduct even before a concrete decision is made and is obviously in the public interest.

(A) Examples: hypothetical issues - cases where review has been refused

14. The general position is said to be that hypothetical cases will only be heard exceptionally, although whether the issue is "exceptional" is a matter for the discretion of the Court:

> "The courts have jurisdiction to grant a declaration if there is a need for clarification of the law on an issue of general importance even if the need for a remedy in the particular case has now passed and there is no live issue between the parties. The discretion to hear such disputes, even in public law maters, is to be exercised with caution and the courts ought to not entertain such cases unless there is a good reason in the public interest in doing so".
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> Zamir & Woolf, *Declaratory Judgments*, para. 7-050

15. The Courts will not intervene and assist the parties if the decision no longer would be of practical relevance in the case or would involve expressing a view in circumstances where future action might be affected which turns on a series of judgments, which are likely to be fact sensitive.

16. In ***Draper v British Optical Association*** [1938] 1 All E.R. 115 the Court dismissed a claim for a declaration that the threatened removal of an optician from the association's list of members for a violation of their code of ethics. Farwell J. held that since the association had not yet met to decide the issue, the point was abstract and might not arise.

17. In ***R v Secretary of State for the Home Department, ex p Wynne*** [1993] 1 W.L.R. 115, a prisoner wished to challenge the SSHD's purported power to charge a prisoner the

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[4] See e.g. Lord Woolf's recommendation regarding anticipatory rulings in his report *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System* (1997) p. 251.

travel and escort costs of producing him at court for his judicial review hearing. The case was, however, hypothetical because the prisoner, on being told that he would have to pay these costs, tore up his application and thus did not need to be produced at court. Lord Goff criticised the Court of Appeal for granting leave to appeal in these circumstances because the case was not even a suitable test case (pp. 119-120):

> "I feel driven to say that, in those circumstances, the Court of Appeal should not have given leave to appeal. It was inevitable from the outset that this House would have to dismiss the appeal, for there was no basis upon which the Court of Appeal's decision could be disturbed. In truth, the Court of Appeal were giving leave to appeal because of a difference of opinion among the members of the court expressed in what were in law no more than prolonged obiter dicta. At the outset of the argument before the Appellate Committee, it was drawn to the attention of counsel for the applicant, Mr. Munby, that the substantive argument on the appeal raised what was in truth a hypothetical question; and this was not disputed. Nevertheless, the arguments having been prepared at considerable public expense, in litigation which was intended as a test case, counsel were allowed to develop their arguments before the Appellate Committee. Now however this House has to decide how to dispose of the matter.
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> It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter dicta, expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future. Furthermore, if in the present case the applicant had made a formal application for production which had been pursued to the stage of decision, it is not at all clear that other factors might not then have emerged. In particular, if it had then transpired that (as may be the case) the applicant lacked the means to pay the expenses required of him, and if an indication had then been made by the court that the applicant was required to attend the hearing of his applications to enable them to proceed, it is possible that further steps might have been taken with a view to obtaining legal aid for the applicant, or even that, by analogy to paragraph 57 of the Productions Manual, the requirement to recover full production costs might have been waived by the Home Secretary.
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> In the circumstances, your Lordships' House is placed in a position of considerable embarrassment. I am very conscious that the present case was selected as a test case to resolve the legal and practical problems which arise when a prisoner wishes to appear in court as a litigant in person. It has unfortunately proved to be unsuitable as a test case to resolve the legal problems; and your Lordships' House is not equipped to resolve the practical problems."

18. The claimant in ***R (Cronin) v Sheffield Magistrates' Court*** [2003] 1 W.L.R. 752, sought judicial review of the Justices' decision to grant a search warrant pursuant to the Misuse of Drugs Act 1971 s.23(3) in respect of his home. He contended that the Justices were required to keep a record of the reasons for issuing the warrant and of the proceedings. He had however, been supplied with that information on request and so the point lacked practical significance in the case. In these circumstances, Lord Woolf CJ noted (at [29]) that "[a]t most the point was technical as to whether sufficient information had been recorded. What information was recorded appeared on the face of the information". Lord Woolf added (at [30]):

> "It is very important, in my judgment, that the limited resources which are available from public funds for testing points of principle are confined to cases where it is really necessary. If it is decided that a case justifies the expenditure of public funds, then in

my judgment it is important that those who appear supported by public funds, if they are provided with additional information which makes it clear that the point is one which so far as the particular case is concerned is of very limited significance, then the question of proceeding should be reconsidered."

19. In ***R v Portsmouth Hospital NHS Trust ex p Glass*** [1999] 2 F.L.R. 905, the claimant was the mother of a severely disabled child. Relations between the family of the child and the hospital had broken down when the hospital administered morphine and refused to resuscitate the child. The claimant's application for judicial review seeking an order dealing with the course doctors should take in the event of future disagreements was refused and she applied for permission to appeal. The Court of Appeal refused to grant a declaration dealing with such a future situation. It held that if disagreement between the parents arose in a specific case, then the court would make a decision, on the basis of the best interests of the child. However, to grant a declaration in anticipation of possible future need for treatment would lead to confusion as there were an infinite number of possibilities and dealing with them all in a declaration was impossible. In the instant case, several principles needed to be weighed against one another, *viz*: (1) the sanctity of life; (2) leaving clinical decisions to the medical profession; (3) that treatment without consent constituted trespass to the person, and (4) that the court would act where the interests of a child or person under a disability required protection. As such a decision could not be made in the abstract. To similar effect, see ***Burke***, below.

(B) Examples: hypothetical issues - cases where review was, exceptionally, allowed

20. In ***Chief Adjudication Officer v Foster*** [1993] AC 754, one of the issues before the House of Lords was whether the Social Security Commissioners had jurisdiction to question the vires of certain regulations made by the Secretary of State. Lord Bridge (at p. 761) noted that:

> "The issue as to the commissioners' jurisdiction is in one sense academic, since, if your Lordships were to affirm the Court of Appeal on this issue, it would still be necessary to go on, as the Court of Appeal did, to determine the issue of the vires of the provision under challenge and it is only if the appellant succeeds on this second issue that she can effectively succeed in the appeal. <u>The jurisdiction issue, however, has far-reaching procedural implications for the future, it has been very fully argued and it is important that your Lordships should resolve it</u>, the more so, perhaps, since the Court of Appeal's decision in the instant case runs counter to the practice of the social security commissioners established by a long series of decisions, both by single commissioners and by tribunals of commissioners, holding that they had jurisdiction to decide and in fact deciding issues as to the vires of secondary legislation. Some of those decisions have been reviewed by the courts without any previous suggestion that issues of vires were beyond the jurisdiction of the Commissioners. (<u>emphasis added</u>)

It appears therefore that there was at least a degree of connection between the issue and the case and that there was an issue of principle concerning jurisdiction of wider public importance.

21. In ***R (Greenpeace Ltd) v SS for the Environment*** [2002] 1 W.L.R. 3304, the Court of Appeal entertained a claim for judicial review concerning the lawfulness of the import of endangered species (mahogany from Brazil) notwithstanding the fact that no issue arose in relation to the particular shipment under consideration. The court took this approach because the matters raised were of general importance and further similar shipments were anticipated. This was an example of a case where the decision was not so fact-sensitive to render the decision open to the sort of objections referred to in ***ex parte Glass*** for example.

22. On the question of whether a hypothetical case is exceptional and so deserves to be heard, it is worth noting Laws L.J.'s remarks in ***R v Oxfordshire CC, ex p P*** [1996] E.L.R. 153, pp. 157B-D. He explained the courts should think very hard before declining to rule on a academic point, in terms which show an overlap with standing considerations where a broad approach is usually taken where public interest points arise[5]:

> "A decision to refuse [a remedy] as a matter of discretion on the footing that the claim is academic ought not in my view to be made without some appreciation of the force of those arguments. In a public law case… [a claimant] may have an important point to bring to the court's attention, whose resolution might be required in the public interest, even if the [claimant] himself has suffered no perceptible prejudice as a result of the decision in question"

(C) Examples: academic issues

23. In ***R v Secretary of State for the Home Department, ex p Salem*** [1999] A.C. 450, the issue concerned the time at which a claim for asylum was "determined" by the Secretary of State within the meaning of certain regulations. The question had however, become academic because the appellant had been granted refugee status by an adjudicator between the hearing of the case in the Court of Appeal and the case being listed in the House of Lords. Lord Slynn reviewed the authorities and formulated the following principles (at pp. 456-7):

> "…in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se…The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future"

24. Such good reasons in the public interest were found to exist in ***R v Secretary of State for the Home Department, ex p Adan*** [2001] 2 A.C. 477, a case concerning whether the Secretary of State was entitled to treat France and Germany as "safe third countries" in relation to asylum seekers who assert a fear of persecution by non-state agents in their

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[5] See e.g. ***R(Edwards) v Environment Agency & Ors*** [2004] 3 All E.R. 21.

country of origin, where the state is not complicit in the persecution alleged. Although in the appellant's own case, the Secretary of State had agreed not to remove him to France or Germany, there were a further 218 other cases in raising the same issue waiting to be heard. Laws L.J. held (at p. 486F-H):

> "It is quite plain to us that these appeals raise a question of general importance…This is an issue which may be considered and decided irrespective of the facts of these particular cases. The material which the court must examine…is available to us. Given the number of cases in the pipeline in which, we understand, the issue is raised, it is in our judgment in the public interest that we should determine it in these proceedings".

25. Similarly in ***R v Secretary of State for the Home Department, ex p Abdi*** [1996] 1 W.L.R. 298, where the question was whether Spain was a safe third country to which the Secretary of State could return a Somali asylum seeker, Lord Slynn held (at p. 302F) that although the case was academic (the Secretary of State having agreed to review the claimants' cases) the issue should exceptionally be resolved:

> "Following the applications for judicial review the Secretary of State agreed to review [the claimants'] cases on the merits so that the outcome of these appeals will not directly affect [them]. The appeals do, however, raise what counsel for the Secretary of State in the Court of Appeal accepted (per Steyn L.J.) was a question of fundamental importance and a very difficult case"

26. In ***R v Ministry of Agriculture, Fisheries and Food, ex p Live Sheep Traders Ltd*** [1995] C.O.D. 297, the Divisional Court refused relief to a claimant who had challenged the compatibility of domestic legislation with EU law. The impugned legislation had been repealed before the claimant company had applied for judicial review and the court held that to decide the issue would serve no practical purpose. The Court would not grant a remedy merely to show that a public body had behaved improperly.

27. In ***R v British Broadcasting Corporation, ex p Quintavalle*** (1997) 10 Admin L.R. 428, permission to apply for judicial review was refused in relation to the BBC's refusal to allow a party political broadcast during a general election. The date for transmission had passed and even if permission had been granted the court would have been unlikely to grant relief in those circumstances. Despite refusing permission, the court did note that in exceptional circumstances, for example if there were a need for the law to be clarified, academic cases might be entertained.

28. In ***R (Rushbridger) v Att-Gen*** [2004] 1 A.C. 357, the House of Lords refused to entertain proceedings intended to show that the Treason Act 1848 (which arguably prohibited a campaign for the replacement of a monarchy with a republic) was incompatible with the ECHR. Their Lordships held that no practical purpose would be served by the litigation since there was no prospect of any proceedings being actually being brought and the issue was not a live practical issue. Lord Rodger put the matter this way at pp. 376-7:

> "56 Should these proceedings go ahead? The Divisional Court thought not, while the Court of Appeal thought they should. I agree with the Divisional Court. The claimants seek a declaration as to the interpretation of section 3 of the 1848 Act or as to its incompatibility with

> the right to freedom of expression under article 10 of the Convention. Before the House the parties agreed that these declarations should be treated in the same way as a civil declaration as to the criminality or otherwise of future conduct. A civil court can make such a declaration, although it would be right to do so only in a very exceptional case: *Imperial Tobacco Ltd v Attorney General* [1981] AC 718, 742c-d per Viscount Dilhorne. The authorities do not spell out what constitutes a very exceptional case for these purposes. In ordinary cases people must take and act on their own legal advice. So, broadly speaking, a very exceptional case must be one where, unusually, the interests of justice require that the particular claimant should be able to obtain the ruling of the civil court before embarking on, or continuing with, a particular course of conduct which, on one view, might expose him to the risk of prosecution.
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> 57 Approaching the matter in that way, I am satisfied that the present is not a very exceptional case of that kind. … The Divisional Court is therefore being asked to make a declaration about a point of criminal law because a criminal court will never have to decide it. So far from this being the kind of very exceptional case where the interests of justice require that the claimants should be able to obtain a declaration from the Divisional Court, it is exactly the kind of case where they should not."

Advice, guidance, recommendations and views etc

29. A particularly important and difficult issue in this context is the question whether claimants may seek judicial review of measures such as advice, non-statutory guidance, recommendations or views which do not have legal force. The dilemma is this: judicial review is concerned with legality of decisions rather than their merits, but if a measure does not have any legal force how can judicial review be about the legality of that measure? Accordingly, Wade argued that it was illegitimate for the courts to review administrative action which cannot have some effect on a person's legal position.

30. Nevertheless, there are several good reasons to entertain challenges to advice or plans of action that do not yet affect anyone's rights:

    (1) the promotion of certainty: citizens and public bodies need to know where they stand before deciding on a course of action (especially if the proposed course of action could expose them to criminal sanctions or involve them spending large sums of money);

    (2) advisory declarations/hypothetical challenges need not be available across the board. It would be possible and indeed sensible to decline to decide hypothetical challenges based on the grounds of propriety of purpose, relevance or reasonableness because such challenges are very context and fact specific.

31. The leading case concerning judicial review of non-statutory guidance is ***Gillick v West Norfolk and Wisbech AHA*** [1986] A.C. 112.[6] In ***Gillick*** the claimant challenged the legality of a circular which stated that in exceptional circumstances it was for doctors' clinical judgment to decide whether to prescribe contraception to children under 16 without

[6] It should be noted that it is often difficult to determine whether advice or guidance does have legal consequences. For example, in *Gillick* Lords Fraser and Scarman treated the memorandum as having legal force. Lords Bridge and Templeman held that it did not have legal force, and Lord Brandon expressed no view.

parental consent. Lord Bridge treated the circular as having no legal consequences and articulated the following principle:

> "[I]f a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration. Such an extended jurisdiction is no doubt a salutary and indeed a necessary one in certain circumstances, as the *Royal College of Nursing* case [1981] AC 800 itself well illustrate. But the occasions of a departmental non-statutory publication raising, as in that case, a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of utmost restraint, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision…"

32. There are three important points arising from ***Gillick***.

(1) Practical effect

33. Firstly, although guidance may have no *legal* effect, it may nevertheless have a *practical* effect on the parties or the public at large. This consideration was influential in ***Royal College of Nursing v DHSS*** [1981] A.C. 800. Here the RCN sought a declaration that advice in a circular concerning the termination of pregnancy by extra-amniotic medical induction involved the performance of acts by nurses that were not protected by the Abortion Act 1967 and were therefore criminal acts. The majority of the House of Lords held that the advice did not involve the performance of unlawful acts and issued a declaration to that effect. Lord Edmund-Davis noted (at p 833) that "several thousand" of these procedures were performed each year therefore it was of practical importance to clarify the legal position.

34. Similarly, in ***R v Secretary of State for Health, ex p Pfizer*** [1999] 3 C.M.L.R. 875 Collins J had to consider the legality of interim advice to doctors that the drug Viagra should be prescribed only in exceptional circumstances. Collins J. took into account the fact that doctors were very likely to (and in fact, did) follow the advice and in allowing the claim to proceed he held (at para. 17):

> "Advice or guidance promulgated by a public authority may be the subject of judicial review if it contains an error of law. This is particularly so if it is likely to be acted upon by those it addresses".

35. In ***R v Secretary of State for the Environment, ex p Greenwich LBC*** [1989] C.O.D. 530, the claimant challenged the legality of a government information leaflet entitled "The community charge (the so-called poll tax). How it will work for you" on the basis that it was inaccurate because it did not state that spouses were jointly and severally liable for payment. Although the leaflet had no legal effect, the court exercised its powers of review because of the practical importance of the leaflet.

(2) Link to the commission of criminal offences

36. The second point arising from ***Gillick***, is that the courts are more willing to review advice and guidance which, if heeded, could result in the commission of criminal offences. In ***Gillick***, for example there was a suggestion that doctors following the circular might thereby commit the offence of aiding and abetting unlawful sexual intercourse. In the ***RCN*** case, the nurses were concerned that by following the guidance they might expose themselves to liability for an offence of attempting to procure an abortion contrary to ss. 58, 59 of the Offences Against the Person Act 1861. A concern about potential criminal liability also motivated the application in ***Airedale NHS Trust v Bland*** [1993] A.C. 789, to determine whether surgeons could withdraw medical treatment from a person incapable of consenting.

37. It is not essential however to show that the advice might, if followed, expose the claimant to criminal liability. For example in ***R (UK Renderers Association Ltd) v Secretary of State for the Environment, Transport and the Regions*** [2002] Env. L.R. 21, Ouseley J.[7] considered guidance in circumstances where there was no question of criminal offences being committed. The case concerned a challenge to guidance in respect of animal renderer's obligations under s. 7(1)(a) of the Environment Protection Act 1990 to use the 'best available techniques not entailing excessive cost' for preventing the release of prescribed substances during the rendering process. The claimants argued (unsuccessfully) that the guidance, which was partly non-statutory and which required all due diligence and reasonable steps to be taken, was unlawful because it referred to a higher duty than the EPA 1990. Ouseley J. held (para. 33) that the "guidance, both in its statutory and non-statutory parts, can be challenged by way of judicial review".

(3) Clearly defined issue of law

38. The final important aspect of ***Gillick*** is Lord Bridge's suggestion that guidance or advice should only be reviewed where there is a "clearly defined issue of law, unclouded by political, social or moral overtones".

39. In ***R v SS for Employment, ex p EOC*** [1995] A.C. 1 the substantive issue was whether the rules governing the period which part-time workers had to serve before becoming entitled to unfair dismissal and redundancy payments indirectly discriminated against women, contrary to EU law. The Secretary of State had written to the EOC expressing the view that the English rules on unfair dismissal did not indirectly discriminate and the claimant wished to challenge that view. In the Court of Appeal ([1993] 1 W.L.R. 872, 900) Hirst L.J. held that the letter was not reviewable because it raised issues which were "closely interwoven with questions of social policy and political controversy", observing that "the extended jurisdiction applied in ***Gillick***…is the exception rather than the rule". In the House of Lords, Lord Keith stated that this letter did no more than state the SS's view and did not constitute a reviewable decision.

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[7] Upheld on appeal on slightly different grounds.

40. Lord Bridge's advice in ***Gillick*** was recently applied by the Court of Appeal in ***R (Burke) v General Medical Council*** [2006] Q.B. 273, para. 21, which concerned the GMC guidance leaflet "Withholding and Withdrawing Life prolonging Treatments: Good Practice in Decision making" with regard to the withdrawal of artificial nutrition and hydration:

> "There are great dangers in a court grappling with issues such as those that Munby J has addressed when these are divorced from a factual context that requires their determination. The court should not be used as a general advice centre. The danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice. This danger is particularly acute where the issues raised involve ethical questions that any court should be reluctant to address, unless driven to do so by the need to resolve a practical problem that requires the court's intervention. We would commend, in relation to the guidance, the wise advice given by Lord Bridge of Harwich in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 193-194:
>
> > "the occasions of a departmental non-statutory publication raising ... a clearly defined issue of law, unclouded by political, social or moral overtones, will be rare. In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proffering answers to hypothetical questions of law which do not strictly arise for decision."
>
> The judge himself cited this passage with approval. Unfortunately he did not follow it."

Prematurity

41. Under EC law there is a need for a binding administrative act, before the courts' supervisory jurisdiction may be invoked.[8] By contrast, the English system is very flexible and not so rule-bound. In England, there is much more freedom for litigants to chose which measures to challenge.[9] This freedom does however give rise to problems of prematurity or ripeness for review. A claimant for judicial review must commence proceedings expeditiously (promptly and in any event within three months), but he must not jump the gun. A claimant who leaves the blocks too soon faces the prospect of being refused permission, or denied a remedy at the substantive hearing. However, this presents a difficulty: a prospective claimant, unlike an Olympic athlete, has no starter signalling when he should begin - he has to decide for himself when to commence proceedings.

42. There are good reasons for the courts not to hear premature challenges:

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[8] See for example, ***IBM v Commission*** Case 60/81 [1981] ECR 2634.

[9] In ***R(Burkett) v Hammersmith and Fulham LBC*** [2002] 1 WLR 1593, [38], Lord Steyn observed that: "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 and country 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 in advance of it…"

(1) The error might be corrected during the decision-making process or may never arise[10];

(2) The error might not affect the final decision (or the individual may not be unhappy with the final outcome);

(3) Challenges to preliminary decisions might circumvent a statutory appeals procedure which only permits appeals against final decisions.

43. There are some statutory challenges, on judicial review grounds, which preclude premature challenge e.g. challenges to compulsory purchase orders under s. 23 of the Acquisition of Land Act 1981. See ***Enterprise Inns plc v Secretary of State for the Environment, Transport and the Regions*** [2000] 4 P.L.R. 52 where a challenge was rejected as having been begun before the statutory six week "window" of challenge opened. The inconvenience of preclusive provisions does not provide a basis for departing from it[11] unless the true analysis of the case is that it involves a challenge not to a decision for which the period is stipulated but to:

(1) a failure by the statutory decision-maker to exercise his jurisdiction (a refusal to make a decision);

(2) the reasoning underpinning the decision which is otherwise in the applicants' favour—such reasoning itself being damaging to some further interest of the applicants; and

(3) an antecedent step which is separate and distinct from any eventual decision reviewable under the statute.

44. On the other hand, there are some arguments in favour of allowing premature challenges, at least in limited circumstances:

(1) It may save expense if an fundamental error can be rectified early on, rather than quashing the whole decision-making process (see the ***Alconbury*** litigation)[12];

(2) The error might be such that it would be unfair to allow the process to proceed at all.

45. The issue most frequently arises in the context of preliminary and interlocutory decisions, for example decisions refusing an adjournment, or allowing evidence to be admitted.

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[10] See ***Draper v British Optical Association***, above.

[11] ***R. v Cornwall CC Ex p. Huntington*** [1994] 1 All E.R. 694, *per* Simon Brown L.J. at pp 699-701, under the Wildlife & Countryside Act 1981.

[12] Significant difficulties have arisen in planning law over the lengthy period of consultation and inquiry process for development plans and the issue whether judicial review should be permitted of procedural errors which arise possibly years before the statutory challenge period following formal adoption arises. The inconvenience cannot, however, easily overcome the provisions which preclude challenge except within the statutory challenge period: see Once the process of plan-making (or, as the case may be, order-making) has commenced, there is a clear line of authority that these provisions preclude any challenge at all until the six-week period commences: see, e.g. ***R. v Test Valley BC Ex p. Peel Estates*** [1990] 3 P.L.R. 14 ***R. v Chichester CC Ex p. Kirdford Conservation Society*** [1999] J.P.L. 374 and also ***R. v Cornwall CC Ex p. Huntington***, above.

Generally, the courts will refuse permission and require the claimant to wait until a final decision has been adopted before commencing proceedings. Thus, in ***R v Association of Futures Brokers and Dealers Ltd, ex p Mordens Ltd*** (1991) 3 Admin. L. Rep. 254, 263 D-F, the court held that:

> "it is only in exceptional circumstances that the court will grant judicial review of a decision taken during the course of a hearing…before that hearing has been concluded"

46. It is usually inappropriate to seek JR of a preliminary ruling on a point of law by the magistrates. In ***R(Hoar-Stevens) v Richmond-upon-Thames Magistrates' Court*** [2002] EWHC 2660, para, 2, Kennedy L.J. stated "Normally this court will not entertain an application for a quashing order in relation to a decision made in a magistrates' court where the proceedings in that court are not complete". At para. 18 he continued:

> "It is of the utmost importance that the course of a criminal trial in the magistrates' court…[E]ven when, as here, there is an important substantive point which arises during a trial this court should not and indeed cannot intervene. The proper course is to proceed to the end of the trial in the lower court and then to test the matter, almost certainly by way of case stated."

47. The general rule against premature challenges is not however absolute and the courts do recognise that there may be exceptional reasons to justify hearing a premature case. In ***R v Secretary of State, ex p Royal Borough of Kensington & Chelsea*** (1987) 19 H.L.R. 161 it was held that although a planning inspector's decision not to admit certain evidence at inquiry would not normally be reviewed, the court would exceptionally entertain a challenge if the inspector's decision blocked one of the main argument advanced by an objector thereby rendering the inquiry futile.

48. Sometimes, it is necessary to obtain a court ruling as soon as possible and therefore challenges to very preliminary decisions are entertained. For example, in ***R v British Advertising Clearance Centre, ex p Swiftcall Ltd*** 16th November 1995, unreported, Carnwarth J. held, in the context of advertisements that were being broadcast on television:

> "this is an area in which decisions are made very quickly. Looking at the letters and affidavits realistically, they give a clear indication of how [the defendant] is minded to act…[if] the course they are suggesting is fundamentally unlawful, the sooner that is decided the better."

49. In some cases, it is important to allow a challenge to an interlocutory decision because errors might not be reversed if the claimant is made to challenge the final decision. Thus, in ***R v Lord Saville of Newdigate, ex p A*** [2000] 1 W.L.R. 1855, para. 43, it was recognised that:

> "The fact that a court would not quash the final decision of a tribunal on a procedural ground does not mean that a preliminary decision would not be quashed. The unfair refusal of an interpreter or an adjournment are very much the type of decisions which, if the subject of an immediate application for judicial review, will be reversed by the courts although the final decision would not be. The concern of the courts is whether what has happened has resulted in real injustice.

50. In ***Alconbury*** it was clearly relevant to test the compatibility of the planning and compulsory purchase systems with Article 6 rather than let them run their course, although

there was a significant public interest in testing the compatibility of Secretary of State decision-making processes with the Convention.

51. Sometimes it will be unfair to allow the decision-making process even to begin. For example, in ***R v Telford Justices, ex p Badhan*** [1991] 2 All E.R. 854, a decision to commit a defendant for trial was held to be reviewable in circumstances where it was alleged that it would be an abuse of process to commit because the defendant would not be able to receive a fair trial.

52. The importance of building on these cases and developing a more sophisticated doctrine of prematurity is explained in the following passage:

> "[T]he fact that prematurity is expressly address means that in these cases the courts are more likely to focus on the nature of the issue. They will ask whether it will crystallise further if the administrative procedure is allowed to proceed, and may conclude that it will not where there is a 'clean' question of law. They will ask whether the matter is fit for review, and are likely to conclude that it is not where the facts have yet to emerge or where the determination of the question of law is intertwined with factual issues. They are more likely to allow the delay to and dislocation of the administrative process if there will be no effective opportunity for review later either because irreparable damage will be suffered or because of the danger of prejudgment because the effective determination has been made. It [can be seen that] where prematurity is not considered, the result is a less focused and at times inappropriate approach. Beatson, "Prematurity and Ripeness for Review" in *The Golden Metwand and the Crooked Cord*, at p 229.

The European dimension – preliminary rulings

53. With few exceptions, the European Court of Justice has taken a relatively broad view of cases referred to it by the national courts for preliminary rulings under Art. 234 EC[13]. In general, the orthodox approach is to respect the decision of the referring national court to determine that the issues are suitable for a preliminary ruling and not to question the basis of them or the circumstances in which the dispute has arisen. That is not to say that the ECJ necessarily answers all questions, if it should turn out that certain issues do not arise following their ruling on other matters, or are irrelevant, but in general in references a good of discretion is afforded to the referring court[14].

54. There are some instances, such as ***Jules Borker*** Case 138/80 [1980] E.C.R. 1975, where the ECJ will decline jurisdiction under Art. 234 where the requirements of Art. 234 are not met – in that case because the referring French court (the Conseil de l'ordre des avocats à la Cour de Paris) had no jurisdiction in the first place to try the question of rights of audience of a French advocate in a German court. The ECJ held that the case accordingly did not fall within Art. 234:

> "4. It is apparent from that provision that the court can only be requested to give a preliminary ruling under Article 177 by a court or tribunal which is called upon to give judgment in

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[13] See Hartley, *Foundations of European Community Law* (OUP, 2003, 5th ed.) pp. 289-292 and Anderson, *References to the European Court* (Sweet & Maxwell, 2002, 2nd ed.) esp. pp. 114-118.

[14] See e.g. ***Pretore di Salò v Persons Unkown*** Case 14/86 [1987] E.C.R. 2545 where a reference was made in a case of potential criminal pollution at the stage of a complaint to the *Pretore*, at the investigative stage, and prior to the commencement of proceedings. The ECJ allowed the reference despite arguments of prematurity, allowing a wide discretion to the referring court.

proceedings intended to lead to a decision of a judicial nature. That is not the position in this case since the Conseil de l'ordre does not have before it a case which it is under a legal duty to try but a request for a declaration relating to a dispute between a member of the bar and the courts or tribunals of another Member State."

55. The ECJ has established the wider principle that will not hear references in cases which are contrived (e.g. in order to obtain a ruling on a point of interest) or which do not concern a genuine dispute. The principle was established in the ***Foglia v Novello*** litigation which perhaps also marks the high water mark of the operation of the principle: ***Foglia v Novello*** Case 104/79 [1980] E.C.R. 745 (***No. 1***) and ***Foglia v Novello*** Case 244/80 [1981] E.C.R. 3045 (***No. 2***).

56. In *No. 1* a case was brought in the Italian courts concerning a contract for the sale of fortified wine. One of the terms of the contract, the burden of the costs of delivery to France, turned on the lawfulness of a French consumption tax. It was argued that the delivery charges were not payable since the French tax was contrary to EC law. What may have been a critical factor was that the referring court, determining the dispute, was an Italian court which was purporting to determine the legality of a French tax.

57. The ECJ plainly considered that the whole dispute had been contrived in order to obtain a ruling from the ECJ on the legality under EC law of the French tax and rejected the reference in short order:

"9 In their written observations submitted to the Court Of Justice the two parties to the main action have provided an essentially identical description of the tax discrimination which is a feature of the French legislation concerning the taxation of liqueur wines ; the two parties consider that that legislation is incompatible with community law . in the course of the oral procedure before the Court Foglia stated that he was participating in the procedure before the court in view of the interest of his undertaking as such and as an undertaking belonging to a certain category of Italian traders in the outcome of the legal issues involved in the dispute .

10 It thus appears that the parties to the main action are concerned to obtain a ruling that the French tax system is invalid for liqueur wines by the expedient of proceedings before an Italian court between two private individuals who are in agreement as to the result to be attained and who have inserted a clause in their contract in order to induce the Italian court to give a ruling on the point. The artificial nature of this expedient is underlined by the fact that Danzas did not exercise its rights under French law to institute proceedings over the consumption tax although it undoubtedly had an interest in doing so in view of the clause in the contract by which it was also bound and moreover of the fact that Foglia paid without protest that undertaking' s bill which included a sum paid in respect of that tax .

11 The duty of the Court of Justice under Article 177 of the EEC treaty is to supply all courts in the Community with the information on the interpretation of Community Law which is necessary to enable them to settle genuine disputes which are brought before them. A situation in which the court was obliged by the expedient of arrangements like those described above to give rulings would jeopardize the whole system of legal remedies available to private individuals to enable them to protect themselves against tax provisions which are contrary to the treaty .

12 This means that the questions asked by the National Court, having regard to the circumstances of this case, do not fall within the framework of the duties of the court of justice under Article 177 of the Treaty .

13 The Court of Justice accordingly has no jurisdiction to give a ruling on the questions asked by the national Court."

58. The Italian Court did not rest quiet and referred further questions to the ECJ in ***Foglia (No. 2)***. Despite the more temperate advice of Advocate General Slynn, the ECJ once again

refused to give a ruling and emphasized that the Court does review the genuineness of the dispute in a reference in appropriate cases:

> "2. The duty assigned to the Court by Article 177 is not that of delivering advisory opinions on general or hypothetical questions but of assisting in the administration of justice in the member states. it accordingly does not have jurisdiction to reply to questions of interpretation which are submitted to it within the framework of procedural devices arranged by the parties in order to induce the court to give its views on certain problems of Community Law which do not correspond to an objective requirement inherent in the resolution of a dispute. a declaration by the court that it has no jurisdiction in such circumstances does not in any way trespass upon the prerogatives of the National Court but makes it possible to prevent the application of the procedure under Article 177 for purposes other than those appropriate for it. furthermore, whilst the court of justice must be able to place as much reliance as possible upon the assessment by the national court of the extent to which the questions submitted are essential, it must be in a position to make any assessment inherent in the performance of its own duties, in particular in order to check, as all courts must, whether it has jurisdiction."

59. It seems clear, as Hartley points out[15], that there was a strong element of policy in play in this case and the ECJ was anxious to avoid conceding that one member state could determine the legality of measures in another. At paras. 3 and 4 The ECJ added:

> "3. In the absence of provisions of Community Law, the possibility of taking proceedings before a national court against a member state other than that in which that Court is situated, whose legislation is the subject of a disagreement as to whether it is compatible with Community Law, depends on the procedural law of the state in which the court is situated and on the principles of international law.
>
> 4. In the case of preliminary questions intended to permit the National Court to determine whether provisions laid down by law or regulation in another Member State are in accordance with Community Law the degree of legal protection may not differ according to whether such questions are raised in proceedings between individuals or in an action to which the state whose legislation is called in question is a party, but in the first case the court of justice must take special care to ensure that the procedure under article 177 of the EEC treaty is not employed for purposes which were not intended by the Treaty."

60. The policy aspect of ***Foglia*** is thrown into relief in two cases determined between 1 and 2 where the ECJ did accept references from Italy despite suggestions of contrived issues similar to ***Foglia***. However, they notably did not involve ruling on the legality of measures of one Member State in the courts of another[16].

61. In a manner not dissimilar from cases in the English courts, the ECJ may decline to determine issues which may be of importance though not arising for determination in the specific case. In ***Wienand Meilicke v ADV/ORGA F. A. Meyer AG*** Case C-83/91 [1992] I-4871 the ECJ held:

> "22 It has consistently been held … that the procedure provided for by Article 177 is an instrument for cooperation between the Court of Justice and the national courts.
>
> 23 It is also settled law … that, in the context of such cooperation, the national court, which alone has direct knowledge of the facts of the case, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment.
>
> 24 Consequently, since the questions submitted by the national court concern the interpretation of a

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[15] *Op. cit.* p. 291.

[16] See ***Chemial v DAF*** 140/79 [1981] E.C.R. 1 and ***Vinal v Orbat*** Case 46/80 [1981] E.C.R. 77.

provision of Community law, the Court is, in principle, bound to give a ruling …

25 Nevertheless, in Case 244/80 *Foglia v Novello* [1981] ECR 3045, paragraph 21, the Court considered that, in order to determine whether it has jurisdiction, it is a matter for the Court of Justice to examine the conditions in which the case has been referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (*Foglia v Novello*, cited above, paragraphs 18 and 20, and Case 149/82 *Robards v Insurance Officer* [1983] ECR 171, paragraph 19)."

62. The ECJ considered that the issue raised was one which had been answered in the national courts and the fact that it was hypothetical was underlined by the absence of identification of the matters of fact and law which would be pertinent to determining it:

"32 The Court is thus being asked to give a ruling on a hypothetical problem, without having before it the matters of fact or law necessary to give a useful answer to the questions submitted to it.

33 Accordingly, the Court would be exceeding the limits of the function entrusted to it if it decided to answer the questions submitted to it."

63. As in national cases, the ECJ has not always been wholly consistent in its refusal to determine abstract issues or ones which might be regarded as hypothetical[17].

64. Whilst it may be the case that the ***Foglia*** type of contrived circumstances will not arises regularly, the question of hypothetical or academic issue is much more likely to exercise the ECJ given the expansion of the EU and the number of courts able to make references to it.

Conclusion

65. In his essay "Prematurity and Ripeness for Review" in *The Golden Metwand and the Crooked Cord*, Professor Beatson (as he then was), lamented that:

> "… there has been no satisfactory statement of the boundaries of either the jurisdiction to give a public law remedy in respect of non-binding advice, guidance, recommendations and views or the circumstances in which it would be appropriate to exercise the jurisdiction to do so"

66. There is undoubtedly a growing willingness now to entertain hypothetical cases. In its report "*Administrative Law: Judicial Review and Statutory Appeals*" 1994 Law Com No226, the Law Commission recommended (at p76 para 8.14) that the jurisdiction of the courts to grant declarations should be placed on a clear footing and that the courts ought to be specifically empowered to grant such a declaration if the point is one of general public importance. Furthermore, in ***R (Campaign for Nuclear Disarmament) v Prime Minister of the United Kingdom*** [2002] EWHC 2777, at para 46, Simon Brown L.J. (as he then was) noted the 'strong argument' that the courts ought to have jurisdiction to grant advisory declarations in appropriate, though limited, circumstances. This development accords with the general trend towards a more expository role for the courts which is

[17] See e.g. ***Union Royale Belge des Sociétés de Footabll v Bosman*** C-415/93 [1995] E.C.R. I-4921 para. 65.

reflected in the liberalised rules on standing[18]. However, such an approach should still be limited to avoid the type of issues which arose in ***Glass*** or ***Wynne***.

67. Hypothetical issues are more likely to be accepted in cases which raise issues of sufficient public importance, which are ones of principle or construction and are not likely to apply in cases which are very fact sensitive, or involving difficult discretions, so as to expose the exercise to the risk of error or simply render it pointless.

68. However, English law still lacks a developed doctrine of prematurity or ripeness and, although the general position is clear, there is still considerable doubt as to when a hypothetical case will be exceptional enough to be granted permission. The challenge for the future is to move beyond general propositions and to develop clear guidelines for determining when a case is sufficiently 'ripe' for the courts to hear hypothetical and academic cases.

28 July 2006

[18] See Miles, *Standing under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication* [2000] C.L.J. 133.