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IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
(LLOYD LJ and MACPHERSON J)

Royal Courts of Justice.

Wednesday, 27th November, 1985.

Before:

THE MASTER OF THE ROLLS
(Sir John Donaldson)

LORD JUSTICE MAY and

LORD JUSTICE GLIDEWELL

- - - -

WILLIAM KENNETH CALVELEY
MICHAEL BLUNDELL
STANLEY GEORGE GRIFFITHS
ANTHONY SPENCER and
RORY JAMES ANDERSON — Appellants

v.

MERSEYSIDE POLICE — Respondents

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(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Ltd., Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, W.C.2).

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MR. J. SAMUELS, Q.C. and MR. R. PERCIVAL (instructed by Messrs. Russell Jones & Walker) appeared on behalf of the Appellants.

MR. R.J.D. LIVESEY, Q.C. and MR. J.F. APPLETON (instructed by C.K. Wilson, Esq.) appeared on behalf of the Respondents.

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J U D G M E N T

THE MASTER OF THE ROLLS: The appellants are five police officers. They have been found guilty of disciplinary offences by the Chief Constable of Merseyside and dismissed the force or required to retire. They are entitled to appeal, and are appealing, to the Secretary of State. However, they submit that an alternative, and more appropriate, remedy is open to them, namely judicial review of the decision by the Chief Constable to hear and adjudicate upon the charges.

The Divisional Court (Lloyd L.J. and MacPherson J.) held that although judicial review might be the appropriate remedy after the appeal had been heard and determined by the Secretary of State, the appellants were premature in their application. In reaching this conclusion, the court, as it was entitled to do, was proceeding of its own motion in the sense that this was not a contention advanced on behalf of either party.

The essential basis of the appellants' application can be briefly stated. The incident which gave rise to the disciplinary charges occurred in the early hours of the 21st June, 1981. There was a disturbance in the street and two of the five appellants were involved. They called for assistance by radio and were reinforced by the three other appellants. The five police officers then arrested five men and took them to the police station. Later in the day three of the prisoners made formal complaints concerning the conduct of the police officers concerned, alleging that there had been a largely unprovoked attack by the officers.

On the 30th June, 1981 an investigating officer was

appointed, but it was not until some two and a half years later, at the end of November and the beginning of December 1983, that the appellants were officially informed of the fact that complaints had been made or that they were being investigated. The basis of the appellants' claim for relief by way of judicial review is that this failure to inform them constituted a breach of regulation 7 of the Police (Discipline) Regulations 1977 and so seriously prejudiced their ability to defend themselves against the disciplinary charges as to amount to a denial of natural justice.

Regulation 7 provides that:

"The investigating officer shall, as soon as is practicable (without prejudicing his or any other investigation of the matter), in writing inform the member subject to investigation of the report, allegation or complaint and give him a written notice -

(a) informing him that he is not obliged to say anything concerning the matter, but that he may, if he so desires, make a written or oral statement concerning the matter to the investigating officer or to the chief officer concerned, and

(b) warning him that if he makes such a statement it may be used in any subsequent disciplinary proceedings."

Having adverted to the essence of the problem, it is convenient to set out the full chronology of events:

SSN.

21st June, 1981

A (i) At about 1.40 a.m. five men were arrested by the appellants and later charged with being drunk and disorderly.

(ii) Later during the day three of these men formally
B complained of the conduct of the arresting officers. All alleged that they were assaulted in the van whilst being taken to the police station and one alleged that he was also the subject of an
C unprovoked assault before being arrested. The girlfriend of one of the men also complained, but almost immediately withdrew the complaint.

30th June, 1981

D The Deputy Chief Constable appointed a Detective Superintendent as investigating officer. However, the investigation was suspended pending the completion of the criminal proceedings against the
E arrested men.

20th July, 1981

Two of the appellants prepared and signed witness statements against the five men.

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30th September, 1981

The remaining three appellants did likewise.

22nd-23rd December, 1981

G The five arrested men were tried and acquitted by Magistrates.

24th February, 1982

The Deputy Chief Constable instructed the inves-
H tigating officer to continue to defer his investigation, pending clarification of the

SSN.

complainants' declared intention to pursue a civil claim against the police rather than to use the statutory complaints procedure.

June 1982

Routine destruction of divisional incident reports, including radio messages and logs relating to the 21st June, 1981.

April/May 1983

In response to inquiries, the police were told that the solicitors acting for the complainants in the civil proceedings had no instructions and would not object to their clients being interviewed.

June 1983

Routine destruction of parade states showing what other officers were on duty on the 21st June, 1981.

August/November 1983

The investigating officer interviewed the complainants and other witnesses.

28th November - 12th December, 1983

The appellants were interviewed by investigating officer and served with regulation 7 notices.

6th January, 1984

The investigating officer reported to the Deputy Chief Constable.

9th January - 3rd April, 1984

Consultations with the Director of Public Prosecutions and the Police Complaints Board.

26th April, 1984

Disciplinary forms specifying the charges were

served on the appellants.

25th-26th September, 1984

Disciplinary hearing before the Chief Constable.

Under the relevant regulations, a police officer facing disciplinary charges may conduct his case at the hearing either in person or by a police officer selected by him. All the appellants elected to be represented by a Sergeant Ashton. He took a preliminary objection to the hearing of the charges, submitting that compliance with regulation 7 was mandatory. This submission is not, I think, well founded. The issue of whether it was mandatory or directory was considered fully in Reg. v. Secretary of State for the Home Department, ex parte Miller (4th May, 1983) and a divisional court consisting of Lord Justice Robert Goff and Mr. Justice Glidewell held that it was directory, basing their decision, inter alia, on a decision of this court (Kilduff v. Wilson & ors. [1939] 1 All E.R. 429). Suffice it to say that the submission was expressly disavowed by Mr. John Samuels, Q.C., appearing on behalf of the appellants. In fairness to Sergeant Ashton, I should make it clear that he is not to be, and has never been, criticised for making the submission.

However, Sergeant Ashton also, in effect, submitted that, even assuming that the regulation was directory, the delay in these cases had been so considerable that the appellants had been irremedially prejudiced. In particular he took the following points. (1) The interval between the receipt of the complaints and the moment when the appellants were informed of their nature and given an opportunity of making

a statement was of the order of two years and five months. (2) The passage of time would have dulled their recollection of the events in question and would have made it difficult or impossible to trace witnesses. (3) The divisional incident reports, radio logs and parade states had been destroyed meanwhile and a sight of these might have assisted the appellants by refreshing their memories, corroborating their evidence or putting them on to the track of potential witnesses. (4) Since the incident, changes had occurred in the street lighting and hedges at the scene.

In reply it was submitted that the regulation 7 notices had been given "as soon as is practicable". The basis of this submission was that the notices could not be served before all the evidence had been acquired and considered by the investigating officer. The delay in reaching this point was unavoidable in the light of the criminal proceedings against the complainants and the anticipated civil actions by them which prevented the investigation proceeding meanwhile.

The Chief Constable ruled on this submission, saying, "I don't think that anything should be frustrated by documentary delay, which was certainly out of the hands of the Investigating Authority in any event, because of the vagaries of both civil and criminal justice systems. So on that alone, with all good honesty of purpose, I think that this discipline hearing must pursue." Evidence concerning the charges was then given by various witnesses including the appellants and the charges were found proved.

Although the Chief Constable's ruling is not over-

elaborate, I think that he must be taken to have been saying that the notices were indeed served as soon as was practicable. Certainly this is what was maintained before the Divisional Court, where it met with some scepticism. The contention was rightly abandoned before us, it being accepted that the notices could have been given soon after the conclusion of the criminal proceedings or about 18 months before they were in fact given.

For my part I regard regulation 7 as providing an essential protection for police officers facing disciplinary charges and think that, save in the rare case where an investigation of the complaint or a related investigation would be prejudiced by the giving of the notice or where the nature of the complaint is unclear or it is clearly frivolous, it will be difficult to justify any appreciable delay in giving the officer concerned notice of the complaints. "As soon as is practicable" should be read with all the emphasis on the word "soon". In particular I do not accept the view, which appears at one time to have been taken by the police, that all the evidence must be collected and considered before the regulation 7 notice is given. The procedure does not require that the officer under investigation be given only one opportunity of making a statement and it would often be both fair and sensible that he should be re-interviewed at the conclusion of the investigation or, indeed, at intervals during it. The primary purpose of the regulation is to put the officer on notice that a complaint has been made and to give him a very early opportunity to put forward a denial, which in some cases might even take the form of an alibi, or

an explanation and to collect evidence in support of that denial or explanation.

On the facts of this case, I can see no obvious justification for failing to give regulation 7 notices in or about July 1981 and I regard it as self-evident that the officers have been prejudiced by the delay. What is more difficult is to assess the degree of prejudice. At the time of the disciplinary hearing, they still had access to their notebooks, but the entries were not in sufficient detail to be of much assistance in refreshing their memories in the context of the charges. In addition, their own witness statements prepared for the criminal proceedings were still available. Finally, the alleged factual basis of the complaints was no doubt put to them at the hearing in the magistrates' court within six months of the incident, albeit nearly two years before they were told of the fact that the complaint was being investigated.

Mr. Ronald Livesey, Q.C., for the police, submits that the application for judicial review was rightly dismissed, not upon the ground that it was premature, but because judicial review is not an available remedy when another avenue of appeal is open. In this context he referred to Reg. v. Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 All E.R. 257 where, with the agreement of Lord Justice Purchas, I said that "it is a cardinal principle that, save in the most exceptional circumstances, [the judicial review] jurisdiction will not be exercised where other remedies were available and have not been used." This, like other judicial pronouncement on the inter-

relationship between remedies by way of judicial review on the one hand and appeal procedures on the other, is not to be regarded or construed as a statute. It does not support the proposition that judicial review is not available where there is an alternative remedy by way of appeal. It asserts simply that the court, in the exercise of its discretion, will very rarely make this remedy available in these circumstances.

In other cases courts have asserted the existence of this discretion, albeit with varying emphasis on the reluctance to grant judicial review. Thus in Reg. v. Paddington Valuation Officer, ex parte Peachey Property Corporation Ltd. [1966] 1 Q.B. 380, 400, Lord Denning, M.R., with the agreement of Lords Justices Danckwerts and Salmon, held that certiorari and mandamus were avaiilable where the alternative statutory remedy was "nowhere near so convenient, beneficial and effectual." In Reg. v. Hillingdon London Borough Council, ex parte Royco Ltd. [1974] 1 Q.B. 720 Widgery C.J. said, at page 728, "... it has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy." In Reg. v. Mental Health Tribunal, ex parte Waldron (C.A. transcript 2nd October, 1985) Lord Justice Glidewell, after referring to this passage, said: "Whether the alternative statutory remedy will resolve the question at issue fully and directly, whether the statutory procedure would be quicker, or slower, than procedure by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate

body; these are amongst the matters which a court should take into account when deciding whether to grant relief by judicial review when an alternative remedy is available." Finally, this approach is, I think, consistent with Reg. v. I.R.C., ex parte Preston [1985] 2 W.L.R. 836, where Lord Templeman said, at page 848, "Judicial review process should not be allowed to supplant the normal statutory appeal procedure [but] the present circumstances are exceptional in that the appeal procedure provided by section 462 cannot begin to operate if the conduct of the commissioners in instituting proceedings under section 460 [which relates to the cancellation of tax advantages] was unlawful." In the same appeal Lord Scarman, at page 839, said: "But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the court cannot in the absence of special circumstances decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Part XVII of the Act of 1970."

The statutory scheme for police discipline contained in the Police (Discipline) Regulations 1977 and the Police (Appeals) Rules 1977 contemplates a right of appeal to the Secretary of State from a determination by the Chief Constable. Notice of Appeal has to be given within 22 days of the officer being informed of the Chief Constable's

decision and these appellants in fact gave timeous notice on the 4th October, 1984. The appeal takes the form of an inquiry by an appeal tribunal consisting of a lawyer and a senior police officer. It can involve a complete re-hearing of the charges. There was some dispute as to how long the process takes and it seems that the Secretary of State has recently taken steps to reduce the time. However, it is not speedy and, even if there had been no application for judicial review, it is not certain that the appeal would have been determined much before the present time. The application for judicial review in fact caused the appeal to be stayed and, on the most optimistic view, it could not be determined in less than five to six months from now.

Mr. Livesey submits that the appellants' complaint of delay in serving the regulation 7 notices and of consequential prejudice should be determined by the appeal procedure provided by Parliament. The appeal tribunal would have a specialised expertise rendering it better able than a court to assess the prejudice. Furthermore, the appellants would be able to raise new points and call fresh evidence directed to the disciplinary charges themselves.

I acknowledge the specialised expertise of such a tribunal, but I think Mr. Livesey's submission overlooks the fact that a police officer's submission to police disciplinary procedures is not unconditional. He agrees to and is bound by these procedures taking them as a whole. Just as his right of appeal is constrained by the requirement that he give prompt notice of appeal, so he is not to be put in peril in respect of disciplinary, as contrasted with

criminal, proceedings unless there is substantial compliance with the police disciplinary regulations. That has not occurred in this case. Whether in all the circumstances the Chief Constable, and the Secretary of State on appeal, is to be regarded as being without jurisdiction to hear and determine the charges which are not processed in accordance with the statutory scheme or whether, in natural justice, the Chief Constable and the Secretary of State would, if they directed themselves correctly in law, be bound to rule in favour of the appellants on the preliminary point, is perhaps only of academic interest. The substance of the matter is that, against the background of the requirement of regulation 7 that the appellants be informed of the complaint and given an opportunity to reply within days rather than weeks, the appellants had no formal notice of the complaints for well over two years. This is so serious a departure from the police disciplinary procedure that, in my judgment, the court should, in the exercise of its discretion, grant judicial review and set aside the determination of the Chief Constable.

I would allow the appeal accordingly.

LORD JUSTICE MAY: This is an appeal from a decision of the Divisional Court of the 26th June, 1985 refusing judicial review to quash a decision of the Chief Constable of the Merseyside Police following a disciplinary hearing held on the 25th and 26th September, 1984, when he found certain serious offences proved against five police officers.

The principal ground upon which the court was asked to quash that decision was that there had been a breach of

the rules of natural justice - in particular it was said that the applicants had been denied a fair hearing by reason of the fact that they had not been served with notice of the complaints made against them as the result of the relevant incident as soon as was practicable in accordance with regulation 7 of the Police (Discipline) Regulations 1977.

The Divisional Court refused the application for judicial review on the ground that the applicants both have a right of appeal against the Chief Constable's decision under section 37 of the Police Act 1964 and also that they had indeed exercised that right by giving notice in accordance with paragraph 4 of the Police (Appeals) Rules 1977. The procedure under those rules is that the Secretary of State appoints an appeal tribunal, which usually comprises a Queen's Counsel and one of Her Majesty's Inspectors of Constabulary, to hold an inquiry. Where the appeal is against both the findings of the Chief Constable and the punishment imposed, as it is here, the hearing before the appeal tribunal is by way of a re-hearing. Thereafter the tribunal are required to make a report to the Secretary of State upon which the latter takes whatever seems to him to be the appropriate action.

I respectfully agree with the Divisional Court that the normal rule in cases such as this is that an applicant for judicial review should first exhaust whatever other rights he has by way of appeal. In Reg. v. I.R.C., ex parte Preston [1985] 2 W.L.R. 836, at page 839, Lord Scarman said:

"My fourth proposition is that a remedy by way of

judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

In the same case at page 848, Lord Templeman, with whose speech all the other Law Lords agreed, said:

"Judicial review should not be granted where an alternative remedy is available."

To a normal rule will of course be exceptions. One of these was exemplified in the decision of the Divisional Court in Reg. v. Hillingdon London Borough Council, ex parte Royco Homes Ltd. [1974] 1 Q.B. 720 upon which counsel for the applicants relied and to which Lord Justice Glidewell referred in his judgment in the hitherto unreported decision of Reg. v. Mental Health Review Tribunal, ex parte Waldron (2nd October, 1985). The former was a case in which a planning authority had granted planning permission for the residential development of a particular parcel of land but had sought to impose conditions upon that permission which in the view of the Divisional Court were clearly illegal. After setting out the facts, Lord Widgery, C.J. considered in his judgment whether judicial review would go at all to control the activity of a local planning authority. He concluded that it would and at page 728 of the report said:

"In particular, it has always been a principle that

certiorari will go only where there is no other equally effective and convenient remedy."

However, in my view it would be wrong to conclude from this dictum that in every case where there is an alternative remedy, but one which is not as effective or as convenient as certiorari, this alone is enough to enable the court to put the alternative remedy on one side and to grant judicial review. This I think is clear from the following passage from Lord Widgery's judgment in the Royco Homes' case. He had considered the system of appeals in planning cases and why in many instances the statutory appeal route was the more convenient to follow, but he then returned to the question of speed and cost at page 729 of the report where he said:

> "An application for certiorari has, however, this advantage: that it is speedier and cheaper than the other methods, and in a proper case, therefore, it may well be right to allow it to be used in preference to them. I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law. Given those facts, I can well see that it may be more efficient, cheaper and quicker to proceed by certiorari, and in those cases when they arise it seems to me proper that that remedy should be available."

In Reg. v. Paddington Valuation Officer, ex parte

Peachey Corporation Ltd. [1966] 1 Q.B. 380, Lord Denning, M.R. had used a similar phrase to that used by Lord Widgery in the Royco Homes' case. At page 400 of the report he said:

> "Now these cases certainly warrant the proposition that, if the Peachey Corporation were attacking the assessment of any one particular hereditament, or any small group of hereditaments, such as all the houses in a particular terrace, their only remedy would be that statutory remedy. By which I mean that if and in so far as they are attacking particular assessments within a valid valuation list, they must go by the remedy which Parliament has provided, namely, to make proposals to alter those assessments. But if and in so far as they are attacking the valuation list itself and contend that the whole list is invalid (as they do), then I do not think they are confined to the statutory remedy for the simple reason that the statutory remedy is in that case no where near so convenient, beneficial and effectual as certiorari and mandamus. I suppose that in theory the Peachey Property Corporation might make proposals for the alteration of every one of the 31,656 hereditaments in the list, but that would in practice be impossible. Mr. Blain conceded this; but he suggested that a few test cases might be taken, and proposals could be made for altering those few assessments, and a decision given by the Lands Tribunal. But one side or the other might not agree on what should be taken as test cases. And in any case the procedure would be most

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deficient because there could be no discovery against the occupiers. I am therefore of opinion that the existence of the statutory remedy is no bar to this application. The case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies both to the remedies by certiorari and mandamus:"

In the light of these passages from the two earlier cases and bearing in mind that we are considering an exception to a general rule, I think that one must guard against granting judicial review in cases where there is an alternative appeal route, merely because it may be more effective and convenient to do so. In both the cases to which I have referred it is clear that the challenged decisions were in truth ones which had been made without jurisdiction or in consequence of an error of law.

A further indication of when it is legitimate to depart from the general rule can be found in passages in the speeches of Lord Hailsham of St. Marylebone, L.C. and Lord Brightman in Chief Constable of North Wales v. Evans [1982] 1 W.L.R. 1155. In his judgment in the Court of Appeal in that case, Lord Denning, M.R. had said:

"I go further. Not only must he be given a fair hearing, but the decision itself must be fair and reasonable. That is the protection afforded to every servant who is employed under a contract of service. He is protected against unfair dismissal. No less protection should be afforded to a

probationer constable."

A It was in relation to this dictum that Lord Hailsham at page 1160 said:

"There are passages in the judgment of Lord Denning, M.R. (and perhaps in the other judgments of the Court B of Appeal) in the instant case and quoted by my noble and learned friend which might be read as giving the courts carte blanche to review the decision of the authority on the basis of what the courts themselves C consider fair and reasonable on the merits. I am not sure whether the Master of the Rolls really intended his remarks to be construed in such a way as to permit the court to examine, as for instance in D the present case, the reasoning of the subordinate authority with a view to substituting its own opinion. If so, I do not think this is a correct statement of principle. The purpose of judicial review is to E ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter on which it is F authorised by law to decide for itself a conclusion which is correct in the eyes of the court."

Lord Brightman in his turn quoted at page 1173 Lord Evershed's reference in Ridge v. Baldwin [1964] A.C. 40, at G page 96, to "a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice." Lord Brightman himself continued at page 1173F:

H "Judicial review is concerned, not with the decision,

but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

Finally, at pages 1174-5, the learned Law Lord said;

"There is however a wider point than the injustice of the decision-making process of the chief constable. With profound respect to the Court of Appeal, I dissent from the view that 'Not only must [the probationer constable] be given a fair hearing, but the decision itself must be fair and reasonable.' If that statement of the law passed into authority without comment, it would in my opinion transform, and wrongly transform, the remedy of judicial review. Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. The statement of law which I have quoted implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself ... When the sole issue raised on an application for judicial review is whether the rules of natural justice have been observed, these propositions are unexceptionable. Other considerations arise when an administrative decision is attacked on the ground that it is vitiated by self-misdirection, by taking account of irrelevant or neglecting to take account of relevant factors, or is so manifestly unreasonable that no reasonable

authority, entrusted with the power in question, could reasonably have made such a decision: see the well known judgment of Lord Greene M.R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223."

I would also respectfully agree with the dictum from my Lord's judgment in the earlier case of Reg. v. Epping and Harlow General Commissioners, ex parte Goldstraw [1983] All E.R. 257, at page 262J, to which he has already referred.

In my opinion one must be careful not to allow the exception, particularly as it is one which has the merits of speed and efficiency, to become the rule. On the question of delay itself, we were referred to Reg. v. Brentford J.J., ex parte Wong [1981] Q.B. 345 and Reg. v. Oxford J.J., ex parte Smith [1982] R.T.R. 201. In the former case the Divisional Court held that if justices found that delay in the prosecution of a summons had amounted to an abuse of the process of the court, then they had jurisdiction to dismiss the summons. In the latter case no mala fides were alleged against the prosecution and the justices were of the opinion that the delay in their case had not been unconscionable and had not amounted to an abuse of the process of the court: however, the Divisional Court disagreed and prohibited the justices from proceeding further. In giving the judgment of the court, Lord Lane, C.J. drew attention to a number of matters which as a result of more than two years' delay the applicant had understandably forgotten and continued:

"He points out that the friends who were with him at the time, even if they could be traced, would doubtless

have forgotten them too and, in other words, this is the type of delay by its nature and its length which inevitably, in my judgment, must lead to prejudice, unfairness and injustice to the applicant."

The Oxford Justices' case was not drawn to the attention of the Divisional Court later the same year in Reg. v. Gray's J.J., ex parte Graham [1982] Q.B. 1239. That was one in which the justices proposed to commit for trial on indictment and the applicant had been questioned about the alleged offences within a fortnight after their commission. Thereafter, however, two years passed before the date of the committal proceedings. An application to prohibit the justices from proceeding further because of the delay failed and at page 1247 the court said:

"Certainly there must be some abuse of the process of the court, some at least improper and it may be mala fide use of its procedure, before an order of judicial review in the nature of prohibition will be made. In our opinion, although delay of itself, with nothing more, if sufficiently prolonged, could in some cases be such as to render criminal proceedings brought long after the events said to constitute the offence both vexatious and an abuse, we do not think that delay of the order that there has been in and in the circumstances of this case can be so described."

I return finally to Preston's case and to a passage from Lord Templeman's speech at page 848 C-D:

"Judicial review is available where a decision making authority exceeds its powers, commits an error of

law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers."

In my opinion, if one applies the principles deducible from the cases to which I have referred, prima facie the present appellants should be left to their statutory appeals in the course of which the tribunal can consider not only the point based on the failure to give notice under regulation 7 in time and also the question of delay, but in addition the general merits of the case. Although judicial review can provide an effective, convenient and relatively swift remedy, it should only be granted, particularly where the basis of the application is merely delay in taking the necessary proceedings, where this can properly be described as amounting to an abuse of process. Unnecessary delay in legal and analogous proceedings, such as the disciplinary ones in the instant case, is of course to be deplored, but it does occur and, in the absence of mala fides, should not tempt one to resort to judicial review where no real abuse or breach of natural justice can be shown.

That said, however, I think that abuse can be shown in the instant case. Apart from the failure to give the notices under regulation 7 timeously, over three years passed between the alleged offences and the hearing before the Chief Constable. In that time the radio log sheets and the parade states and other documents which would have shown what other officers were on duty at the relevant time have been destroyed. Although I suspect that the fact that complaints under section 49 of the Police Act 1964 had been

made was known shortly afterwards to the appellants, they were never formally warned at that time nor have they been able to obtain the names of or statements from any witnesses that they might have wished to call. Further, the investigating officer did nothing between the end of 1981 and July 1983. In addition, I respectfully do not think that the Chief Constable appears to have had the question of possible prejudice sufficiently in mind when he rejected the preliminary point on the regulation 7 notices taken by Sergeant Ashton at the start of the original disciplinary hearing. Finally, it is clear that even now it will be at least some months before the appellate tribunal can hear any appeal and even then it has to report to the Home Secretary and he has to consider that report.

For these reasons I too would allow this appeal and grant the judicial review sought.

LORD JUSTICE GLIDEWELL: I agree that this appeal should be allowed for the reasons set out in the judgment of Sir John Donaldson, M.R.

I add only that I also agree that, where application is made for judicial review but an alternative remedy is available, an applicant should normally be left to pursue that remedy. Judicial review in such a case should only be granted in exceptional circumstances. If I did not make this clear in my judgment in Reg. v. Hallstrom and Morgan, ex parte Waldron, to which my Lord the Master of the Rolls has referred, I now repair the omission. The criteria to which I there referred are amongst the matters which, in my view, a court should consider when deciding whether the

circumstances are exceptional.

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(Order: Appeal allowed. Order of certiorari to quash decision of Chief Constable. Liberty to applicants to apply with regard to mandamus. Applicants' costs of the appeal and proceedings in the Divisional Court. Applicants given leave to amend their statement to apply for damages with regard to the costs of the abortive appeal to the Home Secretary, such costs to be assessed by taxing master as damages; if not agreed, to be assessed in same way as if taxation had been ordered. Application for leave to appeal to the House of Lords refused).

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