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## THE OMBUDSMAN, TRIBUNALS AND ADMINISTRATIVE JUSTICE

### SECTION

#### **Making Sense of the Case Law on Ombudsman Schemes**

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This article analyses the case law on ombudsman schemes in the UK, with the purpose of identifying some of the key trends that underpin this branch of law pre-the first Supreme Court decision in this area, *JR55 v Northern Ireland Commissioner for Complaints*. While the law on ombudsman schemes remains based on legislation and the various grounds of administrative law available in judicial review, distinct bespoke principles have also been relied upon. These principles are beginning to provide consistent guidance on how the law should be used and interpreted in cases involving an ombudsman scheme. One task of the Supreme Court in *JR55* will be to confirm these principles, or rationalize any departure from them.

**Keywords:** ombudsman; Supreme Court; statutory interpretation; discretionary power; judicial review

#### **Introduction**

In a recent article in this journal, Brian Thompson (2015) offered a powerful critique of the majority judgment of the Northern Ireland Court of Appeal (NICA) in the case of *JR55 v Northern Ireland Commissioner for Complaints* [2014] NICA 11. As this edition of the Journal comes out that decision will have been heard on appeal in the Supreme Court. This will be the first time that a decision of an ombudsman scheme in the UK has been heard in full in the highest court of the land and will set the tone for judicial review of ombudsman schemes for years to come.<sup>1</sup>

This article contextualises the backdrop to the case of *JR55* by providing an analysis of the case law to date on the ombudsman. It makes the argument that the law pre-*JR55* was clear on the doctrinal approach that the courts should adopt in resolving judicial reviews of decisions of an ombudsman. The article highlights the consistency within that case law of a unified interpretation of the powers of ombudsman schemes across the sector. While variances in interpretation can occur from scheme to scheme, it is argued that underpinning the approach of the courts are some very clear principles as to how cases brought against an ombudsman scheme should be resolved. The decision of the NICA in *JR55* stands out because it did not follow all of these principles, which presents the Supreme Court with a conundrum.

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## **JR55**

A full analysis of the NICA *JR55* judgment can be found in the Thompson article (2015) and, given its importance, other legal commentaries will no doubt follow shortly after the Supreme Court judgment. But a brief summary of the NICA's judgment in *JR55* is provided here as it usefully throws a spotlight on a number of key features of the law surrounding ombudsman schemes which will be addressed in this article.

The salient facts of *JR55* are that the Commissioner for Complaints conducted an investigation into a complaint against a GP. The complainant's husband had died from a coronary artery artheroma, and various complaints were made about the care that he had received prior to his death, including delays on the part of the GP in passing on important information as to his ongoing treatment. The complaint was upheld, and a recommendation made that the GP pay to the widow of the deceased patient the sum of £10,000 by way of consolatory payment. This aspect of the Commissioner's report was challenged by the GP, upheld at first instance, then quashed by the NICA.

For the purposes of this article, three of the legal grounds pursued in the NICA are particularly relevant. The first two can be briefly summarised, and involved the process that the Commissioner employed, or was employing, to make his decisions in writing and implementing his report into the complaint. The conjoined legal question that these two grounds raised concerned the standards of procedural fairness that an ombudsman owes the parties in an ombudsman investigation. In *JR55*, first the Court found that the Commissioner had inadequately reasoned his recommendation that a consolatory payment should be made (*JR55*, paras 40-41). Second, the Court also implied that any move by the Commissioner to submit a report to the Northern Ireland Assembly would have amounted to a breach of natural justice (*JR55*, paras 46-47).

The third ground relevant to this article requires more explanation. The Court had to establish the lawful scope of the Commissioner's discretionary powers, in particular to make recommendations. This raised the fundamental legal question of what is the correct approach for a court to take in interpreting the extent of the discretionary powers of an ombudsman.

In *JR55*, the NICA ruled that the Commissioner did not have the power to recommend financial compensation. To arrive at this conclusion the Court applied a twin-track approach to statutory interpretation. In giving the lead judgment, Girvan LJ stated:

The ... [case] ... does not raise an issue of Wednesbury irrationality but rather requires a focus on the nature and extent of the statutory powers of the Commissioner. That involves a careful scrutiny of the statutory remit of the Commissioner who as a creature of statute has only such powers as are conferred on him by the statute (*JR55*, para 28).

Thus the first track taken by the majority was to read the relevant legislation in the round to establish its correct meaning. This exercise involved the court considering the interlinking effect of various aspects of the Commissioner for Complaints (Northern Ireland) Order 1996. Under Article 11 of the Order, the Commissioner has the power "to effect a settlement of the matter complained of; or if that is not possible to state what action should in his opinion be taken by the ... general health service provider concerned ... to effect a fair settlement of that matter." This provision, therefore, provides the Commissioner with a wide discretion to effect a settlement. But additionally, under Article 16 a complainant can make a claim against public bodies at the County Court for redress on the basis of a Commissioner report. Significantly for the NICA, this latter Article 16 process was not available to the complainant where the original complaint was against a health service body, as provided for under Article 8 of the Order. This reasoning led to the following conclusion:

Reading the legislation as a whole to ensure an inherent logic we conclude that the deliberate omission of a damages claim in Article 8 cases was designed to ensure that in such cases no question of monetary

compensation should arise. In the result we conclude that the Commissioner does not have power to recommend the payment of a monetary sum in an Article 8 investigation (*JR55*, para 33).

This conclusion is open to criticism on the grounds of selective reasoning. Other questions and sources of information that could have aided the Court's interpretation of the Order do not appear to have been factored into the majority's judgment. For instance, the Court could have asked: What was the purpose of the legislation? Why was the specific County Court process chosen to supplement the ombudsman's work, as opposed to the standard ombudsman model of enforcement which does not involve the courts? Why were the different jurisdictions of the Commissioner forms of ombudsman investigation (ie local government and health services) separated out? In contrast to the majority reasoning in *JR55*, in answering these questions to do with the purpose of the Order, Thompson's article delves into the history of the evolution of the Commissioner for Complaints scheme and the Order itself (2015). The County Court power was originally incorporated to tackle the issues of sectarianism in local government in the late 1960s. Without this added power, it was felt that the Commissioner scheme would be ineffectual. The jurisdiction to investigate health service complaints was added at a later date, by which time the need to provide extra support to the commissioner scheme was less pressing (in practice the County Court proceedings is now rarely invoked). The expansion of the jurisdiction of the Commission essentially mirrored equivalent legislative provisions from other UK schemes. Notably, those same other ombudsman schemes in the UK responsible for investigating health services regularly recommend financial compensation.

Instead of addressing this broader approach to uncovering the purpose of the Order, the Court appears to have used a second interpretative strategy to back up its reading of the legislation. Thus the Court directed itself to adopt a narrow interpretation strategy, driven by an observation as to the effective power of ombudsman schemes and the potential impact on the reputation of the GP concerned.

Having regard to the status thus afforded to an Ombudsman's findings and recommendations which can have significant consequences for the party found guilty of maladministration, *it would require clear wording to infer that the Commissioner has a power to make a recommendation that a body or individual pay monies in consequence of a finding of maladministration. Such a power would have to be found in express wording or by necessary implication from the relevant legislation.* There is no such clear wording in the present instance. Rather the wording of the 1996 Order leads to the conclusion that ... the Commissioner does not have any such power (*JR55*, para 31, emphasis added).

This interpretive strategy is stark and is striking for the lack of legal authority offered in support. It implies that because of the consequences that may follow from an ombudsman's report, its powers should only be exercised to the extent that there is express wording to support a particular use of that power, or such a use can be arrived at by necessary implication. This interpretative strategy, as this article will demonstrate, is contrary to almost all existing case law on ombudsman schemes. It is submitted here that the profound potential consequences of this aspect of the ruling in *JR55* was one of the main reasons why the Supreme Court granted permission for appeal.

In response, in making its decision on the case the Supreme Court has three broad options. First, it could adopt the full line of reasoning pursued by Girvan LJ in the NICA judgment, which implied that the court has a duty to read the powers of the ombudsman narrowly. Second, it could agree with the decision of the NICA but on grounds founded purely on the particular wording of the legislative scheme at issue. Third, it could overrule the ruling in the NICA regarding the powers of the Commissioner, and instead decide the case on procedural grounds only, including the quality of the reasons provided by the Commissioner and/or the fairness of the processes of investigation and reporting.

In the following section, this article analyses the manner in which these three grounds of law have been handled by the courts in previous cases on ombudsman schemes. It achieves this by using the results of a study into the case law surrounding the ombudsman institution to establish the doctrinal framework that has dominated judicial reasoning to date.

### **Step 1: The role of the courts**

There is no single definition of an ombudsman,<sup>2</sup> but in the UK there are at least 17 statutory bodies that could be considered to be performing an ombudsman-type service.<sup>3</sup> Other non-statutory ombudsman schemes might also be deemed to exercise a public function and thereby be subject to judicial review, although as yet the case law on these schemes is sparse and has not generated anything significant.<sup>4</sup> With the transposition of the 2013 EU Directive on Consumer ADR (2013/11/EU), an interesting subsidiary question for the future may be the extent to which accredited ADR schemes under the Directive, which will include private sector ombudsman schemes, are subject to judicial review.

The question of whether an ombudsman scheme can be subject to judicial review has been argued in court. The principal objections to allowing judicial review of ombudsman schemes are that (i) an ombudsman should be considered as operating a discrete body of justice that would be undermined if the courts can exercise authority over it; and (ii) conceding to judicial review of ombudsman schemes exposes the office to various cost pressures and procedural restrictions which make it impractical to operate an efficient and effective ombudsman service. For some schemes it might also be argued that the proper place for review of an ombudsman's decision-making is the legislature.

These arguments have been rejected by the courts. In *R v Parliamentary Commissioner for Administration Ex Parte Dyer* [1994] 1 WLR 621 Lord Justice Simon Brown considered "the proper ambit of this Court's supervisory jurisdiction over the PCA [Parliamentary Commissioner for Administration]" and went on to "unhesitatingly reject" the argument that judicial review did not apply.

Many in government are answerable to Parliament and yet answerable also to the supervisory jurisdiction of this Court. I see nothing about the PCA's role or the statutory framework within which he operates so singular as to take him wholly outside the purview of judicial review (*Dyer*, p. 625).

Nor did Lord Justice Simon Brown accept the argument that "the Court should intervene only in the most exceptional cases of abuse of discretion". This broad conclusion has been followed in cases on other ombudsman schemes.<sup>5</sup> For instance, it was stated in *R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365:

The designated operator should, in my view, be subject to the supervision of the High Court. The wish of OIA, which I readily accept to be genuine and well-intentioned, to be free from supervision should not be upheld. Its aspiration to be an informal substitute for court proceedings is not inconsistent with the presence of supervision by way of judicial review (*Siborurema*, para 50, per Pill LJ).

As a consequence of such rulings, a distinguishing feature of ombudsman schemes is the scale and spread of case law surrounding the ombudsman institution. These schemes have generated a largely unchartered body of over 100 reported cases heard in the UK courts, dealing with both judicial reviews of and, for some schemes,<sup>6</sup> appeals against decisions of ombudsman schemes. Although the appeals process built into some ombudsman schemes opens up some fresh issues, they are still relevant here because the grounds of appeal are restricted and do not open up a general right to appeal on the cases merits alone. Additionally, there exists a collection of other legal proceedings which have involved an ombudsman scheme which also provide important dicta regarding the rule of law surrounding the practise of the ombudsman sector. An argument of this article is that cumulatively this body of law is

distinct and now sufficiently well-developed to provide authoritative bespoke guidance to the court on how a case involving an ombudsman scheme should be resolved.

## **Step 2: Applying standard statutory interpretation techniques**

The initial stage in any legal analysis of an ombudsman scheme, and in any legal dispute, is to establish its legal powers and to scrutinise any interpretations of the law that the ombudsman has made. Statutory ombudsman schemes possess their power by virtue of their founding legislation. They are also obliged to operate within the terms laid out in other general legislation and case law which places obligations on public bodies, such as the Freedom of Information Act 2000 (FOI) and the Data Protection Act 1998. The FOI is particularly important for ombudsman schemes as most have had proceedings brought against them under the legislation. Nevertheless, this body of case law is not considered any further in this article, as the interpretative task of the Information Commissioner and the Information Tribunal, and the law that applies, does not obviously differ because an ombudsman scheme is a party.

An ombudsman's interpretation of the law might become contentious in two main scenarios. First, in concluding an investigation into a complaint, an ombudsman can make a determination based on a finding that the investigated body has misapplied the law. The leading case is *Argyll & Bute Council v SPSO* [2007] CSOH 168. In this case, the Scottish Public Services Ombudsman (SPSO) had determined that the Council had failed to provide funding for the personal care of a resident over 65 in a private care home, as required by the Community Care and Health (Scotland) Act 2002 and regulations made under the Act. This finding was challenged by the Council. In the case, the Court of Session separately considered the meaning of the Act and found that "it was not possible to interpret the legislation about free personal care as obliging a local authority to make payments for personal care that was not provided by them". The SPSO had, therefore, erred in its interpretation of the law, meaning that a determination of service failure could not be justified (*Argyll & Bute*, paras 66-67, per Lord Macphail).

The role of the court in verifying interpretations of the law used by an ombudsman, as in the case of *Argyll & Bute*, is uncontentious, but in a second respect more difficult questions of statutory interpretation arise. Ombudsman schemes are also required to interpret their *own powers* and founding legislation. The approach that the courts adopt in such cases is one of the most important features of the *JR55* case. Here too, the approach may appear straightforward:

There is no dispute ... that the starting point in the interpretive exercise is to determine the natural and ordinary meaning of the words in the context of the statute (*In an application by Armagh City and District Council for Judicial Review* [2014] NICA Ref: MOR9314, para 22, per Girvan LJ).

This form of objective statutory interpretation is the courts' core claim to expertise and constitutional authority (eg *R v Secretary of State for the Environment, Transport and the Regions ex p Spath Holme Ltd* [2001] 2 AC 349, p. 396) but the technique is easier to summarise than it is to implement and must be applied in a number of subtly discrete scenarios.

The most straightforward scenario is where the meaning of the statutory provision in question is capable of being interpreted in isolation. Here the logical first step is to consider the natural and ordinary meaning of the specific provision that creates the power. Even here though, often the court will be obliged to consider in addition any relevant case law on the specific provision or accompanying legislation.

From ombudsman case law, examples can be found in which the specific wording of a legislative instrument can be claimed to be the determinative issue. In such instances, one

means available to the court is to treat the interpretive task as an issue of law that not only requires the court to interpret the law, but also grants it the authority thereafter to apply the law directly to the facts of the case. This is a doctrine known as precedent fact (*R (A) v Croydon London Borough Council* [2009] 1 WLR 2557). In *R (Bluefin Insurance Services Ltd) v Financial Ombudsman Service Ltd* [2014] EWHC 3413, the court implied that there were certain ombudsman decisions which could be treated in court as questions of precedent fact (*Bluefin*, paras 66-74). Recognising that this usurpation of the ombudsman's discretion might be seen as controversial, in the alternative, the Court ruled that it was also appropriate for it to interpret the legal provision for itself in order to establish whether or not the Ombudsman had misdirected itself in law (*Bluefin*, para 74). Either way, the subsequent legal analysis matched an approach which focussed on the natural and ordinary meaning of the words in law.

The legal question in *Bluefin* was whether the Ombudsman had correctly accepted a complaint, which in turn was dependent upon whether the complainant could be interpreted as a 'consumer' under the scheme's Rules, when read through existing case law and EU legislation on the matter. The Court ruled that it could not be so interpreted and quashed the Ombudsman's decision.

But *Bluefin* contrasts with an earlier case, *R (Bankole) v Financial Ombudsman Service* [2012] EWHC 3555, in which the Administrative Court also considered the eligibility of a complaint under the same Rules of the FOS scheme. In *Bankole*, the challenge centred on the time limit to be applied, not on the meaning of a 'consumer', and the Court ruled that the eligibility question to be determined was not a question of precedent fact. Instead, it ruled that the eligibility question was a discretionary decision for the Ombudsman to make and went on to find that an error of law had not been made.

How might these cases be interpreted consistently? The most plausible answer is that what counts as a matter of 'precedent fact' is a question of degree. Under the FOS's statutory powers, the relevant law ('the Rules') that dealt with the meaning of a 'consumer' did so in such detail that the court deemed that it amounted to 'a hard-edged finding of an objective fact'. By contrast, within the same Rules the question of what amounted to the correct time limit to apply was couched in considerable looseness (*Bluefin*, para 55). In *Bankole*, therefore, the residuary discretion of the Ombudsman was much wider and required the court to adopt a different judicial strategy towards statutory interpretation.

*Bluefin* and *Bankole* provide a useful benchmark for considering how, more generally, the discretionary powers of ombudsman schemes should be dealt with by the court. They imply that some cases may be resolvable through a straightforward interpretation of a legislative provision, where for example the case hinges on a question of jurisdiction (*Armagh City and District Council*) or eligibility that may be defined in some detail in legislation. But with ombudsman schemes the statutory design is one that is dominated by the conferral of wide discretionary powers, which makes the exercise of controlling them in court through techniques of statutory interpretation, such as in *Bluefin*, problematic. In most ombudsman cases the court is obliged to move beyond 'the natural and ordinary meaning of the words' to use more sophisticated techniques. One strategy for the judge is to focus on examining 'the context of the statute' in the round.

### **Step 3: Reading legislation in the round**

As laid out above, one of the three options available to the Supreme Court in *JR55* is to decide the case upon grounds isolated specifically to the Commissioner for Complaints scheme. Through such as strategy, the wide discretionary power of an ombudsman to recommend financial redress might be considered lawfully to apply to ombudsman schemes as a general rule, but not to apply to the Commissioner for Complaints purely because of the

in-built capacity within the scheme for applications to be made to the County Court for financial compensation in certain listed circumstances. To cite the NICA:

The relevant Order is a piece of Northern Ireland legislation which, while it draws on analogous English legislation in relation to ombudsmen, nevertheless contains a distinctive framework for the office of the Northern Ireland Commissioner for Complaints which is somewhat differently structured from that established in the English and Scottish analogues. In particular, and uniquely in Northern Ireland, the relevant Order contains a statutory framework for an aggrieved party to apply to the County Court for damages in the event of the Commissioner making a finding of injustice sustained by a complainant as a result of maladministration (*JR55*, para 29).

Given that the scheme is soon to be replaced by a new unified scheme, as currently being considered by the Northern Ireland Assembly in the Public Services Ombudsman Bill, such an interpretation might have relatively little impact on how ombudsman case law is considered in the future.

Moving beyond a strict interpretation of a statutory provision to read a statute in the round is a standard and well known judicial technique used to establish the intention of Parliament in making legislation. There is also precedent for this approach. Citing *Dyer*, in *Siborurema* the court stated:

The degree and manner of supervision to be exercised by the court will vary from institution to institution and from statutory scheme to statutory scheme (*Siborurema*, para 52).

One line of cases, involving the Parliamentary Ombudsman and the Local Government Ombudsman (LGO), illustrates more than most the possible variances in interpretation that can be caused by the bespoke nature of each individual statutory scheme.

In *R (Bradley) v Secretary of State for Work and Pensions* [2008] ECWA Civ 36, and three subsequent cases, the courts were called upon to consider the potential impact and consequences that derive from an ombudsman investigation and a subsequent report. The cases are interesting for a number of reasons, one of which being that unusually they were all brought by individual complainants (or groups of complainants) against a public body that had chosen not to implement the recommendations of an ombudsman. Two of the cases involved a report of the Parliamentary Ombudsman, the other two a report of the LGO. In all cases the key legal question was the manner in which it was lawful for a public body to reject a report of an ombudsman.

Using a purposive approach to statutory interpretation and interpreting the relevant legislation in the round, the judgments in all four cases inferred supplementary duties on investigated bodies when responding to ombudsman reports, duties which were non-specified in the founding legislation of the ombudsman schemes concerned. In the Parliamentary Ombudsman cases, *Bradley* and *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC 2495, the court ruled that a public authority could lawfully refuse to accept the findings of the Parliamentary Ombudsman provided that it had cogent reasons for doing so. By contrast, in *R (Gallagher and Basildon District Council) v Secretary of State* [2010] EWHC 2824 and, *R (Nestwood Homes Developments Ltd) v South Holland District Council* [2014] EWHC 863 the court ruled that the findings of the LGO are legally binding unless declared unlawful in court.<sup>7</sup>

The explanation for this difference in approach lies in the differences in the legislative scheme being considered and purposes being sought. The courts ascertained the legislative intention by reading the two Acts in the round and through consideration of other evidence, such as the White Paper that preceded the Parliamentary Commissioner Act 1967. In *Bradley*, this led Wall LJ to conclude:

[U]nder the 1967 Act, a minister who rejects the ombudsman's findings of maladministration will have to defend him or herself in Parliament, and will be subject to parliamentary control. The ultimate remedy

for aggrieved citizens such as the complainants in the instant case ... will ... be through political action rather than judicial intervention.

...

In cases involving the local government ombudsman ("LGO"), the citizen who has invoked his assistance has – in law – no substantive remedy against the local authority concerned if that authority rejects the LGO's conclusion. It is true that the citizen could apply for judicial review of the local authority's decision not to implement the LGO's findings, but the system, as I understand it, depends upon the convention that local authorities will be bound by the findings of the LGO. It must follow inexorably that if a local authority wishes to avoid findings of maladministration made by a LGO, it must apply for judicial review to quash the decision (paras 137-9).

These cases have been subject to critique, both in favour (Kirkham, Thompson and Buck, 2008) and against (Endicott, 2015, ch. 13) the eventual conclusions made, but the merits of the judgments go beyond the scope of this article. Instead, what these cases provide support for is the principle that even where very similar legislative powers are being applied (ie the degree to which ombudsman findings are legally enforceable) then the courts can and do read around the specific statute in question to come to different conclusions depending on the specific legislative scheme. Such an approach might provide ballast for an equivalent distinction to be made in *JR55*. But it is noteworthy that the reasoning put forward by the courts to justify the distinct differences in approach in *Bradley*, and the subsequent cases on the same legal point, were comprehensively developed and involved a supporting analysis that went well beyond the specific terms of the statutes at issue in order to consider the context within which the relevant schemes operate. The same could not be said for the NICA judgment in *JR55*.

#### **Step 4: Does the rule of law require a restrictive interpretation?**

The NICA ruling in *JR55* raised an important point of law in that it implied that restrictive interpretations should be given to the discretionary powers of an ombudsman. If the Supreme Court upholds this aspect of the lower court ruling, then at the very least the Supreme Court would have to define when such an approach is appropriate. Such limiting criteria would be necessary in order to avoid the possibility of collateral damage through a fresh round of legal challenges being brought against ombudsman schemes on the basis that, in the light of *JR55*, their discretionary powers have hitherto been too widely interpreted.

This is a point of potentially wide impact. Each statutory ombudsman scheme may have its own founding legislation, but they tend to cover very similar features. Ombudsman legislation usually covers:

- *Institutional design*: including provisions concerning the appointment of the ombudsman and any overseeing board, plus procedures for budget.
- *Organisational powers*: including powers of delegation, appointment of staff and operation of an office.
- *Powers to receive and close complaints*: including powers to choose which complaints to investigate, and at which point an investigation is closed.
- *Powers to manage a complaint*: including the selection of the processes applied to a complaint and handling that complaint appropriately and fairly.
- *Powers of investigation*: including powers to obtain information and access to witnesses.
- *Powers to make determinations*: including powers to make a finding and a recommendation.
- *Reporting powers*: including powers to report individual cases, annually, make special reports, issue guidance.

- *Additional powers*: some schemes possess ‘non-standard’ powers and duties for an ombudsman scheme. A good example is the SPSO which operates as a Complaints Standard Authority and from 2016 will review welfare fund decisions.

A common denominator with some of the above powers is that they are often loosely defined in legislation. As a consequence, an ombudsman possesses a series of wide-ranging and extensive discretionary powers, often with the powers of different ombudsman schemes being described through similar wording. Hence the reasoning behind a decision with regard to a discretionary power in one ombudsman scheme could relatively easily be transposed across to other schemes. The significance of wide discretionary powers is reflected in litigation involving ombudsman schemes, most of which include at their core a dispute about how such discretionary power has been exercised.

This background context explains why *JR55* is a landmark case in the jurisprudence on the ombudsman. Put simply, the Supreme Court’s approach to interpreting the Commissioner’s powers will set, or at least re-iterate, the template for how all discretionary powers of ombudsman schemes should be interpreted in the future.

In the NICA, no cases were supported in support of its restrictive approach towards statutory interpretation, but the wording deployed in the lead judgment mirrored very closely a line adopted in several cases on civil liberties. For instance, Lord Browne-Wilkinson stated in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539:

A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament (para 575).

Whether the rights and liberties at stake in ombudsman cases could ever be considered sufficient to trigger such a presumption is a moot point, but within the overall case law on ombudsman schemes the paucity of legal authority to support this approach is noticeable.

### ***Croydon***

In *R. v Commissioner for Local Administration Ex p. Croydon LBC* [1989] 1 All E.R. 1033, one issue at stake was whether the Ombudsman had correctly exercised a widely worded discretionary power to investigate a complaint, notwithstanding the availability of a judicial remedy (Local Government Act 1974, s.26(6)). Arguably, this remedy (in the case, judicial review) would have provided greater protection for the individuals that were criticised in the Ombudsman’s report. On this point Woolf LJ recognised that the Ombudsman’s discretion meant that “the courts do not have sole jurisdiction” in such cases:

On the other hand the general tenor of s.26(6) is that, if there is a tribunal . . . which is specifically designed to deal with the issue, that is the body to whom the complainant should normally resort. I suggest that this approach is particularly important in the case of issues which are capable of being resolved on judicial review (*Croydon*, para 1044–1045).

Woolf LJ laid out two prime concerns with allowing an ombudsman free rein to resolve cases containing a heavy legal element. The first concern was that the ombudsman process does not provide the parties with the same safeguards that are available under judicial review. The second concern was that where the investigation involves interpreting the law, an ombudsman’s “expertise is not the same as that of a court of law” (*Croydon*, para 1045).

*Croydon*, therefore, used external considerations to justify adopting a narrow interpretive strategy towards an ombudsman’s discretionary power, albeit simultaneously the judge made reference to additional features of the statute. But two factors make it difficult to cite the decision in *Croydon* as being supportive of a general judicial approach in favour of a narrow interpretive strategy.

First, on the facts, the Court of Appeal in *Croydon* did not rule that the Ombudsman was operating outside his jurisdiction in taking on the complaint, instead, it declared his report void on another ground. Second, it is doubtful that the guidance provided by Woolf LJ is now good law following subsequent civil justice reforms and the later Court of Appeal decision of *R (Liverpool City Council) v Commissioner for Local Administration* [2000] EWCA Civ 54.

In contrast to *Croydon*, in *Liverpool* the case hinged upon whether or not the acceptance and continuation of the investigation by the Ombudsman was lawful given the potential for judicial review. On this question the Court ruled that the Ombudsman had exercised her discretion appropriately and found that the fact that judicial review had been available could not be taken to imply that the ombudsman should refuse the investigation. To do so would lead to an absurd position of complaints to an ombudsman never being eligible, as there is almost always an overlap in the jurisdiction of ombudsman schemes and judicial review (*Liverpool*, para 24, per Henry LJ). That being the situation, a choice had to be made, and by law the decision as to whether or not to pursue an investigation despite the apparent existence of a legal remedy was the legitimate discretionary power of the ombudsman, as prescribed for by legislation. Therefore, presuming that the complaint is of a kind that the ombudsman is legally empowered to investigate, the only ground upon which the court could review the ombudsman's exercise of discretion is where the ombudsman has made a decision which is Wednesbury unreasonable (*Liverpool*, para. 41, per Chadwick LJ).

### ***Cavanagh***

Another example of the courts applying a narrow interpretation to an ombudsman's discretionary power can be found in the case of *Cavanagh v Health Service Commissioner* [2005] EWCA Civ 1578. In the case, dispute centred on the Ombudsman's discretion to define the extent of the complaint. The claimants, that included the complainant and two doctors who were investigated under the complaint, argued successfully that the Ombudsman had over-extended her investigation into the complaint against the wishes of the complainant. Despite the Ombudsman's wide powers to define the scope of her investigation, from the legislation the Court of Appeal deduced the following:

The statutory discretions which [the Commissioner] possesses, while generous, go to (a) whether she should embark upon or continue an investigation into a complaint (s.3(2)) and (b) how an investigation is to be conducted (s.11(3)). They do not enable her to expand the ambit of a complaint beyond what it contains, nor to expand her investigation of it beyond what the complaint warrants.

This does not mean that the ambit of every complaint or the scope of every inquiry is a question of law: ... . But there are legal limits. .... [A] point may come at which the pursuit of an investigation goes beyond any admissible view either of the complaint or of what the statutory purpose of investigation will accommodate (*Cavanagh*, para 16-17, per xxx).

The Court went on to conclude that the Ombudsman had "exceeded the Commissioner's statutory powers, not technically or marginally but so substantially as to vitiate it in its entirety" (*Cavanagh*, para 45).

*Cavanagh* is a difficult case to make sense of, as a full reading of it reveals that the Court came to no contentious conclusions as to the meaning of the legislation, albeit the impact of the Court's emphasis on the limits of the ombudsman's discretion will have been registered in the Ombudsman's office. But the Court did use the opportunity of scrutinising the meaning of the legislation to then revisit both (i) the *substance* of the decision made by the Ombudsman to extend the investigation in the direction that she did and (ii) to consider the *process* by which that decision was made. It is submitted here that in doing (i), exploring the substance of the decision, the Court of Appeal erred in law as it effectively allowed itself to ask afresh the question of whether the Ombudsman had made the correct decision. Through such an approach, what the court did was to use the technique of statutory interpretation to allow for a

more restrictive form of control over the ombudsman's discretionary powers. But what the court should have done is scrutinised the rationality of the decision under standard administrative law grounds or relied upon procedural grounds for voiding the decision.

That this should have been the approach is the implication of the later case of *Miller v Health Service Commissioner* [2015] EWHC 2981. In *Miller*, the depth of an investigation into a complaint grew during the course of the Ombudsman's inquiries because of the ongoing findings that were made. This scenario has parallels with that in *Cavanagh* and led to the expansion of the investigation being challenged by some of the medics involved. In *Miller*, the court considered the question of the legitimate scope of the complaint very differently to *Cavanagh*.

[T]he Ombudsman was entitled to reconsider the scope of the complaint and to determine whether or not she was investigating all the matters raised by the complaint. The Ombudsman's remit is to investigate complaints about injustice. She has a wide discretion as to how to set about that. If, having decided to investigate and whilst in the process of defining the scope of the investigation, the Ombudsman wishes to reconsider the scope of the complaint and, indeed, to seek clarification from the complainant as to the matters encompassed within that complaint, she is entitled to do so (*Miller*, para 59).

Thus no question of whether the Ombudsman had acted outside her powers arose, only whether she had acted reasonably, which the court found she had.

### ***When is a restrictive interpretation to a discretionary power required?***

The preceding analysis suggests that there is little support in case law for an approach which *prima facie* requires a narrow statutory interpretation to be applied to the discretionary powers of an ombudsman. The only ground that could justify such an approach would be if the court concluded that a breach of human rights or fundamental liberties were at stake. But there are cases which do provide for procedural confinements as to how powers of an ombudsman should be exercised. The justification for these cases could perhaps be understood to link to the same logical underpinning as those civil liberties cases that require restrictive readings of discretionary powers, namely that discretionary powers must be implemented in a way that pays due respect for individual interests.

In *R (Turpin) v Commissioner for Local Administration* [2002] JPL 326 the question at issue was whether the complainant was entitled to see certain documents upon which the Ombudsman's decision had been based. Mr Justice Collins stated:

I am far from saying that the Ombudsman does not have a discretion to refuse to disclose. ... One cannot deal with every possible situation and it must be a matter left always to the discretion of the Ombudsman, but it is a discretion which ought, *prima facie*, in my judgment, to be exercised in favour of disclosure unless there are good reasons not to disclose. I see no justification for giving the Ombudsman a general right to refuse to disclose whatever the circumstances (*Turpin* para 68-69).

Thus the ombudsman's discretion in this instance was confined by a broader body of case law on procedural fairness. As a result, notwithstanding the Ombudsman's wide discretionary power to disclose, this case has arguably established clear guidance as to the importance of both sides being entitled to see relevant information upon which ombudsman reports are based. Likewise, in *R (Cardao-Pito) v Office of the Independent Adjudicator for Higher Education* [2012] EWHC 203 in which the complainant challenged the level of financial compensation that the Adjudicator had recommended. The Adjudicator's determination on the remedy was quashed on the basis that he had failed to provide an adequate explanation of all aspects of the remedy based on the nature of the injustice experienced. This case might also be considered to provide a precedent for ombudsman schemes to follow when subsequently applying their recommendation to recommend a remedy (Mitchell, 2015, 9-10).

Taken together, therefore, the courts are not obliged to consider wide discretionary powers narrowly, but there is precedent for the courts applying restrictive procedural obligations on

ombudsman schemes in the manner in which they implement, what might be termed, their ‘second order’ discretionary powers. Thus the ‘first order powers’ of an ombudsman to define the scope of a complaint, to determine maladministration or make a determination should not be confined by the courts, but the process by which those decisions are made and the evidence that is required to justify those decisions can be confined.

### **Step 5: Reviewing discretionary power according to standard public law grounds**

If the Supreme Court in *JR55* does not accept that there is a general principle that an ombudsman’s discretionary powers should be interpreted narrowly, or choose to find that the legislative scheme requires a bespoke interpretation to the Commissioner’s powers, then it has one other likely option with which to approach the case. Under this third approach, the court could accept the breadth of the discretionary powers available to the Commissioner and thereafter review their exercise according to standard public law grounds. It is argued here that this is the approach most in conformity with the existing body of case law on the ombudsman.

#### ***Recognising the wide discretionary power of the ombudsman***

As noted earlier, there are many ombudsman schemes in the UK, and for those that have been challenged in court there is generally a leading case in which the courts establish the fundamentals of the position that should be adopted when reviewing ombudsman schemes, a case which is thereafter regularly cited. This outlining of the nature of judicial review with regard to an ombudsman scheme almost always involves acknowledging the special status of the ombudsman office, one which has been designed by the legislature with bespoke design features to assist in administering justice. The lead case is *R v Parliamentary Commissioner for Administration ex p Dyer* [1994] 1 WLR 621.

All that said ... it does not follow that this court will readily be persuaded to interfere with the exercise of the [Parliamentary Ombudsman’s] discretion. Quite the contrary. The intended width of these discretions is made strikingly clear by the legislature (*Dyer*, pp. 626E-G, per Simon-Brown LJ).

This case has been followed by plenty of equivalent expositions of the legal status of an ombudsman and the court’s duty in relation to interpreting their powers.

It is for the [Office of the Independent Adjudicator] in each case to decide the nature and extent of the investigation required having regard to the nature of the particular complaint and on any application for judicial review the court should recognise the expertise of the OIA (*Siborurma*, para 60, per Moore-Bick LJ).

[A] court should treat a decision of the [Financial Ombudsman Service] with respect and give it a reasonably generous margin of appreciation in order to reflect the particular expertise which the [FOS] has and which he will make use of in reaching any conclusion (*Walker, Re Judicial Review* [2013] NIQB 12, para 11, per Horner J).

[T]he Court’s supervisory jurisdiction should be exercised with sensitivity to the special nature of the [Scottish Public Services] Ombudsman’s constitutional role and function (*Argyll*, para 16, per Lord Machphail).

Equivalent statements can be found for the Legal Ombudsman (*R (Crawford) v The Legal Ombudsman & Anor* [2014] EWHC 182) and the Independent Police Complaints Commission (*Muldoon v IPCC* [2009] EWHC 3633, para 19),

This is an approach rooted in an understanding of the purposes for which ombudsman schemes have been established, purposes which the court has repeatedly demonstrated a willingness to support. Such purposes are not always fully laid out in the founding legislation, but where present such statements drive home the point. For instance, with the Legal

Ombudsman scheme the Legal Services Act 2007 states at section 1(1) the regulatory objectives of the Act. This in turn enabled the court to conclude:

It is within the context of consumer protection, public interest and the maintenance of appropriate standards that the relevant statutory provisions have to be interpreted (*R (Kerman & Co Llp.) v Legal Ombudsman* [2014] EWHC 3726, para 61).

Further, in their rulings the judiciary have also specifically recognised the subtly different working methodology of ombudsman schemes.

Recent years have seen the growth of alternative processes of inexpensive dispute resolution: they are not intended to be fully judicial, or to be operated in accordance with civil law trial procedures, or to be dependent on what is fast becoming a luxury of legal advice and representation. The new processes have the advantage of being able to produce outcomes that are more flexible, constructive and acceptable to both sides than the all-or-nothing results of unaffordable contests in courts of law (*Shelly Maxwell v The Office of the Independent Adjudicator for Higher Education* [2011] EWCA Civ 1236, para 38, per Lord Justice Mummery).

The logic of this purposive approach to understanding the operation of ombudsman schemes is the reverse of the narrow interpretation strategy applied in *JR55*. It suggests that if the legislature has granted an ombudsman wide discretionary powers and the purpose of the legislation is to support consumers and users of public services; then it should be assumed that the intention was to allow the ombudsman the leeway to exercise those powers, unless restrictions can necessarily be implied by legislation or are required by the standard grounds of public law as developed by the courts.

In line with this interpretation of the law on ombudsman schemes, the form of the following citation on the role of the court is repeated regularly in ombudsman cases.

The principles of law that must be applied are well known and clear. ... The court's supervisory role is there to ensure that he has acted properly and lawfully. However much the court may disagree with the ultimate conclusion, it must not usurp the Ombudsman's statutory function. It is likely to be very rare that the court will feel able to conclude that the Ombudsman's conclusions are perverse, if only because he must make a qualitative judgment based upon [his department's] wide experience of having to put mistaken administration onto one side of the line or the other. I have to say that in this case I would not have made the same judgment as the Ombudsman; but I am not asked to make any personal judgment and the real question is whether any reasonable Ombudsman was entitled to hold the view expressed in this careful report (*Doy v. Commissioner for Local Administration* [2001] EWHC 361, para 16).

### ***Subjecting the ombudsman's use powers to tests of good administration***

Notwithstanding the degree of respect proclaimed within case law for ombudsman schemes, the line repeated in case after case is that their exercise of discretionary power can be tested according to standard public law grounds.

[T]he court does not put itself in the position of the Ombudsman and does not test the reasonableness of the decision against the decision the court would make if it were considering the matter and if it were exercising the statutory powers. What the court does is to review the decision of the Ombudsman to determine whether or not it is legally flawed. The decision may only be overturned on established public law grounds. There are a number of formulas which capture that and a number of ways in which public law errors are described (*R (Hafiz & Haque Solicitors) v Legal Ombudsman* [2014] EWHC 1539, para 18, per Mr Justice Lewis).

If it is clear that the Ombudsman in reaching a decision has misdirected himself as to a matter of law or has failed to have regard to a relevant consideration or has had regard to an irrelevant consideration ... then the court can and should intervene (*R v Commissioner for Administration (ex parte Turpin)* EWHC 503, para 36).

In this sense the law with regard to ombudsman schemes does not look any different to that which applies to other public bodies in that they are required to abide by the various

standards of good administration that the courts have developed through case law. Even here, however, there is good reason to believe that the manner in which the courts apply these principles needs to be read through the context of the work of ombudsman schemes. In a recent article, Mitchell has drawn out ten ombudsman-specific interpretations of law from the case law on the OIA (Mitchell, 2015). To illustrate the point, two general examples of ombudsman tailored legal thinking can be provided here which directly relate to the grounds used in *JR55*: reasons and fairness.

It is widely established that ombudsman schemes must provide good reasons for their findings (eg *Murnin v Scottish Legal Complaints Commission*, [2012] CSIH 34). However, there is case law to suggest that the extent of rigour that needs to be provided is not the same that would be expected of a court.

The courts will be slow to interfere with review decisions and recommendations of the OIA when they are adequately reasoned. They are not required to be elaborately reasoned, the intention being that its operations should be more informal, more expeditious and less costly than legal proceedings in ordinary courts and tribunals (*Shelly Maxwell*, para 38, per Lord Justice Mummery).

An Ombudsman's report should be read fairly, as a whole, and should not be subject to a hypercritical analysis nor construed as if it were a statute or a contract (*Rapp v PHSO* [2015] EWHC 1344, para 38).

Likewise, it is regularly argued in ombudsman cases that the challenged scheme has breached standards of fairness in one regard or another. Typically, attempts have been made to persuade the courts to impose courtroom-like procedural restrictions on ombudsman schemes at various stages in the ombudsman process (eg *Kay v Health Service Commissioner* [2009] EWCA Civ 732; *Kerr Stirling LLP v Scottish Legal Complaints Commission* [2012] CSIH 98). In the main, however, the courts have respected the very different design put in place by the legislature.

There are in reality bound to be significant differences in the way the process is conducted, in terms of how the evidence is called, the powers to enforce attendance, and disclosure, and the role of cross-examination. Were such differences not to exist, the FOS could not provide an informal procedure (*R (Chancery (UK) LLP) v FOS* [2015] EWHC 407, para 46).

In a case on the Office of the Independent Adjudicator, the Court of Appeal stated that if the ombudsman is to be required to:

... act as a surrogate of the ... court ... it is difficult to see what point there would be in having a scheme, which was established ... not as another court of law or tribunal, but as a more user friendly and affordable alternative procedure for airing ... complaints and grievances. The judicialisation of the [ombudsman] so that it has to perform the same fact-finding functions and to make the same decisions on liability as the ordinary courts and tribunals would not be in the interests of [complainants] generally (*Shelly Maxwell*, para 37-8, per Lord Justice Mummery).

Using this logic, the processes of ombudsman schemes have generally been interpreted generously. For instance, it has been ruled more than once that only in exceptional circumstances would the court require oral hearings (*R (Heather Moor & Edgcomb Ltd) v FOS* [2008] EWCA Civ 642, para 57-67; *Heather Moor & Edgcomb Ltd v United Kingdom* (2011) 53 EHRR SE 18).

## **Conclusion**

Using the Supreme Court's consideration of the appeal in *JR55* as a springboard, this article has analysed existing UK case law on ombudsman schemes. On the basis of a study of the collective body of case law in the field, it makes the claim that all statutory ombudsman schemes are covered by much the same body of law and legal principles. This understanding of the law implies that the courts, prior to *JR55*, had settled on a particular method when resolving cases on ombudsman schemes. This background method is important because

although most ombudsman schemes derive their power from legislation, the general form of legislation employed in the sector is remarkably similar, a form which has included the provision of wide-ranging discretionary powers. Such discretionary powers reduce the capacity for a court to resolve a case purely through an interpretation of statute. Instead, the court is required to analyse ombudsman legislation in the round and through an appreciation of the purposes for which an ombudsman scheme has been established. In undertaking this task, a growing feature of cases involving an ombudsman has been the tendency for the courts to cite cases involving other ombudsman schemes.

Two major principles that have evolved out of the case law on the ombudsman have been an embedded degree of respect for the specialised service performed by an ombudsman, one supported by specific design features; and a confirmation that the primary technique with which to review ombudsman schemes are the standard good administration grounds of public law. Within the latter set of grounds, we can also see the evolution of a series of more specific principles of interpretation and application that should be used when considering the procedural propriety of their decision-making.

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## Notes

1. In 1970 the House of Lords refused permission in *Re: Fletcher's Application* [1970] 2 All E.R. 52.
2. But see Ombudsman Association (2015).
3. The Parliamentary Ombudsman (Parliamentary Commissioner Act 1967); Northern Ireland Assembly Ombudsman (The Ombudsman (Northern Ireland) Order 1996); Commissioner for Complaints in Northern Ireland (The Commissioner for Complaints (Northern Ireland) Order 1996); Local Government Ombudsman (Local Government Act 1974, as amended); Health Services Ombudsman (Health Service Commissioners Act 1993); Pensions Ombudsman (Pension Schemes Act 1993); Housing Ombudsman (Housing Act 1996, section 51 of and Schedule 2); Police Ombudsman Northern Ireland (Police (Northern Ireland) Act 1998, 200, 2003); Financial Ombudsman Service (*Financial Services and Markets Act 2000 (as amended)*); Scottish Public Services Ombudsman (Scottish Public Services Ombudsman Act 2002); Independent Police Complaints Commission (Police Reform Act 2002); Office of the Independent Adjudicator for Higher Education (Higher Education Act 2004); Public Services Ombudsman for Wales (Public Services Ombudsman (Wales) Act 2005); Police Investigations and Review Commissioner (Police, Public Order and Criminal Justice (Scotland) Act 2006, Police and Fire Reform (Scotland) Act 2012); Scottish Legal Complaints Commission (Legal Profession and Legal Aid (Scotland) Act 2007); Legal Ombudsman (Legal Services Act 2007); Service Complaints Ombudsman (Armed Forces Service Complaints and Financial Assistance Act 2015).
4. Eg the Prisons and Probation Ombudsman, Ombudsman Services.
5. Eg *R v Local Commissioner for Administration, Ex parte Eastleigh Borough Council* [1988] 1 QB 855, pp 866H-867D, per Lord Donaldson of Lymington MR.
6. See the Pensions Ombudsman and the Scottish Legal Complaints Commission.
7. In all four cases, the question then arose as to the rationality of the decision of the public body to refuse to implement the recommendations of the ombudsman's report.

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