



Delegation of Functions: Principles and Recent Perspectives

Matt Hutchings

To cite this article: Matt Hutchings (2016) Delegation of Functions: Principles and Recent Perspectives, *Judicial Review*, 21:2, 93-98, DOI: [10.1080/10854681.2016.1178537](https://doi.org/10.1080/10854681.2016.1178537)

To link to this article: <http://dx.doi.org/10.1080/10854681.2016.1178537>



Published online: 01 Jul 2016.



Submit your article to this journal [↗](#)



View related articles [↗](#)



View Crossmark data [↗](#)

Delegation of Functions: Principles and Recent Perspectives

Matt Hutchings

Cornerstone Barristers

Introduction

1. The rule forbidding a public body from improperly delegating its functions is an aspect of the inalienability of statutory powers and duties. It may be seen as protecting two important principles. The first is the rule of law, itself a cornerstone of democracy. In *R v London Borough of Tower Hamlets ex p. Khaliq* (1994) 26 HLR 517 at 525 Sedley J described the impermissible delegation of local authority housing decisions in that case in scathing terms:

“Because a group of councillors and officers which does not amount to a committee or sub-committee of the council is under no obligation under Part VI of the Local Government Act 1972 to give public access to its meetings, agenda material and minutes, the taking of decisions on policy or practice by such a body is in my view a grave abuse of power.”

2. The second principle is that the person or body in whom the decision-making power has been vested must address its mind to the issue. Thus, in the classic case of *H Lavender & Son Ltd v Minister of Housing and Local Government* [1971] 1 WLR 1231, Willis J quashed a decision to refuse planning permission for mining operations. This was made pursuant to the Minister of Housing and Local Government’s policy to refuse planning permission within reservation areas if the Minister of Agriculture objected. Willis J stated (p. 1241): “I think the Minister has fettered himself in such a way that in this case it was not he who made the decision for which Parliament made him responsible.”
3. The proposition that a public body should discharge the responsibility that Parliament has vested in it and not surrender it to others whom Parliament has not chosen for the task has the ring of high constitutional principle. Indeed, there are various authoritative judicial statements to the effect that administrative expediency does not justify an unlawful delegation of power: see e.g. Lord Roskill (approving Donaldson LJ) in *R v Manchester Stip. ex p. Hill* [1983] AC 328 at 336F.
4. However, the realities of government mean that in practice decision-making is usually delegated to a greater or lesser extent; decision-makers frequently follow technical advice from sources which are not directly accountable; and governmental business is increasingly conducted through strategic partnerships with inter alia the private sector. When working out the practical limits of permissible delegation, the courts are influenced by pragmatic considerations and value judgments to derive solutions that are both workable and acceptable in a democracy operating under modern day conditions.
5. This article will focus on three aspects of delegation considered in the case law: (i) express and implied powers to delegate, (ii) rubber stamping and (iii) refusal of relief. In each of these areas, the decisions of the courts are characterised by a flexibility

that responds to the values underpinning the rule, namely democratic accountability and sound decision-making.

Express and implied powers to delegate

6. In relation to local government decisions, there are express powers of delegation found principally in ss 101–102 of the Local Government Act 1972 and, in relation to executive functions, in ss 9E–9EB of the Local Government Act 2000. Local authority schemes of delegation are published under s. 100G of the 1972 Act. *R (Friends of Hethel Ltd) v South Norfolk District Council* [2010] EWCA Civ 894 [2011] 1 WLR 1216 stands as a cautionary reminder of the need to comply with the detailed requirements of the statutory scheme: in that case, the provisions of paras 39 and 44 of Sch. 12 to the 1972 Act requiring decisions delegated to a planning committee to be taken by a simple majority vote.
7. Central government powers are traditionally vested by Act of Parliament in the responsible Minister, but the *Carltona* [1943] 2 All ER 560 principle recognises that the Minister's powers can be exercised by officials in the Minister's department. There is a presumption that the Minister's powers, whether statutory or prerogative, are permitted to be exercised by such officials without any formal delegation being necessary.
8. Some public bodies fall between these two stools and thus implied statutory power to delegate is key to determining whether a lawful delegation has taken place. The police are a case in point. *DPP v Haw* [2007] EWHC 1931 (Admin) [2008] 1 WLR 379 concerned authorisation for Mr Haw to continue his demonstration in Parliament Square. It was submitted by the advocate to the court that the only permissible delegation of powers vested in "the Commissioner of Police of the Metropolis" was as set out expressly in ss 9A–9F of the Police Act 1996. The Divisional Court (Lord Phillips CJ and Griffith Williams J) rejected this argument, reasoning at para. 34 that the express powers of delegation did not exclude implied powers, since they permitted delegation in circumstances where there would not be an implied power to delegate. Thus, they did not preclude implied powers to delegate. The decision to impose conditions on Mr Haw's authorisation was held to have been delegable under such an implied power.
9. The principal factors relied on at para. 36 of the judgment were the number of demonstrations that had to be authorised and that determining the conditions for each demonstration was a "technical matter". It appears that the court applied the *Carltona* principle by analogy, i.e. a power to delegate was implied based on the practical inevitability of delegation, but subject to the caveat or limitation suggested by the court (para. 29) as follows: "the seniority of the official exercising a power should be of an appropriate level having regard to the nature of the power in question."
10. In *R (Hamill) v Chelmsford Justices* [2014] EWHC 2799 (Admin) [2015] 1 WLR 1798 the *Haw* approach was applied to a review of indefinite notification requirements imposed on a convicted sex offender. The relevant power was vested by statute in the Chief Constable but was in fact delegated to a detective superintendent. The court (Aikens LJ and Bean J) held (para. 64) that there was an implied power to delegate, but this was subject to the *Haw* limitation, and that delegation to an officer of the rank of superintendent or above fulfilled this requirement. The implication is that, having regard to the seriousness of the matter at stake, delegation to an officer of a lower rank might not have been permissible.

11. A review of the case law was conducted by Beatson LJ in *Noon v Matthews* [2014] EWHC 4330 (Admin). This was an appeal by way of case stated which raised the issue of whether the Conservators of the River Cam could lawfully delegate the power to bring bye-law prosecutions. The prosecutions were brought by the River Manager. The principal governing Act was the Cam Conservancy Act 1922. Perhaps unsurprisingly, there was no previous reported case on the 1922 Act. Beatson LJ reviewed the delegation case law (paras 25–35), extracting the following factors which may influence the extent of any implied permitted delegation:

- whether the powers are judicial or disciplinary;
- whether the power is conferred on an office holder because of his personal qualifications and experience;
- whether the power is final and conclusive;
- whether the power is given to the head of a hierarchically structured organisation;
- whether delegation is inevitable.

12. The line that Beatson LJ drew in that case was stated as follows (para. 39):

“In my judgment, a distinction must be made between the determination of policy on [the various functions allotted to “the Conservators” by the 1851 and 1922 Acts and the Byelaws] and the operational execution of such policy. Notwithstanding the difficulties at the margin of locating the boundaries of these categories, I consider that the Conservators are not impliedly authorised to delegate broad policy on such matters. They can, in my judgment, however, delegate the implementation of such policies to officers who will have some discretion as to how, operationally, to execute the policy in question.”

13. The factors relied on by Beatson LJ in support of his conclusion that the power to prosecute could be delegated to the River Manager, are reminiscent of the factors that were decisive in *Haw* (para. 43):

“I have taken account of the fact that the decision to institute a prosecution is not determinative of the rights and entitlements of those affected. The court has control in the sense of deciding whether to issue the summons and then in hearing the case. I have also taken account of the fact that to require the Conservators to act as a body in the case of each individual against whom a prosecution is being considered would not be practical since they conduct their business at quarterly meetings.”

14. A similar conclusion had been reached by Sedley LJ in relation to police decisions to apply for an ASBO, in *R (West Midlands Police) v Birmingham Justices* [2002] EWHC 1087 (Admin). However, the language he used at para. 16 was suggestive of a less prescriptive approach: “it is for the Chief Constable to decide who is best suited to do it on his behalf; and it is not for the court to second-guess him unless his choice is irrational or otherwise beyond his powers.”

15. The *Haw* approach, which appears to have strongly influenced *Noon*, could be criticised as an exercise of make believe, in that it encourages the court to derive the legal limits of permitted delegation from statutory language silent on the point. But, on the other hand, if a statute omits any express provision for delegation which is inevitable, it can fairly be said that Parliament has left it up to the courts to work out sensible limits for any delegation.

16. Of course, this is not a new development in principle. The idea of a decision-maker appropriate to the nature of the function is a thread running through the case law. Thus, for example, in the *Manchester Stip* case referred to above, Lord Roskill (pp. 342–343) contrasted the “ministerial” act of receipt of an information, which could be delegated to staff in the office, with the “judicial” act of issuing a summons, which had to be done by a justice of the peace or a clerk. What *Haw* introduces is the possibility of a more hands-on approach by the courts, with finer distinctions being drawn, dependent on the gravity of the matter at stake.

Rubber stamping

17. The case of *Lavender* referred to above is a clear illustration of the principle that the decision-maker must address his own mind to any decision which is for him to make. But, in practice, elements of the decision-making process are frequently de facto delegated to others. This does not amount to a delegation of the power, provided that the decision-maker retains the final say and exercises sufficient independent judgment in the matter. What amounts to sufficient independent judgment? In some contexts, the answer seems to be: not a lot. The courts appear to be particularly pragmatic where the decision in question involves technical expertise.
18. This issue was explored in *R v GLC ex p. Blackburn* [1976] 1 WLR 550. That case, like *Wednesbury*, concerned local authority licensing for cinemas under the Cinematograph Acts. The GLC licensed cinemas to show films passed by the British Board of Film Censors. The GLC had never banned a film that had been passed by the Board. However, the GLC’s rules allowed it to do so. The Court of Appeal held that, by retaining the power to veto the Board’s decisions, the GLC had avoided any impermissible delegation of its licensing function.
19. A striking more recent example is *The Audit Commission v Ealing London Borough Council* [2005] EWCA Civ 556. Under s. 99 of the Local Government Act 2003, the Audit Commission produced reports rating local authorities on their performance. It operated a rule which automatically downgraded its rating to “weak” if the local authority received a “zero star” rating from the Commission for Social Care Inspection (CSCI) in respect of its social services functions. Ealing had successfully challenged its “weak” rating before Walker J on the basis that this represented mere adoption of the findings of the CSCI. The Court of Appeal (Lord Phillips CJ, Latham and Keene LJ) allowed the Audit Commission’s appeal. They noted that Ealing did not challenge the Audit Commission’s use of the CSCI’s scores and endorsed this concession, given the CSCI’s expertise. That being so, the Court of Appeal reasoned that there was no impermissible delegation involved in the Audit Commission adopting the CSCI’s system of weighting scores, leading to the star rating, or applying its own rule as to how this translated into the final rating. The court was prepared to hold (para. 26) that the Audit Commission “must be taken to have been content with those weightings and to have adopted them”. At para. 27 *Lavender* was distinguished on the basis that the CSCI’s system of weighting was transparent and objective. Thus, the Audit Commission retained sufficient oversight over the rating process.
20. There are a number of reported cases of local authorities getting into difficulties over “in-house” delegations, in particular where there is a lack of clarity as to who is the ultimate decision-maker. *R (Selter Associates Ltd) v Leicestershire County Council* [2005]

EWHC 2615 (Admin) concerned a temporary order under the Road Traffic Regulation Act 1984. The ground on which Walker J quashed the order was that, even on the assumption that the power to approve the order had been delegated by the Chief Executive, there was no evidence that the legal officers to whom the function had been delegated had addressed their minds to the merits of making the order, as opposed to dealing with the legalities of the drafting.

21. In *R (007 Stratford Taxis Ltd) v Stratford upon Avon District Council* [2011] EWCA Civ 160 [2012] RTR 5 the Executive Cabinet of the taxi licensing authority had decided that all new taxis licensed were to be wheelchair accessible. The detailed deliberation had been conducted by a committee, which then recommended the adoption of the policy to Cabinet. However, insufficient information had been put before the Cabinet on which it could exercise its own judgment. The Court of Appeal held that its decision was therefore flawed. The court summarised the relevant principles as follows (para. 11):

“Decision making bodies in the position of the cabinet here are not required to give personal detailed attention to every strand of fact and argument capable of bearing on the decision they are making. But they are required to have drawn to their attention the main lines of relevant debate ...”

Refusal of relief

22. It is axiomatic that relief in judicial review is discretionary. The usual principles apply here. However, a particular tactic for public bodies facing a challenge on the ground of impermissible delegation is to ratify the decision under attack. Such “ratification” may in fact consist in a re-taking of the decision by a person or body with proper authority. Further, challenges based on impermissible delegation may be particularly susceptible to the refusal of relief on the basis that it is highly likely, or inevitable, that a decision properly made would have been the same.
23. In the Sunday trading case *Stoke on Trent City Council v B&Q Retail Ltd* [1984] Ch 1, the council commenced proceedings to enforce provisions of the Shops Act 1950 without having properly considered whether it was expedient to do so, under s. 222 of the Local Government Act 1972. However, it subsequently considered its discretion and this was held by the Court of Appeal to have provided authority for the continuance of the proceedings. However, there are limits to this kind of rearguard action. In *Webb v Ipswich Borough Council* (1989) 21 HLR 325, the Court of Appeal upheld the quashing of a control order in respect of a House in Multiple Occupation (HMO) that had been approved by an officer without delegated authority. It was held that the ratification of the order by the appropriate committee could not save it, since this came after the order, which had “immediate effect”.
24. The context in *Webb* was important as well as the timing. The officer who signed the control order, Mr Hutchinson, had no relevant experience (p. 329). The effect of the control order was draconian: the council obtained full possession and control of Mr Webb’s house. Croom-Johnson LJ stated (p. 333):

“Neither the Council nor the Sub-Committee had seen fit to delegate the power to make control orders to any officer, and in view of the wide effect of such orders such care can be well understood. In my view, the judge’s approach to the problem of ratification was

sound and correct when the contentions of the Ipswich Council are measured against what he called 'the immediate and cataclysmic effect' of the order."

25. By contrast, in *R v Monopolies and Mergers Commission ex p. Argyll Group plc* [1986] 1 WLR 763, the Court of Appeal refused to quash the laying aside of a reference of Guinness's bid to the MMC, although this had been based on a recommendation by the Chairman made without the authority of the MMC. The principal grounds on which relief was refused were that there was "little doubt" that the MMC would have reached the same decision and the interests of good administration in upholding (very) speedy certainty, particularly in the fast moving area of finance where "the financial public" were entitled to rely on the finality of the decision: see per Sir John Donaldson MR at pp. 774–775.
26. More recent case law supports the proposition that a complaint of impermissible delegation is unlikely to lead to effective relief unless it can be shown that this had a substantive effect on the decision-making process. *Selter and 007 Stratford Taxis* above are examples where the lack of any proper decision meant that it was difficult for the defendant authority to argue that the "rubber stamping" had no substantive effect (although in the taxis case, relief was refused on the ground of undue delay).
27. On the other side of the line is *R (Raphael) v Highbury Corner Magistrates' Court* [2011] EWCA Civ 462 [2012] PTSR 427. That case concerned a decision by Islington London Borough Council to reduce the permitted hours under a nightclub premises licence. There were in fact two delegation challenges: the first was to the effect that Islington's licensing committee had jumped the gun by delegating functions under the Licensing Act 2003 to sub-committees before the relevant provisions of the Act were in force. The second was that the power to decide that a representation was not frivolous or vexatious and was a "relevant representation", and thus to refer it to the sub-committee, had been exercised by an officer without delegated authority. The first ground failed on the basis of subsequent ratification (in the wide sense explained above). Relief was refused in robust terms in relation to the second ground by Etherton LJ (paras 54–57) on the basis that there was no evidence that this flaw in the process made any difference to the outcome. Thus, it was described (para. 57) as an "arid technicality" going to form, not substance. As suggested above, where the particular challenge does not bring into play underlying principles of democratic accountability and sound decision-making, the courts are understandably less receptive to granting effective relief.