

## Outline answers

### Chapter 2

#### Problem answer

##### Parties and causes of action

In any prospective legal proceedings the Leader of the Opposition would be the claimant, claiming a mandatory injunction to compel the incumbent Prime Minister and the other members of the government to resign. The application would be defended by the Attorney General on behalf of the government.

##### Cause of action: application for a mandatory injunction

The relevant constitutional conventions must first be explained.

##### *Reference re Amendment to the Constitution of Canada (1982):*

- Are there precedents?
- Do the actors consider themselves bound?
- Is there a good reason for the rule?

Define relevant conventions:

- government must have the confidence of the House of Commons;
- if the government loses the confidence of the House of Commons the Prime Minister should offer the Queen his resignation and ask for dissolution of Parliament and a General Election;
- the Queen is bound to accept the government's resignation; and
- in the event of a General Election the Queen must ask the leader of the party with a majority in the House of Commons to form a government.

Apply *Attorney General v Jonathan Cape Ltd (1975)* grounds: it is against the public interest for the government to remain in office without the confidence of the House of Commons; that there is no other facet of the public interest in conflict with and more compelling than that relied upon; and that the Prime

Minister's course of action is unconstitutional.

### **Relevant counter arguments**

The court has no jurisdiction to grant the injunction because constitutional conventions are not enforceable in the courts—*Madzimbamuto v Larder Burke (1969)*.

That because he has really 'won' the election by polling more votes than the Opposition his continuance in office will not prejudice the constitutional convention that the government must have the confidence of the House of Commons; and that his continuance in office is not contrary to the public interest.

This is based on *Attorney General v Jonathan Cape Ltd (1975)*.

Conclusion—the court would probably decline jurisdiction.

### **The constitutional position of the Queen**

You should break this stage down into two parts.

#### **Part one: the Queen's legal powers**

The Queen is the only person authorized to:

- dissolve (prorogue) and call Parliaments;
- appoint ministers; and
- appoint a prime minister and ask him or her to form a government.

The source of these powers is common law under the Royal Prerogative.

#### **Part two: constitutional conventions**

Whether the Queen is obliged to accept the Prime Minister's resignation; and whom she may ask to form the next government.

The relevant conventions are:

- the Queen acts on the advice of ministers; and
- Her Majesty's Government must have the confidence of the House of Commons.

You should explain the consequences:

- she may wait to see if the Prime Minister can form a coalition government;
- if not she is obliged to accept the Prime Minister's resignation; and
- ask the leader of the party with a majority in the House of Commons to form a government.

## Chapter 5

### Problem answer

This type of problem question asks you to write an opinion on selected issues, from a lawyer's point of view, to a specified audience, in this case the Queen's Private Secretary. In the introductory section you need to identify all the issues upon which you are required to advise the Queen's Private Secretary. You can also use this section to define basic concepts. This question asks you to advise the Queen's Private Secretary on the role of the monarchy in the conduct and exercise of personal prerogatives. It also requires you to look at the interrelationship between the Royal Prerogative and constitutional conventions which are relevant to the role and duties of the monarch, including government formation, the appointment of the Prime Minister and the summoning and dissolution of Parliament.

Starting with the role and duties of the monarch you should begin this section by defining the Royal Prerogative quoting Blackstone and Dicey.

After this you should go on to give relevant examples of the personal prerogatives of the monarch acting as head of state. Of particular relevance is government formation and the appointment of the Prime Minister.

In the next part of your answer you have to concentrate on the relevant constitutional conventions. You should define constitutional conventions so that your advice clearly states what constitutional conventions are. You should use Dicey's definition of constitutional conventions and then refer to all the relevant constitutional conventions which inform the monarch as to how to exercise their powers in relation to the appointment of

the Prime Minister.

In the concluding part of your answer you should concentrate on presenting the outcomes of your analysis and application of the rules. You may agree with Rodney Brazier in *Constitutional Practice*, 3rd edn (1999) where he says that the monarch's legal power to appoint a Prime Minister must be used to enhance the democratic process rather than to pre-empt it.

## Chapter 6

### Problem answer

#### Introduction

In this part of your answer it is important to emphasize that the Home Secretary's position is governed by constitutional conventions which cannot be enforced in the courts. Distinguish between law and convention (Dicey).

#### Collective Cabinet responsibility

You should begin by defining collective Cabinet responsibility in the way that Lord Widgery CJ did in *Attorney General v Jonathan Cape (1975)*.

You should stress that the obligation is a political rather than a legal one.

#### The political and legal accountability of the Home Secretary

According to the *Crichel Down Principle* based on the *Crichel Down Affair (1954)* accountability arises when a civil servant:

- has carried out the minister's explicit order;
- acts in accordance with policy laid down by the minister; or
- makes a mistake or causes a delay.

As to whether the Home Secretary is politically bound to resign, you should consider:

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- the Scott Report findings;
- the Report of the Public Service Committee.

### **The legal accountability of the Home Secretary**

The relevant principle is that ministers have legal responsibility for whatever happens in their departments. It is the minister who is sued, not the civil servant. The courts accept and recognize the convention that a civil servant often acts in the name of ministers. The relevant case law is:

- *Carltona v Commissioners of Works (1943)*;
- *R v Skinner (1968)*;
- *R v Secretary of State for the Home Department, ex p Oladehinde (1991)*;
- *M v Home Office (1993)*.

## **Chapter 8**

### **Problem answer**

#### **Introduction**

In this part of your answer you should identify: the parties, the causes of action, and the issues.

#### **The jurisdictional issue**

The relevant case law is:

- *Stockdale v Hansard (1839)*;
- *Edinburgh & Dalkeith Railway v Wauchope (1842)*;
- *Lee v Bude & Torrington Junction Railway (1871)*;
- *Pickin v British Rail Board (1974)*.

#### **The effect of sections 2 and 3 of the 2005 Act**

In this part of your answer you should: define express and implied repeal; define ‘entrenchment’; apply the rule that Parliament cannot bind its successors.

Elizabeth could rely on:

- *Vauxhall Estates Ltd v Liverpool Corporation* (1932);
- *Ellen Street Estates v Minister of Health* (1934).

The doctor could rely on:

- *R v Military Governor of NDU Internment Camp* (1924);
- *AG of New South Wales v Trethowan* (1932);
- *Harris v Minister of the Interior* (1952).

Conclusion: entrenchment clauses are not effective against express or implied repeal.

### **Prospective formula**

Here, you should define prospective formula and explain its effect on express and implied repeal. If the 2006 Act expressly repeals the 2005 Act, the 2006 Act prevails.

## **Chapter 9**

### **Problem answer**

#### **Introduction**

In this part of your answer you should identify: the parties, the causes of action, the issues.

#### **The jurisdictional issue**

All a court can do is interpret and apply an Act of Parliament once it has received the separate but simultaneous assents of the House of Commons and House of Lords plus the Royal Assent. The relevant case law is:

- *Stockdale v Hansard* (1839);

- *Edinburgh & Dalkeith Railway v Wauchope* (1842);
- *Lee v Bude & Torrington Junction Railway* (1871);
- *Pickin v British Rail Board* (1974).

You should consider whether this applies where EU law is concerned.

### Express and implied repeal

The underlying question is whether **s 2 European Communities Act 1972** is protected from amendment or repeal. In this part of your answer you should define express and implied repeal. The relevant case law is:

- *Vauxhall Estates Ltd v Liverpool Corporation* (1932);
- *Ellen Street Estates v Minister of Health* (1934).

Once you have explained these rules, you must consider whether a clause in an Act of Parliament can effectively protect a statute from amendment or repeal.

### Prospective formula

You should begin this section of your answer by looking at **s 2(4) European Communities Act 1972**. Then you should consider:

- **s 2 European Communities Act 1972**;
- *R v Secretary of State for Transport, ex p Factortame* (1989);
- *Stoke-on-Trent City Council v B & Q plc* (1991);
- *Equal Opportunities Commission v Secretary of State for Employment* (1994).

Finally you should discuss *Thoburn v Sunderland City Council* and decide whether the court would, in this case, disapply the provisions of the **2009 Act**. You should also indicate that, following *Factortame No 1*, **s 2 European Communities Act 1972** is not subject to the doctrine of implied repeal.

## Chapter 10

### Problem answer

#### Introduction—parties and causes of action

Claimants = Antonio and the Society of Ice Cream Manufacturers

Defendant = The Food Standards Authority

Cause of Action = for judicial review. He will ask a judge to review the lawfulness of the decision of the Food Standards Authority.

#### Is the Food Standards Authority amenable to judicial review?

First consider *Datafin* criteria, bearing in mind that all the criteria have to be considered (*R v Panel on Take-overs and Mergers, ex p Datafin* (1987)).

Consider whether: the functions of the Food Standards Authority are governmental; it is an integral part of a government-supported scheme of regulation; and, would the government introduce legislation through Parliament to set up a regulatory body if the Food Standards Authority did not exist. Key case:

• *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* (1993).

#### Is the decision of the Food Standards Authority a public law matter?

Consider whether the context of the decision is the exercise of a public function and whether the claimant would be accused of abuse of process if he brought a claim using private law procedure. Key cases:

• *O'Reilly v Mackman* (1982);

• *Clark v University of Lincolnshire and Humberside* (2000).

#### Does the Society of Ice Cream Manufacturers have the right to bring a claim for judicial review?

You should consider whether, in your opinion, the organization has sufficient interest taking into account all the relevant criteria set out in the cases above. Key cases:



- *IRC v National Federation of the Self-Employed and Small Businesses (1981)*;
- *R v Inspectorate of Pollution, ex p Greenpeace (1994)*;
- *R v Secretary for State for Foreign Affairs, ex p World Development Movement (1995)*.

## **Remedies and procedure**

You should choose a remedy or combination of remedies and explain its effect. Then you should outline the initial procedural steps.

## **Chapter 11**

### **Problem answer**

#### **Parties and causes of action**

Claimant = Justin

Defendants = The Commission and the Secretary of State

Cause of Action = Judicial Review. The defendants are public authorities and the decisions being challenged are public law matters (*O'Reilly v Mackman (1983)*).

#### **Basic procedural steps**

Pre-action Protocol:

- alternative dispute resolution;
- letter before claim;
- letter in response.

Commencement of proceedings under **Pt 54, s 1 Civil Procedure Rules**:

- application for permission;
- to Administrative Court;

- within three months of the decision;
- using appropriate claim form; and
- supporting documents.

### **Grounds for judicial review**

Has the defendant acted ultra vires? Define ultra vires. Relevant case law includes:

- *AG v Fulham Corporation (1921)*;
- *Bromley LBC v GLC (1983)*.

In this question, the following grounds, with reference to relevant cases, are to be considered:

### **Improper purpose**

The relevant case law to which you should refer includes:

- *Congreve v Home Office (1976)*;
- *R v Lewisham LBC, ex p Shell (1988)*;
- *Wheeler v Leicester City Council (1985)*.

### **Relevant considerations**

- *R v Secretary of State for the Home Department, ex p Venables and Thompson (1998)*.

### **Lack of evidence**

- *Coleen Properties v Minister of Housing and Local Government (1971)*.

### **Fettering discretion by policy**

- *British Oxygen Co Ltd v Minister of Technology (1971)*.

### **Remedies**

Choose the remedy you think is most appropriate. In this case it would be a quashing order to nullify the decision.

## Chapter 12

### Parties and causes of action

You should begin your answer by identifying the prospective claimant and the defendant.

Cause of Action = Judicial Review. The defendants are public authorities and the decisions being challenged are public law matters (*O'Reilly v Mackman (1983)*).

### Basic procedural steps

Pre-action Protocol:

- alternative dispute resolution;
- letter before claim;
- letter in response.

Commencement of proceedings under **Pt 54, s 1 Civil Procedure Rules:**

- application for permission;
- to Administrative Court;
- within three months of the decision;
- using appropriate claim form; and
- supporting documents.

### Grounds for judicial review

You should be aware that the grounds of illegality and irrationality run together and that there is usually a mixture of such issues in examination questions.

The starting point for considering the notion of unreasonableness is:

- *Roberts v Hopwood (1925)*;
- *Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948)*;

- *Backhouse v Lambeth LBC* (1972);
- *R v Ministry of Defence ex parte Smith* (1996).

Then consider:

proportionality:

- *Council of Civil Service Unions v Minister for the Civil Service* (1985);
- *R v Secretary of State for the Home Department ex parte Brind* (1991);
- *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* (2003).

## Chapter 13

### Parties and causes of action

Claimant = Andrew

Defendants = Estate Agents Licensing Bureau

Cause of Action = Judicial Review. The defendants are public authorities and the decisions being challenged are public law matters (*O'Reilly v Mackman* (1983)).

### Basic procedural steps

Pre-action Protocol:

- alternative dispute resolution;
- letter before claim;
- letter in response.

Commencement of proceedings under **Pt 54, s 1 Civil Procedure Rules:**

- application for permission;

- to Administrative Court;
- within three months of the decision;
- using appropriate claim form; and
- supporting documents.

In the breakdown of a judicial review problem the first step is to determine:

- whether the dispute concerns ‘public law’;
- who can bring a challenge; and
- who can be challenged.

The second step is to set out the basic procedure.

The third step is to consider whether and, if so to what extent, the rules of natural justice apply.

The fourth step is to determine whether the rules of natural justice have been breached. This can be broken down into a number of stages. The first stage involves consideration of whether the trial has been fair. Consider, in particular:

- notice;
- opportunity to present a case;
- evidence;
- the right to cross-examine;
- legal representation.

The next stage concerns whether there is a real likelihood of bias.

You should back up all your points with relevant case law.

## Chapter 15

### Problem Question

The central issues in this question concern the stop and search and arrest powers the police have under the **Police and Criminal Evidence Act 1984** (the Act). To answer this question successfully you will need to have read and understood **ss 1 to 5** of the Act as well as Code of Practice A and **s 24** of the Act. As you read the facts of the problem question focus your mind on questions like: Where can a person be stopped and searched by the police? What can be searched? What can the police look for when they stop and search? What is reasonable suspicion and what information must be given by the police when they stop and search? Then go to **s 24** of the Act and consider the nature and scope of the powers of arrest available to a police constable; notification of arrest and cautions.