

**When does the "no substantial difference test" make a difference in JR applications?
Does the outcome differ, depending on whether the case is based on EU or UK law?**

**James Maurici Q.C.
Landmark Chambers**



The “not substantially different”/ NSD test

- What is it?
- Introduced by Criminal Justice and Courts Act 2015 (“CJCA”) and requires that the Court refuse to grant the relief sought in a JR “***if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred***”
- The CJCA also allows for, and in some cases, requires permission to apply for JR to be refused if this test is made out.

Introduction

Will cover:

- (1) The position prior to the introduction of the new test
- (2) The Government's justification for the new test
- (3) The new test
- (4) The way in which the test has been applied by the courts



(1) The position prior to the introduction of the new test

- In JR, and most statutory review (e.g. s. 288 TCPA 1990), the Court has discretion to refuse to grant relief even where an error of law is made out
- A first principle of JR “*remedies are discretionary*”.
- Rationale:
 - Many public law challenges are not to the outcome of a decision-making process but the way in which that decision was made
 - Public law litigation requires court to balance a range of often competing public interests
 - Constitutional protection of the rule of law; not adjudication of competing private interests; remedy not (generally) as of right

(1) The position prior to the introduction of the new test

- Key case: ***Simplex GE (Holdings) v Secretary of State for the Environment*** (1989) 57 P. & C.R. 306
 - Generally cited as imposing a test that the Court exercise its discretion where the decision-maker “*would necessarily, or inevitably, have reached the same decision if he had not committed the legal error which has been acknowledged*”
 - High threshold for public authority seeking to persuade a court not to grant relief
- 

(1) The position prior to the introduction of the new test

- Generally said that the Court's discretion to refuse to quash an ultra vires act "exceptional or "very narrow": see ***South Gloucestershire Council v SSCLG*** [2016] JPL 798 and ***Bolton MBC v SSE*** (1991) 61 P&CR 343;
- But many public law challenges not to substantive outcome, but to process – and entail the possibility that success on the JR may not alter any re-determined decision;
- Process important though: see classic statements in ***John v Rees*** and ***ex p Cotton***;
- Court could take into account a wide range of factors, "including the needs of good administration, delay, the effect on third parties, the utility of granting the relevant remedy";
- Plenty of pre-CJCA examples of the Court not quashing ... was it really that rare or exceptional?

(1) The position prior to the introduction of the new test: the relevance of an EU law right/obligation?

- *In Berkeley v Secretary of State for the Environment and another* [2001] 2 AC 603, appeared that House of Lords held that existence of a breach of an EU law obligation either narrowed or extinguished Court's discretion;
- *Per Lord Hoffmann: "Although section 288(5)(b), in providing that the court "may" quash an ultra vires planning decision, clearly confers a discretion upon the court, I doubt whether, consistently with its obligations under European law, the court may exercise that discretion to uphold a planning permission which has been granted contrary to the provisions of the Directive."*
- This orthodoxy prevailed for many years but ...

(1) The position prior to the introduction of the new test: the relevance of an EU law right/obligation?

- Supreme Court in ***Walton v Scottish Ministers*** [2013] P.T.S.R. 51, *per* Lord Carnwath:
 - Speeches in ***Berkeley*** must be read in context
 - Question of discretion always context-specific: depends on facts, statute; see House of Lords subsequent decision in ***R (Edwards) v Environment Agency***
 - EU law did not require Court's discretion to be narrowed, extinguished, or materially altered;
- See also *per* Lord Hope “*The fact that an individual may bring an objection on environmental grounds derived from European directives does not mean that the court is deprived of the discretion which it would have at common law, having considered the merits and assessed where the balance is to be struck, to refuse to give effect to the objection.*”

(1) The position prior to the introduction of the new test: the relevance of an EU law right/obligation?

- Per Lord Carnwath in subsequent case of ***R (Champion) v North Norfolk DC*** [2015] 1 W.L.R. 3710: “*the court retains a discretion to refuse relief if the applicant has been able in practice to enjoy the rights conferred by European legislation, and there has been no substantial prejudice*”.
- Query: which is more faithful to the EU law position – ***Berkeley*** or Lord Carnwath’s position per ***Walton*** and ***Champion***?
 - See ***Inter-Environnement Wallonie ASBL v Région Wallonie*** (Case C-41/11): very restrictive conditions on exercise of discretion not to ‘quash’ defective measure; distinguished by Lord Carnwath?
 - See also Case C-411/17 ***Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen*** to similar effect.

(2) The Government's justification for the NSD test

- In September 2013, the then-Justice Secretary, Chris Grayling MP, wrote an article which was published in the Daily Mail entitled *'The judicial review system is not a promotional tool for countless Left-wing campaigners'*



(2) The Government's justification for the NSD test

“Campaign groups have taken it for granted that courts will expect the public body involved to pick up most of the costs. But I believe that it is time we put a stop to this.”

Of course, the judicial review system is an important way to right wrongs, but it is not a promotional tool for countless Left-wing campaigners. So that is why we are publishing our proposals for change.

We will protect the parts of judicial review that are essential to justice, but stop the abuse. Britain cannot afford to allow a culture of Left-wing-dominated, single-issue activism to hold back our country from investing in infrastructure and new sources of energy and from bringing down the cost of our welfare state.”

(2) The Government's justification for the NSD test

- Ministry of Justice document *Judicial Review: Proposals for further reform (September 2013)* set out proposals
- Re proposed NSD test: *“The Government considers that judicial review can too often be used to delay perfectly reasonable decisions or actions. Often this will be part of a campaign or other public relations activity and the judicial review will be founded on a procedural defect rather than a substantive illegality. The Government is considering strengthening the law and practice to enable the Courts to deal more swiftly with applications where the alleged flaw complained of would have made ‘no difference’.”*
- NB the proposal, consulted on, would have limited the NSD test to where a procedural defect, not a substantive one.
- The legislation went further ...

(3) The NSD test

- Section 84 of the CJCA
- Introduced new provisions into s.31 of the Senior Courts Act, which deals with JR procedure in the High Court
- And parallel provisions into ss.15 and 16 of the Tribunals, Courts and Enforcement Act 2007 re the Upper Tribunal's JR jurisdiction



(3) The NSD test

- Two points at which NSD test may be applied:
- (i) at permission stage – s.31(3C)-(3F)

“(3C) When considering whether to grant leave to make an application for judicial review, the High Court—

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave.

(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied.”

(3) The NSD test

- (ii) at substantive consideration – s.31(2A)

“(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review, and

(b) may not make an award under subsection (4) on such an application, if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirements in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.”

(3) The NSD test

- At substantive stage – issue goes to Court’s jurisdiction.
- No discretion – must refuse relief whether or not asked to.
- No need for D to plead reliance on provision.
- See ***R (Hawke) v Secretary of state for Justice*** [2015] EWHC 4093 (Admin), where supplementary judgment had to be given after s.31(2A) brought to judge’s attention
- S.31(8): ***“In this section “the conduct complained of”, in relation to an application for judicial review, means the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief”.***
- Courts held that this must be limited under s. 31(2A) to grounds made out, not grounds that have failed. The wider language may be more relevant at permission stage: see below and see ***R (DAT) v West Berkshire Council*** [2016] EWHC 1876 (Admin).

(4) Application of the NSD test

- (i) The scope of the NSD test;
- (ii) The general approach to the NSD test;
- (iii) The Court's approach to the counterfactual question in particular;
- (iv) Examples of application of the NSD test/themes
- (v) EU law
- (vi) Exceptional circumstances test.

(4) Application of the NSD test

- As at the time of writing, there are, according to Westlaw, 100 cases citing the test under either s.31(2A)(b) or 31(3D):
 - 92 High Court cases; 1 Upper Tribunal; 6 Court of Appeal; and 1 Supreme Court;
 - 36 environmental cases, the single largest category;
 - 15 cases involving a claim against the Secretary of State for the Home Department;
 - 33 cases in which at least one party was a local authority/the Mayor of London.
- On a search of the term "*substantially different if the conduct complained of had not occurred*"

(4) Application of the NSD test: scope

- (i) JR only not statutory review: but **Save Our Greenhills Community Group v SSCLG** [2016] EWHC 1929 (Admin) “*I leave open for consideration in another case whether the principles set out in section 31(2A), (3C) and (3D) should be read across into a challenge under section 288 of the 1990 Act or other similar statutory challenges.*”
- (ii) Alters **Simplex** position in 3 ways (see **R (Wet Finishing Works Ltd) v Taunton Deane BC** [2017] EHC 1837 (Admin)):
 - (1) test modified: need not be satisfied outcome would have been the same only that it is highly likely;
 - (2) outcome need not be the same, only not substantially different;
 - (3) no discretion – if conditions met – must refuse relief.

(4) Application of the NSD test: scope

- (iii) “Although section 31(2A) has lowered the threshold for refusal of relief where there has been unlawful conduct by a public authority below the previous strict test set out in authorities such as **Simplex** ..., the threshold remains a high one: that it is highly likely that the outcome would not have been substantially different. This involves an evaluation of the counter-factual world in which the identified unlawful conduct by the public authority is assumed not to have occurred.” **R (Public and Commercial Services Union) v Minister for the Cabinet Office** [2017] EWHC 1787 (Admin) at [89]
- (iv) The NSD test under s.31(2A) applies to all forms of relief that may be granted on an application for JR, including declarations, but not declaratory judgments: see e.g. **Hawke** (above)

(4) Application of the NSD test: general approach

- A number of points emerge from case-law:
- (i) Court must be satisfied on the balance of probabilities that it is highly likely the NSD test is met;
- (ii) He who asserts must prove: i.e. the defendant;
- (iii) Assessment should be based on material in existence at the time of the decision; not post-decision speculation;
- (iv) Normally expect evidence from defendant; not absolutely essential, but will be the norm.

But what kind of evidence?



(4) Application of the NSD test: general approach

- “...not evidence of past facts by a witness with knowledge of those facts, but an exercise in speculation about how things might have worked out if no unlawfulness had occurred. It is true that Mr Jinks's speculation is informed by a background understanding of the parameters within which the Minister was working and thus is entitled to some weight. However, self-interested speculations of this kind by an official of the public authority which has been found to have acted unlawfully should be approached with a degree of scepticism by a court. That is especially so where the public authority has not provided a full evidential picture of all matters which bear upon such parameters.”*
- R (Public and Commercial Services Union) v Minister for the Cabinet Office*** [2017] EWHC 1787 (Admin),

(4) Application of the NSD test: court's approach to the counterfactual question

- Key case is ***R (Goring-on-Thames PC) v South Oxfordshire DC*** [2018] EWCA Civ 860 [2018] 1 W.L.R. 5161
- NB Court rejected argument that NSD test is limited to *“conduct of a merely procedural or technical kind, and not also to conduct that goes to the substantive decision-making itself”*
- Sound familiar? Very similar to MOJ's description of its intention in MOJ report

(4) Application of the NSD test: court's approach to the counterfactual question

- Per Cranston J at first instance:

“In my view it is highly likely that the outcome would not have been substantially different if the Council had applied the correct test. If there was any harm to heritage assets the response of both conservation officers, from the Council and West Berkshire Council, was that it was, at most, minor harm. That approach then became part of the officer's report. More importantly, the factors weighing in favour of the grant of planning permission were weighty, the opportunity of generating renewable energy from an existing water source. In my view there is simply no prospect that this issue would make any difference to the overall planning balance if the decision had been taken in accordance with section 72.”

(4) Application of the NSD test: court's approach to the counterfactual question

- Appellant argued that judge had strayed into the planning merits; submitted that “*to describe the factors weighing in favour of planning permission, including the benefit of generating renewable energy, as “weighty”, which the judge did at [69], was to attribute weight of his own choosing to those considerations*”.
- Court of Appeal rejected this argument

(4) Application of the NSD test: court's approach to the counterfactual question

- “The mistake in [counsel for the appellant’s] submissions here is that, in the context of a challenge to a planning decision, they fail to recognize the nature of the court's duty under section 31(2A) . It is axiomatic that, when performing that duty, or, equally, when exercising its discretion as to relief, the court must not cast itself in the role of the planning decision-maker (see the judgment of Lindblom L.J. in Williams , at paragraph 72). If, however, the court is to consider whether a particular outcome was "highly likely" not to have been substantially different if the conduct complained of had not occurred, it must necessarily undertake its own objective assessment of the decision-making process, and what its result would have been if the decision-maker had not erred in law.”*

(4) Application of the NSD test: court's approach to the counterfactual question

- Number of cases deprecate straying into merits; including **Williams**
- *“As is well known and well established on the authorities, matters of planning judgement are essentially ones for the democratically elected planning authority. It is not for this Court generally speaking to anticipate what the outcome would be if a planning authority directs itself correctly according to law.”: R (Midcounties Co-operative Limited) v Forest of Dean District Council and another [2017] EWHC 2056 (Admin)*
- Tension?

(4) Application of the NSD test

Categories of case where courts reluctant to find NSD test satisfied

- **Detention:** Where the Court is assessing the lawfulness of detention, it has been said that there is “*no room for the application of section 31(2A)*”: ***R (Sheikh) v SSHD*** [2019] EWHC 147 (Admin)
- **Consultation:** “*[i]t would be wrong in principle for the court in a case where the hypothetical decision would have been made on the basis of materially different information and advice from the actual decision to make a judgment expressed as a high likelihood about what the Lord Chancellor would have decided.*”: ***R (Law Society) v The Lord Chancellor*** [2018] EWHC 2094 (Admin)
- **ECHR?** ***R (Balajigari and others) v Secretary of State for the Home Department*** [2019] EWCA Civ 673

(4) Application of the NSD test

Factors identified as relevant to whether NSD test satisfied:

- (1) The strictness with which a policy that has been misapplied was expressed and the importance of the public interest protected: see ***R (Lensbury Limited) v Richmond-Upon-Thames LBC*** [2016] EWCA Civ 814, where the policy in question provided that “*The strongest protection should be given to London's Metropolitan Open Land and inappropriate development refused, except in very special circumstances, giving the same level of protection as in the Green Belt.*”
- (2) The presence of a statutory duty: ***R (Butler) v East Dorset District Council*** [2016] EWHC 1527 (Admin) had to consider a failure to consider whether the proposal was in accordance with the Development Plan as required by s. 38(6) of the Planning and Compulsory Purchase Act 2004. This a key cornerstone of the planning system.
- (3) Departing from advice:

(4) Application of the NSD test

EU law and the NSD test?

- Not case law
- See *Langton* [2018] EWHC 2190.
- Note:
 - Non-discretionary effect of the s.31(2A) test
 - Pre-emptive nature of the NSD test if applied at the permission test
 - Lower threshold for refusing relief; all seem like matters would be relevant for EU law purposes, and in the context of the principle of effectiveness in particular.

(4) Application of the NSD test: exceptional circumstances

- What constitutes ‘exceptional circumstances’?
- Not simply the breach of a statutory duty, e.g. under s.149 of the Equality Act 2010: “*There is nothing in fact in section 149 to elevate the public sector equality duty to some specially prestigious position above many other no less important statutory duties upon public authorities. It does not seem to me that there is about the present case some “exceptional public interest”, although there is obviously significant public interest.*”: see **Hawke**.

(4) Application of the NSD test: exceptional circumstances

- “...Although it seems to me highly likely that the outcome would not have been substantially different if the errors complained of had not occurred, this is a case where in my judgment section 31(3E) is in play. As I stated earlier in this judgment, there is a great public interest in the state detaining people indefinitely for the purposes of effecting removal from the jurisdiction only where the conditions for doing so are clearly made out. That was not the case here. It is wrong for casual and careless risk assessments to form the basis for detention. It is wrong for simple steps (such as transmission of documents) to take four weeks because of technology failures. A few days' delay may be justified by a broken fax. Four weeks are not. It is wrong for pre-action responses and indeed Summary Grounds of Resistance to be drafted on the basis of seriously misleading facts because due care has not been taken to instruct the Government Legal Department what the facts are, or to read OASys records with sufficient care. Where, as here, there have been errors of law in administrative detention, there is an exceptional public interest in the court saying so and disapplying section 31(3D) of the Senior Courts Act 1981 .”*
- R (Omed Abid) v SSHD*** [2017] EWHC 1962 (Admin)

So...when does the "no substantial difference test" make a difference in JR applications?

- (1) More likely to do so where court is reviewing a discretion rather than assessing legality itself
- (2) Where there is clear, robust evidence indicating that the decision would have been the same anyway

In summary: appears clear that the NSD test has made a difference.

Data on effect at permission stage less clear. There is a clear risk of drawing out the permission stage due to (practical) need for evidence. However, in a very clear case, e.g. a 'technical' breach, may be possible to establish NSD at permission stage.

James Maurici QC

jmaurici@landmarkchambers.co.uk

Thanks to Admas Habteslasie for assisting with writing this talk.

