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The A Word: Academic Appeals in Public Law Challenges

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Introduction

1. Judging is a practical profession. A judge is employed to resolve real disputes between real people. For this reason, judges are wary of delving into academic or hypothetical legal questions when a judgment does not require it.[1] This is especially so when they are asked to allow an "academic appeal": an appeal that, if successful, would not affect what was decided in the case below.

2. As judging is a practical profession, so a legal judgment is a practical document. A judgment settles the substance of a legal dispute. It aims to reach a definitive answer, at least as far as the parties to the dispute are concerned. Inevitably, peripheral legal questions will arise in the process. Answering such questions will often be an interesting exercise: but ultimately that exercise is not part of the judge's job description. For that reason, the answer to a peripheral legal question might well be found in a conference paper, a professor's blog post, or the crisp, un-thumbed pages of a specialist law journal. But it will rarely be found in a judgment of the court.

3. Rarely: but sometimes. This article considers the test for when a court will allow an appeal to proceed on an academic ground.[2] It will trace the case law on the consideration of academic issues of law generally, before turning to the case law on academic appeals in particular. It will then consider the leading case on academic appeals, *Hutcheson v Popdog*, before discussing the recent Court of Appeal case of *MS*, which applied *Popdog* in a public law context.[3]

[1]In this article I will refer to "academic" and "hypothetical" questions interchangeably. Some writers advocate distinguishing between the two terms: see e.g. Sir John Laws, "Judicial Remedies and the Constitution" (1994) 57 MLR 213:

> The courts have tended to use these phrases indifferently. I do not think that they have been right to do so. We should understand an academic question to be one which does not need to be answered for any visible practical purpose at all … A hypothetical question is quite different: it is a question which may need to be answered for real practical purposes; it connotes only a situation in which the events have not yet happened which will clothe the answer to the question with immediate practical effects.

See also *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin) at [55].

[2]This question was last considered in this journal by David Elvin QC in 2006: see D. Elvin, "Hypothetical, Academic and Premature Challenges" [2006] JR 307.

[3]*Hutcheson (formerly WER) v Popdog Ltd (formerly REW)* [2011] EWCA Civ 1580, [2012] 1 WLR 782; *Secretary of State for the Home Department v R (MS (A Child))* [2019] EWCA Civ 1340. *Popdog* has been applied more recently in *Rehoune v Islington LBC* [2019] EWCA Civ 2142.

The courts' general reluctance to rule on academic legal questions

The general principle

4. The courts' general aversion to entertaining academic appeals should be understood in the context of their reluctance to consider academic issues as a matter of principle. That reluctance has long been an underlying principle of our legal system. In 1953, the Lord Justice-Clerk (Thomson) in *Macnaughton v Macnaughton's Trustees* 1953 SC 387 put it like this (p. 392):

> Our courts have consistently acted on the view that it is their function in the ordinary run of contentious litigation to decide only live, practical questions, and that they have no concern with hypothetical, premature or academic questions, nor do they exist to advise litigants as to the policy which they should adopt in the ordering of their affairs. The courts are neither a debating club nor an advisory bureau. Just what is a live practical question is not always easy to decide and must, in the long run, turn on the circumstances of the particular case.

5. An illustration of the principle that academic issues should not generally be heard by the courts is the case of *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357. Mr Rusbridger was the editor of the *Guardian* newspaper. He expressed concern that his newspaper's editorial stance on the appropriateness of a hereditary monarchy in a modern democracy would fall foul of the Treason Felony Act 1848.[4] He therefore applied to the High Court for a declaration of incompatibility under the (then recently introduced) Human Rights Act 1998.

6. The case reached the House of Lords. Lord Steyn held (para. 28) that the concerns of Mr Rusbridger were "more than a trifle alarmist" because it was fanciful to suggest that the relevant provision of the 1848 Act could survive the introduction of the 1998 Act. Lord Steyn therefore dismissed the application on the basis that "the courts ought not to be troubled further with this unnecessary litigation".[5]

Relief in academic cases

7. The fact that a legal question posed to a court is academic or hypothetical has implications for the relief sought. As De Smith notes:

> If an issue is theoretical, then in ordinary civil proceedings that is a compelling factor against the grant of relief and that remains the situation even if one of the parties has a perfectly legitimate reason for seeking clarification of the legal situation.[6]

8. Furthermore, the very fact that the question concerns hypothetical matters will often mean the relief requested will be declaratory in nature, as it was in

[4]Section 3 of that Act prohibits publication of articles advocating abolition of the monarchy, although no prosecutions had been brought under s. 3 since 1883.

[5]See also the speech of Lord Hutton, who said that "it is not the function of the courts to decide hypothetical questions which do not impact on the parties before them" (para. 35), and Lord Scott, who said "the valuable time of the courts should be spent on real issues" (para. 45).

[6]*De Smith's Judicial Review* (8th edn) 18-042. See also *Sun Life Assurance v Jervis* [1944] AC 111 at 114, per Viscount Simon LC.

Rusbridger.[7] The courts have demonstrated a willingness to grant declaratory relief, but this is usually only when the issue in question is *not* academic.[8] In *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1, Millet LJ noted that:

> the jurisdiction [to grant declaratory relief] is limited to the resolution of justiciable issues; that the only kind of rights with which the court is concerned are legal rights; and that accordingly there must be a real and present dispute between the parties as to the existence or extent of a legal right.

9. However, this approach has not been consistently followed in the case law. For example, in *R v BBC ex p. Quintavelle* (1998) 10 Admin LR 425, Lord Woolf MR (with whom Aldous and Chadwick LJJ agreed) suggested that declaratory relief could be appropriate in academic or hypothetical cases where there was any relief that could be granted "which would be of value to those who have to decide matters such as this", and where the particular case was an appropriate vehicle for providing that guidance.[9]

10. As to the limits of granting declaratory relief, in *R v Inland Revenue Commissioners ex p. Bishop* (1999) 11 Admin LR 575 at 588F–589A, Dyson J said:

> I accept that in recent years the courts have adopted a somewhat more generous approach than previously to the grant of [a] declaratory [remedy] in public law cases where the issues raised are, to some extent, theoretical … Nevertheless, the position remains that, the greater the extent to which the dispute between the parties is based on hypothetical facts, the more likely it is that, as a matter of discretion, the court will refuse to grant [a] declaratory remedy.

11. Consistent with this approach, in *Rusbridger* Lord Rodger addressed the subject of relief as follows (pp. 366–367):

> Should these proceedings go ahead? The Divisional Court thought not, while the Court of Appeal thought they should. I agree with the Divisional Court. The claimants seek a declaration as to the interpretation of section 3 of the 1848 Act or as to its incompatibility with the right to freedom of expression under article 10 of the Convention. Before the House the parties agreed that these declarations should be treated in the same way as a civil declaration as to the criminality or otherwise of future conduct. A civil court can make such a declaration, although it would be right to do so only in a very exceptional case: *Imperial Tobacco Ltd v Attorney General* [1981] AC 718, 742c–d per Viscount Dilhorne. The authorities do not spell out what constitutes a very exceptional case for these purposes. In ordinary cases people must take and act on their own legal advice. So, broadly speaking, a very exceptional case must be one where, unusually, the interests of justice require that the particular claimant should be

[7]The White Book Commentary notes at 54.1.10 that:

> The courts may decline to grant a remedy if a remedy is no longer necessary because the issues have become academic or are no longer of practical significance (although the courts may still grant declaratory relief, particularly if the claim raises an issue which it is in the public interest to resolve and which is likely to arise in other cases in the near future …)

[8]The High Court has jurisdiction to make advisory declarations: see *Equal Opportunities Commission v Secretary of State for Employment* [1995] 1 AC 1 at [27], [36]. See also *R v Ministry of Agriculture, Fisheries and Food ex p. Live Sheep Traders Ltd* [1995] COD 297; *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 at 21H–22C (Millet LJ); *R (Campaign for Nuclear Disarmament) v The Prime Minister* [2002] EWHC 2759 (Admin) at [15].

[9]See also *R (Williams) v Secretary of State for the Home Department* [2015] EWHC 1268 (Admin) at [55], per Hickinbottom J.

> able to obtain the ruling of the civil court before embarking on, or continuing with, a particular course of conduct which, on one view, might expose him to the risk of prosecution.
>
> 57. Approaching the matter in that way, I am satisfied that the present is not a very exceptional case of that kind. … The Divisional Court is therefore being asked to make a declaration about a point of criminal law because a criminal court will never have to decide it. So far from this being the kind of very exceptional case where the interests of justice require that the claimants should be able to obtain a declaration from the Divisional Court, it is exactly the kind of case where they should not.

12. In *Oxfordshire CC v Oxford City Council and another* [2006] UKHL 25, [2006] 2 AC 674, Baroness Hale considered the legitimacy of a local council asking the court to decide an issue that the council itself had a statutory duty to decide. While noting that "the declaratory jurisdiction has been expanded considerably in recent decades", she quoted (para. 133) Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501:

> But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.

13. She then went on to find that, in the present case, the authority clearly did have an immediate interest in knowing what its powers were: "There was nothing hypothetical or academic about the issues. There were opposing parties who also took different views on these matters, so that they could be properly argued".

14. In the leading judgment, Lord Hoffmann was less hesitant. He said that while the courts "should not make declarations of abstract propositions of law", nevertheless "the city council have a real and immediate interest in having the question resolved and there is an appropriate contradictor … " (para. 45). He therefore granted the requested declaration.

When will a court consider an academic question?

15. It is clear from the case law that if the question posed to the court is considered to be academic, it is unlikely to be considered. It is therefore unsurprising that the main battleground in such cases is often whether or not a question is academic.

16. But even if a court is persuaded that a question before it is, or has become, academic, that is not necessarily the end of the matter. The courts, and the Administrative Court in particular, have shown a willingness to consider academic issues in limited circumstances.

17. In some ways the involvement of the Administrative Court in academic issues might be thought of as counterintuitive.[10] Judicial review is generally concerned with "actions or

[10]For objections to the Administrative Court ruling on academic matters, see *R v Secretary of State for the Home Department ex p. Wynne* [1993] 1 WLR 115 at 119–120 (Lord Goff: "The courts – including the Administrative Court – exist to resolve real

other events which have, or will have, substantive legal consequences: for example, by conferring new legal rights or powers, or by restricting existing legal rights or interests".[11] On that basis, it might be thought that a claimant asking the Administrative Court to rule on an academic matter would necessarily fail to show their standing, as the answer to the question would not affect them directly. However, as De Smith notes, in the modern judicial review case "the courts now take a broad view and it is no longer necessary for a claimant to demonstrate that a decision or action has direct legal consequences upon the claimant".[12] This approach has opened the gateway to more active consideration of academic issues in the Administrative Court.

18. The test for considering an academic point of law in a public law context is set out in *R (ZooLife International Ltd) v Secretary of State for Environment, Food and Rural Affairs and others* [2007] EWHC 2995 (Admin) ("*ZooLife*").[13] It is worth considering the case in some detail.

19. *ZooLife* was a case about trade secrets in the tropical fish business. ZooLife Ltd was a group of vets contracted to the London Aquarium. The Zoo Licensing Act 1981, s. 10 (4)(a) required the London Aquarium to be periodically inspected by an inspector nominated by the Department for the Environment, Food and Rural Affairs ("DEFRA"). ZooLife Ltd objected to DEFRA's chosen nominee, Ms Thornton, on the basis that she worked for the International Zoo Veterinary Group ("IZVG"), which was a bitter commercial rival of ZooLife Ltd.

20. ZooLife Ltd was concerned that, if DEFRA's chosen nominee carried out the inspection, she would be privy to "a number of products, medicines, diets, therapeutic regimes, techniques and other specialist methods" that gave ZooLife Ltd a cutting edge over IZVG. It therefore brought a challenge by way of judicial review.

21. A key question for the court was whether the question was academic at the time of the hearing on the basis that (para. 27):

problems and not disputes of merely academic significance"); *R (Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin), [2002] 2 FLR 146 at [240] (Munby J: "Nor is the task of a judge when sitting judicially – even in the Administrative Court – to set out to write a textbook or practice manual or to give advisory opinions"); *R (The Howard League for Penal Reform) v Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR 484 at [140] (Munby J: "Unlike academic textbook writers and examiners, the courts do not decide legal questions in a vacuum").

[11] *R (Shrewsbury and Atcham BC) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 at [32], per Carnwath LJ.

[12] De Smith (8th edn) 3-026. See e.g. *R (Burke) v General Medical Council* [2005] EWCA Civ 1003 (review of hospital guidance on withdrawal of feeding tubes); *R (Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin) at [65]–[69] (review of airports' national policy statement); *R (Equality and Human Rights Commission) v Prime Minister and others* [2011] EWHC 2401 (Admin) (review of intelligence officer guidance).

[13] Although it should be noted that even the Administrate Court is reluctant to rule on an academic question. See e.g. Munby J in *R (Smeaton) v Secretary of State* [2002] EWHC 610 (Admin), [2002] 2 FLR 146 at 420 ("the facts remain that the courts –including the Administrative Court – exist to resolve real problems and not disputes of merely academic significance"); and Davis J in *BBC v Sugar* [2007] EWHC 905 (Admin), [2007] 1 WLR 2583 at [70] ("to grant remedies by reference to a decision made in now outmoded circumstances seems to be to be an arid and academic exercise. It is not something that, as an Administrative Court Judge, I would have been minded to do").

(1) The statutory objection to the nomination of Ms Thornton as a Part I Inspector had been withdrawn by the London Aquarium.
(2) The contention nomination had been withdrawn by DEFRA.
(3) The inspection had already taken place.
(4) ZooLife Ltd's contract with the London Aquarium had subsequently been terminated.

22. ZooLife Ltd argued that the case was not academic. It said that DEFRA's refusal to withdraw the nomination at an earlier stage led to a breakdown in Zoolife's commercial relationship with the London Aquarium. It also said that the shortage of suitable inspectors in its niche industry meant that whichever aquarium it was contracted to in the future, it was likely that Ms Thornton would be nominated as inspector under the 1981 Act once again. Accordingly, it sought general guidance from the High Court on the general approach DEFRA should adopt when considering requests for an alternative person to be nominated as an inspector under the 1981 Act.

23. At para. 36 of the judgment, Silber J set out general principles. He said "academic issues cannot and should not be determined by courts unless there are exceptional circumstances". The "exceptional circumstances" test has two elements:
(1) similar cases exist or are anticipated; and
(2) the decision in the academic case will not be fact-sensitive.

24. He then noted that if the courts entertained academic disputes that did not satisfy each of these two conditions, the consequence would be "a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs" (para. 36). He also noted that "these points are particularly potent at the present time where the Administrative Court is completely overrun with immigration, asylum and other cases".

25. He then observed that there have been a number of cases where the court has considered it appropriate to hear an academic issue but that those cases usually concerned statutory construction or the impact of the European Convention on Human Rights on English statutes, and always satisfied the two tests (para. 37).[14]

26. Applying the test, he held that the decision would necessarily be fact-sensitive and therefore relief should not be granted (para. 39).

27. The test set out in *ZooLife* is a high hurdle to pass. In the recent High Court case *Tewkesbury BC v Secretary of State for Communities Housing and Local Government* [2019] EWHC 1775 (Admin), the claimant local authority applied for judicial review of the defendant Secretary of State's decision concerning the proper approach to calculating housing land supply. The authority sought a declaration that there is no policy that prevented the taking into account of net oversupply in previous years within the

[14]For example *R (B) v Dr SS, Dr AC and Secretary of State for the Department of Health* [2005] EWHC 86 (Admin) [47].

plan period when assessing the annual requirement for the purposes of the five-year housing land supply calculation. The Secretary of State argued the case was not justiciable by way of judicial review as the issue was academic on the basis that the inspector's decision was favourable to the claimant in its outcome.

28. Applying the test in *ZooLife*, Dove J held that the claim was academic as the local authority had won the appeal. He said the case did not "fall within the class of exceptional cases where the determination of an academic dispute about the reasons for a decision, rather than the decision itself, is warranted" (para. 32).

29. In a similar planning case, *Oxford City Council v Secretary of State for Housing, Communities and Local Government and others* [2019] EWHC 1771 (Admin) Dove J again found the question asked of the court to be academic and that there were no exceptional circumstances that justified hearing it. The council in that case was successful in a planning appeal but sought permission to apply for judicial review on the basis that the reasoning and conclusions of the inspector on affordable housing were flawed.[15]

Section 31 of the Senior Courts Act 1981

30. Section 31(2A) of the Senior Courts Act 1981 provides:

> (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.

31. This is commonly referred to as the "makes no difference principle".[16]

32. It might be thought that the effect of this provision is to close off, or at least significantly restrict, academic public law challenges in the Administrative Court. However, the Administrative Court does not appear to have interpreted it in this

[15] At para. 15 Dove J said:

> As is explained in the *Tewkesbury* case it is a feature of the statutory framework for decision-taking in relation to appeals under section 78 of the 1990 Act that issues of this type can be re-investigated in subsequent appeals without the need for any intervention by the court in that process … for the reasons set out in the *Tewkesbury* case are a further reason why the court ought not to entertain engaging with the Claimant's case.

[16] See e.g. M. Elliott, "The duty to give reasons and the new statutory 'makes no difference' principle", *Public Law For Everyone* (18 April 2016) <https://publiclawforeveryone.com/2016/04/18/the-duty-to-give-reasons-and-the-new-statutory-makes-no-difference-principle/> (accessed 29 September 2019).

way so far.[17] In *Tewskesbury*, Dove J noted the Secretary of State's submission that s. 31 (2A)–(2C) amounted to a "codification" of the Administrative Court's prior approach to academic questions, although the judge did not express his own opinion.

Academic appeals

Constraints on hearing academic appeals

33. A distinction can be drawn between cases where one of the questions asked of the court at first instance is academic and cases where a party seeks to appeal on an academic point ("academic appeals"). It may be particularly difficult to succeed in the latter category of cases, because by definition the substance of the case had already been settled, and any further argument will not affect the substance of what was decided as between the parties.[18]

34. There is also a practical constraint to entertaining academic appeals as opposed to academic questions in general: any general guidance provided by a higher court may not be binding without a practical issue to bite on. As Lord Goff said in *R v Secretary of State for the Home Department ex p. Wynne* [1993] 1 WLR 115 at 120:

> It is well established that this House does not decide hypothetical questions. If the House were to do so, any conclusion, and the accompanying reasons, could in their turn constitute no more than obiter dicta expressed without the assistance of a concrete factual situation, and would not constitute a binding precedent for the future.

The Popdog *test*

35. The most recent iteration of the test for hearing an academic appeal can be found in the case of *Hutcheson v Popdog*.

36. This was not a public law case. It concerned libel and the publication of confidential information. Given the nature of the case, the factual background is not without mystery. However, two facts are clear. First, Mr Hutcheson was the father-in-law of Gordon Ramsay, a television chef and presenter. Second, Mr Hutcheson had been dismissed as an employee of Gordon Ramsay's company for misconduct. These two facts, taken together, meant that Mr Hutcheson was a person of great interest to the British media.

37. Popdog Ltd, a news company, wished to publish certain information relating to Mr Hutcheson's private life. He became aware of Popdog's intentions and issued anonymised proceedings seeking to restrain Popdog from publishing the information. The High Court granted Mr Hutcheson an interim injunction restraining Popdog "until after

[17]For example, in *Tewkesbury* Dove J noted that notwithstanding this provision, "it was accepted on all sides that the court does have jurisdiction to consider a claim and grant relief in a claim which is or has become academic or hypothetical".

[18]It should be noted that there is substantial overlap between the principles that apply to the hearing of academic issues at first instance in the Administrative Court and on appeal: see *R (Goloshvili) v Secretary of State for the Home Department* [2019] EWHC 614 (Admin) at [46], per Martin Spencer J.

the conclusion of the trial of this claim or further order of this court in the meantime". It should be noted at this stage that interim injunctions of this nature bind third parties, unlike final injunctions.[19] Shortly after obtaining his injunction, Mr Hutcheson reached a settlement with Popdog.

38. The following year, the information came to the attention of News Group Newspapers Ltd ("News Group"), another news company. News Group decided that it wanted to publish the same information, because the activities of Gordon Ramsay's father-in-law was one of the pressing issues of the day. News Group applied to the High Court to set aside the interim injunction. Eady J held that, in effect, the interim injunction had become permanent by virtue of the settlement, and so ceased to bind third parties such as News Group ("the first decision").

39. Mr Hutcheson was unhappy with this decision. He immediately issued fresh proceedings against News Group seeking a new interim injunction. Eady J refused the application and permission to appeal ("the second decision"). However, the judge granted a protective order pending any application to the Court of Appeal.

40. Mr Hutcheson then applied for permission to appeal against the first decision and the second decision. He obtained permission to appeal against the second decision, but his appeal was dismissed in July 2011.[20] His application for permission against the first decision was effectively stayed behind the appeal against the second decision. Notwithstanding the outcome of his appeal against the second decision, he continued to pursue an appeal against the first decision. The Court of Appeal refused permission on the basis that the result of Mr Hutcheson's appeal against the second decision rendered the appeal on the first decision academic.

41. The problem for Mr Hutcheson was that in deciding the appeal against the second decision, the Court of Appeal agreed with Eady J that the Art. 10 rights of News Group should prevail over the Art. 8 rights of Mr Hutcheson. The effect was that regardless of the outcome of the appeal against the first decision, News Group would have been entitled to publish the information.

42. So far, so academic. But counsel for Mr Hutcheson raised two arguments as to why the court should nevertheless hear the appeal against the first decision. The first argument was that the appeal would raise points that were sufficiently important to justify an appeal, regardless of whether the appeal was in truth academic. The second argument was that the appeal was not academic in any event, because if the appeal was granted and the first decision was reversed, the existing order for costs against Mr Hutcheson would be varied in his favour.

[19]This principle is known as "the Spycatcher principle" (see *Attorney-General v Newspaper Publishing plc* [1988] Ch 333 at 375, 380. For principle as it applies to final injunctions, see *Jockey Club v Buffham* [2002] EWHC 1866 (QB), [2003] QB 462 at [23]–[27].
[20]*Hutcheson v Newspapers Ltd* [2011] EWCA Civ 808.

43. The Court of Appeal rejected both of these arguments. In doing so, the Master of the Rolls summarised the applicable principles as follows (para. 15):

> Both the cases and general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean "may") be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated.

44. I will refer to these principles as the "*Popdog* test".

45. The Master of the Rolls accepted that limb one of the *Popdog* test was met on the basis that the projected appeal would raise at least one point of general importance. The key issue was the correctness of *Jockey Club v Buffham* [2002] EWHC 1866 (QB), [2003] QB 462, from which arises the questionable principle that only interim orders, and not final orders, are binding on third parties. He agreed that it was a point of general significance and should be decided by this court at some stage (para. 19).[21]

46. However, he noted (para. 14) that News Group did not want to proceed with the appeal and that, notwithstanding Mr Hutcheson's offer that both sides should bear their costs, they would nevertheless have to pay their own costs. On that basis he did not consider it would be right to grant the appeal (para. 21).

47. He concluded as follows:

> I would refuse permission to appeal because of the combination of two factors, namely (a) although the two issues which it is said would be raised on the projected appeal are significant they are not of outstanding public importance, and anyway might not actually be determined on the projected appeal, and (b) NGN opposes the grant of permission to appeal and would be significantly out of pocket on costs if the appeal went ahead. (ii) The prospect of the order that Mr Hutcheson pay the costs of the application being varied, even if the projected appeal were to succeed, is at best from Mr Hutcheson's point of view very uncertain, and it would therefore be a disproportionate reason for permitting an appeal to proceed. (iii) Accordingly, I would refuse permission to appeal.

Academic appeals in public law

48. The starting point for considering whether a court should allow a party to pursue an academic point on appeal in a public law case is the statement of Lord Slynn in *R v Secretary of State for the Home Department ex p. Salem* [1999] 1 AC 450 at

[21] Although he said:

> it is not entirely clear, at least on the present state of the argument and evidence, how important the point may be in practice. The fact that the Jockey Club case has not been challenged in this court despite having been decided some nine years ago might fairly be said to cast some doubt on the importance of the point.

On this point see Conclusion below.

456.[22] In this case, the claimant applied for judicial review of the Secretary of State's refusal of his asylum application, following which the Benefits Agency had stopped his income support. Subsequently, a special adjudicator granted the claimant refugee status. The claimant accepted that, as his claims to income support and housing benefit would be satisfied on that basis, there was no live issue relating to the ongoing judicial review. However, he argued that the court should determine the issue of when it could be said that an asylum claim is "determined" by the Secretary of State so that an applicant ceased to be an asylum seeker, as this was a question of general public importance.

49. In a speech with which other members of the Appellant Committee agreed, Lord Slynn said (pp. 456–7):

> … I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to questions of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House, there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se … The discretion to hear disputes, even in the area of public law, must be exercised with caution and appeals which are academic between the parties should not be heard unless there is good reason in the public interest for doing so as for example (but only by way of example) where a discrete point of statutory construction which does not involve detailed consideration of the facts, and where large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.

50. It is clear from the above that an academic appeal in a public law case is more likely to have a wider public interest in the issue being heard. This general point is reflected in more recent case law: in *Gawler v Raettig* [2007] EWCA Civ 1560, the Court of Appeal refused permission to appeal on the ground that the issue it would raise was academic. At para. 36, Sir Anthony Clarke MR said that, before an appeal could proceed in those circumstances, the court must be satisfied that it would be in the public interest for the appeal to proceed. He added that it would be "a very rare event, especially where the rights and duties to be considered are private and not public".[23]

51. The implication that can be drawn from both of these cases is that it is easier to satisfy the "public interest" requirement of hearing an academic appeal in public law cases, which by definition have more of a public interest element than appeals in private cases.

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[22] Overruled on a different basis in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36, [2004] 1 AC 604.

[23] See, by way of contrast, two private law cases where the House of Lords refused to consider academic questions: *Sun Life Assurance Co. of Canada v Jervis* [1944] AC 111 and *Ainsbury v Millington (Note)* [1987] 1 WLR 379. In *Sun Life*, Viscount Simon LC said (pp. 113–114):

> I do not think that it would be a proper exercise of the authority which this House possesses to hear appeals if it occupies time in this case in deciding an academic question, the answer to which cannot affect the respondent in any way … I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

The MS case

52. I turn now to a recent case that considered academic appeals in a public law context. *Secretary of State for the Home Department v R (MS (A Child))* [2019] EWCA Civ 1340 was an immigration case. The respondent was an Afghan national who arrived in France as an unaccompanied minor. He claimed to have a brother living lawfully in the UK as a refugee. If this had been accepted, the UK and not France would have been under an obligation to consider his asylum claim, in accordance with EU Regulation No. 604/2013 ("Dublin III"[24]).

53. France asked the UK to take charge of MS. But the Secretary of State for the Home Department refused because there was a complication. When he applied for asylum in the UK, MS's notional brother had said that he was an only child.

54. MS challenged the refusal to take charge of him via judicial review in the Upper Tribunal (Immigration and Asylum Chamber). Upper Tribunal Judges Grubb and Blum found that MS did have a brother in the UK, and furthermore it was the man he said it was. The tribunal quashed the refusal decisions and remitted the matter to the Secretary of State to remake the decision on the basis of this finding.

55. However, the Upper Tribunal gave the Secretary of State permission to appeal to the Court of Appeal on two grounds:
    (1) The tribunal erred in holding that, for the purposes of Art. 27 of Dublin III, "transfer decision" includes the rejection of a take charge request, which involves no transfer.
    (2) Even if "transfer decision" does include a rejection of a take charge request, the tribunal erred in proceeding on the basis that the tribunal itself must determine, as a matter of preliminary fact, whether the relevant Dublin III criteria (including any required relationship) are met.

56. These were both issues that the Secretary of State wanted to be resolved for future cases: but they were no longer relevant to the case at hand. This is because, following the Upper Tribunal decision, the Secretary of State asked for a renewed charge request from France, which was accepted. MS was accordingly brought to the UK. Following a DNA test, it was established that MS had been telling the truth about his brother, and he was subsequently granted asylum in the UK. In practice, therefore, his judicial review had achieved everything he wanted it to.

57. On this basis, the Secretary of State accepted that the appeal had become academic. However, she argued that although his grounds of appeal were not relevant to MS

[24]Regulation (EC) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person.

himself, they raised important points of principle which satisfied the criteria of the *Popdog* test.

58. Hickinbottom LJ emphasised the fact that, under the *Popdog* test, "even where there is a point of general public interest or importance, an academic appeal will only be entertained very sparingly" (para. 9). He then said (para. 10):

> I stress that the satisfaction of these criteria is merely a gateway to the exercise of discretion which the court has to undertake when considering whether to examine and/or determine academic issues. In addition to the time that will be expended by an overburdened court in deciding issues which are not germane to an actual dispute, determining an issue (even an issue of construction) outside a real dispute can be frustrating and even unhelpful. The key question is whether, in all the circumstances, it is in the public interest for the court to consider and determine an issue which is academic as between the parties. The cases suggest that cases in which it is in the public interest will be rare.

59. On the issue of the construction of Art. 27, counsel for MS submitted that the phrase "transfer decision" in Art. 27 includes the refusal of a take charge request, but that in any event the court should not determine the issue: although permission had been granted under that ground, the point was now academic.

60. Hickinbottom LJ declined to determine the issue. He noted that in applying the *Popdog* test, "the focus is upon whether – and the extent to which – determining the issue is in the public interest" (para. 54). Notably, he accepted that "the issue raised here may be of some, but certainly not outstanding, public importance". He justified this finding with reference to the fact that Art. 27(1) has been in force since mid-2013, and this was the first case to raise the issue – suggesting that there were not a substantial number of cases behind it.[25]

Principles for allowing an academic appeal to proceed

61. It is clear from the discussion above that there are a large number of cases on this subject, many of which pull in different directions. Any judge attempting to distil unifying principles that govern whether an academic challenge should be heard faces a maze of relevant authorities. It is no surprise that we see different judges placing a different emphasis on certain cases, and characterising the applicable principles in different ways.

62. However, finding a way through the maze is not an impossible task. I consider that the courts' approach to the problem of academic questions (and academic appeals in particular) is now sufficiently structured that the following principles can be drawn from the case law:
    (1) The starting point is that it is the function of the courts to resolve real disputes between real people: *Macnaughton v Macnaughton's Trustees* 1953 SC 387 at

[25] As to the merits of this argument, see the Conclusion below.

392. This is no less so in the Administrative Court: *R (Shrewsbury and Atcham BC) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148 at [32], per Carnwath LJ.

(2) Bearing that in mind, the court's first task is to determine whether the issue before it is in fact academic. The fact that a party seeks only a declaration of the legality of a state of affairs does necessarily not mean that the issue is academic: *Oxfordshire CC v Oxford City Council and another* [2006] UKHL 25, [2006] 2 AC 674 at [133]. The court has a jurisdiction to grant such a declaration: *Equal Opportunities Commission v Secretary of State for Employment* [1995] 1 AC 1 at [27]. The fact that the claimant herself will not be directly affected by the resolution of the question does not mean that the question is academic either, if the resolution of the question will have tangible legal consequences: *R (Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin) at [65]–[69].

(3) However, once a legal question has been determined to be academic, it can only be considered by a court in exceptional circumstances. Similar cases must exist or be anticipated, such that the resolution of the question will provide useful further guidance: *R (ZooLife International Ltd) v Secretary of State for Environment, Food and Rural Affairs and others* [2007] EWHC 2995 (Admin) at [36]; *R v BBC ex p. Quintavelle* (1998) 10 Admin LR 425. Similarly, any decision to be given cannot be fact-sensitive: *ZooLife* (para. 36); *R v Secretary of State for the Home Department ex p. Salem* [1999] 1 AC 450 at 456.

(4) It seems likely (although this point has not yet been resolved by the courts) that the requirement of "exceptional circumstances" mirrors the requirements of the "makes no difference" test in s. 31(2A)–(2C) of the Senior Courts Act 1981: see the submission made by the Secretary of State in *Tewkesbury BC v SSHCLG* [2019] EWHC 1775 (Admin).

(5) Before granting permission to appeal on an academic point, in addition to the requirement of exceptional circumstances, there must be a good reason in the public interest for doing so: *Salem* (p. 456); *Hutcheson v Popdog* [2011] EWCA Civ 1580, [2012] 1 WLR 782 at [15]. Another way of putting this is that the question must be of "general public importance": *Popdog* (para. 15).

(6) In public law cases, there is likely to be an issue of at least some public importance that will be addressed by answering an academic question. However, a court must consider all the circumstances in deciding whether to allow the appeal to proceed. The fact that an academic question raises an issue of some public importance does not mean that it should be granted: *Secretary of State for the Home Department v R (MS (A Child))* [2019] EWCA Civ 1340 at [10]. While it is not possible to set a threshold for the necessary degree of public importance, it is clear from the case law that the lesser the public importance of the issue in the prospective appeal, the less likely it is that a court will allow the appeal to proceed: *Popdog* (para. 15); *MS* (para. 54).

(7) There are two further requirements that apply to academic appeals specifically. Before allowing an academic appeal, the court must be satisfied that the

respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced: *Popdog* (para. 15). The court must also be satisfied that both sides of the argument will be fully and properly ventilated: *Popdog* (para. 15); *Oxfordshire CC* (para. 133).

Conclusion

63. Writing in this journal in 2006, David Elvin QC said:

> Consideration of the cases does not reveal an entirely consistent picture and there is no consistent terminology applicable to those issues which the courts will hear and those which it will not. In reality, certain issues are unlikely to be determined, such as cases where the issue has simply become irrelevant (e.g. where the dispute has ceased to be of practical relevance) and in others, where there may be good reasons for the court expressing an opinion, a wide spectrum of responses is possible. Unsurprisingly, the issue tends to be approached as a matter of discretion rather than one of jurisdiction. The factors which have lead the court to determine what is essentially a hypothetical or abstract issue are not wholly clear.[26]

64. This unsatisfactory position has begun to change for the better in the past decade. Courts are now moving away from dealing with academic questions on an ad hoc basis or as a matter of discretion. Increasingly judges have attempted to codify the principles that govern whether they should consider academic issues, although there has been some variance in the approaches taken. Furthermore, there appears to have been some slow but noticeable widening of the circumstances in which judges will consider answering academic questions, notably in relation to the standing of judicial review claimants and the issuing of declarations as a form of relief. In this article, I have attempted to bring these approaches together into a set of coherent principles that summarise the legal position we are at today.

65. So much for today: what about tomorrow? Moving forward, the courts should be less hesitant about answering academic legal questions in circumstances where an answer would be useful.[27] Legal certainty on a given question is rarely a bad thing, even if the question will not arise very often. The answer will be important to someone, someday: and it may well save her a trip to court. Furthermore, to gauge the importance of an academic question by the number of cases in which the issue has arisen, as the court did in *Popdog* (para. 787) and *MS* (para. 54), is to overlook the number of cases that settle or are withdrawn before coming to court (perhaps on the basis that the law is unclear or unsatisfactory).

66. No doubt there is a thin but tangible dividing line between the court room and the university lecture hall. Judges are understandably wary of crossing that boundary and venturing into the looking glass world of legal academia. But they need not

[26] D. Elvin, "Hypothetical, Academic and Premature Challenges" [2006] JR 307.
[27] For a concurring view see the Law Commission Report, *Administrative Law: Judicial Review and Statutory Appeals* (1994) Law Com No. 226, 76.

worry. To consider an academic legal question is not to eat the lotus flower. It is possible for judges to answer important academic questions without forgetting the practical purpose of their chosen profession.

67. Of course, it must first be established that answering a given academic question will be a useful exercise. And the parties to the dispute must be happy for their case to be a vehicle for answering that question (for they are footing the bill). But provided that those two criteria are met, courts should not shy away from venturing beyond the strict confines of a narrow fact pattern. In many cases, it will serve the public interest to do so.