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IT is a well-established aspect of English administrative law that the court may refrain from exercising its jurisdiction to conduct judicial review, "where there is a suitable alternative remedy" for the applicant: see *R (Glencore Energy UK Ltd.) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, [2017] 4 W.L.R. 213, at [54]. Call this the alternative remedies principle. This principle deserves academic attention, most straightforwardly due to its effect on an applicant seeking judicial review. Two short points explain this. First, where the principle applies the applicant without more loses the judicial review challenge: see, for example, *Glencore*, at [71]; *R (Archer) v Revenue and Customs Commissioners* [2019] EWCA Civ 1021, [2019] 1 W.L.R. 6355. And second, whilst judicial review may sometimes remain available once the alternative mechanisms have been used (see e.g. *Archer*, at [92]), this can occasion serious delays (cf. *R (Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 W.L.R. 803) or significant procedural complications (e.g. where some grounds of challenge are reserved for the alternative mechanisms, whilst some are reserved for judicial review: see *R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154, [2016] 1 W.L.R. 2625, at [40]; *Archer*, at [95]). The practical effect of the alternative remedies principle may thus be a very substantial lengthening and/or complication of an applicant's pathway to having a remedy vis-à-vis an unlawful administrative decision.

The alternative remedies principle deserves attention, for a further reason: its operation reflects what a court has deemed sufficient to serve "as substitutes for judicial review": see I. Hare, C. Donnelly, J. Bell and R. Carnwath, *De Smith's Judicial Review*, 9th ed. (London 2023), at [16-017]-[16-019]. This allows us to infer how the court has conceptualised the role and function of judicial review, in the first place. And this is clearly an issue that should and does interest English administrative lawyers. For these reasons, English administrative lawyers should consider the alternative remedies principle with care. And the recent Supreme Court decision in *Re McAleenon* [2024] UKSC 31, [2024] 3 W.L.R. 803 has offered us a good opportunity to do so.

The applicant in *McAleenon* lived near a privately operated "landfill site" (at [3], [4]). (I hereafter follow the Supreme Court's reference to it as "the Site"). She complained of "odours and fumes" arising from the Site, and more specifically "that hydrogen sulphide (H_2S) was being emitted from the Site and affecting her property in a manner which gave rise to significant risk to health" (at [9]). The Site was subject to regulation by a

number of public authorities, equipped with various statutory powers and duties to control emissions therefrom (at [8]). The applicant claimed that the public authorities had – by not bringing the emissions to a halt – acted unlawfully under the corresponding statutory frameworks (at [15]). The public authorities contested this claim along two lines, arguing that (1) "there was no evidence of unlawful harmful emissions from the Site" (at [18]) and (2) in any event, "alternative remedy" was open to the applicant without bringing a judicial review challenge – thus engaging the alternative remedy principle (at [17], [21]). The Supreme Court here was only required to consider point (2) (at [22], [30]–[31]). In a unanimous judgment written by Lord Sales and Lord Stephens, the court ruled in the applicant's favour on point (2): the alternative remedies principle did not preclude her judicial review challenge and thus it ought to be further considered (i.e. on point (1)) by the lower court (at [66]).

As the Court rightly recognised, the paradigm case where the alternative remedies principle applies is "[w]here Parliament has enacted a statutory scheme for appeals" (at [51]). Here the applicant had no recourse to a "statutory right to appeal" against the public authorities for her complaints (at [52]). Nevertheless, the public authorities suggested that three alternative mechanisms – available to the applicant – engaged the alternative remedies principle: (a) "she could herself launch a private prosecution against the owner of the site"; (b) "she . . . could bring a nuisance claim against them in private law" and (c) "[she] was able to complain to the Northern Ireland Public Services Ombudsman" (at [2]).

The Court held (rightly) that the alternative remedies principle did not apply, remedies (a)–(c) notwithstanding (at [66]). Here, the important issue is "whether the [purported] substitute for judicial review adequately protects the rights and interests of the claimant" (De Smith, at [16-017]-[16-019]. That remedy (c) cannot replace judicial review in this respect is self-evident. There are clear institutional distinctions between judicial review and the ombudsman, such as the criteria used in scrutinising the administrative action and the enforceability of the resulting outcome (at [63]; see e.g. *R (Piffs Elm Ltd.) v Commission for Local Administration in England* [2023] EWCA Civ 486, [2024] K.B. 107). Ombudsman action is also precluded where the question is a legal one calling for judicial determination (at [63]; see e.g. *Piffs Elm*). This is the case here, where the key issue is whether the public authorities have acted unlawfully under the applicable statutory frameworks – an issue apt for judicial review (at [40], [44]–[45]).

Both remedies (a) and (b) involve the applicant taking legal action vis-à-vis the Site, *without* directly involving the public authorities (at [58]). The Court has rightly stressed two key differences between

these remedies and judicial review (at [53]–[61]). The first difference is effectiveness: whilst it might be open for the applicant to take direct action against the Site, "[s]he was entitled to assess that her overall objective might best be promoted by ensuring that the defendant regulators … brought their more extensive resources to bear on the problem" (at [54]). That is, judicial review can *more effectively* allow the applicant to pursue her aim to halt the Site's emissions. The second difference is accountability: whilst remedies (a) and (b) can *only* allow the applicant to hold those operating the Site accountable, they do not allow her to hold the *public authorities* accountable vis-à-vis the Site (at [56]). The Court has put it rightly when it said: "[the applicant's] complaint against [the public authorities] was that they were failing to comply with their public law duties, and [remedies (a) and (b)] would neither address the issue nor give a remedy in relation to it" (at [56]).

McAleenon therefore is rightly decided. To many public lawyers, this analysis is unlikely to be surprising. Both these points turn on some well-recognised functions of judicial review that are not readily replicated by remedies (a)–(c) (at [56], [60], [63]). It was unlikely that the shortcomings of remedies (a)–(c) were not evident to the lower court. Rather, what has gone wrong was that the function of judicial review had been very narrowly conceived by the Court of Appeal ([2023] NICA 15, at [59]–[62], [74]; the materiality of this mistake had been stressed by the Supreme Court at [48]). There Horner L.J. had taken the premise that amidst the conflicting evidence "this application is unsuited to the judicial review procedure … it is simply impossible for any court to reach a final conclusion on that contentious, but untested expert evidence, in a judicial review application": see *McAleenon* (CA), at [74]. The conclusion was accordingly that even if remedies (a)–(c) were limited, they were "more effective" than the (on this view) highly inappropriate remedy of judicial review: see *McAleenon* (CA), at [73].

But the Supreme Court was right to reject this premise: "[i]n judicial review proceedings the court is typically not concerned to resolve dispute of facts, but rather to decide the legal consequences in the light of undisputed facts about what information the public authority had and the reasons it had for doing" (at [42]). Accordingly, "the court" on judicial review need only scrutinise if the decision maker "had done enough to justify that decision in the light of all the circumstances, applying the usual rationality standard" (at [44]). This is an issue that can competently and meaningfully be resolved by a court on judicial review, even amidst heavily disputed facts (at [40], [44]). The conclusion drawn by the Court of Appeal therefore falls away. This line of judgments should serve as a helpful reminder that for the alternative remedies principle to be applied

properly, the correct role and function of judicial review should be borne in mind: a failure to attain the latter is likely to lead to a failure to attain the former (at [48], [49]).

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