

JUDICIAL REVIEW AND APPEALS AS ALTERNATIVE REMEDIES

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INTRODUCTION

In the exercise of their supervisory jurisdiction to review administrative and other action—whether it be on application for a prerogative writ, an injunction or declaration, or like statutory remedy—superior courts of law reserve a discretion not to award the remedy or remedies sought, even though the person or body against whom remedy is sought is amenable to the particular jurisdiction invoked, and even though grounds for the award of remedy have been made out. One reason why remedy may be refused is that there is some other remedy, judicial or non-judicial, which is available to the applicant for review which is equally or more appropriate.¹ That alternative remedy may be a statutory right to appeal or a contractual right to review or appeal.²

The alternative remedy by way of appeal may, in some cases, be to appeal to a court of law, in others to a tribunal which is not a court. If the appeal lies to a court of law, it may be an appeal in the strict sense, an appeal by way of re-hearing, or an appeal by way of *de novo* hearing.³ It may be an appeal of a much more restricted character, for example, an appeal limited to questions of legal validity or to questions of law only, or review upon a case stated. Where provision has been made for appeal to a tribunal which is not a court of law, that appeal may also be something less ample than appeal by way of *de novo* hearing on the merits.

For prospective applicants for supervisory judicial review, it is obviously

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¹ See generally S. A. de Smith, *Judicial Review of Administrative Action*, (4th ed., London, Stevens, 1980) 452-7, 562-4; H. Whitmore and M. Aronson, *Review of Administrative Action*, (Sydney, Law Book Co., 1978) 390-2, 444-5; B. Schwartz and H. W. R. Wade, *Legal Control of Government*, (Oxford, Clarendon, 1972) 278-80, 284-6; R. F. Reid and H. David, *Administrative Law and Practice*, (2nd ed., Toronto, Butterworths, 1978) 327-8, 369-72.

² Provisions for reconsideration of decisions by the primary decision maker may afford an alternative remedy but are not included in the following analysis.

³ The distinction between appeals in the strict sense and appeals by way of rehearing in that whereas in both the appellate tribunal decides on the basis of the material before the body whose decision is appealed against, in an appeal in the strict sense the case is decided in accordance with the law in force at the time the decision appealed against was made. In an appeal by way of rehearing the appeal is determined in accordance with the law in force at the time of the appeal. An appeal by way of *de novo* hearing involves the exercise of an original jurisdiction. Many appeals from administrative decisions are of this type. See e.g. *Builders' Licensing Board v. Sperway Constructions Pty Ltd* (1976) 135 C.L.R. 616.

of some importance to know whether, if they do seek a discretionary judicial remedy, rather than avail themselves of their alternative remedy by way of appeal, or seek both judicial remedy and appeal, the court seized of the application for review is likely to refuse remedy because of the availability of an appeal. To take but two examples: A person who has, or believes he has, a statutory right to appeal against a decision of the Commissioner of Patents to one of the courts designated by the *Patents Act* 1952 (Cth) as a prescribed court (i.e. a State Supreme Court or the Supreme Court of the Australian Capital Territory, the Northern Territory or Norfolk Island), would, if contemplating an application for review of the same decision by the Federal Court of Australia, pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), or even direct recourse to the supervisory jurisdiction of the High Court of Australia under s. 75(v) of the Commonwealth of Australia Constitution, be vitally interested in the likely response of the Federal Court, or the High Court, as the case might be, if he were to select it as the forum within which to pursue his grievance rather than a prescribed court. Equally a person having standing to seek review of a decision by the Administrative Appeals Tribunal who was considering direct recourse to the Federal Court, again pursuant to the *Administrative Decisions (Judicial Review) Act* 1977, would almost certainly wish to be advised on the probable response of that Court if he invoked its jurisdiction rather than pursued his appeal right, or else lodged an appeal as well.⁴

The principal purpose of this essay is to examine the kinds of considerations which courts of supervisory jurisdiction have, in the past, taken into account in determining whether the alternative remedy by way of appeal is an appropriate alternative to judicial review and to the judicial remedy or remedies which may be awarded on review; and in the light of that examination to offer some conclusions which may be helpful to those called upon to advise prospective applicants for judicial review.

In undertaking this inquiry, I have not been unmindful of the dangers which attend attempts to elicit principles from the recorded instances of exercise of a judicial discretion. Judicial discretions, like any other discretions, are not rule-controlled in the sense that the decision-maker is obliged to apply a precise set of rules or to resolve a question for which there is only one correct answer. But a discretion may, legally, be controlled in the sense that he or they in whom the discretion is reposed must exercise it with regard to certain considerations, without regard to others, having regard to the merits of the individual case and without blind adherence to some inflexible policy. It is therefore possible that a judicial discretion to refuse a discretionary remedy may be controlled—ultimately through review by a higher court of the exercise of the discretion—by certain guidelines.⁵

⁴ The discretion to refuse an application for an order of review under the Act is expressly mentioned in s. 10(2).

⁵ See F. C. Huntley, "Appeals Within the Judicial Hierarchy" in A. Erh-Soon Tay

On the other hand there can be no assurance that the guidelines which are developed will remain constant over time or that the guidelines will be applied by all courts. Some courts may virtually start from a presumption that if they do have jurisdiction to entertain an application for judicial review, the application should not be refused merely because there happens to be some other remedy available to the applicant, unless there are strong reasons to the contrary. There are signs that in the exercise of its statutory discretion under s. 10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act* 1977 to refuse to grant an application for an order to review under that Act on the ground that adequate provision has been made by law "under which the applicant is entitled to seek a review by the Court, by another court, or by another tribunal, authority or person", the Federal Court will start from that presumption. In *Kelly v. Coats*⁶ Toohey J. held that a respondent to an application under the Act who requests the Court to exercise its discretion under s. 10(2)(b)(ii) bears the onus of persuading the Court to exercise the discretion adversely to the applicant. He held that the onus had not, in this instance, been discharged.

Sometimes judges who have been invited to exercise their discretion to refuse relief on the alternative remedy ground have seemed to take the view that once it is established that an adequate alternative remedy is available, the circumstances presented by the applicant's case must be shown to be exceptional to justify the court's intervention and that the grant of remedies which are coercive in nature should be regarded as extraordinary.

There have also been cases in which although the court has exercised its discretion against the applicant for judicial review, on the ground that he has an appropriate remedy by way of appeal, it has, before deciding whether to award remedy, determined the substantive issue or issues raised in the application for review, e.g. whether the respondent did have jurisdiction, or whether he decided on impermissible grounds.⁷ In such cases, the court will, in effect, have made a declaration which may well have a direct bearing on the disposition of any appeal which is lodged, or else make it unnecessary to proceed to appeal.

If a court is to exercise its discretion to refuse relief because of the existence of an adequate alternative remedy, it should not, presumably, do so of its own motion, but only if it has been invited to do so by the respondent to the application and if the applicant for review has been afforded an opportunity to address argument on both the very existence of the suggested alternative remedy and the adequacy of that remedy. Cases may arise in which although both the applicant and the respondent to the

and E. Kamenka (ed.), *Law Making in Australia*, (Port Melbourne, Arnold, 1980) 184; H. A. Finlay, "Judicial Discretion in Family and Other Litigation" (1976) 2 *Mon. L.R.* 221.

⁶ (1981) 35 A.L.R. 93. See also *Graham v. Commissioner of Superannuation* (1981) 3 A.L.N. [52].

⁷ *E.g. R. v. Ross-Jones; Ex parte Beaumont* (1979) 141 C.L.R. 504.

application for judicial review are aware of the availability of alternative remedy by way of appeal, they have adjudged the dispute between them to be one which should be decided by means of an application for judicial review. I see no good reason why, in a case of this kind, the court should not, if it discovers through its own inquiries that there may be remedy by way of appeal, direct that the parties address argument on the question of how its discretion should be exercised, or perhaps even on the question of whether the provisions establishing the right to appeal have the effect of ousting the court's supervisory jurisdiction. Should it appear to the court that the parties have colluded to invoke its supervisory jurisdiction in order to circumvent statutory provisions which, on their face, are designed to provide a more than ample substitute for review in that supervisory jurisdiction, it might well be thought appropriate by the court to invite intervention by the relevant Attorney-General (in his capacity as *parens patriae*) as a party, or if that course is not open, appearance by that Attorney-General as *amicus curiae*.

PRELIMINARY QUESTIONS

No occasion will arise for the exercise of the judicial discretion to deny remedy on the ground that there is some other appropriate remedy unless the court to which application for review is made is satisfied that the judicial remedy and the other remedy are indeed alternatives. If, therefore the court determines that its own jurisdiction to review has been excluded by the establishment of the other remedy, or that the particular judicial remedy sought is not available, then it must necessarily dismiss the application. Similarly, it will have no discretion if it determines that the case is one in which, by reason of the status of the applicant, or the nature of the error complained of and established, judicial remedy must be granted *ex debito justitiae*.⁸

It may also happen that the remedy which the respondent to the application asserts is an alternative to judicial review, is not, in the circumstances, available; or that if that remedy is available, it is not one which, if pursued, would permit the applicant to raise the issues which he has raised in his application for judicial review.

(a) Exclusion of judicial review

In the absence of any entrenched constitutional provisions, such as s. 75(v) of the Commonwealth of Australia Constitution which confers an original jurisdiction on the High Court of Australia to hear and determine applications for writs of mandamus and prohibition, and injunctions against officers of the Commonwealth, parliaments are free to enact legislation which abolishes or curtails the supervisory jurisdiction invested in superior

⁸ See fn. 47 below.

courts by prior legislation, and to enact legislation which makes statutory mechanisms for review exclusive of those available in a supervisory jurisdiction. It is also fairly well established that when a parliament, by its enactment, creates an entirely new type of legal right or an entirely new type of legal duty, and establishes a special procedure for enforcement of the right or duty, the special procedure is the only procedure available for enforcement.⁹

But courts of law have also presumed that legislation does not operate to remove or curtail established judicial jurisdictions unless the legislature has made its intention to achieve that result manifestly clear.¹⁰ So-called privative clauses, which, on their face, purport to exclude or restrict supervisory judicial review, have been interpreted restrictively, and so much so that it may be impossible for a parliament to devise any form of words which is effective to exclude judicial review for those errors which courts are prepared to characterize as errors going to jurisdiction.¹¹ Judicial attitudes to contractual clauses which are designed to preclude or restrict access to courts have been similar.¹²

There have been numerous judicial statements to the effect that the mere fact that a parliament has conferred a statutory right to appeal against decisions or other action previously reviewable in a supervisory judicial jurisdiction does not oust the supervisory jurisdiction in relation to those decisions which are subject to appeal, and that the existence of the statutory appeal bears only on the courts' discretion to decline to award a remedy.¹³ Yet there have been instances in which it has been held that a particular statutory mode of contesting an administrative decision is the exclusive mode of challenge. For example in *Stepney Borough Council v. Walker (John) & Sons Ltd*,¹⁴ the House of Lords held that mandamus was not available at the suit of a person aggrieved by the non-inclusion of

⁹ *Barracrough v. Brown* [1897] A.C. 615.

¹⁰ See de Smith, op. cit. 357-62 and *Pyx Granite Co. v. Ministry of Housing & Local Government* [1960] A.C. 260.

¹¹ See *Anisminic v. The Foreign Compensation Commission* [1969] 2 A.C. 147. On privative clauses generally see de Smith, op. cit., Ch. 7 and Whitmore and Aronson, op. cit., Ch. 15.

¹² See *Lawlor v. Union of Post Office Workers* [1965] Ch. 712, 733, 734; *Leigh v. National Union of Railwaymen* [1970] Ch. 326, 334; cf. *White v. Kuzych* [1951] A.C. 585.

¹³ *Burder v. Veley* (1840) 12 Ad. & E. 233; *White v. Steele* (1862) 12 C.B. (N.S.) 383, 409-10; *Mayor of London v. Cox* (1867) L.R. 2 H.L. 239, 278, 278-9; *R. v. Brisbane JJ.*; *Ex parte Queensland Treasurer* (1901) 11 Q.L.J. 79; *Mooney v. Commissioner of Taxation* (1905) 3 C.L.R. 221, 236, 246-7 (reversed on other grounds 4 C.L.R. 1439); *Turner v. Kingsbury Collieries Ltd* [1921] 3 K.B. 169, 175; *R. v. North*; *Ex parte Oakey* [1927] 1 K.B. 491; *R. v. Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1910) 11 C.L.R. 1, 21; *R. v. Postmaster-General*; *Ex parte Carmichael* [1928] 1 K.B. 291, 298; *Vowell v. Shire of Hastings* [1970] V.R. 764, 765; *Buchan v. Swan* [1979] 1 N.S.W.L.R. 19, 36; *R. v. Hull Board of Visitors*; *Ex parte St. Germain* [1979] Q.B. 425, 448-9; *R. v. Judges of Federal Court of Australia*; *Ex parte W.A. National Football League (Inc.)* (1979) 143 C.L.R. 190.

¹⁴ [1934] A.C. 365, 395-7. Cf. *Tooth & Co. v. Parramatta C.C.* (1955) 97 C.L.R. 492, 497-8; *North Sydney M.C. v. Comfytex Pty Ltd* [1975] 1 N.S.W.L.R. 447.

premises in a special rating list, on the ground that the legislature had prescribed a special procedure for determination of objections of this kind: by an assessment committee, subject to appeal to Quarter Sessions, and then special case stated to the King's Bench Division and beyond to the Court of Appeal and House of Lords.

Although it is clear that the House of Lords regarded the statutory procedure as the only procedure by which the particular objection made in this case could be taken, that objection was hardly of a kind which a court of law today would immediately recognize as one which, if sustained, would clearly bring it within the range of fundamental errors for the correction of which the supervisory jurisdiction is mainly designed. There was no suggestion that the rating authority had been derelict in the performance of its duty to make a determination according to law. The right of the aggrieved party to have premises classified in a certain way was a right which, if it existed, existed only by statute, and any decision as to how those premises were to be classified necessarily involved the exercise of judgment. In short the alleged error which gave rise to the application for mandamus could hardly be characterized as a clear case of jurisdictional error or wrongful disclaimer of jurisdiction.

Subsequent cases in which judicial review has been sought in relation to action taken in the preparation of valuation rolls suggests that even when the legislature has provided for a special procedure for contesting decisions made in relation to particular premises, the existence of that procedure will not exclude a supervisory jurisdiction to review when the error complained of, if established, affects the validity of a complete valuation roll or list.¹⁵

An express statutory provision which makes a statutory appeal the sole mode of contesting a decision may be effective to exclude supervisory review of decisions of the type subject to appeal, though it may be that the efficiency of such a clause to achieve that result will depend on the status of the body to whom appeal lies. In *Minister of Labour and Industry (N.S.W.) v. M.L.C. Assurance Co. Ltd*¹⁶ the High Court of Australia held that provisions in the N.S.W. *Industrial Arbitration Act 1912* which provided for appeals (and cases stated) to the State Court of Industrial Arbitration against magisterial orders imposing penalties and which also declared that: "No other proceedings in the nature of an appeal from any such order or by prohibition shall be allowed", effectively excluded the jurisdiction of the Supreme Court to grant a writ of prohibition against a magistrate who imposed a penalty under the Act, even when it was alleged that the magistrate had exceeded his jurisdiction. Whether the Court attached any significance to the fact that judges of the Industrial Court had judicial status is not indicated in the reasons for decision. In *McBeatty v.*

¹⁵ See *R. v. Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd* [1966] 1 Q.B. 380; *Anderson v. Valuer-General* [1974] 1 N.Z.L.R. 603.

¹⁶ (1922) 30 C.L.R. 488, 494-5.

*Gorman*¹⁷ Waddell J. did treat that fact as material to the question of whether appeal to the Industrial Commission was an adequate alternative to an order by way of mandamus against a magistrate who had declined jurisdiction. He thought it was. He did not hear argument or rule on the question whether the clause purporting to make the statutory remedy the exclusive remedy was legally effective to exclude the Supreme Court's jurisdiction.

It may be concluded that when a statutory right of appeal is conferred in respect of decisions which previously were subject to supervisory review, nothing short of an express provision ousting supervisory review and declaring appeal to be the exclusive mode of contesting decisions of that type will be construed as effective to exclude the jurisdiction to undertake supervisory review. No such clauses will be effective to oust a constitutionally entrenched supervisory jurisdiction. So jealous have superior courts of law been of their long-established jurisdiction to control the jurisdictional excesses of inferior courts and statutory agencies that it is conceivable that they would not regard an express statutory provision declaring a statutory appeal procedure to be the exclusive mode of contesting a decision as effective to exclude judicial review on jurisdictional grounds unless, perhaps, the appellate jurisdiction has been reposed in a superior court of law.¹⁸

(b) Unavailability of judicial review or remedy on other grounds

There can be no choice between judicial remedy and remedy by way of appeal if, for one reason or another, there is no and never was any supervisory jurisdiction in the particular cause; or if the particular remedy sought is not available; or if the person seeking judicial review lacks the requisite standing to sue.

An application for prohibition or certiorari may founder at the outset because the person or body against whom the remedy is sought is not of the class of persons or bodies whose actions are amenable to judicial review and remedy by those particular means.¹⁹ Any application for a prerogative writ or order may founder on the ground that the respondent is effectively the Crown; or, if the original jurisdiction of the High Court under s. 75(v) of the Constitution is relied upon, on the ground that the respondent is not an officer of the Commonwealth. Should the applicant for judicial review have sought to invoke the supervisory jurisdiction of the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977, his application may fail simply because the action of which he complains is not action of a kind which that court is authorized to review under the Act. Likewise a State Supreme Court may find it necessary to reject an application

¹⁷ [1975] 2 N.S.W.L.R. 262.

¹⁸ See fn. 46.

¹⁹ As in *Turner v. Kingsbury Collieries Ltd* [1921] 3 K.B. 169; *Re Legare & Calgary Municipal Planning Commission* (1972) 28 D.L.R. (3d) 279 and *Chakrovorly v. Attorney-General, Alberta* [1972] 4 W.W.R. 437.

for review on the ground that whatever its merits, the application concerns Commonwealth action which, by s. 9 of the *Administrative Decisions (Judicial Review) Act 1977*, the Court is debarred from reviewing.²⁰

When the application for judicial review concerns action (or inaction) on the part of university or other authorities whose constituent instrument provides for the office of visitor and invests in that officer "authority to do all things which appertain to visitors as often as to him seems meet", it is possible that jurisdiction to review will be disclaimed inasmuch as the subject matter of complaint falls within the visitor's exclusive jurisdiction. The existence and extent of that exclusive jurisdiction is controversial and cannot be entered upon here.²¹

A court to which an application for review is made may sometimes have doubts about its own jurisdiction to entertain the application or to award the remedy sought, and rather than rejecting the application outright on jurisdictional grounds, it may proceed to entertain it on the assumption that even if it does have jurisdiction, it should decline to grant remedy on discretionary grounds. One kind of situation in which a court may take this course is where there is uncertainty about whether the alleged error in respect of which remedy is sought goes to jurisdiction or not. It is now well established that certiorari will not lie to quash decisions which proceed from non-jurisdictional errors of law unless those errors are disclosed on the face of the record, or unless there is some statutory rule which permits the writ to be granted for error of law, regardless of whether it is patent on the record.²² It is also well established that the companion writ of prohibition does not lie for non jurisdictional errors of law, notwithstanding that they may be disclosed by the record.²³ Although the importance of the distinction between jurisdictional errors and non jurisdictional errors of law has

²⁰ Section 9 effectively withdraws from State Supreme Courts the supervisory jurisdiction previously exercisable by them under s. 39(2) of the *Judiciary Act 1903* in relation to the actions of Commonwealth officers.

²¹ Recent cases on the exclusive jurisdiction of university visitors include *Patel v. University of Bradford Senate* [1979] 1 W.L.R. 1066 (affirming *Megarry V.C.* [1978] 1 W.L.R. 1488); *Murdoch University v. Bloom* [1980] W.A.R. 193. See also *Re University of Melbourne; Ex parte de Simone* [1981] V.R. 378; J. W. Bridge, "Keeping the Peace in the Universities: The Role of the Visitor" (1970) 86 L.Q.R. 531; R. J. Sadler, "The University Visitor . . ." (1981) 7 U. Tas. L.R. 2; P. M. Smith, "The Exclusive Jurisdiction of the University Visitor" (1981) 97 L.Q.R. 610.

²² Decisions etc. reviewable by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (Cth.) are reviewable, inter alia, for error of law whether or not the error appears on the record, see s. 5(1)(f) and s. 6(1)(f).

²³ *Mackonochie v. Penzance (Lord)* (1881) 6 App C. 624; *R. v. Local Government Board* (1882) 10 Q.B.D. 309; *R. v. Clerkenwell General Commissioners of Taxation* [1901] 2 K.B. 879; *R. v. Commissioner of Patents; Ex parte Weiss* (1939) 61 C.L.R. 240; *R. v. Industrial Court; Ex parte Federated Miscellaneous Workers' Union* [1967] Qd.R. 349, 360; *R. v. Syme; Ex parte Page* [1970] W.A.R. 153, 157; *R. v. Evatt; Ex parte the Master Builders' Association of N.S.W. (No. 2)* (1974) 132 C.L.R. 150; *R. v. Stanley; Ex parte Redapple Restaurant Pty Ltd* (1976) 13 S.A.S.R. 290; *R. v. Judges of Federal Court of Australia; Ex parte Pilkington etc.* (1979) 142 C.L.R. 113; *R. v. Judges of Federal Court of Australia; Ex parte Soul Pattinson (Laboratories) Pty Ltd* (1979) 142 C.L.R. 113.

diminished by reason of judicial extensions of the range of legal errors characterized as errors going to jurisdiction, in Australia at least, the distinction is still maintained.²⁴

One consequence is that when confronted with an application for judicial review of some matter in which the character of the error complained of is controversial and also critical to the question of whether the court does have jurisdiction to review, the court may, if it considers that there is an alternative remedy by way of appeal which, if pursued, would permit an authoritative resolution of the questions of law raised upon the application for review, either disclaim its own jurisdiction to review, or whilst assuming jurisdiction, deny remedy on the ground that the remedy by way of appeal is as appropriate or more appropriate.²⁵ Whichever of these courses a court adopts may not constrain it from expressing an opinion on the substantive issue presented for its decision, which opinion cannot be safely ignored in any subsequent proceedings. For example, it is not unknown for a court to dismiss an application for prohibition on the ground that determination of the question in issue falls within the jurisdiction of the person or body sought to be prohibited, but at the same time to express a view on the manner in which that question should be decided, or on the factors which should be considered in deciding it.²⁶

(c) *Availability of appeal*

Before a court of supervisory jurisdiction reaches the stage of deciding whether judicial remedy should be refused because of the availability of an adequate alternative mode of review, it must have satisfied itself that the suggested alternative is indeed available to the particular applicant. The onus of establishing that it is falls on the respondent and if there is any real doubt about whether it is, the court is likely to resolve it in the applicant's favour.²⁷

The availability of an appeal in the instant case must obviously be considered in relation to the particular issue or issues raised on the application for judicial review. So if, for example, what is contested is the respondent's authority to make an order for costs, the respondent could not resist judicial review unless he could show that the provision made for

²⁴ *R. v. Small Claims Tribunal; Ex parte Barwiner Nominees Pty Ltd* [1975] V.R. 831. See also *South East Asian Fire Bricks Sdn Bhd v. Non Metallic Mineral Products Manufacturing Employees' Union* [1981] A.C. 363; cf. *Re Racal Communications Ltd* [1981] A.C. 374.

²⁵ See e.g. *R. v. Comptroller-General of Patents; Ex parte Tomlinson* [1899] 1 Q.B. 909, 914-5. See also cases in fn. 82.

²⁶ E.g. *R. v. Judges of Federal Court of Australia; Ex parte Pilkington etc.* (1979) 142 C.L.R. 113; *R. v. Judges of Federal Court of Australia; Ex parte Soul Pattinson (Laboratories) Pty Ltd* (1979) 142 C.L.R. 113.

²⁷ *R. v. Cotham* [1898] 1 Q.B. 802, 806; *R. v. North; Ex parte Oakey* [1927] 1 K.B. 491; *Bosnjak's Bus Service Pty Ltd v. Commissioner of Motor Transport* (1970) 92 W.N. (N.S.W.) 1003, 1019.

appeals against his decisions extended to decisions of the kind here in issue.²⁸ If the jurisdiction of the appellate body is defined in terms of a jurisdiction to hear and determine appeals against decisions of a particular kind, it will be necessary to decide first whether the subject of the application for judicial review is a decision within the meaning of the legislation governing appeals and if so a decision which is appealable.²⁹ If the application for judicial review is made before the respondent has made an appealable decision, for example if a writ of prohibition or an injunction is sought to restrain proceedings which are being conducted in breach of a duty to accord natural justice, the court may well take the view that the fact that any ultimate decision on the merits would be appealable is irrelevant.

Whether the subject of the application for judicial review is appealable may also depend on the ground or grounds on which the review is sought. If, for example, it is asserted that the decision under review is null and void, it may be unappealable because the jurisdiction of the appellate body extends only to the hearing and determination of appeals against valid decisions. Although there have been some cases in which courts themselves have disclaimed jurisdiction to hear and determine appeals against nullities, or have held that other appellate tribunals lack jurisdiction to decide appeals against determinations which are null and void,³⁰ it cannot be said that there is any general rule that an appellate jurisdiction does not extend to appeals against nullities.³¹ Whether such a jurisdiction does encompass appeals against nullities seems to depend on the manner in which the appeals jurisdiction is defined, the scope of review on appeal, and the nature of the invalidating cause.

²⁸ *R. v. South Brisbane JJ.; Ex parte Zagami* (1901) 11 Q.L.J. 81. See also *Re Weber & Metro Licensing Commission* (1964) 43 D.L.R. 2d 334.

²⁹ On what constitutes an appealable decision see *Deputy Commissioner of Patents v. Board of Control of Michigan Technological University* (1979) 28 A.L.R. 551; *Re Hare & Commissioner of Superannuation* (1979) 2 A.L.D. 233; *Re Loschiavo & Secretary of Department of Housing & Construction* (1980) 2 A.L.D. 757; *Duncan v. D.F.R.D.B.A.* (1980) 30 A.L.R. 165; *Collector of Customs (N.S.W.) v. Brian Lawlor Pty Ltd* (1979) 24 A.L.R. 307; *Re Rennie & D.F.R.D.B.A.* (1979) 2 A.L.D. 424; *BHP Ltd v. American Can Co.* [1980] V.R. 143; *Mobitel (International) Pty Ltd v. Dun & Bradstreet (Aust.) Pty Ltd* (1979) 22 S.A.S.R. 288; *Director-General of Social Services v. Chaney* (1980) 31 A.L.R. 571.

³⁰ E.g. *Watts v. Giesecke* (1870) 4 S.A.L.R. 123; *Lincoln v. Sinclair* (1885) 1 W.N. (N.S.W.) 143; *Harman v. Official Receiver* [1934] A.C. 245; *Barnard v. National Dock Labour Board* [1953] 2 K.B. 18; *Nelson Catchment Board v. Waimea County & Richmond Borough* [1958] N.Z.L.R. 1126; *Chapman v. Earl* [1968] 2 All E.R. 1214; *Metropolitan Properties Co. (F.G.C.) Ltd v. Lannon* [1969] 1 Q.B. 577; *R. v. Jones* [1969] 2 Q.B. 33; *Joseph v. Egan* (1970) 13 F.L.R. 497; *Campbell v. Rochdale General Commissioners* [1975] 2 All E.R. 385; *Yule v. Juneke* (1978) 52 A.L.J.R. 307; *Hanson v. Church Commissioners for England* [1978] Q.B. 823; *Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Pty Ltd* (1965) 113 C.L.R. 520.

³¹ *Meyers v. Casey* (1913) 17 C.L.R. 90; *Wild v. Wild* [1968] 3 W.L.R. 1148; *Alan E. Tucker Pty Ltd v. Orange C.C.* (1969) 90 W.N. (Pt. 1) 477, 480-1; *Stringer v. Minister of Housing & Local Government* [1971] 1 All E.R. 65, 75; *R. v. Hillington B.C.*; *Ex parte Royco Homes Ltd* [1974] 1 Q.B. 720; *Collector of Customs (N.S.W.) v. Brian Lawlor Automotive Pty Ltd* (1979) 24 A.L.R. 307; *Calvin v. Carr* [1980] A.C. 574.

Even if the appellate body does have jurisdiction to hear and determine an appeal against the decision which is the subject of the application for review, it is possible that its jurisdiction is confined in such a way that it cannot, in deciding the appeal, make a determination on the issue which is raised for decision on the application for judicial review. A tribunal having jurisdiction to hear and determine appeals against assessments for rating purposes may not, for example, have jurisdiction to enter upon the validity of the rate struck, or the validity of the total valuation roll.³²

A complete want of jurisdiction in the appellate body to decide an appeal on the ground raised in the application for judicial review is not the same as having jurisdiction to make a determination on that ground, but not a binding and conclusive determination. The difference between the two was adverted to by Brennan J. sitting as President of the Administrative Appeals Tribunal in *Adams v. Tax Agents Board*.³³ In that case one of the grounds on which the decision under review was challenged was that the legislation pursuant to which the decision was made was unconstitutional. Brennan J. accepted that since the Tribunal did not possess any of the judicial powers of the Commonwealth, it could not in determining an appeal properly before it make a binding and conclusive determination on the constitutionality of legislation. The alleged invalidity of the legislation under which the respondent to the appeal had acted was not "a ground which might invoke the exercise of the Tribunal's powers".³⁴ Further, "when a decision-maker acts in conformity with his statutory authority, a person whose interests are affected by his act may not obtain relief from this Tribunal upon the ground that the statute is ultra vires the Parliament."³⁵

It might be inferred from these observations that Brennan J. considered that the Tribunal lacked jurisdiction to rule on the constitutional issue. But other observations by him in the same case show that this was not his view. Rather the Tribunal was competent "to consider and reach an opinion on the question" and to do so "for the purpose of moulding its own conduct."³⁶ But this competence was "not to be treated as a jurisdiction invested in the administrative body to reach a conclusion having legal effect."³⁷ In the end, Brennan J. declined even to express an opinion on the constitutional question. His view was that an administrative body ought not "to consider constitutional validity of a statute affecting its power."³⁸ Similar views have been expressed in other cases in which administrative appeals tribunals

³² *Ex parte Coff's Harbour S.C.; Re Allen* (1957) 36 W.N. (N.S.W.) 103; *R. v. Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd* [1966] 1 Q.B. 380; *Anderson v. Valuer-General* [1974] 1 N.Z.L.R. 603.

³³ (1977) 12 A.L.R. 239.

³⁴ *Id.* 245.

³⁵ *Ibid.*

³⁶ *Id.* 241, 242.

³⁷ *Id.* 245.

³⁸ *Id.* 243.

have been invited to rule on the validity of subordinate legislation on non-constitutional grounds.³⁹

If, on an application for judicial review, it appears that although the appellate body to whom the applicant for review might appeal does have jurisdiction to form an opinion on the issue which is now before the court, but cannot make a binding determination with respect to it, that consideration must weigh very strongly against any argument that the appeal is an effective alternative to judicial review.

In determining whether remedy by way of appeal is an available alternative to judicial review, account must be taken of whether review by way of appeal is automatic upon request, or whether leave to appeal must be sought and obtained. Regard must also be had to the powers exercisable by the appellate body and whether they are of a kind which enable that body to correct the error for which judicial remedy has been sought. Review upon appeal could not be regarded as a true alternative remedy if establishment of a tribunal for the hearing and determination of an appeal is discretionary.⁴⁰ If an appellant needs to obtain special leave to appeal, whether from the appellate body or some other body, and the grant of leave to appeal is discretionary, that may also be a ground for concluding that appeal is not truly an alternative to judicial review.

Notwithstanding that the applicant for judicial review has a right to appeal in the sense that if he lodges an appeal he is entitled to have his appeal heard and determined, and to seek and obtain a writ of mandamus or mandatory injunction to enforce his right, his remedy by way of appeal may not be a true alternative to the judicial remedy sought inasmuch as even if his appeal should succeed, the appellate body lacks power to rectify the error complained of. In *R. v. Hull Board of Visitors; Ex parte St. Germain*⁴¹ the English Court of Appeal held that the provision made in Prison Rules for review of decisions of Boards of Visitors on petition to the Home Secretary was no true alternative to remedy by certiorari. The right to petition to the Minister for redress of grievances was not, strictly speaking, a right to appeal, and more important for present purposes, the Minister had no power to quash a finding by a Board of Visitors that a prisoner had been guilty of a breach of discipline.

An appellate body may have jurisdiction to undertake a *de novo* hearing and review a decision on its merits, but if it cannot make a decision in substitution for that appealed against, but merely confirm that decision or else recommend to the person or body making it that it be set aside or varied, then it would be difficult to sustain an argument that the right to

³⁹ *Albion v. Shire of Lilydale* (1976) 5 V.P.A. 32; *Re Zimmax Trading Co. Pty Ltd & Collector of Customs* (N.S.W.) (1979) 2 A.L.D. 120; *Re Costello & Secretary of Department of Transport* (1979) 2 A.L.D. 934, 939.

⁴⁰ *R. v. Town Planning Committee; Ex parte Skye Estate Ltd* [1958] S.A.S.R. 1, 21-4, 27-8, 39-40.

⁴¹ [1979] Q.B. 425, 448-9, 456, 465.

appeal was an alternative to supervisory judicial proceedings in which the very validity of the appealable decision was impugned. Appeals to the Administrative Appeals Tribunal against ministerial decisions to order deportation pursuant to ss. 12 and 13 of the *Migration Act* 1958 fall into this category.⁴²

Whether appeal is an alternative to judicial remedy must also be considered in relation to the standing of the applicant to appeal. The applicant for judicial review may well be a person who has locus standi to sue for the particular remedy sought, but not be one who, under the legislation providing for appeals, would have standing to appeal. In this connexion it needs be borne in mind that although prerogative writs, injunctions and declarations may be obtained to vindicate personal rights, breach of which is also an actionable wrong, they are also proceedings for the vindication of public rights. And for the vindication of those public rights, individuals may be accorded standing on a much more generous basis than is allowed in appellate proceedings.

Doubts about the standing of the applicant for judicial review to appeal was one of the reasons why in *R. v. North; Ex parte Oakey*⁴³ the English Court of Appeal decided that the appeal was not a bar to an application for prohibition. In that case a Consistory Court had made a determination imposing a liability on the applicant for review. He was not a party to the proceedings and had not been afforded an opportunity to be heard. Determinations of the Consistory Court were appealable to the Court of Arches, but it was doubtful whether the applicant for review could invoke that appellate jurisdiction, he not being a party to the proceedings in which the adverse determination was made.

Another reason why appeal may not be a viable alternative to judicial review is that although the applicant for review could have appealed, and on the very ground now raised in the application for review, the time for lodging an appeal has expired and is incapable of being extended. The failure of the applicant to avail himself of his right to appeal within the prescribed time could have a bearing on the question of whether judicial remedy should be denied on the separate ground of undue delay in seeking it. But the fact that there is a limit on the time within which an appeal must be lodged is certainly no absolute and universal bar to judicial review. In *Graddage v. London Borough of Haringey*,⁴⁴ a declaration was granted in relation to the validity of a notice to pay the costs of work undertaken by a local authority following non-compliance with a prior order that the work be performed by the party receiving the notice. A declaration was granted notwithstanding that the time for appealing against the notice had expired. That the time for appeal had expired was also treated as irrelevant in *R. v.*

⁴² *Migration Act* 1958 (Cth), s. 66A.

⁴³ [1927] 1 K.B. 491.

⁴⁴ [1975] 1 All E.R. 224.

*Agents Board of A.C.T.; Ex parte Green.*⁴⁵ There a writ of certiorari was sought to quash a decision of the Board that the applicant be refused registration. It was sought on the ground that the decision had been made in contravention of a duty to accord natural justice. The applicant could have appealed against the decision to the A.C.T. Supreme Court. She had not within the prescribed time, but had made an application to the Court for an extension of time, mainly on the ground that notice of the Board's determination had not arrived within sufficient time to enable her to consider whether to appeal. That application had been refused, but only because the Court concluded that it had no power to grant it.

If the statutory right to appeal within a prescribed time is expressly declared to be the exclusive mode of review, a question will arise as to whether in law supervisory review is excluded altogether. Subject to any applicable constitutional constraints, it may be that if the right to appeal is to a court of law which has authority to undertake the kind of review which otherwise would be undertaken by a court of supervisory jurisdiction, the time-limited appeal will be construed as the sole mode of challenge, or at least the sole mode of challenging for non-jurisdictional errors of law.⁴⁶

IS THERE A DISCRETION?

Even when it is clear that appeal is available as an alternative remedy and that it is a suitable alternative to judicial review, the case may be one in which the court concludes that it has no discretion to decline remedy because the applicant is entitled to the judicial remedy sought *ex debito justitiae*. There is considerable authority for the view that where prohibition or certiorari is sought for patent jurisdictional error, a court has no discretion to refuse the writ once it has determined that the error complained of does indeed amount to a patent jurisdictional excess.⁴⁷

STAGE AT WHICH DISCRETION IS EXERCISED

Although a respondent may have made his objection to the grant of the remedy sought on discretionary grounds at the beginning of the hearing, if the court follows established practice it will not rule upon it as a preliminary issue but will rather proceed to consider the merits of the applicant's case and decide the question of how its discretion should be exercised only at the conclusion of the case.

It appears that the practice of the Federal Court of Australia in exercising

⁴⁵ (1970) 15 F.L.R. 306, 313; cf. *Chad Investments Ltd v. Longson, Tammels & Denton Real Estate Ltd* [1971] 5 W.W.R. 89.

⁴⁶ *R. v. Secretary of State for the Environment; Ex parte Ostler* [1977] Q.B. 122.

⁴⁷ *Yirrell v. Yirrell* (1939) 62 C.L.R. 287, 297; *R. v. Postmaster-General; Ex parte Carmichael* [1928] 1 K.B. 291, 299; *R. v. Comptroller-General of Patents & Designs; Ex parte Parke Davis & Co.* [1953] 2 W.L.R. 760, 764-5; *R. v. Tillett; Ex parte Newton* (1969) 14 F.L.R. 101, 123; *R. v. Hillington B.C.; Ex parte Royco Homes Ltd* [1974] 1 Q.B. 720; *R. v. Town Planning Committee; Ex parte Skye Estate Ltd* [1958] S.A.S.R. 1; *R. v. Elliott; Ex parte Elliott* (1974) 8 S.A.S.R. 329, 342-3.

the discretion conferred on it by s. 10(2)(b)(ii) of the *Administrative Decisions (Judicial Review) Act* 1977 is likely to be different. In *Kelly v. Coats*⁴⁸ and *Graham v. Commissioner of Superannuation*,⁴⁹ Toohey J. and Fox A.C.J. respectively dealt with the respondent's request that the Court exercise its discretion adversely to the applicant as a preliminary issue and, seemingly, as one which ought to be determined before the merits of the applicant's application for review were examined. The Act does not expressly require that this course be adopted and it is doubtful whether it can be so interpreted, which is not to say that it is impermissible for the Court to take the approach it did in the two cases referred to.

The Act does not, like s. 31 of the United Kingdom *Supreme Court Act* 1981, require an applicant for review to seek and obtain the Court's leave to have his case reviewed. It is true that ss. 5, 6 and 7, which define the grounds on which review may be sought, when read together with s. 10(2)(b), might be interpreted as giving the Court a discretion to decline to exercise jurisdiction on the two grounds set out in s. 10(2)(b). Sections 5, 6 and 7 provide that an aggrieved person "may apply to the Court for an order of review" on certain grounds. Section 10(2)(b) states that "the Court may, in its discretion, refuse to grant an application under section 5, 6 or 7" on specified grounds. But s. 16, which describes the remedies the Court may award, makes it clear that a decision on an application for an order of review is not to be a decision on whether the Court should or should not exercise its jurisdiction to review. The orders which s. 16 authorizes the Court to make are orders which may be made "on an application for an order of review". In contrast s. 11(4) gives the Court a discretion to "refuse to entertain an application for an order of review" when no period for making of the application has been prescribed, and the Court is of the opinion that it was not made within reasonable time.

There is thus a clear distinction between refusing to entertain an application for an order of review and deciding an application for such an order, albeit on the ground that whatever the merits of his case, the applicant has an adequate alternative remedy. Doubtless there will be many cases in which, once the respondent has requested the Court to exercise its discretion under s. 10(2)(b), it is convenient for that objection to be ruled upon as a preliminary issue. The interests of neither party may be served if, despite the respondent's objection, the case proceeds to hearing and determination of the substantive grounds of the application and concludes with a finding, on the merits, in the applicant's favour but a refusal of his application on either of the grounds referred to in s. 10(2)(b).

But it would, I believe, be unfortunate if the view were to gain hold that once the alternative remedy ground is raised by a respondent, the Court should, as a matter of course, dispose of it as a preliminary issue, without

⁴⁸ (1981) 35 A.L.R. 93.

⁴⁹ (1981) 3 A.L.N. [52].

inquiry into the grounds advanced by the applicant in support of his application. Assessment of the adequacy of the suggested alternative remedy may not be possible until the strength of the applicant's claim is ascertained. Similarly if the applicant contests the very availability of the suggested alternative remedy on, for example, the ground that the error of which he complains rendered the decision he seeks to have reviewed a complete nullity and that the appellate tribunal has no jurisdiction to hear and determine appeals against nullities, then the Court cannot make an informed ruling on the issue thereby raised until it decides not merely the ambit of review on appeal, but also whether the administrative decision under challenge was indeed a nullity. Again, if the Court accepts that it may have no discretion to refuse relief when patent jurisdictional error is established, it cannot properly reject an application on the alternative remedy ground at the preliminary stage if any of the grounds relied upon by the applicant suggest that such an error may have been committed.

FACTORS RELEVANT TO EXERCISE OF DISCRETION

When an appeal is available as an alternative to judicial review, courts do not always spell out in any detail why it is that they conclude that appeal is a suitable alternative remedy and that the judicial remedy or remedies sought should be refused. Nor do they always explain why it is that, despite the existence of a right to appeal, they have concluded that judicial remedy is more or just as appropriate and that in consequence the discretion to refuse remedy on the alternative remedy ground should not be exercised against the otherwise meritorious applicant for review. Nevertheless there are sufficient reported cases in which reasons have been given to enable one to identify at least some of the factors which have been considered relevant in determining whether judicial remedy should be denied; which is not to say that courts will always have regard to these factors or adopt a uniform approach in assessing their significance.

It is apparent that some courts have been much more ready than others to allow their supervisory jurisdiction to be utilized notwithstanding that the legislature has afforded the applicant an equally efficacious remedy by way of appeal. Other courts seem to have proceeded from the assumption that the supervisory jurisdiction is an extraordinary jurisdiction which should not be invoked unless there is no other forum in which the applicant may have his grievance redressed.

Whether or not remedy by way of appeal is considered to be an adequate alternative to the judicial remedy or remedies sought seems to depend on a wide variety of factors, among them: the nature of and the time at which judicial remedy is sought; the ground or grounds on which remedy is sought; the status and powers of the appellate body; the nature and scope of review on appeal; the relative costs of appeal and judicial review; the relative speed with which the matter in dispute is likely to be resolved

depending on which remedy is pursued, and the importance of a speedy resolution; whether or not an appeal is pending; and whether or not an appeal has been lodged and already determined.

Since rather different considerations appear to come into play according to the stage at which judicial remedy is sought of a court of supervisory jurisdiction, I have chosen to examine the exercise of the judicial discretion according to whether the application for judicial review is made (a) prior to the giving of a final decision on the merits by the respondent to the application; (b) following the giving of a final decision on the merits by the respondent and without recourse to remedy by way of appeal; (c) following the giving of a final decision on the merits by the respondent and concurrently with the lodging of an appeal; and (d) following the giving of a final decision on the merits by the respondent and after an unsuccessful appeal.

(a) *Judicial review before final decision*

Typically remedy by way of appeal is resorted to only when the person or body whose decisions are subject to appeal has purported to exercise a jurisdiction and has made a final decision. An appellate jurisdiction may have been defined in such a way as to encompass disclaimers of power or jurisdiction, for example, a refusal by the Commissioner of Patents to grant an application for extension of time under s. 160 of the *Patents Act 1952* on the ground that the conditions precedent for the exercise of discretion conferred by that section have not been fulfilled.⁵⁰ The appellate jurisdiction may also have been defined in such a way as to encompass appeals against interlocutory decisions, e.g. a decision regarding a person's locus standi or entitlement to be joined as a party to proceedings.⁵¹ But more usually rights of appeal are exercised only when the decision-making process has concluded. Supervisory jurisdictions, in contrast, are invoked not merely to contest the validity and legality of final decisions, but also to compel the exercise of jurisdiction wrongly disclaimed and the performance of duties incidental to the exercise of decision-making powers, e.g. duties to accord natural justice, and to restrain proceedings en route to final decision.

When an application is made for judicial review of conduct which a person has engaged in, is engaging in or proposes to be engaged in for the purposes of making a decision (to adapt the words of s. 6 of the *Administrative Decisions (Judicial Review) Act 1977*), and that conduct could not afford a ground for appeal until a final decision was made, the prospective availability of an appeal can hardly be regarded as a satisfactory alternative to judicial review and remedy. Indeed at the time at which application for

⁵⁰ *Deputy Commissioner of Patents v. Board of Control of Michigan Technological University* (1979) 28 A.L.R. 551; *Re Hare & Commissioner of Superannuation* (1979) 2 A.L.D. 233; *Re Loschiavo & Secretary Department of Housing & Construction* (1980) 2 A.L.D. 757.

⁵¹ See *Administrative Appeals Tribunal Act 1975* (Cth), s. 44(2).

judicial review is made, it may be that there is no accrued right to appeal at all. It is not surprising then that when the conduct which is the subject of complaint would vitiate any decision ultimately made, courts have not, in the main, regarded the prospective availability of an appeal as an adequate alternative to remedy by way of prohibition, injunction or mandamus. Coercive judicial remedy must, presumptively, be more appropriate when the applicant can establish a wrongful assumption of jurisdiction,⁵² failure to comply with mandatory procedural requirements, or a clear misdirection on the questions to be decided or matters relevant to their determination such that the final determination would be null and void.

Lord Denman C.J. summed up the desirability of preventive judicial measures to restrain wrongful assumption of jurisdiction as follows:

"There is no reason for driving the subject to that expensive process [i.e. appeal], to abide by the chance of repetition of error, which, if committed, can, at last, be only rectified by prohibition, and may be so committed as to be placed beyond the reach of even that remedy; or for compelling him to submit even to that direct inconvenience arising from that decision alone, if none lay beyond them."⁵³

When prohibition is sought to prohibit an alleged exceeding of jurisdiction by a superior court of limited jurisdiction, e.g. by the Federal Court of Australia, the availability of an appeal by rehearing to a higher court, a Full Court of the Federal Court, may, depending in part on the extent to which the alleged excess of jurisdiction is controversial, dispose the reviewing court towards refusal of remedy. If the presence or absence of jurisdiction depends on determination of questions of fact, and the court against which prohibition has sought has not, as yet, decided those questions of fact, let alone decided whether it has jurisdiction, that circumstance may lead the reviewing court to the conclusion that, quite apart from the prospective availability of appeal, the application for prohibition is premature.⁵⁴ It was a circumstance to which some significance was attached in *R. v. Judges of Federal Court of Australia; Ex parte Western Australian National Football League (Inc.)*.⁵⁵

In that case, application had been made to the High Court for prohibition against judges of the Federal Court to prohibit proceedings brought under the *Trade Practices Act* 1974. The writ was sought on the ground that the defendant to the proceedings, the Football League, was not amenable to the Federal Court's jurisdiction under the Act in that it was neither a

⁵² *R. v. Wimbledon JJ.; Ex parte Derwent* [1953] 1 Q.B. 380, 389-90; *R. v. Comptroller-General of Patents & Designs; Ex parte Parke Davis & Co.* [1953] 2 W.L.R. 760; *Ex parte Mimna* (1900) 16 W.N. (N.S.W.) 209.

⁵³ *Burder v. Varley* (1840) 12 Ad. & E. 233, 263.

⁵⁴ *R. v. Judges of the Federal Court of Australia; Ex parte W.A. National Football League (Inc.)* (1979) 143 C.L.R. 190; *R. v. Small Claims Tribunal; Ex parte R.A.C.V. General Insurance Pty Ltd* [1981] V.R. 602.

⁵⁵ (1979) 143 C.L.R. 190.

trading corporation nor a corporation engaged in inter-State trade. At the time the writ was sought the Federal Court had yet to rule on the defendant's objection to its jurisdiction. The High Court accepted that the Federal Court had jurisdiction to rule on the objection though not conclusively. Although opinions were expressed on whether the League was amenable to the Federal Court's jurisdiction and the majority view was that it was, three of the five Justices had reservations about the propriety of its intervention. Mason and Jacobs JJ. thought that the High Court should have the benefit of the Federal Court's findings, and that the existence of the right to appeal to a Full Court of the Federal Court constituted "a persuasive ground for refusing the writ as a matter of discretion."⁵⁶ Gibbs J. thought that although the High Court's jurisdiction to review was not excluded by the availability of an appeal, the application for prohibition was premature.⁵⁷ Barwick C.J., in contrast, thought that the availability of appeal was not even relevant to the exercise of the High Court's discretion.⁵⁸ If the Federal Court proceeded to decision, its decision would not necessarily be appealed against. If there were no appeal the Federal Court's ruling on the jurisdictional issue might become a precedent followed in subsequent cases. That in itself was reason enough for the High Court's intervention.

When the ground for seeking judicial review is that the respondent to the application was under a duty to exercise jurisdiction, and refused to perform that duty, e.g. by wrongfully disclaiming jurisdiction, the existence of a right to appeal against a determination that there is no such duty or no jurisdiction, has rarely been regarded as an adequate alternative to judicial remedy, more particularly, mandamus or an order having the same effect.⁵⁹ In such cases the adequacy of appeal as an alternative remedy must surely depend largely on the nature of the appeal and status and powers of the appellate body. Unless the appeal allows for an authoritative determination of the jurisdictional issue and the appellate body is obliged to conduct a *de novo* hearing and stands in the shoes of the primary decision-maker, the right to appeal cannot be treated as a true substitute for the applicant's right to a proper exercise of jurisdiction by the primary decision-maker.

The few cases in which courts have refused to make mandatory orders to compel the exercise of a jurisdiction wrongfully declined have presented peculiar features. In *Ex parte Jarrett*⁶⁰ the reasons why the court refused to grant a writ of mandamus to compel justices to hear and determine an application for custody, by reason of the existence of a right to appeal, were, first that the justices had not disclaimed jurisdiction, but had merely

⁵⁶ Id. 230, 237.

⁵⁷ Id. 216.

⁵⁸ Id. 204-6.

⁵⁹ *R. v. H. Beecham & Co.; Ex parte R. W. Cameron & Co.* [1910] V.R. 204; *Ex parte Newham* (1923) 23 S.R. (N.S.W.) 231; *Ex parte Coff's Harbour S.C.*; *Re Allen* (1957) 76 W.N. (N.S.W.) 103; *Barham v. Stevenson* [1975] 1 N.S.W.L.R. 31; cf. *R. v. Burchill & Salwaj; Ex parte Kretschmar* [1947] Q.St.R. 249.

⁶⁰ (1946) 62 T.L.R. 230.

adjourned the hearing of the application for some five months; and secondly and more importantly, an appeal, if lodged, would be heard and decided by a judge of the High Court of Justice practised in the exercise of a guardianship jurisdiction. The appeal, one assumes, was by way of *de novo* hearing.

In *McBeatty v. Gorman*,⁶¹ Waddell J. refused to grant an order by way of mandamus against a magistrate who had wrongfully declined to exercise jurisdiction to hear and determine a complaint of breach of a New South Wales industrial award. The magistrate's decision was appealable to the State Industrial Commission. On the hearing of an appeal the Commission had power to remit the case to a magistrate. The Commission also had authority, by statute, to review its own decisions. Waddell J. considered that here the remedy by way of appeal was as "convenient, beneficial and effectual" a remedy as remedy by way of an order in the nature of mandamus. Although he did not comment on the character of the appeal, one assumes that he took it to be an appeal by way of *de novo* hearing. He thought it significant that the judges of the Industrial Commission enjoyed the same status as puisne judges of the Supreme Court. He noted that in providing for appeals against magisterial orders and the Commission, the Parliament had also declared that "no other proceedings in the nature of an appeal from any such order or by prohibition shall be allowed".⁶² but since no argument had been addressed to him on the effect of this privative clause, he did not base his exercise of discretion upon it.

The High Court's refusal of mandamus against a judge of the Family Court in *R. v. Ross-Jones; Ex parte Beaumont*,⁶³ in respect of his determination that he had no jurisdiction to hear and decide an application for appointment of a receiver of a partnership, was also influenced by special considerations. It was accepted that the respondent's decision was subject to appeal to a Full Court of the Family Court as of right. Stephen, Jacobs and Aickin JJ. thought this to be the preferable remedy.⁶⁴ Gibbs, Stephen and Aickin JJ. made it clear that, whatever the merits of the application, it should be refused having regard to the fact that the Family Court judge's ruling, disclaiming jurisdiction, had been made by consent, in order to raise an issue for determination by the High Court.⁶⁵ Nonetheless, the Court proceeded to decide the jurisdictional question and found that the respondent judge's disclaimer of jurisdiction was well founded.

The moral to be drawn from both the *W.A. Football League* case and the *Ross-Beaumont* case is that, although in both the High Court did, in exercise of its jurisdiction under s. 75 of the Constitution, decide the substantive merits of the application for review and thereby made it unnecessary for either party to the application to exercise the right to appeal

⁶¹ [1975] 2 N.S.W.L.R. 262.

⁶² *Industrial Arbitration Act 1940* (N.S.W.), s. 120(4).

⁶³ (1979) 141 C.L.R. 504.

⁶⁴ *Id.* 513, 514, 517-8, 522.

⁶⁵ *Id.* 513, 522.

against a decision of the primary decision-maker, in future the Court expects that those contesting the jurisdiction of superior courts of limited federal jurisdiction, prior to final decision, should not resort to the High Court until the respondent court has made an informed and deliberate decision on the issue going to its own jurisdiction. I think it may also be inferred that a significant number of serving High Court Judges will be reluctant to embark upon those inquiries which are necessary to decide issues concerning the jurisdiction of superior courts of limited federal jurisdiction which turn on questions of fact, in advance of reception of evidence germane to proof of the relevant facts by the primary court, in advance of adjudication by the primary court of the preliminary jurisdictional issue with regard to that evidence, and before resort to the established appellate court machinery, including that which allows a single judge to refer a question of law for determination by a Full Court.

(b) *Judicial review after final decision*

The choice between resort to judicial review in a supervisory jurisdiction and resort to a right of appeal will normally be made when the prospective respondent has proceeded to make a final decision and has made it clear that he regards himself or itself *functus officio*. The applicant's choice of forum, if an informed choice, is likely to depend very much on the ground or grounds upon which he principally relies in protesting the decision subject to review and appeal, and whether a judicial determination would serve his interests better than an appeal. If, for example, he complains of a decision to revoke his occupational licence and his main ground for contesting that decision is that there was no basis whatsoever on which that decision could be taken, he may think it preferable to have the matter resolved authoritatively by a superior court of law rather than by, say, an administrative appeals tribunal whose decisions are themselves subject to supervisory judicial review. If, on the other hand, his complaint concerns the procedure by which the decision was reached, and the alleged procedural defects could be overcome upon an appeal by way of *de novo* hearing, he might consider it preferable to appeal. A successful application for judicial review could, after all, result in no more than an order to quash the decision reached in violation of mandatory procedures and a redetermination of the matter by the primary decision-maker.

When application has been made for judicial review on the ground that the respondent had no jurisdiction whatsoever in the cause, the courts have seldom declined remedy merely because the decision is subject to appeal.⁶⁶

⁶⁶ *R. v. Skinner* (1870) 1 A.J.R. 151; *R. v. Postmaster-General; Ex parte Carmichael* [1928] 1 K.B. 291; *R. v. Galvin; Ex parte Metal Trades Employees' Association* (1949) 77 C.L.R. 432; *R. v. District Court, Brisbane; Ex parte Allen* [1969] Qd.R. 114; *R. v. Johns; Ex parte Public Service Association of South Australia Inc.* [1971] S.A.S.R. 206, 209-11; *Re Canadian Pacific Transport Ltd v. Loomes Courier Services Ltd* (1976) 72 D.L.R. 3d 434; *R. v. Cook; Ex parte Twigg* (1980) 54 A.L.J.R. 515.

In most cases, it seems not to have been considered material that the appeal lies to a court rather than to an administrative tribunal, but in *R. v. Potsmaster-General; Ex parte Carmichael*,⁶⁷ the status of the appellate body and the nature of the appeal were thought to be relevant. In that case application had been made to quash a medical certificate which had been issued in purported exercise of authority conferred by workers' compensation legislation. There was a statutory right to appeal against the certification to a medical referee. The applicant for review claimed that the person who had issued the certificate was not a person having the requisite authority to certify. Avory J. upheld this contention and awarded certiorari despite the right to appeal. On appeal, he pointed out, the correctness of the certificate on medical grounds could be brought into question, but not its validity on legal grounds.

In *R. v. Cook; Ex parte Twigg*⁶⁸ the High Court of Australia granted certiorari to quash a conviction for contempt entered by a judge of the Family Court, on the ground of want of jurisdiction, notwithstanding that the applicant might have appealed to a Full Court of the Family Court. But Murphy and Wilson JJ. indicated that in future, they would be less favourably disposed towards grant of judicial relief where there was a right to appeal from court to court.⁶⁹ "It may become appropriate in a future case", Wilson J. observed, "to withhold relief, on discretionary grounds in order to encourage aggrieved persons to pursue their remedy in the proper forum."⁷⁰

Absence of jurisdiction to make the decision which is the subject of complaint may arise not because the decision-maker had no authority to entertain the cause, but rather because he had no authority to make a decision of the kind he made, e.g. to grant a planning permit on conditions which are claimed to be impermissible. Once again the courts have rarely declined relief merely because of the availability of an appeal whether it be to a court or to another body.⁷¹ If, as in *R. v. Hillingdon B.C.; Ex parte Royco Homes*,⁷² the appeal lies to a person or body which is ill-equipped to make determinations on questions of validity, there are obvious advantages in proceeding direct to a superior court of supervisory jurisdiction to settle the matter conclusively. Current indications are that the Federal Court of Australia will not be slow to exercise its supervisory jurisdiction under the *Administrative Decisions (Judicial Review) Act 1977* when the subject of

⁶⁷ [1928] 1 K.B. 291.

⁶⁸ (1980) 54 A.L.J.R. 515.

⁶⁹ Id. 521, 523.

⁷⁰ Id. 523.

⁷¹ *R. v. Brisbane JJ.; Ex parte Queensland Treasurer* (1901) 11 Q.L.J. 77; *R. v. Licensing Court for Western District; Ex parte Francis* [1929] S.A.S.R. 140, 148; *R. v. Paddington Valuation Officer; Ex parte Peachey Property Corporation Ltd* [1966] 1 Q.B. 380; *R. v. Hillingdon B.C.; Ex parte Royco Homes Ltd* [1974] 1 Q.B. 720.

⁷² [1974] 1 Q.B. 720.

complaint is an alleged error of law and the body to which appeal lies is not invested with any part of the judicial power of the Commonwealth and cannot therefore make any binding determination on questions of law.⁷³

Possibly different considerations apply where appeal lies from an inferior court to a superior court and the alleged excess of jurisdiction can be raised and dealt with on appeal. The majority of the South Australian Supreme Court apparently thought so when in *R. v. Elliott; Ex parte Elliott*⁷⁴ they declined to grant certiorari to quash convictions which were appealable to that Court.

Administrative appeals tribunals which are not courts of law may consist of or include legally qualified members, but it is doubtful whether Australian courts would now attach much significance to the legal qualifications of the tribunal members in determining the adequacy of the right to appeal as an alternative to judicial review on a jurisdictional question. Cases such as *R. v. Comptroller-General of Patents; Ex parte Munz*⁷⁵ and *Re Wingate's Patent*⁷⁶ in which the availability of appeal to a Law Officer was advanced as the reason for denying judicial remedy in a supervisory jurisdiction, should not therefore be regarded as accurate guides to current judicial thinking.

The jurisdictional errors which are grounds for the grant of judicial remedy in a supervisory jurisdiction include not merely unauthorized assumptions of jurisdiction, but also constructive failures to perform a duty to exercise a jurisdiction according to law. In such cases the decision-maker has purported to make a decision in exercise of his or its jurisdiction but has fallen into the error of deciding with regard to irrelevant considerations, or in disregard of considerations he was legally obliged to take into account, or by application of an inflexible policy, or as dictated to by an unauthorized person, or in consequence of having applied the wrong test. When errors of this kind are alleged, judicial intervention is often sought with the object of compelling the decision-maker to redetermine according to law, or of obtaining a declaration of invalidity which may prompt a redetermination without legal coercion.

The fact that an applicant for judicial review may appeal against decisions which proceed from such errors and on appeal is entitled to a *de novo* hearing is no absolute bar to the grant of judicial remedy. In *R. v. Stepney Corporation*,⁷⁷ the court concluded that the availability of an appeal to the Treasury against a decision regarding the compensation payable to an office holder whose office had been abolished, was not an adequate alternative to mandamus when the decision-maker had not really exercised its discretion, but had rather followed a practice of another body in the

⁷³ *Kelly v. Coats* (1981) 35 A.L.R. 93; *Graham v. Commissioner of Superannuation* (1981) 3 A.L.N. [52].

⁷⁴ (1974) 8 S.A.S.R. 329, 366, 375.

⁷⁵ (1922) 39 R.P.C. 335.

⁷⁶ [1931] 2 Ch. 272, 286.

⁷⁷ [1902] 1 K.B. 317.

mistaken belief that it was bound by that practice. In *R. v. Shire of Perth; Ex parte Dewar & BurrIDGE*,⁷⁸ the Western Australian Full Court concluded that an appeal to the Minister against the local authority's refusal of a planning permit was not an adequate substitute for mandamus when it was alleged that the decision had been based on irrelevant considerations. The Minister's appellate jurisdiction was not, it was thought, designed for investigation of questions of detail of the kind which are raised when the relevance of considerations taken into account by planning authorities is disputed. In any event, the Minister should not, Jackson J. thought, be expected to decide questions of law or jurisdiction.

In *Marks v. Swan Hill Shire Council*,⁷⁹ Norris J. concluded that he should not decline to grant a declaration that the Council had erred in its decision not to grant the plaintiff a permit merely because the plaintiff could have appealed to the County Court or even because appeal would have been a cheaper and more expeditious remedy than a suit for a declaration. In his view, it was enough that the plaintiff had established that the defendant Council had decided on the basis of an illegitimate policy.

Notwithstanding that the relevance of considerations taken into account in the making of decisions and the legitimacy of the policy or guidelines applied by the decision-maker do raise legal questions going to the validity of the decision, courts of supervisory jurisdiction have, on a number of occasions, forced applicants for judicial review to utilize their rights to appeal to tribunals on the ground that the tribunal in question can traverse all the issues raised in the application for review and that it possesses an expertise which the court does not. Nearly all of these cases have been ones to do with the administration of land planning legislation and have also been ones in which the applicant for review sought mandamus to compel the primary decision-maker to redetermine his application according to law.

When in *Tooth & Co. Ltd v. Parramatta City Council*⁸⁰ the High Court refused special leave to appeal against a decision of the Supreme Court of New South Wales to refuse mandamus against the Council to compel issue of a planning application, or reconsideration of it, the Court made it plain that although the appeals provisions had not ousted the Supreme Court's supervisory jurisdiction, those provisions were of a kind which gave the applicant for the permit a more appropriate and suitable remedy than that the Supreme Court could give. The legislature had appointed remedies by way of appeal, to the Land and Valuation Court and in some cases to the Minister, which were obviously intended to embrace reviews on the grounds relied upon by the applicant for judicial review in the instant case. Dixon C.J., who dealt most fully with the discretionary point, reasoned from the premise

⁷⁸ [1968] W.A.R. 149, 155.

⁷⁹ [1974] V.R. 896.

⁸⁰ (1955) 97 C.L.R. 492.

that mandamus is to be regarded as an extraordinary remedy. He argues thus:

"Where the legislature has provided for the very description of case a remedy designed as appropriate and adequate, a court should be careful that mandamus is not used to avoid recourse to the remedy or as a substitute for it. The general rule is that the court exercises its discretion against granting a writ of mandamus where a remedy is provided by way of appeal or the like which is equally convenient, beneficial and effective. If the writ of mandamus does not provide the party with a more convenient and better remedy, the court, in such a case, leaves the party with that which has been provided."⁸¹

In a series of subsequent cases the New South Wales Supreme Court declined to award mandamus against local planning authorities in respect of their decisions to refuse application for planning permits, partly or wholly on the ground that the statutory provisions for appeals against such refusals enabled the dissatisfied applicant to obtain review by an expert tribunal exercising original jurisdiction.⁸² In one, *Ex parte Australian Property Units Management (No. 2) Ltd; Re Baulkham Hills Shire Council*,⁸³ Sugarman J., taking his cue from Dixon C.J.'s observations in *Tooth's* case, expressed the view that mandamus was not an appropriate remedy when there is a statutory right to appeal against a decision allegedly based on illegitimate principles and

"where the matter for decision by the subordinate or local body being of an administrative rather than a judicial character, the appeal from its decision lies to the superior or central authority which is vested with authority and power to define and enforce the administrative policies in accordance with which decisions are to be given."⁸⁴

It is plain that in that particular case the Supreme Court was not persuaded that there was much substance in the applicant's claim to a remedy on jurisdictional grounds. In that respect the case can be distinguished from the subsequent case of *Salmar Holdings Pty Ltd v. Hornsby Shire Council*⁸⁵ in which a declaration was sought on the validity of a decision of a Council that an application for a planning permit be refused. It was alleged that the Council had erred in supposing that the permit sought could not be granted in that the land development proposed by the applicant would infringe an overriding proclamation. It was conceded by the New South Wales Court of Appeal that the plaintiff could have appealed to a Board of Appeal, which, in its turn might state a case for determination by

⁸¹ Id. 498.

⁸² *Ex parte Arnold Homes Pty Ltd; Re Blacktown M.C.* [1963] N.S.W.R. 806; *Ex parte Australian Property Units Management (No. 2) Ltd; Re Baulkham Hills S.C.* [1963] N.S.W.R. 787, 804-5; *Ex parte Catlett Constructions Pty Ltd; Re Baulkham Hills S.C.* [1964-5] N.S.W.R. 1667. See also *R. v. Port of London Authority; Ex parte Kynoch* [1919] 1 K.B. 176, 186, 187-8.

⁸³ [1963] N.S.W.R. 787.

⁸⁴ Id. 796.

⁸⁵ [1971] 1 N.S.W.L.R. 192.

the Land and Valuation Court, whose decision would not be subject to further appeal. Mason J.A., as he then was, acknowledged that the Court should be slow to intervene when a court or tribunal having "special capacity or experience" had jurisdiction to adjudicate an appeal on grounds relied upon in the application for judicial review.⁸⁶ But he justified judicial intervention in this case because the question raised by the suitor was one of general importance — meaning presumably one the disposition of which affected applications of others besides the plaintiff — and because, if the plaintiff did appeal to a Board of Appeal, there might be further appeal to the Land and Valuation Court, and in consequence delay in the reaching of a final, authoritative decision. Moffitt J.A. agreed.⁸⁷

When the ground for challenging the validity of a decision is that the decision was made in breach of a duty to accord natural justice, a right to appeal against the decision cannot be regarded as an adequate alternative remedy unless the hearing on appeal is capable of correcting the deficiency in the proceedings at first instance. Normally the party to whom natural justice has been denied could not hope for rectification of his grievance on appeal unless the appeal is by way of a *de novo* hearing. Appeal by way of rehearing on the evidence received by the primary decision-maker or appeal by case stated cannot repair the wrong done to the complainant, for the fact that he has not had a fair hearing at first instance may mean that the evidence received does not include evidence which was relevant to the matter to be decided and which he was entitled to have considered.⁸⁸

There is no absolute rule that if an applicant for judicial review is entitled to a full and fair hearing on appeal, he is not entitled to judicial remedy in respect of a decision which proceeded from a breach of natural justice at first instance, whether the remedy be certiorari to quash, an injunction or prohibition to restrain implementation of the decision or a mere declaration of right. There will be many cases in which the applicant for judicial review will have chosen the judicial forum advisedly in order to establish the very existence of his right to natural justice and the nature of that right — whether, for example, he was entitled to be granted a request for an adjournment or to inspect certain documents.

Some judges have taken the view that even if a person to whom natural justice has been denied is entitled to a *de novo* hearing on appeal, appeal is not as appropriate a remedy as a judicial remedy. In *R. v. North; Ex parte Oakey*,⁸⁹ Atkin L.J. expressed the view that where an excess of jurisdiction "is based upon the breach of a fundamental principle of justice", the availability of an appeal could not be regarded as a bar to judicial relief. In

⁸⁶ *Id.* 204.

⁸⁷ *Id.* 206.

⁸⁸ *R. v. Chairman of General Sessions at Hamilton; Ex parte Atterby* [1959] V.R. 800, 806; *R. v. Spalding* (1955) 5 D.L.R. (2d) 374, 377, 383-4.

⁸⁹ [1927] 1 K.B. 491, 506.

R. v. Agents Board of A.C.T.; Ex parte Greene,⁹⁰ Fox J. queried whether he even had a discretion to deny certiorari to an applicant who had not received a full and proper hearing at first instance. Her right to a rehearing on appeal to the court could not be regarded as a complete substitute for a fair hearing by the Board.⁹¹

There have been some cases in which certiorari to quash decisions reached in breach of a duty to accord natural justice has been refused, but in many of these the applicant had already lodged an appeal — usually to a court — and this was thought to be fatal.⁹² In *Rozander v. Energy Resources Conservation Board*⁹³ the Appellate Division of the Supreme Court of Alberta declined to grant certiorari to quash a decision based on an alleged breach of natural justice on the ground that the decision could be impeached on appeal to a court. Its view was that if the error complained of could be examined on appeal and if the appellate body could quash the decision appealed against, as it could in this instance, certiorari should not be granted. It is important to note that the statutory right of appeal which was available in this case was to a superior court and that review on appeal was supervisory in character, being limited to questions of law and jurisdiction. It seems to have been assumed that on appeal the court's inquiry would be confined to matters appearing on the record. That being so it would not be proper to refuse certiorari when the error complained of was not disclosed on the record, e.g. when the applicant for review alleged bias or that evidence had been improperly obtained and acted upon.

In *Herelkin v. University of Regina*⁹⁴ the Supreme Court of Canada upheld a decision that a university student who complained that he had been expelled from his university without a fair hearing should not be granted certiorari or mandamus. The student had not availed himself of his rights to appeal to the university's appeal tribunal which was, the Court believed, capable of giving the student an entirely new hearing. But in any event, the Court considered that if natural justice had been denied, the decision to expel the student was not void, but merely voidable.

The decided cases on the exercise of the judicial discretion to refuse remedy because of the availability of an appeal have, in the main, been cases in which the error complained of would now be characterized as

⁹⁰ (1970) 15 F.L.R. 306, 313.

⁹¹ See also *Cooper v. Wilson* [1937] 2 K.B. 309, 321, 358; *R. v. Wandsworth JJ.; Ex parte Read* [1942] 1 K.B. 281, 284; *Lawlor v. Union of Post Office Workers* [1965] Ch. 712. In *Hook v. Registrar of Liquor Licences* (1981) 35 A.C.T.R. 1 at 5 it was said that in an appeal by way of *de novo* hearing, a breach of natural justice was not itself a ground for setting aside the decision at first instance.

⁹² *R. v. Barnes; Ex parte Vernon* (1910) 102 L.T. 860; *R. v. Pereira; Ex parte Khotoo Bawlab* [1949] W.N. 96; *R. v. Alberta Law Society; Ex parte Demco* (1967) 64 D.L.R. (2d) 140; *Jain v. North & West Vancouver Hospital Society* (1974) 43 D.L.R. (3d) 291; *R. v. Calvin; Ex parte Bowditch* (1979) 2 N.T.R. 9; *Commissioner of Police v. Gordon* [1981] 1 N.S.W.L.R. 675. See at pp. 44-45 below.

⁹³ (1979) 93 D.L.R. (3d) 271.

⁹⁴ [1979] 3 W.W.R. 676.

errors going to jurisdiction. (Whether they would have been so regarded by the court which exercised the discretion is not always made clear.) Clearly the existence of a right to appeal either generally or on questions of law, does not oust a court's jurisdiction to grant certiorari for non-jurisdictional error of law appearing on the face of the record. But it might be argued that if the only ground on which the applicant for judicial review can sustain his application is that a non-jurisdictional error of law has been committed, and that error can be corrected on appeal, the appeal should normally be regarded as a suitable alternative.

In the exercise of its statutory discretion under s. 10 of the *Administrative Decisions (Judicial Review) Act 1977* to refuse remedy on the alternative remedy ground, the Federal Court of Australia has not so far discriminated between jurisdictional and non-jurisdictional errors of law. Since its supervisory jurisdiction under that Act enables it to review for error of law regardless of whether the error appears on the face of the record,⁹⁵ the jurisdictional or non-jurisdictional character of the error complained of is not likely to figure prominently in the Court's deliberations. In the few cases in which the discretion conferred by s. 10 has been considered, the Court's attention has been directed more to the desirability of judicial determination of the question or questions of law raised in the application for review before it.

In *Kelly v. Coats*,⁹⁶ Toohey J. dealt with the request that he exercise his discretion under s. 10(2)(b)(ii) adversely to the applicant (who had already lodged a notice of appeal to the Repatriation Commission against a Repatriation Board's refusal of her application for a pension) as a preliminary point. He rejected the argument that when the applicant does have a right to appeal, the circumstances must be exceptional before the Court "should embark on the hearing of an application. Rather the onus is on those seeking to persuade the court that it should not exercise the jurisdiction conferred upon it by the legislature."⁹⁷ Having heard the respondent's objections to the Court's entertaining the application for review of the Board's decision, Toohey J. concluded: "Assuming that the applicant's complaint is truly one of error of law, the present application is likely to be a more expeditious way of disposing of the matter than the procedures to be found in the *Repatriation Act*."⁹⁸

The desirability of a speedy, authoritative determination also weighed heavily in the decision of Fox A.C.J. in *Graham v. Commissioner of Superannuation*⁹⁹ to proceed to hearing of an application for review notwithstanding that the applicant had another avenue for redress under

⁹⁵ s. 5(1)(f); s. 6(1)(f).

⁹⁶ (1981) 35 A.L.R. 93.

⁹⁷ *Id.* 94.

⁹⁸ *Id.* 95.

⁹⁹ (1981) 3 A.L.N. [52] N87; cf. *Re London Gardens Ltd and Township of Westminster* (1976) 9 O.R. (2nd) 175.

the *Superannuation Act* 1976 and thereafter to the Administrative Appeals Tribunal. The application related to a decision by the Commissioner that he had no power to grant the particular request the applicant had made. In exercising the discretion conferred by s. 10, Fox A.C.J. suggested: "The main consideration . . . is what is best to be done in the interests of the parties and the public interest and with a view to saving cost and time and reaching as soon as possible a finality of decision." The question raised for determination in the application for review was the proper construction to be placed on s. 119 of the *Superannuation Act*, a question of law. "If the matter were not dealt with by this Court she [the applicant] could seek reconsideration by the Commissioner and then go to the Administrative Appeals Tribunal and if the question of law was still decided adversely to her she might then have to come back to a Full Bench of this Court." That being so, Fox A.C.J. concluded, it seemed plain that it was "in the best interests of everyone that this Court should deal with the question of law."

Although neither Toohey J. nor Fox A.C.J. mentioned the point, both, presumably, were mindful of the inability of the administrative review tribunals to make an authoritative determination of a question of law. If the appellate jurisdiction has been reposed in a court of law, and particularly in a superior court of law such as a State or Territory Supreme Court, subject to appeal, by special leave, to a Full Court of the Federal Court of Australia, then it may well be that the Federal Court will be much less ready to undertake review of an application, notwithstanding that it concerns a decision which is clearly a decision reviewable by it under the *Administrative Decisions (Judicial Review) Act* 1977, and notwithstanding that the application could be referred to a Full Court.

If, therefore, application is made for review of an administrative decision of the Commissioner of Patents, and the application relates to a decision which is also appealable to the Supreme Court which is a prescribed court within the meaning of the *Patents Act* 1952, whose decision on appeal would be subject to further appeal, under s. 148 of that Act, to the Federal Court or the High Court, with leave, the Federal Court might well decline to exercise its supervisory jurisdiction. Whether it would be proper for it to take this course if the respondent Commissioner did not resist the hearing and determination of the application for review, is debateable. If the matter in dispute is pre-eminently a question of law, it could be that both parties would prefer that it be determined immediately by a Full Court of the Federal Court, upon reference by a single judge of that Court, rather than incidentally in the course of an appeal to a prescribed court, and then on further appeal, by leave, to the Federal Court.

In a case such as this, there is no reason why the Federal Court should not raise the availability of an appeal of its own motion and request the parties to address argument on the question of why the Court should entertain the application. But in the end, the fundamental issue to be

decided by the Court would be: given that the Court does have jurisdiction and given that the parties agree that it is a convenient forum, should the Court decline to exercise its jurisdiction?

(c) *Judicial review when appeal is pending*

A person who has made application for judicial review may, in order to safeguard his position, have also lodged an appeal which has yet to be determined. The fact that an appeal initiated by him is pending cannot be an automatic bar to the award of judicial remedy for the matter in respect of which he seeks that remedy may not be one he can raise in his appeal¹⁰⁰ or a matter on which the appellate body can make an authoritative ruling.

In several cases courts have refused to grant certiorari to quash convictions alleged to be invalid for breach of the rules of natural justice, on the ground that an appeal against the conviction was pending.¹⁰¹ In one case the court gave as a further reason the fact that if the applicant did succeed in having his conviction set aside on appeal, certiorari would be useless.¹⁰² But in *McCarthy v. Grant*¹⁰³ the fact that an appeal against conviction was pending was not regarded as a sufficient reason for refusing certiorari to quash when the applicant had not been afforded a fair hearing. Appeal was not, it was said, an appropriate remedy where manifest injustice had been done.

Whether or not the fact that the applicant has chosen to appeal and that his appeal is still pending is a good reason to refuse him judicial remedy must depend on the status of the appellate body, the nature of the appeal and the ground or grounds on which remedy is sought. In *R. v. Spalding*¹⁰⁴ the court issued certiorari to quash a deportation order on the ground that the applicant had not been afforded a fair hearing, despite the fact that the applicant had lodged an appeal to the Minister. The appeal was not regarded as a satisfactory alternative remedy, for the Minister's review would be confined to an examination of documentary material and there was no assurance of an oral hearing or legal representation. Similarly, in *Anderton v. Auckland City Council*¹⁰⁵ Mahon J. concluded that a decision of the council which was rendered invalid because of actual bias was "not cured by the existence of a right of appeal by way of rehearing" to the Town and Country Planning Appeal Board.¹⁰⁶ The Board's jurisdiction was an appellate jurisdiction rather than an original jurisdiction to conduct a *de novo* hearing. That an appeal to the Board had been lodged was relevant to the exercise of the judicial discretion, but Mahon J. was "not persuaded that any decision vitiated by actual bias should as a matter of discretion be allowed

¹⁰⁰ (1974) 43 D.L.R. (3d) 291.

¹⁰¹ See fn. 92 above.

¹⁰² (1910) 102 L.T. 860.

¹⁰³ [1959] N.Z.L.R. 1014.

¹⁰⁴ (1955) 5 D.L.R. (2d) 374.

¹⁰⁵ [1978] 1 N.Z.L.R. 657.

¹⁰⁶ *Id.* 700.

to stand."¹⁰⁷ In *R. v. Moylan; Ex parte Jenkins*¹⁰⁸ a fireman who complained that disciplinary measures taken against him had been taken in breach of the rule against bias succeeded in his application for certiorari despite the fact that he had lodged an appeal to an appeals board. A consideration which the Court took into account was that, on the appeal, the appellant would bear the onus of establishing that the decision appealed against was wrong.

In *Vowell v. Shire of Hastings*¹⁰⁹ Crockett J. regarded the fact that the plaintiff had appealed to the Town Planning Appeals Board against the grant of a planning permit to another person as having little bearing on the exercise of his discretion to refuse a declaration in respect of the validity of the grant of the permit. This was yet another case in which the ground for seeking judicial review was breach of an obligation to accord natural justice. Crockett J. noted that it had been necessary for the plaintiff to lodge an appeal to the Board to preserve his rights, and to guard against the possibility that the court might not find in his favour. He also had regard to the fact that determination of the appeal might take some time and that the Board might be reluctant to proceed to a determination whilst the validity of the decision appealed against was under review by the Supreme Court.¹¹⁰

The New South Wales Court of Appeal has shown itself to be much less sympathetically disposed towards applications for judicial review of decisions alleged to have been made in breach of a duty to accord natural justice whilst appeals against those decisions are pending and the appeal allows for a *de novo* hearing on the merits. In *Commissioner of Police v. Gordon*¹¹¹ the Court upheld an appeal against an order in the nature of certiorari quashing the suspension and dismissal of the respondent police officer, principally on the ground that the legislative code governing suspension and dismissal of police officers was exhaustive and did not permit an implication to be drawn that, in the circumstances of the particular case, the Commissioner was under any duty to the respondent officer to afford him a hearing before taking action against him. But the Court was also moved by the consideration that the officer had exercised his right to appeal to the Crown Employees Appeals Board, a body presided over by a judge, and bound to conduct a *de novo* hearing on the merits, and that this appeal was still pending. The "existence and continuance of the proceedings before the board", it was said, "provided compelling ground for the court to decline to intervene . . . The court has always and properly shown reluctance

¹⁰⁷ Ibid.

¹⁰⁸ [1974] W.A.R. 176.

¹⁰⁹ [1970] V.R. 764.

¹¹⁰ Id. 765-7. The fact that an application for judicial review was pending would not have deprived the Board of jurisdiction: see *Slipper Island Resort Ltd v. Number One Town & Country Planning Appeal Board* [1981] 1 N.Z.L.R. 143, 145.

¹¹¹ [1981] 1 N.S.W.L.R. 675.

to exercise this discretionary jurisdiction where there are available, and on foot proceedings before a tribunal, particularly if presided over by a judge which is invested with power exercisable judicially to determine the subject matter of the dispute on the merits.”¹¹² The instant case, *Moffitt P.* went on to say, appeared

“to be another example of . . . one, where complaints, based on the principles of natural justice, that an opportunity to be heard, only in some limited way on the merits are pursued at length and with delay, while an opportunity to have a substantive investigation on the merits is spurned or postponed. In this way technicality based on not being heard in some limited way on the merits is preferred to being heard on the merits. In the present case, almost at the moment when the merits of an allegedly unjust dismissal was to be investigated by an independent tribunal, the opportunity to do so was set aside in favour, not of a vindication of the respondent on the merits, but in favour of a technical approach to the act of dismissal which would leave the merits either unresolved or postponed.”¹¹³

Were the respondent officer to have succeeded in his application for judicial review, *Moffitt P.* pointed out,¹¹⁴ “the consequence would only be that the particular decision of dismissal would be invalidated, leaving it open to the Commissioner, if he thought fit and after consideration of the written submissions, again to decide to dismiss him. In this event any challenge to this decision would have to be by way of a fresh appeal.” Further the judicial proceedings “would not determine whether the respondent ought to remain a member of the police force but the appeal would.” It was in the public interest that this question be decided and decided promptly.

The observations made by the Court of Appeal in *Gordon's case* are obviously addressed only to those cases in which, regardless of whether the applicant for judicial review had a right to a fair hearing at first instance, a fair hearing could be had on appeal to an independent tribunal authorized to conduct a *de novo* hearing on the merits and capable of curing any procedural defects in the proceedings below. Whilst it may be that the Court of Appeal failed to give sufficient weight to the consideration that when the obligation of the primary decision-maker to accord natural justice is in dispute, it may be resolved by a court of law, it is clear that its observations have little relevance in those cases in which the matter raised for judicial determination is a question of law which the appellate tribunal could not decide finally and conclusively.

The desirability of an early authoritative determination of a disputed question of law has been accepted in a number of cases as a sufficient reason for judicial intervention notwithstanding the pendency of an appeal in which that question can or might be raised. If the appellate body cannot resolve

¹¹² *Id.* 690.

¹¹³ *Ibid.*

¹¹⁴ *Id.* 689-90.

the question authoritatively, or if its decision on it would be subject to further appeal, or if there is any doubt about the competency of the appellate body to decide the issue at all, then the more likely it is that the court will assert its jurisdiction.¹¹⁵

If an appeal is pending it need not necessarily be one which the applicant for judicial review initiated. He may be respondent to the appeal, and his application for judicial review may be designed to secure an authoritative ruling on an issue to be raised by the appellant in the appeal. *Sutherland Shire Council v. Leyendekkers*¹¹⁶ was such a case.

The Council sued for a declaration that the rate it had struck in relation to Leyendekkers' land was valid. The validity of the rate had been called into question by Leyendekkers in an appeal pending before a Court of Petty Sessions. He alleged that the rate was invalid in that the Council had failed to comply with certain requirements regarding the service of notices. The Council proposed to contest the jurisdiction of the Court of Petty Sessions to rule on the validity of the rate, and if that Court assumed jurisdiction, it would exercise its right to appeal to the Supreme Court. Street J. perceived that if there were a contest over the very jurisdiction of the lower court to determine the validity of the rate, months could elapse before the validity of the rate was finally determined. The issue was one which needed to be settled, authoritatively without delay. That was a reason sufficient to justify the Supreme Court's entertaining of the Council's suit.¹¹⁷

(d) *Judicial review after appeal*

It is not unknown for persons who are aggrieved by decisions made at first instance to exercise their rights of appeal and then, being dissatisfied with the result of appeal, to institute proceedings in a court of supervisory jurisdiction to contest the decision on appeal, or the decision at first instance, or both. I shall be concerned here only with those applications for judicial review which impugn the validity of decisions made at first instance, despite the fact that those decisions have already been the subject of an unsuccessful appeal by the applicant for review.

The applicant who has appealed, without success, before instituting his application for judicial review of the decision appealed against, may sometimes have disqualified himself from obtaining judicial remedy by reason of his delay in seeking that remedy. But the fact that he has appealed is no necessary bar to the exercise of supervisory jurisdiction. Assuming that he does have cause to complain about the validity of the decision of the primary decision-maker, the readiness of a court of supervisory jurisdiction to entertain his application for review and grant remedy is likely to

¹¹⁵ *Edmonton Catholic South District Trustee Board v. Edmonton* (1971) 75 D.L.R. (3d) 443; *Kelly v. Coats* (1981) 35 A.L.R. 93; *Sutherland S.C. v. Leyendekkers* [1970] 1 N.S.W.R. 356, 366-7.

¹¹⁶ [1970] 1 N.S.W.R. 356.

¹¹⁷ *Id.* 366-7.

depend on several factors: the ground which he advances for seeking judicial remedy; whether it was a ground which could have been raised and determined on appeal and if so whether it was raised or should have been raised; the status of the appellate body; and whether the alleged defect in the original decision was cured upon appeal.

If the appeal was against an administrative decision and was heard and determined by an administrative appeals tribunal, without the benefit of legal representation or advice, it is conceivable that the unsuccessful appellant will not have become aware of the possibility that the original decision was defective and that that defect was not cured by the appeal, until the result of the appeal is made known and he then solicits legal advice. It seems likely that this is what occurred in *Barnard v. Dock Labour Board*¹¹⁸ and in *Fermanis Investments Ltd v. City of Perth*.¹¹⁹ In *Barnard's* case a dock-worker who had been suspended appealed without success against his suspension to a special tribunal. He then sought a declaration that the decision to suspend him was null and void on the ground that it was made by a person to whom the Board had delegated its authority to suspend, but invalidly. The validity of the suspension was not raised before the appeal body. Even so the court granted the declaration sought. Denning L.J., as he then was, considered that the fact that an appeal had been made and decided was irrelevant. Once the original decision to suspend was found to be a nullity, the order of the appeal tribunal was also a nullity. That tribunal had "no original jurisdiction of its own". It could not "itself make a suspension order". It could "only affirm or disaffirm a suspension order which . . . [had] already been made".¹²⁰ In *Fermanis Investments* the court entertained a suit for and granted a declaration that a notice given by the Council ordering the plaintiff to demolish certain premises was invalid, in that the Council had failed to comply with procedural requirements. The plaintiff had already appealed without success to referees and had not, in that appeal, contested the validity of the order. That he had not done so did not, in the Court's opinion, disentitle him to judicial remedy.

When the applicant for judicial review seeks judicial remedy on the ground that the primary decision-maker had no jurisdiction at all to deal with the case before him, but it was the applicant who himself invoked the jurisdiction, and subsequently appealed against the primary decision, it is unlikely that judicial remedy will be forthcoming.¹²¹ But if the proceedings which led to the primary decision were set in motion by another person, then although the applicant for review appealed against the decision, without objecting to the jurisdiction of either of the appeal body or the primary decision-maker, it may still be possible for the jurisdictional question to be

¹¹⁸ [1953] 2 K.B. 18.

¹¹⁹ [1978] W.A.R. 33.

¹²⁰ [1953] 2 K.B. 18, 42-3.

¹²¹ *Ex parte Sherlock* (1899) 16 W.N. (N.S.W.) 94.

dealt with on an application for judicial review. *Ex parte Fitzgerald; Re Gordon*¹²² was such a case. There certiorari was granted to quash a conviction notwithstanding that the applicant had not, on his appeal to Quarter Sessions, queried the magistrate's jurisdiction to hear and determine the case. In contrast in *R. v. Wasley; Ex parte Frankel*,¹²³ an applicant was denied a writ of prohibition against a Court of General Sessions in respect of the order it had made for the payment of moneys by a husband to his wife. It was claimed that the Court had no jurisdiction to make the order. But the question of jurisdiction had not been raised before the Court; nor had it been raised upon a case stated before the Supreme Court. Having regard to the fact that the order was regular on its face and the fact that no objection to the jurisdiction to make it had been taken in the prior proceedings, the Supreme Court of Victoria concluded that prohibition should not be awarded.

There have in the past been cases in which an applicant for judicial review, having appealed, without success, against a decision adverse to him, has sought to impugn the validity of the initial decision on the ground that it was made in breach of the principles of natural justice. Judicial approaches to cases of this kind have not been entirely consistent,¹²⁴ but the approach which is now emerging as the favoured approach is as follows. If the appellate body did have jurisdiction to hear and determine an appeal against a decision made in violation of a duty to accord natural justice, and in determining the appeal it afforded the applicant the fair hearing denied to him at first instance, the fair hearing on appeal will be treated as curing the breach of natural justice at first instance such that the applicant cannot thereafter impugn the validity of the decision made on that occasion and affirmed on appeal. Whether the denial of natural justice at first instance can be effectively cured on appeal will depend on the nature and scope of the appeal. If the appeal entails a *de novo* hearing and essentially the exercise of an original jurisdiction, then a fair hearing on appeal is normally capable of curing the failure of natural justice. But as the Judicial Committee of the Privy Council acknowledged in *Calvin v. Carr*,¹²⁵ there is no absolute rule in this regard. There are, the Judicial Committee said "cases, where,

¹²² (1945) 45 S.R. (N.S.W.) 182.

¹²³ [1914] V.L.R. 635. See also *Meyers v. Casey* (1913) 17 C.L.R. 90.

¹²⁴ Cases in which it was held that appeal did not preclude judicial remedy include *Ridge v. Baldwin* [1964] A.C. 40; *Annamunthodo v. Oilfield Workers' Trade Union* [1961] A.C. 945; *Denton v. Auckland City* [1969] N.Z.L.R. 256; *Wislang v. Medical Practitioners Disciplinary Committee* [1974] 1 N.Z.L.R. 29, 42-5; *Reid v. Rowley* [1977] 2 N.Z.L.R. 472 (with some reservations); *Leary v. National Union of Vehicle Builders* [1971] Ch. 34; *Anderton v. Auckland City Council* [1978] 1 N.Z.L.R. 657; cf. *A.W.U. v. Bowen* (No. 2) (1948) 77 C.L.R. 601, 618, 619, 632; *Pillai v. Singapore City Council* [1968] 1 W.L.R. 1278, 1286; *King v. University of Saskatchewan* [1969] S.C.R. 678; *Re Chromex Nickel Mines Ltd* (1971) 16 D.L.R. (3d) 273; *Twist v. Randwick* (1977) 136 C.L.R. 106.

¹²⁵ [1980] A.C. 574. Followed in *R. v. Marks & Federated Ironworkers Association; Ex parte Australian Building Construction Employees and the Builders' Labourers' Federation* (1981) 35 A.L.R. 241.

after examination of the whole hearing structure, in the context of the particular activity to which it relates (trade union membership, planning, employment etc.) the conclusion is reached that a complainant has the right to nothing less than a fair hearing both at the original and at the appeal stage."¹²⁶ The inference to be drawn from this observation is that there may be cases in which, despite the fact that there has been a fair hearing on appeal, an aggrieved party may still obtain judicial review on the ground that he did not receive a fair hearing at the original stage.

Their Lordships suggested that there was an intermediate category of cases: those in which the appellate jurisdiction was founded upon contract, did not involve a hearing *de novo* completely insulated from the hearing at first instance, but, viewed in its entire contractual context, was a jurisdiction which, if properly exercised, produced a fair decision. In these cases, those party to the contract establishing the jurisdiction would be deemed to have accepted "what in the end is a fair decision notwithstanding some initial defect".¹²⁷ But their Lordships hastened to add that even in these intermediate cases "there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or rehearings will not be sufficient to produce a just result".¹²⁸

CONCLUSIONS

Australian and English courts have not embraced the doctrine which has been developed in courts in the United States of America according to which applications for judicial review will not be entertained unless the applicant has exhausted his administrative remedies.¹²⁹ The requirement that an applicant for judicial review must have exhausted his administrative remedies means that courts will normally not intervene before the primary decision-maker has made his final order, or, if the applicant has a right to appeal, until he has exhausted his remedy by way of appeal.¹³⁰

The requirement has been justified on several grounds. In *United States v. Karton*,¹³¹ Judge Augustus N. Hand, described it as necessary for "the orderly conduct of the government's business." Schwartz viewed it as "an expression of administrative autonomy and a rule of sound judicial administration."¹³² Administrative agencies, he suggested, should be free to work out their own problems, and courts should not interfere in their

¹²⁶ Id. 592.

¹²⁷ Id. 593.

¹²⁸ Ibid.

¹²⁹ For accounts of this doctrine see K. C. Davis, *Administrative Law Treatise* (St. Paul, West Publishing Co., 1958) Vol. 3, Chap. 20 and 1980 Supplement (San Diego, K. C. Davis Pub. Co., 1980), Chap. 20; K. C. Davis, *Administrative Law in the Seventies* (New York, The Lawyers Co-operative Publishing Co., 1976), Chap. 20; B. Schwartz, *Administrative Law* (Boston, Little Brown, 1976) 172, 173; B. Schwartz and H. W. R. Wade, op. cit., 278-80.

¹³⁰ *U.S. v. Singh Tuck*, 194 U.S. 161 (1904); K. C. Davis, op. cit., 20.08.

¹³¹ 133 F. 2d 703, 706 (2nd Circ. 1943).

¹³² Schwartz, op. cit. 498.

operations until they had done their work. Yet the requirement has not been without its critics and some of them, notably K. C. Davis, believe that the circumstances in which courts have been prepared to admit exceptions to it are so numerous that it can no longer be regarded as an absolute rule.¹³³ Exceptions have, he points out, been made where the applicant complains of a patent absence or excess of jurisdiction,¹³⁴ or where he can show that he would sustain irreparable injury if required to pursue his administrative remedy, or where the respondent agency has not opposed judicial review. On the other hand, federal courts have, he maintains, tended to ignore s. 704 of the *Administrative Procedure Act*.¹³⁵ This section expressly allows for judicial review of agency action even though the applicant has not availed himself of his right to appeal against it, except in cases where there is an agency rule requiring him to have exhausted that right.

When an applicant for judicial review contests the assumption of jurisdiction of an inferior court, tribunal or agency, it is clearly pointless to expect him to submit to that assumption of jurisdiction and not to seek judicial remedy against its exercise until he has exhausted his remedy by way of appeal. An early, authoritative judicial determination of the jurisdictional issue, if favourable to the applicant, will spare all concerned "the vexation of a useless hearing."¹³⁶ Again, if an applicant is entitled to demand the exercise of a jurisdiction or discretion, and has been denied his due, why should he be required to protest his right by appealing and be denied the benefit of a conclusive judicial ruling on his right, and, if need be, a coercive order to enforce it?

The kinds of considerations which come into play when a decision-maker has made what he regards as a final disposition and a person affected by his determination has a choice between appealing and making application for judicial review in a supervisory jurisdiction are somewhat different. Assuming that the choice is a real one and that the grounds on which application for judicial review might be made are also grounds which might be relied upon in an appeal, the forum which the applicant selects is likely to be affected by considerations such as these:

- (a) The ability of the appellate body to make a conclusive determination which cannot itself be subject to judicial review, except perhaps by way of appeal. This consideration is bound to be of some significance

¹³³ See references in fn. 129 above.

¹³⁴ *Re Penthouse International Ltd & Minister of National Revenue* [1977] 2 F.C. 555, and R. F. Reid and H. David, *op. cit.*, 371-2.

¹³⁵ The section was applied in *United States v. Consolidated Mines & Smelting Co.* 455 F. 2d 432 (9th Circ. 1971) and *Mt. Sinai Hospital of Greater Miami v. Weinberger*, 376 F. Supp. 1099, 1124-6 (1974), but ignored in *McKart v. United States*, 395 U.S. 185 (1969); *McGee v. United States*, 402 U.S. 479 (1971); and *Ensey v. Richardson*, 469 F. 2d 664 (9th Circ. 1972). See further K. C. Davis, *op. cit.* 1980 Supplement, Chap. 20.

¹³⁶ *Ward v. Keenan* 70 A. 2d 77 (N.J. 1943) per Vanderbilt C.J. at 82.

when the choice is between appealing to the Administrative Appeals Tribunal or some other administrative appellate body and seeking review by a superior court of supervisory jurisdiction.

- (b) The likelihood that a favourable determination on an application for judicial review will resolve the controversy once and for all. If, for example, a person has been deprived of an occupational licence and contends that even if the conduct alleged against him is proved, there was no power to cancel his licence, he would probably prefer to proceed direct to a court of supervisory jurisdiction, rather than appeal to an administrative appeals tribunal whose determination on the jurisdictional question could still be contested on an application for supervisory review, or on a further appeal. Similarly, if the choice is between appealing to one court, subject to further appeal to a higher, superior court, and between applying direct for review by the superior court in its supervisory jurisdiction, the applicant may prefer the latter both to avoid delay in final resolution of the cause and to minimise expenses.
- (c) The ancillary powers available to the appellate body and the court of supervisory jurisdiction. The former may not, for example, have power to require the attendance of witnesses or production of documents; it may not have power to award costs; it may not have power to enforce its orders.
- (d) Availability of legal aid. Legal aid may be available in judicial proceedings, but not on an appeal.

Australian and English courts have not gone to the extreme of allowing parties who do have an effective choice between appealing and invoking their supervisory jurisdiction to select the judicial forum, regardless of the court's own assessment of what remedy is the most appropriate.¹³⁷ If the appeal lies to an administrative tribunal rather than to a court, and the party seeking judicial review does so on jurisdictional grounds, then it is more likely than not that a court will accept the applicant's choice of the judicial forum, if only to bring the dispute to a speedy and authoritative conclusion.¹³⁸ On the other hand there are intimations that the High Court of Australia will be less ready to intervene at the behest of parties who invoke its original supervisory jurisdiction in relation to the actions of superior courts of limited federal jurisdiction, in advance of the exercise of rights to appeal

¹³⁷ Cf. *Re Richards* [1945] 3 D.L.R. 87.

¹³⁸ Cases in which the relative speed and finality of judicial review have been mentioned as factors favouring judicial review include *Burder v. Veley* (1840) 12 Ad. & E. 233, 263; *R. v. H. Beecham & Co.*; *Ex parte R. W. Cameron & Co.* [1910] V.L.R. 204; *R. v. Hillington B.C.*; *Ex parte Royco Homes Ltd* [1974] 1 Q.B. 720; *R. v. Anderson* [1942] 1 D.L.R. 58; *Salmar Holdings Pty Ltd v. Hornsby S.C.* [1971] 1 N.S.W.L.R. 192; *Sutherland Shire Council v. Leyendeckers* [1970] 1 N.S.W.L.R. 356; *Vowell v. Shire of Hastings* [1970] V.R. 764; *Kelly v. Coats* (1981) 35 A.L.R. 93; *Graham v. Commissioner of Superannuation*, (1981) 3 A.L.N. [52].

to a Full Court of the relevant superior court.¹³⁹ Similarly if the court to which application for judicial review is made itself possesses a jurisdiction to hear and determine appeals against decisions of the type now the subject of the application for review, the court may well take the view that appeal is the preferable remedy.¹⁴⁰

It is always open to a court of supervisory jurisdiction to decline to intervene on the ground that the application made to it is premature. This situation is most likely to occur when a writ of prohibition or an injunction or a declaration is sought in respect of an alleged usurpation of jurisdiction, and where the presence or absence of jurisdiction depends on a finding and evaluation of facts which, at the time the application for review is made, have not yet occurred. It may be too that courts will be less disposed to intervene, in advance of exercise of a right of appeal, when the error complained of by the applicant, if established, could only be non-jurisdictional error of law. Depending on the competence of the appellate body to decide the issue, the court may decline remedy on the ground that the error, if any, can be corrected on appeal.¹⁴¹

If the applicant for judicial review complains about a decision which, he contends, was reached in contravention of a duty to accord natural justice to him, the fact that he has not chosen to exercise his right to appeal against that decision, or has appealed and also made an application for judicial review, will probably not count against him unless the right to appeal is a right to a *de novo* hearing which, if conducted fairly, will cure any defect in the original proceedings. But even if an appeal could cure any deficiencies in the conduct of the original hearing, the court might, if it perceived the case to be one in which the central issue was whether there was a duty to accord natural justice and if so what that duty entailed, either grant the remedy sought, or if it refused it on discretionary grounds, make what was tantamount to a declaration of right.

There can be little doubt that henceforth the choice between resort to statutory remedy by way of appeal and pursuit of remedy in a court of supervisory jurisdiction will present itself more often than it has in the past, and that courts of supervisory jurisdiction will, in consequence, be called upon more frequently to exercise their discretion not to award relief by

¹³⁹ E.g. *R. v. Ross Jones; Ex parte Beaumont* (1979) 141 C.L.R. 504; *R. v. Judges of Federal Court of Australia; Ex parte W.A. National Football League (Inc.)* (1979) 143 C.L.R. 190; *R. v. Cook; Ex parte Twigg* (1980) 54 A.L.J.R. 515.

¹⁴⁰ See *Chad Investments Ltd v. Longson, Tammets & Denton Real Estate Ltd* [1971] 5 W.W.R. 89, 94; *Re Novak & Law Society of British Columbia* (1973) 31 D.L.R. (3d) 89, 102-3; *R. v. Elliott; Ex parte Elliott* (1974) 8 S.A.S.R. 329, 366; *Rozander v. Energy Resources Conservation Board* (1979) 93 D.L.R. (3d) 271, 279-83; *Re Wilfong; Cathcart v. Lowery* (1962) 32 D.L.R. (2d) 477, 479.

¹⁴¹ There is a hint in Lord Denning's speech in *Baldwin & Francis Ltd v. Patents Appeal Tribunal* [1959] A.C. 663, 697 that a distinction should be drawn between jurisdictional and non jurisdictional errors of law. See also *R. v. Chief Immigration Officer, Heathrow Airport; Ex parte Bibi* [1976] 1 W.L.R. 979, 987; *Sebastian v. Saskatchewan* (1978) 93 D.L.R. (3d) 154; *Re London Gardens Ltd and Township of Westminster* (1976) 9 O.R. (2d) 175. See also Schwartz and Wade, *op. cit.* 280.

reason of the existence of the other avenue for seeking redress. Australian parliaments have, in recent years, moved towards the creation of more ample rights to secure review of administrative decisions upon appeal, whether to courts or administrative appeal tribunals. But at the same time steps have been taken to extend the scope of supervisory judicial review and also to enhance litigants' prospects of obtaining redress upon applications for such review. Some courts, either of their own motion,¹⁴² or because of legislative intervention,¹⁴³ will now review on the ground of error of law, regardless of whether the error is characterized as jurisdictional or non jurisdictional, and if non jurisdictional, regardless of whether the error appears on the face of the record. Imposition of statutory duties to give reasons for administrative decisions has facilitated discovery and proof of reviewable errors.¹⁴⁴ Procedures for making application for judicial review have been simplified and the risk of failing to obtain remedy because the wrong "form of action" has been selected, has, in many jurisdictions, been eliminated. Legislation such as the *Administrative Decisions (Judicial Review) Act 1977* and Victoria's *Administrative Law Act 1978* has probably heightened public awareness of the possibility of obtaining redress in a judicial forum. And while the cost of litigating is still a deterrent to many persons with justiciable grievances, the availability of legal aid may mean that some will now pursue their grievances by legal action who, unaided, would not have even contemplated litigation.

That developments such as these may encourage more frequent recourse to the judicial forum in preference to exercise of statutory rights to appeal to appellate tribunals was recognized by the New South Wales Court of Appeal in *Commissioner of Police v. Gordon*.¹⁴⁵ Moffitt P. (with whom Reynolds and Glass JJ.A. concurred) concluded his reasons for judgment on this cautionary note:

"In this field, as in others, where the law is evolving in aid of a more just approach to some situations, resort to the new tool is inclined to become fashionable, leading to the danger on occasions that resort to it is not in aid of its true purpose, so that the instrument intended to produce greater justice on some occasions may produce less justice. Justice is not a one sided affair."¹⁴⁶

Justice in that particular case was seen to be better served by recourse to the right to appeal to an independent tribunal which could afford the

¹⁴² See *Re Racial Communications Ltd* [1981] A.C. 374.

¹⁴³ E.g. *Administrative Decisions (Judicial Review) Act 1977* and s. 8 of the *Administrative Law Act 1978* (Vic.).

¹⁴⁴ Persons entitled to seek review of decisions reviewable under the *Administrative Decisions (Judicial Review) Act 1977* are entitled to demand written reasons for decision (s. 13) except in those cases listed in the Second Schedule. See also *Administrative Appeals Tribunal Act 1975* and *Administrative Law Act 1978* (Vic.).

¹⁴⁵ [1981] 1 N.S.W.L.R. 675.

¹⁴⁶ Id. 690.

applicant for judicial review the fair hearing which, he alleged, was wrongly denied to him at first instance, and which was both authorized and required to conduct a *de novo* hearing on the merits.

If, as seems likely, courts of supervisory jurisdiction will be confronted with an increasing number of cases in which the applicant for review could have appealed to another body but did not, it will, I believe, be difficult for them to resist demands that, in the exercise of their discretion to refuse relief by reason of the existence of the alternative remedy, they act in accordance with principles which are clearly articulated and adumbrate their reasons for decision. Potential litigants who do have a choice between invoking the appropriate supervisory jurisdiction and appealing, are surely entitled to know what considerations the court is likely to take into account in deciding whether remedy by way of appeal is a suitable alternative to judicial review and one which is to be preferred.¹⁴⁷ They are surely entitled also to expect some degree of consistency in the disposition of like cases before the same court.

Should there be any marked inconsistencies in the approaches adopted by individual judges to the exercise of the discretion, it would always be open to a party aggrieved by the manner in which the discretion was exercised in his case to appeal to a Full Court or, perhaps, to a higher court. An individual judge who recognized that the case before him did raise important issues of judicial policy concerning the exercise of the discretion might also think it prudent to refer the matter to a Full Court. Notwithstanding that Australian courts do not, on the hearing of appeals against the exercise of judicial discretions, exercise much more than a supervisory-style jurisdiction,¹⁴⁸ they are capable of enunciating broad principles by which the exercise of discretion is to be guided.

The exercise of the judicial discretion to refuse remedy on the alternative remedy ground does raise fundamental questions about the nature and purpose of supervisory judicial review, about the extent to which the courts should defer to an applicant's assessment of his most convenient forum, and about the extent to which it is proper for them to decline to exercise jurisdiction in favour of some other agency which has been endowed by statute with jurisdiction to review on appeal. How judges resolve these questions is bound to be affected by their perceptions of their authority and responsibilities. Those who regard a supervisory jurisdiction as a residual and extraordinary jurisdiction would probably be less ready to assert that jurisdiction than would those who view the jurisdiction as one which litigants with the requisite standing are presumptively entitled to invoke whenever the

¹⁴⁷ On the importance of "principled" exercise of judicial discretions see *Ward v. James* [1966] 1 Q.B. 273, 293-5.

¹⁴⁸ See fn. 5 above and *Gronow v. Gronow* (1979) 29 A.L.R. 129, 138, 143, 149.

legality of administrative action, as distinct from its merits or expediency, or the policy behind it, is called into question.¹⁴⁹

Judicial approaches to the exercise of the discretion may also be influenced by differing evaluations of the competence of appellate tribunals to decide the legal issues raised for decision. Whether a question of law is even raised for decision is a matter on which judges may differ and differ principally because they have different notions about what kinds of questions are fit for judicial determination and what can properly be left to be determined by other agencies of government.

When provision has been made for appeals against administrative decisions of a kind which are made frequently and in large numbers, there is another factor which may influence judicial uses of the discretion to refuse remedy, but which may not always be spelled out. This is that were the court to assume jurisdiction and to award remedy too readily, it might encourage resort to it rather than to the appointed appellate tribunal or tribunals and thereby invite a multiplicity of suits with which it could not cope. Courts have a limited capacity to control their own workloads.¹⁵⁰ A court of appellate jurisdiction to which application for leave to appeal must be made may exert some control over its workload by adopting a practice of granting leave to appeal sparingly. A higher court having a jurisdiction which is concurrent with that of a lower court may be authorized by statute to remit a cause to the lower court.¹⁵¹ Judicial discretions to refuse discretionary remedies may also be employed to regulate the volume of litigation. One of the rare instances in which this was done overtly was in *R. v. Preston Supplementary Benefits Appeal Tribunal; Ex parte Moore & Shine*.¹⁵²

The applicants for review in this case had sought certiorari to quash a decision of the Tribunal, on appeal from the Supplementary Benefits Commission, denying them award of benefit as householders. What was in issue was the correctness in law of the decision that they did not qualify as householders. The Court of Appeal held that the Tribunal had erred; nevertheless in its discretion it declined to quash the Tribunal's determination. Lord Denning M.R., with whom the other Lord Justices agreed, thought the point raised for decision was a technical one and in his opinion the governing

¹⁴⁹ Judicial "activism" has been urged by, *inter alia*, Lord Scarman in his Hamlyn Lectures, 26th series, *English Law the New Dimension* (London, Stevens, 1979) and by Brennan J. ("New Growth in the Law: The Judicial Contribution" (1979) 6 *Mon. L.R.* 1). See also Schwartz and Wade, *op. cit.* 285-6. Contrast the arguments for judicial restraint of P. W. Hogg, "Judicial Review: How Much do we Need?" (1974) 20 *McGill L.J.* 157 and H. W. Arthurs, "Re-thinking Administrative Law: A Slightly Dicey Business" (1979) 17 *Osgoode Hall L.J.* 1.

¹⁵⁰ As P. Robertshaw would have put it, to exercise "homeostatic control", i.e., to maintain "equilibrium between processes intake and available manpower resources" — "Characteristics of the Judicial Group and Their Relation to Decision-Making" (1973) 47 *A.L.J.* 572 at 572.

¹⁵¹ E.g. the High Court's power of remittal under s. 44 of the *Judiciary Act* 1903.

¹⁵² [1975] 1 *W.L.R.* 624; followed in *R. v. Barnsley S.B.A.T.; Ex parte Atkinson* [1977] 1 *W.L.R.* 917.

legislation "should be administered with as little technicality as possible."¹⁵³ He conceded that, since the legislation had to be administered by thousands of officials and by some 120 appellate tribunals, it was desirable that there be uniformity in decision of like cases. "In order to ensure this, the court should be ready to consider points of law of general application . . ."¹⁵⁴ But, he said:

"The courts should hesitate long before interfering by certiorari with decisions of the appeal tribunals. Otherwise the courts would become engulfed with streams of cases . . . The courts should not enter into a meticulous discussion of the meaning of this or that word in the Act. They should leave the tribunals to interpret the Act in a broad reasonable way, according to the spirit and not to the letter . . . The court should only interfere when the decision of the tribunal is unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."¹⁵⁵

When establishing new remedies by way of appeal against administrative decisions, parliaments rarely, if ever, give any positive guidance to the courts on how their supervisory role might be affected. The courts have made it plain that they will not regard the mere creation of alternative remedies as ousting their jurisdiction to review. Parliaments, for their part, seldom legislate to make the alternative statutory remedy the exclusive remedy or to require recourse to that remedy before any application for judicial review can be entertained. Section 10(2) of the *Administrative Decisions (Judicial Review) Act 1977* gives statutory expression to the discretion traditionally exercised by courts of supervisory jurisdiction, and it may be read as a legislative direction to the Federal Court that it must at least consider whether the applicant for review has a suitable, alternative remedy. I doubt whether the independence of the judiciary would be compromised or any constitutional precepts regarding separation of powers would be violated if a parliament were to indicate, though not exhaustively, factors which were to be taken into account in exercise of the judicial discretion. It is not, I believe, a course which a legislature would be well advised to adopt unless it had become apparent that the courts had proved themselves incapable of devising sensible principles which were consistently applied. This is not to say that there might not be circumstances in which, having created special machinery for review of administrative decisions of a certain description, the legislature would not be justified in stipulating that recourse should be had to that machinery before any supervisory or like judicial jurisdiction was invoked.

¹⁵³ [1975] 1 W.L.R. 624, 631.

¹⁵⁴ *Id.* 632.

¹⁵⁵ *Id.* 631-3.