In the recent case of Anisminic Ltd. v. Foreign Compensation Commission¹ both the Court of Appeal and the House of Lords considered in detail the question whether a misconstruction of a statutory provision resulting in the taking into account of an irrelevant consideration constitutes an error "going to the jurisdiction" of a statutory tribunal rendering its decision ultra vires and a "nullity". Prior to this decision, the legal effect of such an abuse of discretionary power was far from certain.

The courts' inherent powers of review of decisions of inferior tribunals are based on the concept of jurisdiction; with one exception, the courts have power to review such decisions only where a tribunal has acted outside the limits of the authority conferred upon it by its empowering instrument. The exception is, of course, that certiorari will issue to quash a decision where it is apparent from the record of the decision that the tribunal committed an error of law, regardless of whether the error can be classified as jurisdictional.²

Until the early nineteenth century the courts seemed prepared to find that almost any error made by a tribunal related to the limits of its jurisdiction and therefore rendered its decision ultra vires.³ Then the judicial attitude changed, and a very narrow approach to jurisdictional error was taken in a number of cases.⁴ By this "pure" theory of jurisdiction, the question whether a body

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⁵This theory is strongly supported by Mr. D. M. Gordon: see The Relation of Facts to Jurisdiction (1929), 45 L.Q. Rev. 459; Observance of Law as a Condition of Jurisdiction (1931), 47 L.Q. Rev. 386.
has jurisdiction is determined “on the commencement, not at the conclusion, of the inquiry”\footnote{R. v. Bolton, supra, footnote 4, at p. 74, per Lord Denman C.J.}, so that if an inquiry is undertaken by the persons authorised, and is of the nature or kind authorised, the tribunal concerned must be found to have acted within its jurisdiction. By this view, if a tribunal has jurisdiction to enter upon an inquiry, errors committed in the course of that inquiry will not deprive it of jurisdiction.

In fact the courts have rarely taken such a narrow view. Even by application of what may be termed the “narrow” approach to jurisdictional review, the courts have regarded any errors made in the course of considering matters “preliminary” or “collateral” to the issue presented to a tribunal for determination as being jurisdictional errors rendering the resulting decision *ultra vires*. On the other hand, errors made in the course of considering the “merits” of the question a tribunal is required to decide are, by this view, regarded as non-jurisdictional errors. Perhaps the clearest description of this approach was made by Coleridge J. in *Bunbury v. Fuller*:\footnote{(1853), 9 Ex. 111, at p. 140.}

Now it is a general rule, that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends . . . and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question, its decision must always be open to inquiry in the superior Court.

By the application of this approach, a tribunal which, in reaching its decision on the merits of the inquiry it is authorised to conduct, is actuated by an improper purpose, takes into account an irrelevant consideration, fails to take into account a relevant consideration, or exercises its power unreasonably, will be guilty only of an error within its jurisdiction. Therefore such abuse of discretionary powers would not render action *ultra vires*, and decisions would be reviewable only if these errors constitute errors of law which appear on the record of the decision.

It is hardly necessary to point out that this is not always so. In fact the courts appear to have taken different views as to what errors go to jurisdiction in respect of different remedies, and even in respect of individual remedies there often exist two distinct and conflicting lines of authority on the question. This can be best illustrated by examining the attitude of the courts to the scope of jurisdictional review for the purposes of each of the remedies of certiorari, mandamus, prohibition and the declaratory judgment.
Mandamus:

In respect of the writ of mandamus, most courts have taken a wide view of jurisdictional error, regarding errors made in the course of an authorised inquiry as rendering the resulting decision ultra vires. This has been made possible by the use of the fiction of "denial of jurisdiction".

Mandamus arose as a means of enforcing inferior tribunals to determine questions they were obliged by law to determine. By the eighteenth century it was clear that a tribunal must consider any question presented to it which falls within its jurisdiction, and that this principle also applies to any person or body in whom a discretionary power is vested. But as Dr. Rubenstein has pointed out, if the courts had confined the availability of the writ to cases where there were "actual refusals to form any opinion on the matter the answer would have been simple: any proceedings culminating in any decision would have been beyond the reach of mandamus". However the courts began to take the view that if a discretionary power was exercised improperly it was not exercised at all, and therefore mandamus could issue for "denial" or "refusal" of jurisdiction. Lord Esher M.R. makes this clear in R. v. Vestry of St. Pancras: "If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion."

The courts have often applied this wide view of jurisdictional error, finding that the taking into account of irrelevant considerations, the failure to take into account relevant considerations,

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8 Groenvelt v. Burwell (1700), 1 Ld. Raym. 464, at p. 469.
and the exercise of discretionary powers for an improper purpose,\(^{12}\) all render action *ultra vires* for the purpose of mandamus. And in *Gibson v. Manukau City*\(^{14}\) Richmond J. accepted the proposition that a decision which is unreasonable would be *ultra vires* for the purpose of mandamus. In all these cases the courts readily concluded that errors made in the course of exercising discretionary powers resulted in a denial of jurisdiction for which mandamus could issue.

In two recent Australian cases however, the narrow view of jurisdictional error has been applied in respect of mandamus. In *Ex parte Hulin, Re Gillespie*\(^{15}\) the Full Court of New South Wales applied the narrow view of jurisdictional error propounded by the Privy Council in *Colonial Bank of Australasia Ltd. v. Willan*,\(^{16}\) concluding that even if the official had erred in taking into account irrelevant factors, the error did not relate to matters "extrinsic to the adjudication impeached", but rather to "a fact to be adjudicated on in the course of the inquiry—a fact which . . . he was competent to try",\(^{17}\) and therefore did not result in a declining of jurisdiction. In *Wade v. Burns*\(^{18}\) the High Court of Australia considered in some detail whether the error proved was made in relation to the extent of the official's authority, or whether it was made in the course of the exercise of his jurisdiction. However it seems clear that this narrow approach in respect of mandamus is contrary to the weight of authority.

**Certiorari:**

With regard to certiorari there are two conflicting lines of authority as to whether abuse of discretionary powers renders action *ultra vires*.

Certiorari is rarely applied for on the grounds that a tribunal has exercised its powers for an improper purpose, as tribunals exercising judicial functions are seldom actuated by such purposes. In a number of cases however, exercise of a discretionary power to...
achieve an improper purpose has been regarded as rendering action
ultra vires for the purpose of certiorari. But in Smith v. East
Elloe R.D.C. the majority of the House of Lords held that ac-
tuation by an improper purpose did not mean that the authorisation
made was "not empowered to be granted" so as to give rise to a
statutory right to review of the decision.

It is, with regard to the taking into account of irrelevant
considerations and the failure to take into account relevant con-
siderations that this conflict of authority is most apparent. In many
cases the courts, with little or no discussion of the scope of juris-
dictional review by certiorari, have regarded such errors as going
to the jurisdiction of a tribunal, rendering its decision ultra vires.

Yet in another line of cases the courts have adopted the narrow
"collateral" approach to jurisdictional error and considered that
the taking into account of an irrelevant factor in the course of the
authorised inquiry constitutes an error within jurisdiction which
will not attract certiorari unless it appears on the record of the
final decision.

The conflict between these two views as to the scope of juris-

Marylebone Rent Tribunal, Ex parte Bell London and Provincial Properties
W.L.R. 485.


21 In re Roche (1888), 7 N.Z.L.R. 206; R. v. Board of Education, supra,
footnote 10; R. v. Shann, [1910] 2 K.B. 418; R. v. Minister of Transport,
Ex parte H.C. Motor Works Ltd., [1927] 2 K.B. 401; R. v. Sheffield Jt.,
Ex parte Thomas Rawson and Co. Ltd. (1928), 138 L.T. 234; R. v. Pony-
bridge County Court Registrar, [1938] 1 All E.R. 218; R. v. Agricultural
Land Tribunal for the Wales and Monmouth Area, Ex parte Davies, [1953]
1 W.L.R. 722; Toronto Typographical Guild v. Globe Printing Co., [1953]
3 D.L.R. 561; Smith & Rhuhs Ltd. v. R., [1953] 3 D.L.R. 690; Seereelall
Agricultural Land Tribunal for Eastern Province of England, Ex parte
Grant, [1956] 1 W.L.R. 1240; Dunn v. Wellington Licensing Committee,
149; Maradana Mosque Trustees v. Mahmud, [1967] 1 A.C. 13; Baldwin and
Francis Ltd. v. Patents Appeal Tribunal, [1959] A.C. 663, at p. 687, per
Lord Denning; R. v. Paddington Valuation Officer, Ex parte Peachey
Property Corp. Ltd., [1966] 1 Q.B. 380 (dicta by all members of the Court
of Appeal); R. v. Fulham, Hammersmith and Kensington Rent Tribunal,
Ex parte Hierowski, [1953] 2 All E.R. 4, at pp. 6-7, per Lord Goddard C.J.
(this dictum was omitted from the report of the case in the Law Reports,

Note: In both Davies' case and Grant's case the influence of irrelevant
considerations was apparent from a statement of reasons given for the
decision. But in Davies' case error of law on the record was regarded as
"another ground on which the court might grant certiorari", and this case
was referred to with approval in Grant's case.

22 Ex parte Hopwood (1850), 15 Q.B. 121; R. v. St. Olave's, South-
wick, District Board of Works (1857), 8 E. & B. 529; Colonial Bank of
Australia Ltd. v. Willan, supra, footnote 10; R. v. Mahoney, [1910] 2
dictional review by certiorari can perhaps be explained by reference to the history of error of law on the face of the record as a ground for issue of the writ. From the seventeenth century the Court of King's Bench asserted the right to quash convictions and orders of inferior courts where the commission of an error of law was apparent from the record of the decision, and Justices were required to set out the proceedings in criminal cases in considerable detail. However in 1848 the Summary Jurisdiction Act prescribed a form of conviction which did not require details of the evidence presented, nor the reasons for the final decision. The result was that it became virtually impossible for the courts to determine from the record whether or not the Justices had erred in law. As time went on the courts often appeared to forget that they had ever had the power to quash decisions of Justices on this ground, and in one case its existence in respect of officials exercising functions of a judicial nature was actually denied.

The result of the acceptance by the courts in the nineteenth century that certiorari lay only to quash for jurisdictional defects, was that the concept of jurisdiction came to be used by the courts "as a mere tool to preserve the powers of review". In some cases, especially where both certiorari and mandamus were sought, the courts regarded the test of jurisdictional error for certiorari as being the same as that for mandamus. These cases it was accepted that both mandamus and certiorari could issue if it were


Rubenstein, op. cit., ibid., p. 74.

proved that irrelevant considerations had been taken into account in reaching a decision. Perhaps the best illustration of this attitude is *Toronto Newspaper Guild v. Globe Printing Co.*, where the majority of the Supreme Court of Canada applied the test of jurisdictional error propounded by Lord Esher M.R. in *R. v. Marsham.* As *Marsham's* case involved an application for mandamus, the majority naturally found that the failure to consider relevant matters resulted in the tribunal “declining jurisdiction”. On this basis certiorari was granted. In many of the other certiorari cases where the wide view of jurisdictional error has been applied, the concept of jurisdiction itself has been discussed either very briefly or not at all.

But in *R. v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw*, non-jurisdictional error of law on the face of the record was revived as a ground for certiorari, and its application extended to all decisions of a judicial nature. In order to give this revival of error of law on the face of the record any meaning, it was necessary to conclude that some errors did not go to jurisdiction and could be reviewed by certiorari only if they were patent. Consequently the distinction between jurisdictional and non-jurisdictional error has been considered in greater depth in some recent cases involving applications for certiorari, especially those cases in which error of law on the record has been argued as an alternative ground to absence of jurisdiction for issue of the writ. In these cases the narrow “collateral” test of jurisdictional error has been applied, with the result that errors such as the taking into account of irrelevant considerations have been held to be errors within jurisdiction which are unreviewable by certiorari unless apparent from the record of the decision. But while certiorari was refused, in a number of these cases the courts nevertheless conceded that such errors would render action *ultra vires* for the purpose of mandamus.


*R. v. Paddington Rent Tribunal; Yukich v. Sinclair;* and *Ex parte Bracey, ibid.*
There appears to be no reported case in which certiorari has issued solely because a tribunal's exercise of discretionary powers has been held unreasonable. However, proof of unreasonableness is usually closely related to, or dependent on, the fact that a tribunal has been actuated by an improper purpose or has taken irrelevant considerations into account, and so by application of the wide approach to jurisdictional error, unreasonableness would presumably constitute a valid ground for certiorari. In *Lange v. Town and Country Planning Appeal Board*, Richmond J. appeared to accept that if the conditions in question were proved to be unreasonable, they would be *ultra vires* for the purpose of certiorari.

**Prohibition:**

Two conflicting lines of authority as to the scope of jurisdictional review also exist in respect of the writ of prohibition. In *R. v. Paddington and St. Marylebone Rent Tribunal, Ex parte Bell London and Provincial Properties Ltd.*, both certiorari and prohibition issued on the grounds that the tribunal had been actuated by an improper purpose and had taken irrelevant considerations into account, and in *R. v. Minister of Health, Ex parte Davis* prohibition was granted to prevent the exercise of a power for an improper purpose. The Privy Council in *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust* held that the consideration of irrelevant factors resulted in the respondents "applying a wrong and inadmissible test" which rendered its decision *ultra vires* for the purpose of prohibition, and this decision was referred to with approval by Latham C.J. and Williams J. in *R. v. Connell, Ex parte The Hetten Bluebird Collieries Ltd.* Similarly, in *R. v. Australian Stevedoring Industry Board, Ex parte Melbourne Stevedoring Co.*, the High Court of Australia issued a writ of prohibition *quo usque* on the grounds that the Board had taken irrelevant matters into account and were exercising their powers for an improper purpose.

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*Supra, footnote 19.*

*[1929] 1 K.B. 619.*


*Ibid., at p. 917.*

*(1944), 69 C.L.R. 407, at pp. 430-432 and 455-456.*

*(1953), 88 C.L.R. 100.*
But in a greater number of cases the courts have taken the narrow "collateral" view of jurisdictional error, finding that errors made in relation to the merits of the authorised inquiry do not render action *ultra vires* for the purpose of prohibition.\(^{42}\) By application of this approach errors consisting of a misconstruction of a statutory provision resulting in failure to consider a relevant matter,\(^{43}\) the rejection of relevant and admissible evidence,\(^{44}\) and the improper reception of inadmissible evidence,\(^{45}\) have all been held to be within jurisdiction and not reviewable by prohibition.

**Action for a declaratory judgment:**

There has also been considerable doubt as to what errors will render action invalid for the purpose of a declaration.

In a number of cases the exercise of discretionary powers for an improper purpose has been regarded as rendering action *ultra vires* for this purpose,\(^{46}\) and in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*\(^{47}\) the Court of Appeal considered that a decision reached by taking into account irrelevant considerations or failing to consider relevant factors may be declared *ultra vires*. In other cases, declarations that action taken was unreasonable and *ultra vires* seem to have been based on the fact that irrelevant matters were considered and relevant factors disregarded.\(^{48}\)

In fact a number of wide dicta by Lord Denning\(^{49}\) gave rise


\(^{43}\) *Ex parte Wakefield* (1927), 27 S.R. (N.S.W.) 261.

\(^{44}\) *R. (Ex rel. City of Fitzroy) v. Casey* (1897), 23 V.L.R. 495; *Ex parte Alldritt* (1875), 15 W.N. (N.S.W.) 43; *Ex parte Buzzacott, Re Burns* (1920), 20 S.R. (N.S.W.) 144.


\(^{47}\) *Supra*, footnote 34.


to speculation that declarations of invalidity may be made even where tribunals commit errors within jurisdiction which do not render their decisions ultra vires. In *Taylor v. National Assistance Board*, Lord Merriman P. applied the dictum in *Barnard's case*, and his decision was not reversed on this point by the Court of Appeal. However it is not altogether clear that Lord Merriman P. in fact regarded the particular error (the consideration of an irrelevant factor) as being within the Board's jurisdiction.

In *Healey v. Minister of Health* the applicant requested a declaration of his legal rights on the grounds that the Minister's determination of his rights was wrong. The Court of Appeal held that it had no power to do so. It was accepted that an erroneous construction of a statutory provision constituted merely an error within the Minister's jurisdiction, and the court therefore found that it could not declare his decision to be ultra vires and void ab initio. By granting the declaration sought, the court would only make another determination of the applicant's rights contrary to that made by the Minister. Denning L.J. pointed out that in such a case the Minister's decision "would stand unless the Minister chose of his own free will to revoke it. There would then be two inconsistent findings, one by the Minister and the other by the Court". Denning L.J. did express the view that if the Minister's decision had disclosed an error of law on its face, the court could have issued a declaration. But assuming the error to be within jurisdiction, this view seems contrary to his earlier objection to the existence of two inconsistent findings.

In *Punton v. Ministry of Pensions and National Insurance*, a Court of Appeal comprising Lord Denning M.R., Upjohn and Diplock L.JJ., refused to strike out an amended summons for a declaration to determine whether the Commissioner came to the correct decision in point of law. Lord Denning M.R. and Upjohn L.J. were both clearly of the opinion that a decision could be declared wrong in law. But on proceeding to trial on the merits, a differently constituted Court of Appeal held that it had no jurisdiction to grant the declaration sought. As the alleged misconstruction of statute, even though apparent from the record of the decision, was regarded as an error of law within jurisdiction, the decision

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52 [1955] 1 Q.B. 221.
could not be declared *ultra vires* and void. Consequently there would be no way of "getting rid of" the Commissioner's decision so as to give any practical effect to a declaration that his decision was wrong in law. Although it can be argued that the basis of this decision was the fact that a declaration by the court would not have provided the applicant with an effective remedy, this merely illustrates the result in this context of a finding that an error does not go to jurisdiction.

*Punton's* case made it clear that the courts will normally have power to grant declaratory relief only where a decision can be declared *ultra vires*. And as a misconstruction of a statutory provision, even where apparent from the record of a decision, was regarded as a non-jurisdictional error, the obvious implication was that abuse of discretionary power such as the consideration of irrelevant factors or the application of a "wrong and inadmissible test", (which are the usual consequences of such a misconstruction), would similarly be regarded as errors within jurisdiction for the purpose of a declaration.

Yet the courts have consistently treated action which is unreasonable as *ultra vires* for the purpose of a declaration. The statement of Lord Greene M.R. in the *Wednesbury* case to the effect that a decision which is "so unreasonable that no reasonable authority could ever have come to it" may be declared *ultra vires*, and the similar test propounded by Lord Russell C.J. in *Kruse v. Johnson* have been applied by both the Court of Appeal and the House of Lords in recent cases. In these cases, which involved the validity of conditions attached to planning permissions, reliance was also placed on Lord Denning's statement that any condition which does not "fairly and reasonably relate to the permitted development" is *ultra vires*. And yet in all these cases the concepts of improper purpose, irrelevancy and unreasonableness are closely connected, and often inseparable.

So the availability of a declaration of invalidity on the grounds that a discretionary power had been erroneously exercised was

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56 *Ibid.*, at p. 238, per Sellers L.J. *Taylor v. National Assistance Board*, *supra*, footnote 50, was in fact distinguished on the grounds that the Board in that case had the power to amend its own decisions.

57 *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*, *supra*, footnote 34.

58 [1898] 2 Q.B. 91.


60 *Pyx Granite Co. v. Ministry of Housing and Local Government*, *supra*, footnote 49, at p. 572.
also clouded by uncertainty. Where abuse of discretionary power is regarded as a jurisdictional error, does any such error render action ultra vires?

Where the only purpose for which a discretionary power has been exercised is improper, the decision is inevitably invalid. But where an official has exercised a power to achieve authorised as well as improper purposes, the courts have applied a number of different tests to determine whether the action is invalid, some of which are contradictory. Birkett J. has said that if any of the purposes for which the power was exercised were authorised and proper, the presence of improper purposes will not invalidate the decision, yet in Sadler v. Sheffield Corporation, P.O. Lawrence J. considered that the existence of any improper purpose would render action invalid. As neither of these tests is supported by later authority, it is submitted that they should not be applied. The weight of authority supports the view that in order to invalidate a decision, an improper purpose need not be the sole purpose for which the power was exercised, but it must be the main, primary, or dominant purpose. It has also been said that the tribunal must have been so influenced by the improper purpose that but for it the decision would have been different, but it submitted that in practice this requirement is the same as the "dominant purpose" test.

The test for determining whether the influence of an irrelevant factor invalidates a decision is more uncertain. Professor de Smith considers that "if the influence of irrelevant factors is established, it does not appear necessary to prove that they were the sole or even the dominant influence; it seems enough to prove that their

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64 Supra, footnote 46, at pp. 504-505.
65 In Webb v. Minister of Housing and Local Government, [1965] 1 W.L.R. 755, at p. 777, Danckwerts L.J. appears to support the view of P.O. Lawrence J., but at p. 778 he states that the improper purpose must be the dominant purpose in order to invalidate the decision.
influence was substantial". The statement of Megaw J. in *Hanks v. Minister of Housing and Local Government* certainly supports this view:

Similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which ought to be known to it, and which it ought to have taken into account, the exercise of the power is normally bad. I say "normally" because I can conceive that there may be cases where the factor wrongly taken into account, or omitted, is insignificant.

But in *Dunn v. Wellington Licensing Committee*, Hutchinson J., while also using the term "substantial", seemed to place more emphasis on the fact that the irrelevant factor "was the consideration or, at least, the dominant or over-riding consideration", which influenced the decision. A similar approach was taken by Lord Denning M.R. and Salmon L.J. in *R. v. Paddington Valuation Officer, Ex parte Peachey Property Corp. Ltd.* Lord Denning M.R. approved the Divisional Court's view that in order to render the decision *ultra vires* it was necessary to show that "the valuation officer has misdirected himself on some fundamental matter or matters which so vitiate the value of his work that it must be regarded as worthless . . .". He added, "In short, there must be an error which goes to the root of the list or a large part of it". He then proceeded to determine whether the list was "vitiates by fundamental error". Salmon L.J. agreed that "the real question must be: has the valuation officer made an error in law which goes to the root of the whole list and vitiated it?" He found that although the officer had acted incompetently and was guilty of a number of errors, those errors did not "go to the root of the list". This requirement that the error be "fundamental" in the sense of going "to the root of" a decision, seems closer to the requirement of "dominant" than to that of "substantial" in the sense of being more than "insignificant". In view of the fact that irrelevancy and improper purposes are so closely related, and may often provide alternative grounds for attack, it is submitted that from the point of view of both consistency and policy, the same test should be applied in respect of both grounds.

With regard to unreasonableness, it will be recalled that in the *Wednesbury* case Lord Greene M.R. said that to be regarded as *ultra vires* on this ground, a decision must be "so unreasonable

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70 *Supra*, footnote 21, at p. 1090.
71 *Supra*, footnote 21.
75 Supra, footnote 34, at p. 230.
that no reasonable authority could ever have come to it”, and that “to prove a case of that kind would require something quite overwhelming”. The test laid down by Lord Russell C.J. in Kruse v. Johnson with regard to by-laws is equally stringent, and although this “benevolent” approach has not been so rigidly applied in some cases, unreasonableness still seems extremely restricted as a ground for review.

The position today in the light of the Anisminic case:

In Anisminic Ltd. v. Foreign Compensation Commission, the plaintiffs sought declaratory relief on the grounds that due to a misconstruction of its empowering instrument, the Commission had taken into account, and based its decision on, an irrelevant consideration. Because the existence of a wide privative clause in the Foreign Compensation Act 1950 was regarded as excluding the courts’ powers of review unless the decision of the Commission was a nullity, the members of both the Court of Appeal and the House of Lords were induced to consider the scope of the concept of jurisdictional review on a broad scale rather than by limiting the application of their observations to the specific remedy sought. In the Court of Appeal Diplock L.J., with whom Sellers and Russell L.JJ. agreed, analysed the concept of jurisdiction in considerable detail and listed the types of errors he considered would go to jurisdiction and render a decision a nullity. Diplock L.J., who criticised Maradana Mosque Trustees v. Mahmud and relied on Davies v. Price, omitted from this list of jurisdictional errors the taking into account of irrelevant factors, the exercise of powers for an improper purpose, and unreasonableness. Applying this narrow view of jurisdictional error to the facts, the Court of Appeal naturally concluded that the error alleged, even if proved to the court’s satisfaction, would constitute only an error within jurisdiction. Therefore the decision could not be a nullity and the privative clause operated to exclude review by the courts.

The House of Lords, by a majority, has reversed the Court of Appeal’s decision. All members of the House of Lords accepted

76 Supra, footnote 58.
77 In the Hall and Mixnam Properties cases, supra, footnote 59; and Hartnell v. Minister of Housing and Local Government, [1965] A.C. 1134, conditions were held unreasonable although the evidence could hardly be described as “overwhelming”. It should be noted that in New Zealand the courts have often determined the question of unreasonableness on a balance of probabilities rather than by application of the “benevolent” approach: see D. E. Paterson, Aspects of Unreasonableness in New Zealand Administrative Law (1968), 3 N.Z.U.L.R. 52.
78 Supra, footnote 1. 79 Supra, footnote 21. 80 Supra, footnote 22.
the Court of Appeal's view that a privative clause cannot exclude the courts' powers of review if a decision is a nullity. But on the question of the scope of jurisdictional review, the two conflicting views were again apparent. Lords Reid, Pearce and Wilberforce upheld the plaintiff's contention that due to a misconstruction of its empowering Order in Council the Commission had taken into account an irrelevant factor, and, taking a wide view of jurisdictional error, held the Commission's decision to be ultra vires and a nullity. All three considered Davies v. Price\textsuperscript{81} to have been wrongly decided. Lord Pearson also favoured this wide approach to jurisdictional error, but dissented on the ground that, in his opinion, the Commission's construction of the Order in Council was correct and therefore no consideration irrelevant to its inquiry had been taken into account. Only Lord Morris took the narrow "collateral" approach to jurisdictional error, but even he seems to have regarded the exercise of a power for an improper purpose as rendering action ultra vires.\textsuperscript{82}

Lords Pearce, Wilberforce and Pearson all considered that even although a tribunal may have jurisdiction to enter upon an inquiry, the consideration of an irrelevant factor or the failure to consider a relevant factor in course of that inquiry, the asking of "the wrong question", or the exercise of the power for an improper purpose, will result in the tribunal acting "without" or "in excess of" its jurisdiction and its decision will be a nullity.

Lord Reid however, conscious of the numerous cases in which jurisdictional errors had been restricted to errors made in respect of matters preliminary or collateral to the exercise of the power conferred,\textsuperscript{83} attempted to separate the hitherto related concepts of "lack of jurisdiction" or "ultra vires", and "nullity".

Lord Reid said:\textsuperscript{84}

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It

\textsuperscript{81}Ibid.

\textsuperscript{82}Supra, footnote 1, at p. 179 (W.L.R.).

\textsuperscript{83}Including Lord Reid's own judgment in R. v. Governor of Brixton Prison, Ex parte Armah, [1968] A.C. 192, which was referred to by Lord Morris in support of his argument.

\textsuperscript{84}Supra, footnote 1, at p. 170 (W.L.R.).
may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.

If Lord Reid's view that the term jurisdiction should be used only in its "narrow and original sense" is accepted, and yet errors committed in the course of an inquiry upon which a tribunal has "jurisdiction" to enter renders its decision a nullity, one is faced with the novel proposition that non-jurisdictional errors which do not make a decision ultra vires, nevertheless render it a nullity. It is submitted that Lord Reid, like Lords Pearce, Wilberforce and Pearson, must be regarded simply as adopting a wide approach to the concept of jurisdictional error.

Indeed it is difficult to envisage any recognised form of error which would not now fall within the category of jurisdictional errors. In the course of one or other of the judgments of the majority, all of whom emphasised that the lists of examples given were not intended to be exhaustive, almost every recognised form of abuse of power is expressly stated to render a decision a nullity. The important omissions are the grounds of unreasonableness and fraud upon the official. But unreasonable action has often been regarded as ultra vires for the purposes of "collateral" attack, and a declaration of invalidity. Similarly, it has been held that the power of the courts to quash decisions procured by fraud is not excluded by privative enactments, and New Zealand courts have expressly stated that such decisions are "null and void". There is therefore every reason for regarding these errors as rendering action ultra vires for all purposes.

Yet the majority in the Anisminic case considered that the role of the courts is still supervisory rather than appellate in nature, and that there are still some non-jurisdictional errors which can be reviewed only if they constitute errors of law which appear on the

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86 See the cases referred to in footnotes 57 and 59, supra.
88 In re Mangatainoka Block 1 B.C. No. 2 (1912-13), 33 N.Z.L.R. 23, at p. 58, per Edwards J; In re Taraire Block, ibid., at p. 54.
face of the record of a decision. Lord Reid said: 89

If [a tribunal] is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.

But the Anisminic decision confers such wide powers of judicial review on jurisdictional grounds that error of law on the face of the record as a ground for certiorari would appear to be unnecessary and redundant. Any error of construction which a court considers to be “dominant” or “substantial” in the sense of materially affecting the ultimate decision is now capable of being treated as resulting in any one of a number of jurisdictional errors: taking an irrelevant consideration into account, failing to consider a relevant factor, exercising the power for an improper purpose, imposing an unwarranted condition, 90 asking the wrong question, 91 applying the wrong test. 92 As any such error will render a decision a nullity, a number of remedies will be available to an applicant, regardless of whether the tribunal was acting judicially, the error was one of law apparent from the record of the decision, or a privative clause was included in the empowering statute.

If the view of the majority in the Anisminic case is universally adopted, it would seem that certiorari will continue to be sought on the grounds of patent error of law only if the courts apply certain general statements which suggest that any error of law which appears on the record of a decision gives grounds for certiorari, regardless of whether it is material to the actual decision reached. 93 However a number of Commonwealth courts have held that errors which are immaterial to the final decision will not attract certiorari even if they do appear on the record. 94 In R. v.

89 Supra, footnote 1, at p. 170 (W.L.R.).
90 Ibid., at p. 210, per Lord Wilberforce.
91 Ibid., at pp. 192, per Lord Pearce, 206, per Lord Wilberforce, 210, per Lord Pearson.
92 Ibid., at p. 206, per Lord Wilberforce.
Tennant, Ex parte Woods, Wanstall J., with whom Mansfield C.J. agreed, said: 

The defect or informality alleged to appear on the face of the record relied on to ground certiorari must, I think, amount to something more than a mistake in law in the exercise of jurisdiction.

He concluded that “certiorari does not go to correct a non-jurisdictional error in law which does not have the effect of rendering the actual decision invalid.” Wanstall J. appeared to consider that only an error which is “fundamental to the decision of the question at issue” would have this effect of rendering the decision invalid. The application of this restriction in both the Tennant case and the Industrial Appeals Court case indicates that, in practice, it is very similar to the requirement that an improper purpose be dominant in the sense that but for the error the decision would have been different.

And although the courts have been prepared to infer that a tribunal has erred in law where there is no evidence to support its decision, in such circumstances they have also inferred that the tribunal must have taken into account irrelevant considerations or exercised its powers for an improper purpose, and that its decision is therefore ultra vires. So basing an application for certiorari on error of law on the record rather than on the argument that the error in question renders the decision ultra vires, involves a number of serious disadvantages, but attracts no advantages whatever.

So the major obstruction to the adoption of the wide approach to jurisdictional error applied by the majority in the Anisminic case is the problem of logically reconciling it with the existence of error of law on the face of the record as a ground for the issue of certiorari. In fact Lord Morris supported his narrow view of jurisdictional error by referring to this difficulty.

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55 Ibid., at p. 257. 56 Ibid., at p. 261. 57 Supra, footnote 94.
59 Maradana Mosque Trustees v. Mahmud, supra, footnote 21 (certiorari); R. v. Cotham, supra, footnote 11, and Re Battaglia and Workmen's Compensation Board, supra, footnote 11 (mandamus); Ross-Clunis v. Papadopoulos, [1958] 1 W.L.R. 546. at p. 560 (collateral attack); Short v. Poole Corporation, [1926] 1 Ch. 66, at p. 94 (declaration); Leeson v. General Council of Medical Education and Registration (1889), 43 Ch.D. 366, at p. 378 (injunction); but cf., R. v. Nat Bell Liquors Ltd., supra, footnote 22; and Rural Co-Operative Society v. Thomson, supra, footnote 22 (certiorari).
60 Supra, footnote 1, at p. 181 (W.L.R.).
In the *Northumberland* case the whole argument proceeded on the basis that the error or errors of law were within jurisdiction. The judgments would have been unnecessary if it could have been asserted that error of construction was tantamount to excess of jurisdiction. Lord Reid's attempt to meet this difficulty by separating the concepts of *ultra vires* and nullity cannot logically be supported. Lord Morris' argument can be rebutted only by agreeing that the revival of error of law on the record was in fact unnecessary, and that today it constitutes a redundant and illogical exception to lack of jurisdiction as the basis for judicial review of administrative action.

It should also be noted that the decision in the *Punton* case No. 2 has been circumvented by the *Anisminic* decision. Although the Court of Appeal's view that a declaration of invalidity may be made only in respect of action which is a nullity has not been challenged, the House of Lords has now held that such errors as taking into account irrelevant factors, or "asking the wrong questions" as a result of a misconception of statute, do render action *ultra vires*.

**Conclusion**

It is obviously undesirable that the scope of jurisdictional review should vary in respect of different remedies, and even less desirable that there should exist two conflicting lines of authority on this question in respect of individual remedies. In the light of the *Anisminic* case, the weight of authority now favours the adoption of an extremely wide view of jurisdictional error in respect of all remedies. If this view is consistently taken by the courts, it would seem that the only "discretionary" function remaining outside the ambit of the courts' powers of review will be the assessment by a tribunal of the weight to be placed on the relevant factors it is bound to consider.\(^{102}\)

Whether the universal adoption of this wide approach is regarded as desirable naturally depends on one's view as to the proper role of the courts in this field.

From the point of view of logic, one's attitude will depend on whether one accepts that the courts should not only ensure that administrative tribunals comply with express restrictions upon the exercise of their discretionary powers, but should also imply further limitations which must be complied with. It will also de-

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\(^{101}\) *Supra*, footnote 55.

pend upon whether one considers that the existence of error of law on the face of the record as a ground for certiorari can be logically reconciled with the majority view in the Anisminic case.

From the point of view of policy, one's attitude will depend on the degree of control by the courts that is considered desirable. If it is felt that the courts should exercise extensive powers of control over administrative tribunals, the wide view of jurisdictional error will be preferred, as privative clauses will be denied any effect, and all remedies will be available to correct any error which materially affects a decision. But if one considers that the courts' powers of review should be more limited, the narrow approach to jurisdictional error will be favoured.

At a time when an increasing number of important decision-making functions are being delegated to administrative tribunals, it is the writer's view that the checks on the inefficient exercise of such functions should be as effective as possible. To this extent the decision in the Anisminic case is a welcome one. However the decision confers upon the courts such wide powers of review that their function now appears to be more appellate than supervisory. By adoption of the Anisminic approach, a court now has almost unlimited power to impose its view in respect of a particular matter upon a specialised tribunal created by the Legislature for the express purpose of dealing with such questions. Although it may be desirable to subject administrative tribunals to a considerable degree of control, it can be argued that courts of general jurisdiction are not the most appropriate bodies to exercise such powers of control. There is much to be said for the creation of specialised administrative appeal courts, the members of which are not only legally trained but also possess special knowledge and expertise in respect of the activities regulated by the tribunals from which a right of appeal is given. 103

103 In New Zealand, the Judicature Amendment Act 1968 has given effect to the recommendations of the Public and Administrative Law Reform Committee (the First Report of which was noted in [1968] N.Z.L.J. 97). An Administrative Division of the Supreme Court has been created to hear appeals from certain administrative tribunals, and also to exercise the normal supervisory jurisdiction of the Supreme Court. For a discussion of the Committee's recommendations and the subsequent legislation see D. E. Paterson, (1969), 5 N.Z.U.L. Rev. 351. For a general discussion of these problems see K. J. Keith, Appeals from Administrative Tribunals, The Existing Judicial Experience (1969), 3 V.U.W.L. Rev. 123. In Victoria, the Statute Law Revision Committee of the Victorian Parliament, in a report dated 30th April 1968, (noted in (1968), 42 A.L.J. 38) has recommended the creation of an Administrative Appeals Tribunal to hear appeals from a number of the State's administrative tribunals.