§ Law in Context

Law and Administration

THIRD EDITION

CAROL HARLOW AND
RICHARD RAWLINGS

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521197076

14

Continuity and change: Procedural review

Contents

As every student of government should know, the administrative process is shaped not only by executive and legislature but also by courts. This chapter focuses on the judicial contribution in the form of procedural review, classically epitomised in the two Latin tags: *audi alteram partem* (hear the other side) and *nemo iudex in causa sua* (no man a judge in his own cause). Suitably hallowed,

even hackneyed, the precept that 'justice must not only be done but be seen to be done' is the essence of the rule of law.

A first theme of this chapter is judicialisation and we shall find a general tendency to model the administrative process in the courts' own adjudicative image. We may conceive of a sliding scale: the closer to the 'ideal type' of formal court procedure, the more 'judicialised' the process will be. As emphasised by Lord Diplock's use of the term 'procedural impropriety' (see p. 107 above), this trait is inevitably bound up with the role and form of statutory procedural requirements. Our second major theme is the meeting of a quintessential common law tradition with 'Europe': both the ECHR and Community law are involved. This important constitutional dimension has a two-way aspect. In Art. 6 especially, the Convention wears the genetic imprint of a deep-rooted Anglo-American concern with natural justice and due process.[1] Again, the ECJ in developing general principles of law has drawn directly on common law requirements of a fair hearing.[2] Conversely, we will see how the Human Rights Act (HRA) has ushered in a new round of judicialisation based on the ECHR. Directed to judicial procedures, but casting a wider shadow, the Art. 6 prescription of an 'independent and impartial tribunal' in the determination of 'civil rights and obligations' is today a defining aspect of the administrative law landscape.

We shall also take up a theme discussed in earlier chapters of the use of adjudication to devise and install procedural requirements for other forms of deciding. As noted previously in the context of formal rule-making, this offers a doorway for collective-interest representation, allowing groups to appeal to process values as a way of emboldening the courts: look back, for example, at the *Greenpeace* and *Bapio* cases (see p. 176 above). The scale of the general development of procedural fair play raises the question of judicial discretion. Deepened and widened over the years, procedural review exhibits a determinedly flexible quality. Judges must not only marshal facts and 'weigh' competing considerations but also navigate multiple policy domains and myriad decision-making processes in the cause of variable protection. 'Soft-centred' is an apt description of much in the case law.

The interplay of the twin elements of continuity and change provides a convenient angle of approach to the subject. Much in the general principles has enduring appeal. The courts themselves under the banner of 'procedural fairness' have pursued a course essentially set half-a-century ago in the watershed case of *Ridge v Baldwin*.[3] Looking more closely we identify a whole

[1] A. Lester, 'Fundamental rights: The UK isolated?' [1984] *PL* 46. And see Lord Woolf, 'Magna Carta: A precedent for recent constitutional change' in C. Campbell-Holt (ed.), *The Pursuit of Justice* (Oxford University Press, 2008).

[2] Case 17/74 *Transocean Marine Paint v Commission* [1974] ECR 1063; also Case 222/86 *Heylens* [1987] ECR 4097. And see F. Bignami, *Three Generations of Participation Rights in European Administrative Proceedings* (Jean Monnet WP No. 11, 2003).

[3] [1964] AC 40.

series of developments integral to the 'transforming' of judicial review (see Chapter 3):

- *paradigm shift*: determinedly conceptual/deferential approach ('natural justice') replaced by a more vigorous/open-ended one ('procedural fairness')
- *elaboration of procedural fairness*: adjudicative-type features extended and tailored in contextual fashion, increasingly in the shadow of EU and especially ECHR requirements
- *procedural legitimate expectation*: additional entitlement to judicial protection, ranging across individuated and consultative process (see p. 223 above)
- *cautious experiments with regulating more plural, non-adjudicative types of process*
- *checking for structural as well as personalised forms of bias*: associated with (but not confined to) the Art. 6 Convention right.

There are major stresses and strains. The fact that procedural review is shot through with discretion raises questions about institutional competence, especially when courts venture outside the adjudicative habitat of individuated decision-making and/or begin to second-guess procedural choices expressed in legislation. Again, common law forms of procedural review are designed in a very real sense to enrich the administrative process. But given the many practical demands on government, and especially the need to guard against the limiting effects of judicialisation, how far can the development reasonably go? ECHR Art. 6 has given matters an additional twist. The House of Lords will be seen defending national practices of political and administrative decision-making against demands for a judicialised – 'independent and impartial' – body.

1. Scene-setting

(a) Rationale

In a classic account, the American jurist Lon Fuller identified the distinguishing characteristic of adjudication as being to confer 'on the affected person a peculiar kind of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor'.[4] Fuller's general point was that the hallmark of this, and of the other forms of social ordering like contract, negotiation or legislation, was procedural. Each of the forms generates a set of procedural requirements, which protect the integrity of the form; conversely, the integrity of the process becomes eroded if the reality strays too far from the ideal. In the case of adjudication and tribunals, this was the significance of

[4] L. Fuller, 'The forms and limits of adjudication' (1978) 92 *Harv. LR* 353. And see J. Allison, 'Fuller's analysis of polycentric disputes and the limits of adjudication' (1994) 53 *CLJ* 367.

the invocation by Franks and Leggatt of the values of openness, fairness and impartiality, and independence (see Chapter 11). Again, because historically the twin strands in natural justice of the hearing rules and no bias reflected procedure as it developed in English courts of law, the judges in imposing the two principles on the administration have asked for adjudication to be incorporated into the administrative process.

Fuller's ideas have been influential in English administrative law, not least in the quest for 'rational' decision-making. 'Judicialisation', like 'legalisation' or the resort to rules, was to help underpin the integrity of the administration – bringing official conduct under legal control.[5] Yet we find in the literature different justifications for the imposition by the legal system of procedural restraints on administrative decision-making. This has a very practical dimension. Case law stands to be shaped, in Tribe's words, by 'alternative conceptions of the primary purpose of procedural due process and by competing visions of how that purpose may best be achieved'.[6]

One set of justifications is utilitarian and positivist in character, stressing the link between the grant of procedural protection and the quality of substantive outcomes.[7] Participation is required in the service of accuracy and efficiency – a variant of instrumentalist arguments for law as a tool of effective administration. According to theorists of law and economics, the value of due process is quantifiable: the cost of withholding due process can be measured in terms of the probability of error if it is withheld; alternatively, the cost of error can be calculated and weighed against the cost of procedural protection and participation.[8] This form of calculation demonstrates some obvious problems however. What, for example, is the 'error cost' of wrongfully refusing entry to a refugee? And – a question asked in other contexts – is there necessarily a 'correct' outcome? Enough has been said to show that many administrative decisions are not straightforward rule-applications but rather involve questions of judgement or interpretation.

A second set of justifications for fairness or procedural justice is rights-based. In other words, as Dworkin has argued,[9] procedural protections are dependent on, or secondary to, substantive rights. More likely than utilitarian theories to shift the balance in favour of the individual, this model is boosted in Britain by the HRA. Discussed previously in Chapter 13, the 'positive obligation' grounded in ECHR Art. 2 to make inquiries is the most striking example. The duality of Art. 6 – (a) the threshold requirement of a

[5] J. Jowell, 'The legal control of administrative discretion' [1973] *PL* 178. And see J. Rawls, *A Theory of Justice* (Oxford University Press, 1973).

[6] L. Tribe, *American Constitutional Law*, 2nd edn (Foundation Press, 1988), p. 666.

[7] See e.g. J. Resnick 'Due process and procedural justice' in Pennock and Chapman (eds.), *Due Process* (Nomos, 1977).

[8] R. Posner, 'An economic approach to legal procedure and judicial administration' (1973) 2 *J. of Legal Studies* 399; L. Kaplow, 'The value of accuracy in adjudication: An economic analysis' (1994) 23 *J. of Legal Studies* 307.

[9] See e.g. R. Dworkin, *A Matter of Principle* (Clarendon, 1985), Ch. 4.

determination of civil rights and obligations and (b) a bundle of protections including not only independent and impartial tribunal 'established by law', but also 'fair and public hearing' 'within a reasonable time' and 'judgment . . . pronounced publicly' – also fits. Yet as with rights-based theories of administrative law in general, the model may be seen as not going far enough. Where for example an individual has only a bare 'interest' by reason of the existence of administrative discretion, the case for procedural protection is seen as considerably weakened.[10]

Due process can be said to have intrinsic value – that is to say, as the very essence of justice. An opportunity for affected individuals or groups to participate in the administrative decision-making process 'expresses their dignity as persons';[11] they are otherwise deprived of conditions requisite for continued moral agency. Common in the American literature, 'dignitary theory' has also become prominent in Britain in recent years,[12] again in part through European influences.[13] Mashaw, its leading advocate, does not deny the instrumental value of procedural protection, but rather rejects this as its primary basis. A stress on dignitary values suggests a high standard of protection, for example in those cases where the substantive merits of the individual's case are dubious. Like Dworkin however, Mashaw accepts the case for judicial 'balancing', on the basis that a weighing of competing factors recognises and confronts 'the fundamentally compromised nature of social life'.[14] Indeed, some form of 'balancing' appears inevitable. To classify certain interests as rights for the purpose of procedural protection, and to take no account of other factors in determining its content, has been said by Craig to be 'implausible given that the costs of such protection have to be borne by society'.[15] We see too that dignitary theory and mathematical calculation do not mix. There is an important role here for judicial discretion.

The case for courts rendering non-adjudicative procedures more open to interest representation is naturally informed by ideas of pluralism, diversity, inclusiveness and of direct democracy (see also Chapter 4). Typically a product of American borrowings,[16] this expansionist challenge to the traditional – individuated – approach to 'fairness' was already apparent in

[10] D. Galligan, *Due Process and Fair Procedures: A study of administrative procedures* (Clarendon, 1996).

[11] Tribe, *American Constitutional Law*, p. 666. A variety of philosophical underpinnings may be used, including natural rights, fundamental liberal values and social contract theory.

[12] T. Allan, *Constitutional Justice: A liberal theory of the rule of law* (Oxford University Press, 2001).

[13] D. Feldman, 'Human dignity as a human value' [1999] *PL* 682 and [2000] *PL* 61. And see Lord Millett, 'The Right to Good Administration in European Law' [2002] *PL* 309.

[14] J. Mashaw, *Due Process in the Administrative State* (Yale University Press, 1985), p. 155

[15] P. Craig, *Administrative Law*, 6th edn (Sweet & Maxwell, 2008), p. 393.

[16] R. Stewart, 'The reformation of American administrative law' 88 *Harv. LR* (1975) 1776; F. Michelman, 'Formal and associational aims in procedural due process' in Pennock and Chapman (eds), *Due Process*.

Britain in the early 1990s.[17] In jurisprudential terms, there is an evident connection with the permeability of the courts' own procedures to collective or group action (seen in the next chapter as greatly increased in recent times). Splendidly envisioned, procedural fairness is seen here promoting 'independent values of participation, deliberation and consensus' in the governmental decision-making process.[18] More soberly expressed, the courts have a part to play in creating space for different views of 'the public interest' (while at the same time facilitating better flows of information, etc., in instrumentalist fashion). Enthusiasm is tempered by the difficulty (observed in the context of rule-making) of devising procedures which take into account a broad range of views without impairing the efficiency and effectiveness of administration. Nor do the courts exist in a constitutional and historical vacuum. Reflected over many years in patterns of judicial restraint, concern about possible judicial 'interference' with the policy-making process cannot simply be brushed aside.

The legitimating effects of 'fair procedure' are impossible to quantify but perilous to ignore. Signposting contemporary developments in the case law, Bayles, for example, prioritises the value of impartiality by reasons other than 'possible demoralisation effects' or even non-compliance. 'The possibility of partiality should be accepted [only] when the risks of it are small, the costs to parties of an alternative decision maker are great and a failure to decide on the merits might also involve significant injustice.'[19] In similar vein, Solum speaks of 'the hard question' in procedural justice: 'how can we regard ourselves as obligated . . . to comply with a [decision] that we believe (or even know) to be in error?' While procedural perfection is unattainable, and seeking to achieve it intolerably costly, 'procedures that purport to bind without affording meaningful rights of participation are fundamentally illegitimate.'[20] Nor do the advantages in terms of legitimate authority and smooth administration go unremarked in government. *Judge Over Your Shoulder* (JOYS), the Treasury Solicitor's guide to judicial review for civil servants, makes the point explicitly. 'Nobody should be able to allege that the decision is a fix because the decision-maker was biased, whether or not there was any truth in that allegation. The rule must be observed strictly to maintain public confidence in the decision-making process.'[21] The sting in the tail is the evident potential for 'symbolic reassurance', or in Arnstein's terms for therapy and manipulation (see p. 173 above). To ensure they are 'meaningful' requires a close consideration by the courts of the nature of hearings and consultations.

[17] G. Richardson, 'The legal regulation of process' in Richardson and Genn (eds.), *Administrative Law and Government Action* (Clarendon, 1994). And see I. Harden and N. Lewis, *The Noble Lie: The British constitution and the rule of law* (Hutchinson, 1986).

[18] L. Guinier, 'No two seats: The elusive quest for political equality' (1991) 77 *Virginia LR* 1413, 1489.

[19] M. Bayles, *Procedural Justice* (Kluwer, 1990), p. 130.

[20] L. Solum, 'Procedural justice' (2004) 78 *Southern California Law Review* 181, 274.

[21] TSol, *Judge Over Your Shoulder*, 4th edn (2006) [2.7].

(b) From concepts to contexts

Prior to *Ridge v Baldwin*, natural justice had taken on the character of a highly formalist jurisprudence. Judges attempted to distinguish the 'judicial', 'quasi-judicial' and 'administrative' functions of government in order to determine whether the principles applied.[22] Reflecting and reinforcing a restrictive, deferential response by the courts in the post-World War I period of consolidation of the administrative state, this analytical theory was not wholly devoid of merit, at least for green light theorists. By insulating 'administrative' functions from the common law doctrine, it implied a recognition that adjudicative (adversarial) procedures are of limited usefulness and thus left space for experimentation and innovation with alternative forms of social ordering.

Analytical theory came to be criticised in three main ways. First, it was difficult, if not impossible, to separate different types of function. Terminological contortions and hair-splitting distinctions proliferated.[23] Secondly, with the growth of the state, increasing numbers of decisions were rendered devoid of procedural protections because they were classified as administrative. In *Nakkuda Ali v Jayaratne*,[24] for example, a trader alleged to have acted fraudulently was deprived of his licence. The Privy Council held that this exercise of statutory discretion did not require any kind of hearing; the regulator was acting neither 'judicially' nor 'quasi-judicially', but merely withdrawing a 'privilege'. Thirdly, analytical theory was seen as a break with tradition. Critics like Wade[25] harked back to a 'golden age' of natural justice in the nineteenth century in which, confronted by a nascent administrative state, the courts had demonstrated a robust approach to matters of procedural protection.[26]

Described by a contemporary as 'the Magna Carta of natural justice',[27] *Ridge v Baldwin* fatally undermined the analytical theory. In a brilliant exposition of the common law method, Lord Reid by looking back led the judges forward. Acting under statutory powers, a local police committee had dismissed its chief constable. Seeking financial compensation, not reinstatement, he applied for a declaration that the decision was void for breach of natural justice. The Court of Appeal held that the committee was exercising an administrative function and that the principles of natural justice were not applicable. The House of Lords disagreed:

[22] To trace the development, see *Local Government Board v Arlidge* [1915] AC 120, *Errington v Minister of Health* [1935] 1 KB 249, and *Franklin v Minister of Town and Country Planning* [1948] AC 87.

[23] A feature underlined in the reasoning of the (Donoughmore) *Committee on Ministers' Powers*, Cmnd 4050 (1932).

[24] [1951] AC 66.

[25] H. Wade, *Administrative Law*, 1st edn (Clarendon, 1961).

[26] The classic authority being *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

[27] C. K. Allen, *Law and Orders*, 3rd edn (Stevens, 1965), p. 242.

Lord Reid: The appellant's case is that . . . before attempting to reach any decision [the committee] were bound to inform him of the grounds on which they proposed to act and give him a fair opportunity of being heard in his own defence . . . If the present case had arisen thirty or forty years ago the courts would have had no difficulty in deciding this issue in favour of the appellant . . . Yet the Court of Appeal have decided this issue against the appellant on more recent authorities which apparently justify that result. How has this come about? There have been many cases where it has been sought to apply the principles of natural justice to the wider duties imposed on ministers and other organs of government by modern legislation . . . It has been held that those principles have a limited application in such cases and those limitations have tended to be reflected in other decisions on matters to which in principle they do not appear to me to apply. Secondly . . . those principles have been held to have a limited application in cases arising out of wartime legislation; and again such limitations have tended to be reflected in other cases.

In [the earlier] cases . . . the Board of Works or the Governor or the club committee was dealing with a single isolated case. It was not deciding, like a judge in a lawsuit, what were the rights of the person before it. But it was deciding how he should be treated – something analogous to a judge's duty in imposing a penalty. No doubt policy would play some part in the decision – but so it might when a judge is imposing a sentence. So it was easy to say that such a body is performing a quasi-judicial task in considering and deciding such a matter, and to require it to observe the essentials of all proceedings of a judicial character – the principles of natural justice . . . Sometimes the functions of a minister or department may also be of that character, and then the rules of natural justice can apply in much the same way. But more often their functions are of a very different character. If a minister is considering whether to make a scheme for, say, an important new road, his primary concern will not be with the damage which its construction will do to the rights of individual owners of land. He will have to consider all manner of questions of public interest and, it may be, a number of alternative schemes . . . No individual can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case.

Although not abandoning terminology associated with analytical theory, Lord Reid's speech worked to liberate the courts from self-imposed conceptual restraints. While at this stage still largely confined to individuated forms of decision-making, today's common law model – *a generalised doctrine of procedural fairness characterised by variable intensity of review* – thus began to emerge in subsequent cases. In *Re H K (An Infant)*,[28] for example, Lord Parker CJ doubted whether an immigration officer in refusing entry had acted in a 'judicial' or 'quasi-judicial' capacity, but thought that in any event the applicant had to be given a chance to explain his position. 'Good administration and an honest or bona fide decision must . . . require not merely

[28] [1967] 2 QB 617. See also *Schmidt v Home Secretary* [1969] 2 WLR 337.

impartiality, not merely bringing one's mind to bear on the problem, but acting fairly.'

Ridge v Baldwin, in other words, had presented the judges with a challenge and an opportunity. Focused on issues of amenability to jurisdiction, the analytical model implied highly judicialised procedure inside a restricted zone.[29] In contrast, prioritising the question of content, 'the duty to act fairly' was indicative of more varied and variable requirements as it ranged increasingly across the piece. Flexibility became the keyword: judicial discretion. Afforded almost Biblical status in recent times, two later House of Lords speeches demanded that judges hold their nerve:

> *Lord Bridge* (1987): The so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates.[30]
>
> *Lord Mustill* (1993): The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type . . . The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects . . . An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.[31]

2. Flexibility: The sliding scale

Such is the realm of the sliding scale of procedural protection. The mass of common law cases on fair procedure incorporates a pool of specific procedural norms, which can be summoned up, and asserted more or less vigorously, by reference to the decision-making context. While the range of possible requirements is (increasingly) broad, the strong genetic imprint of the model of adjudication as 'presenting proofs and reasoned arguments' is clearly visible:[32]

- Give proper notice (*Bradbury* – see p. 176 above)
- Make available relevant information (classically, 'the case against') (*Roberts* – see p. 642 below)

[29] Although the content was never entirely fixed or determinate: *Board of Education v Rice* [1911] AC 179; *Russell v Duke of Norfolk* [1949] 1 All ER 109.

[30] *Lloyd v McMahon* [1987] 2 WLR 821, 878.

[31] *R v Home Secretary, ex p. Doody* [1993] 3 WLR 154, 168.

[32] The list is not intended to be exhaustive. For a detailed survey, see Lord Woolf, J. Jowell and A. Le Sueur, *de Smith's Judicial Review of Administrative Action*, 6th edn (Sweet & Maxwell, 2007), Chs. 6–7.

- Consult and/or receive written representations (*GCHQ* – see p. 107 above)
- Provide oral hearings (*Smith and West* – see p. 641 below)
- Allow legal representation or other assistance (*Tarrant* – see p. 627 below)
- Permit cross examination (*Bushell* – see p. 585 below)
- Give reasons for the decision (*Doody* – see p. 628 below)

(a) Tailoring

The courts have used a variety of techniques for tailoring procedures to the subject matter in hand. Representing a transitional phase in the move from 'concepts' to 'contexts', a modified form of classification was prevalent in the early years of the generalised 'duty to act fairly'. *McInnes v Onslow Fane*[33] concerned a refusal by the British Boxing Board of Control to grant a manager's licence. The court rejected the applicant's argument that he was entitled to an oral hearing and for prior information of any concerns:

> *Megarry V-C*: It must be considered what type of decision is in question . . . At least three categories may be discerned. First, there are . . . the forfeiture cases . . . In these there is a decision which takes away some existing right or position, as where a member of an organisation is expelled or a licence is revoked. Second, at the other extreme there are . . . application cases . . . where the decision merely refuses to grant the applicant the right or position that he seeks, such as . . . a licence to do certain acts. Third, there is an intermediate category . . . the expectation cases . . . which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted. This head includes cases where an existing licence-holder applies for a renewal of his licence . . .
>
> There is a substantial distinction between the forfeiture cases and the application cases. In the forfeiture cases, there is a threat to take something away for some reason: and in such cases, the right to an unbiased tribunal, the right to notice of the charges and the right to be heard in answer to the charges . . . are plainly apt. In the application cases, on the other hand, nothing is being taken away, and in all normal circumstances there are no charges, and so no requirement of an opportunity of being heard in answer to the charges. Instead, there is the far wider and less defined question of the general suitability of the applicant for a licence . . . The intermediate category . . . may . . . be regarded as being more akin to the forfeiture cases for . . . the legitimate expectation . . . is one which raises the question of what it is that has happened to make the applicant unsuitable.

The obvious danger with this type of reasoning is that the distinctions again become over-rigid. Since a person's livelihood for example can be at stake

[33] [1978] 3 All ER 211. See also from this period, *R v Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 All ER 528 and *Cinnamond v British Airports Authority* [1980] 1 WLR 582.

in each class of case, the classification may also be criticised for protecting vested interests and/or providing insufficient protection. In other words, a more individuated approach is called for, closely attuned to the effects on the applicant of denial of the application. The judges have taken this on board. Laws LJ has said that *McInnes* 'cannot now be treated as a *vade mecum* to the content of a public body's duty of fairness; it may point the way to an answer, but what is always required is a careful focus on the facts of the given case'.[34]

The tailoring of procedural fairness has seen much transaction typing of different areas of administration. Going in tandem with the explicit recognition of multiple standards of substantive review (see Chapter 3), this is part and parcel of a re-balancing exercise in light of the progressive extinction of judicial 'no-go' areas – more pressure to articulate notions of restraint or constitutional and institutional limitations of review.

Cases touching on national security feature prominently here. A familiar example of procedural protection being 'sacrificed on the altar of substantive advantage'[35] is the decision in *GCHQ* (see p. 107 above) to override a legitimate expectation of prior consultation. Alternatively, take *Cheblak*,[36] where Lord Donaldson spoke of natural justice having 'to take account of realities'. A journalist faced deportation on grounds of national security; the court refused to act on his complaint that the administrative procedure failed to secure to the individual adequate knowledge of the allegations. We note too the 'read-across' in terms of ECHR Art. 6 and the so-called 'war against terror' (see Chapter 3). Take the recent control order case of *AF, AM and AN*.[37] 'It is common ground that the ordinary rule that a party is entitled to know both the case against him and the evidence against him must be modified because of the importance of national security. The question is how and to what extent the ordinary rule should be modified.' While lining up to refute the heresy that an (apparently) unanswerable case cures an otherwise unfair hearing, the judges divided on whether – as basic principle would suggest – there was an irreducible minimum of disclosure. In the light of *MB* (see p. 133 above), the majority thought not.

Raising the standard procedural question of whether a breach of fair procedure can be cured by a subsequent (fair) rehearing or appeal, *Calvin v Carr*[38] is a classic illustration of transaction typing in other contexts. The Privy Council rejected the challenge to a disciplinary decision of the Australian Jockey Club:

[34] *Abbey Mine Ltd v Coal Authority* [2008] EWCA Civ 353 [31]. And see *R (Quark Fishing) v Foreign Secretary* [2001] EWHC Admin 1174.

[35] Solum, 'Procedural justice', p. 182.

[36] *R v Home Secretary, ex p. Cheblak* [1991] 1 WLR 890. Another infamous example is *R v Home Secretary, ex p. Hosenball* [1977] 1 WLR 766.

[37] *SSHD v AF, AM and AN* [2008] EWCA Civ 1148.

[38] [1979] 2 WLR 755.

> *Lord Wilberforce:* No clear and absolute rule can be laid down on the question . . . The situations in which this issue arises are too diverse, and the rules by which they are governed so various, that this must be so . . . While flagrant cases of injustice, including corruption or bias, must always be firmly dealt with by the courts, the tendency . . . in matters of domestic disputes should be to leave these to be settled by the agreed methods without requiring the formalities of judicial processes to be introduced . . .
>
> Races are run at intervals; bets must be disposed of according to the result. Stewards are there in order to take rapid decisions as to such matters as the running of horses, being entitled to use the evidence of their eyes and their experience. As well as acting inquisitorially at the stage of deciding the result of a race, they may have to consider disciplinary action: at this point rules of natural justice become relevant. These require, at the least, that persons should be formally charged, heard in their own defence, and know the evidence against them . . . But it is inevitable, and must be taken to be accepted, that there may not be time for procedural refinements. It is in order to enable decisions reached in this way to be reviewed at leisure that the appeal procedure exists.

Here the relevant area might be defined as 'self-regulation', or alternatively as 'sporting disputes', a light-touch standard of review being justified on grounds of agency expertise and practical exigency. Such definitions, however, may themselves be controversial. We must also keep in mind Lord Mustill's warning that fashions change. As shown earlier with regulatory judicial review cases such as *Interbrew* (see p. 313 above) and *Eisai* (see p. 314 above), the results of transaction typing in one era may be different in another.

The potential of transaction typing as a guide to procedural fairness is necessarily limited. Since precise procedural protections remain to be determined in individual cases within particular areas, further tailoring is required at the micro level. We find decisions explicitly premised on the idea of judicial 'balancing', a process naturally apt to encompass (a) the individual interest in issue; (b) the benefits to be derived from added procedural protections; and (c) the costs, both direct and indirect, of compliance.[39] Framed by the competing justifications for imposing procedural restraints, the scope for differences of opinion within the judiciary is apparent at every stage.

Ex p. Tarrant and Anderson[40] shows the workings of the sliding scale in stylised form. Were prisoners charged with serious disciplinary offences entitled to legal representation? The judge preferred to say that the Boards of Visitors responsible for determining the charges had discretion to allow representation or assistance, the exercise of which the courts would police:

> *Webster J:* The following are considerations which every Board should take into account when exercising its discretion . . . (The list is not, of course, intended to be comprehensive: particular cases may throw up other particular matters.)

[39] Craig, *Administrative Law*, p. 388.
[40] *R v Home Secretary, ex p. Tarrant and Anderson* [1985] QB 251.

> 1. The seriousness of the charge and of the potential penalty.
> 2. Whether any points of law are likely to arise . . .
> 3. The capacity of a particular prisoner to present his own case . . .
> 4. The difficulty which some prisoners might have in cross-examining a witness, particularly a witness giving evidence of an expert nature, at short notice without previously having seen that witness's evidence.
> 5. The need for reasonable speed in making their adjudication, which is clearly an important consideration.
> 6. The need for fairness as between prisoners and as between prisoners and prison officers . . .
>
> In most, if not all, charges of mutiny . . . questions are bound to arise as to whether collective action was intended to be collective . . . Where such questions arise or are likely to arise, no Board of Visitors, properly directing itself, could reasonably decide not to allow the prisoner legal representation.

The House of Lords approved this decision in *ex p. Hone*.[41] Lord Goff took the opportunity to warn against the common law being too generous. (Note however that the rights-based formula of ECHR Art. 6 today compels a somewhat different view (see p. 639 below).

> It is easy to envisage circumstances in which the rules of natural justice do not call for representation . . . as may well happen in the case of a simple assault where no question of law arises, and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases, to the detriment of all concerned including the prisoner charged, and to a wholly unnecessary waste of time and money, contrary to the public interest.

A leading case on the duty to give reasons (see below), *ex p. Doody* benchmarks the common law development on the eve of the HRA. *Ridge v Baldwin* and its progeny had, Lord Mustill explained, generated *a presumption* that an administrative power conferred by statute will be exercised in a manner which is fair in all the circumstances.[42] In turn – cutting to the core of the obligation – fairness 'will very often require' that the affected person is provided with the gist of the case against and an opportunity to make representations. Reflecting and reinforcing the trend to rights-based review in the shadow of the Convention (see Chapter 3), Lord Mustill's speech further demonstrates acceptance of a dignitarian as well as instrumental view of procedural protection. Why might the prisoner serving a life sentence wish to know the reasons for the particular tariff or term of imprisonment? 'Partly from an obvious human desire to be told the reasons for a decision so gravely affecting his future, and partly because he hopes that once the information is obtained he

[41] *R v Board of Visitors of HM Prison, The Maze, ex p. Hone* [1988] AC 379.
[42] *R v Home Secretary, ex p. Doody*, p. 168.

may be able to point out errors of fact or reasoning [and/or] challenge the decision in the courts'.[43]

(b) Variation on a theme

It would be strange indeed if the parallel universe of statutory procedural requirements did not exhibit similar features. In 2005, Lord Steyn in *Soneji*[44] effectively crowned an increasing display of flexibility in the case law:

> In the course of the last 130 years a distinction evolved between mandatory and directory requirements [see p. 176 above]. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance . . .
>
> In *London & Clydeside Estates* [45] Lord Hailsham put forward a different legal analysis . . . 'It may be that what the courts are faced with is not so much a stark choice of alternatives but a spectrum of possibilities in which one compartment or description fades gradually into another.' . . . This was an important and influential dictum. It led to the adoption of a more flexible approach of focusing intensely on the consequences of non-compliance, and posing the question, taking into account those consequences, whether Parliament intended the outcome to be total invalidity. In framing the question in this way it is necessary to have regard to the fact that Parliament ex hypothesi did not consider the point of the ultimate outcome. Inevitably one must be considering objectively what intention should be imputed to Parliament . . . The rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness.[46]

The slightly earlier case of *Jeyeanthan*[47] provides some guidance. The minister had fallen foul of the statutory rules on leave to appeal against asylum decisions made by the independent adjudicator by not providing a declaration of truth. Lord Woolf was all for judicial discretion. Faced with a breach of legislative procedural requirement, the court would determine the consequences 'in the context of all the facts and the circumstances of the case in which the issue arises . . . It must be remembered that procedural requirements are designed to further the interests of justice and any consequence which would achieve a result contrary to those interests should be treated with considerable

[43] *Ibid*., p. 160.
[44] *R v Soneji* [2005] UKHL 49. The Law Lords upheld confiscation orders.
[45] *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182.
[46] *Ibid*. [14–15] [23].
[47] *R v Home Secretary, ex p. Jeyeanthan* [2000] 1 WLR 354. And see *Wang v Commissioner of Inland Revenue* [1994] 1 WLR and *Charles v Judicial Legal Service Commission* [2003] 1 LRC 422.

reservation.' Lord Woolf went on to prescribe a little decision-making chain. The question of mandatory or directory was only at most a first step; there are other, more important, questions to answer:

- *The substantial compliance question*: is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance?
- *The discretionary question*: is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case?
- *The consequences question*: if it is not capable of being waived or is not waived then what is the consequence of the non-compliance?

The procedural complaint failed. While (i) there was a major failure of compliance, (ii) the irregularity had effectively been waived; in any case (iii) it had not affected the applicants.

(c) Standard-bearer: Reasons

Intimately bound up with the quest for administrative rationality and legal control (see Chapter 3), and latterly with more rights-based approaches, the rise of reason-giving requirements is emblematic of the broader development. As regards statutory provision, the Franks Report on Tribunals and Inquiries was an important milestone, with reasoned decisions being seen as an essential part of the package of judicialisation (see Chapter 11). Typical however of the role of 'modest underworker', the courts' own contribution had been muted: there was no general duty to provide reasons for administrative decisions.[48] In 1971, JUSTICE went so far as to say that no single factor had inhibited the development of English administrative law as seriously as this.[49] In 1988, the same organisation expressed a need for statutory reform, on the basis that it was 'not . . . at all probable that the judges here will change their basic attitudes' and develop the obligation at common law.[50] Yet six years later, one commentator was able to identify 'a subtle but real shift in this area', while others spoke of 'a triumph of judicial expansionism'.[51] In fact, reason-giving requirements had begun to epitomise the concept of a 'multi-streamed jurisdiction' (see p. 98 above), with notably strong EU and ECHR prescriptions interacting with and partly overreaching the common law development,[52]

[48] See e.g. *Minister of National Revenue v Wrights' Canadian Ropes* [1947] AC 109.
[49] JUSTICE, *Administration under Law* (1971), p. 23.
[50] JUSTICE–All Souls, *Administrative Justice: Some necessary reforms* (Clarendon, 1988), p. 72.
[51] P. Craig, 'The common law, reasons and administrative justice' (1994) 53 *CLJ* 282, 301; R. Gordon and C. Barlow, 'Reasons for life: Solving the sphinx's riddle' (1993) 143 *NLJ* 1005, 1006.
[52] P. Neill, 'The duty to give reasons: The openness of decision-making' in Forsyth and Hare (eds), *The Golden Metwand and the Crooked Cord* (Oxford University Press, 1998).

and the HRA then providing a further boost. Today, the situation increasingly resembles 'death by ink-spot', whereby growing 'exceptions' eventually overwhelm – reverse – the general 'rule'.[53] Attention is again directed to the standard of review: what does the judge think are sufficient reasons in the particular context?

Reasons for reasons are not difficult to identify:

- *administrative discipline*: encouraging careful deliberation and consistency
- *citizen interest*: satisfying a basic need for fair play
- *appeal/review*: facilitating checks for e.g. rationality and proportionality
- *public confidence or legitimacy*: promoting the sense of transparency.

Imposing a duty to give reasons can thus serve a mix of instrumentalist and non-instrumentalist rationales; as a principle of good administration, reason-giving is about both fire-watching (quality of initial decision-taking) and fire-fighting (administration under law) and also gives tangible expression to the idea of dignitary values.[54] In seeking so to promote a culture of justification however, the judges cannot ignore a battery of counter-arguments or caveats. 'The giving of reasons . . . may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgements; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge.'[55] In terms of procedural fairness, this again suggests an important element of 'tailoring'. Alternatively, will judges resist the temptation of utilising the 'procedural veneer' of reason-giving requirements as 'an ideal cover' for substantive merits review?[56]

The absence of a common law duty to give reasons reflected and reinforced the culture of official secrecy which long characterised British government. Giving no explanation was for administrative decision-makers the safe option; a famous dictum referred to 'the inscrutable face of the sphinx'.[57] Conversely, the move to elaborate reason-giving as part of a more comprehensive doctrine of procedural fairness fits the wider constitutional development in favour of transparency signalled by the Official Secrets Act 1989 and – with the broad commitment to give reasons (see p. 471 above) – the 1993 Code on Access to Official Information. Today, this aspect is underpinned

[53] *Stefan v General Medical Council* [1999] 1 WLR 1293, 1301. Though see *R (Hassan) v Trade and Industry Secretary* [2008] EWCA Civ 1311.

[54] J. Mashaw, 'Small things like reasons are put in a jar: Reason and legitimacy in the administrative state' (2001) 70 *Fordham LR* 17; D. Dyzenhaus and M. Taggart, 'Reasoned decisions and legal theory' in Edlin (ed.), *Common Law Theory* (Cambridge University Press, 2007).

[55] *R v Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 WLR 242 (Sedley J).

[56] The concern famously elaborated in the American administrative law context by M. Shapiro, 'The giving reasons requirement' [1992] *University of Chicago Legal Forum* 179.

[57] *R v Nat Bell Liquors* [1922] 2 AC 128 (Lord Sumner).

by s. 19 of the Freedom of Information Act (FOIA); in fulfillment of the duty to make a publication scheme, the public authority 'shall have regard to the public interest . . . in the publication of reasons for decisions made by the authority'. We would also stress the symbiotic quality of the jurisprudential development in the light of the HRA; proportionality-testing not only informed by, but also generating pressures for, reason-giving (see *Miss Behavin'*, p. 122 above).[58]

The place of reasons as a foundational treaty obligation in the Community legal system[59] constituted a standing rebuke to the common law. With the ECJ soon articulating its role as a vehicle of legal accountability and judicial protection,[60] and with the general principle subsequently applied to Member States in respect of fundamental Community rights,[61] nowhere was the scope for cross-fertilisation or jurisprudential 'spill-over' more obvious. Today, the EU Charter of Fundamental Rights rams home the message, with 'the obligation of the administration to give reasons for its decisions' incorporated in the Art. 41 right to good administration. The national judges, in other words, have had to run hard to keep abreast.

The step-change can be demonstrated by juxtaposing two cases a quarter of a century apart. In *Padfield* (see p. 101 above), the basis of the duty to give reasons was treated as 'little more than a symptom of irrationality',[62] the court being more likely to infer *Wednesbury* unreasonableness in the absence of explanation. This was only to happen if the circumstances pointed 'overwhelmingly' towards one exercise of discretion and no reasons for taking the contrary course were given.[63] *Padfield*, in other words, generated an incentive to give reasons but no free-standing or positive obligation. *R v Civil Service Appeal Board, ex p. Cunningham*[64] authoritatively established that, as part of the decision-making process, the giving of reasons was encompassed by procedural fairness. Castigating the refusal of reasons for an abnormally low compensation award for unfair dismissal, Lord Donaldson looked to the place of openness in buttressing a legal theory of 'control'. 'The Board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely for them, but whether their decision was lawful. Any other conclusion would reduce the Board to the status of a free wheeling palm tree.' No right of appeal from the Board's determination was also viewed as an important factor grounding a reason-giving duty.

[58] See further Ch. 15 as regards disclosure of documents.
[59] TEU Art. 253.
[60] Case 24/62 *Germany v Commission* [1963] ECR 69.
[61] Case 222/86 *Heylens* [1987] ECR 4097.
[62] D. Toube, 'Requiring reasons at common law' (1997) 2 *Judicial Review* 68.
[63] *R v Trade Secretary, ex p. Lonrho plc* [1989] 1 WLR 525.
[64] [1991] 4 All ER 310.

The way was now open for the House in *Doody* to push the boundaries. Though not 'at present' amounting to a general duty, there was, in Lord Mustill's words, 'a perceptible trend towards an insistence on greater openness'. And in this instance the liberty interest was compelling:

> The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest: indeed, rather the reverse. This being so, I would ask simply: is refusal to give reasons fair? I would answer without hesitation that it is not . . . As soon as the jury returns its verdict the offender knows that he will be locked up for a very long time. For just how long immediately becomes the most important thing in the prisoner's life . . .
>
> It is not . . . questioned that the decision of the Home Secretary . . . is susceptible to judicial review. To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed.[65]

It was left to judges in later cases to tease out relevant factors. Deference was on show in the *HEFC* case.[66] A challenge to university research assessment grading for unfairness due to lack of reasons thus proved unsuccessful. Sedley J identified two classes of case founding the duty: (a) the 'Transaction type', where (as in *Doody*) 'the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness'; and (b) the 'Trigger factor', where 'the decision appears aberrant', namely – building on *Padfield* and *Cunningham* – there 'is something peculiar to the decision which in fairness calls for reasons to be given'. The element of academic judgement was viewed as negating (a), notwithstanding a loss of funding and reputational damage for the institution concerned; as also (b): 'we lack precisely the expertise which would permit us to judge whether it is extraordinary or not'. In contrast, in *ex p. Murray*[67] the Divisional Court rehearsed a classically protective or 'red light' view of judicial review: where the public body has power to affect individuals, the court would 'readily imply' a procedural safeguard such as reasons. An element of old-style analytical theory was also distilled from the cases, with the fact that a tribunal performs 'a judicial function' identified as another positive factor. The ruling opened up the system of court-martial to greater scrutiny; reasons should have been given for punishing a soldier with a term of imprisonment.

[65] *R v Home Secretary, ex p. Doody* [18–19]

[66] *R v Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 WLR 242.

[67] *R v Ministry of Defence, ex p. Murray* [1998] COD 134. See also *R v City of London Corporation, ex p. Matson* [1997] 1 WLR 765.

The difficult case of *Fayed*[68] dealt with the interplay of common law and statute. Given no prior notice of the minister's concerns, and no reasons for the decision, the Fayed brothers challenged the refusal to grant them citizenship. Government lawyers stood on s. 44(2) of the British Nationality Act 1981: 'the Secretary of State . . . shall not be required to assign any reason' for the relevant – discretionary – decision. Not surprisingly, the Court of Appeal considered that in the absence of this provision there would have been a clear case of procedural unfairness, more especially because of the damage to reputation. Equally, however, an express statutory prohibition on the requirement of reasons could not be overlooked. The majority ruling, that the duty to give notice could be differentiated, is further evidence of the momentum in favour of greater transparency in administrative decision taking (s. 44(2) was subsequently repealed):

> *Lord Woolf MR:* The suggestion that notice need not be given although this would be unfair involves attributing to Parliament an intention that it has not expressly stated. . . English law has long attached the greatest importance to the need for fairness to be observed prior to the exercise of a statutory discretion. However, English law, at least until recently, has not been so sensitive to the need for reasons to be given for a decision after it has been reached. So to exclude the need for fairness before a decision is reached because it might give an indication of what the reasons for the decision could be is to reverse the actual position. It involves frustrating the achievement of the more important objective of fairness in reaching a decision in an attempt to protect a lesser objective of possibly disclosing what will be the reasons for the decision.

But what exactly is entailed in the obligation to give reasons? Classic authority establishes that the reasons given must be proper, intelligible and adequate, dealing with the substantive points which have been made.[69] We learned, however, that a standard such as adequacy is flexible and susceptible to change over time. The dual dynamic of procedural fairness also is in play, with the pressures for variable intensity of review increasing as the coverage of the duty widens. Old arguments against reason-giving are apt to reappear as the rationale for tempering the obligation in the particular circumstances, not least when courts operate outside the familiar paradigm of individualised decision-making. The editors of *de Smith's Judicial Review* find it 'difficult to state precisely the standard of reasoning the court will demand.'[70]

The scope for judicial disagreement is well illustrated by *Save Britain's Heritage v Environment Secretary*.[71] A conservation group complained that the minister, in approving a major development in agreement with the inspector, had failed to indicate with due clarity and precision the extent to which

[68] *R v Home Secretary, ex p. Fayed* [1997] 1 All ER 228.
[69] *Re Poyser and Mills's Arbitration* [1963] 1 All ER 612.
[70] Woolf, Jowell and Le Seuer, *de Smith's Judicial Review of Administrative Action* [7-104].
[71] [1991] 2 All ER 10.

he adopted the inspector's reasoning. In the Court of Appeal, Woolf LJ took a strong contextual approach, tailoring the statutory duty according to 'the nature of the decision . . . the terms of the relevant legislation . . . the importance of the issue' and the need for expedition. His conclusion that the reasons were insufficient was overturned on appeal. Lord Bridge stressed the need to avoid a situation where the minister had 'to dot every i and cross every t', and called for 'a measure of benevolence' in the reading of decision letters.

Where the duty to give reasons is breached, the court can opt to make a mandatory order and/or take the further step of quashing the substantive decision.[72] But what is to happen when (fresh) reasons are adduced after the decision is challenged? This very practical issue cuts to the purpose of the duty, and hence to the basic role of the courts. An instrumentalist view might suggest a relaxed approach: the decision-maker has had the opportunity to reconsider, the decision is now explained, and all should be spared the time and trouble of rehashing the matter. A firm stress on legal control, and especially on promoting good quality decision-making in general, points in the opposite direction. The judges have predictably favoured a middle way, with 'retro-reasons' effectively being made the subject of anxious scrutiny. 'It is well established that the court should exercise caution' before accepting them; reasons put forward after the commencement of proceedings 'must be treated especially carefully'.[73] Is there, in short, 'a real risk' that the 'reasons' are a later invention? The pragmatic bent is manifest.

The case of *Wooder*[74] in 2002 confirms the sense of a continuing dynamic. In an important ruling for the treatment of mental healthcare patients, the Court of Appeal held that a decision forcibly to administer drugs to a competent non-consenting adult called for written explanation (unless this itself was likely to cause serious harm). Brooke LJ based his decision on a common law operating in the context of Convention rights. 'With the coming into force of the Human Rights Act 1998 the time has come . . . to declare that fairness requires that [such] a decision . . . should also be accompanied by reasons.' Sedley LJ went further, basing his decision both on the common law and on ECHR Art. 8. Such was the impact of the medical intervention that it came within the transaction type class of case previously identified in *HEFC*; indeed, *HEFC* was itself ripe for review as overly deferential. And this was an appropriate case in which to trumpet the affirmative concept of personal autonomy elaborated in the Strasbourg jurisprudence.[75] 'The patient is entitled, not as a matter of grace or of practice but as a matter of right, to know in useful form and at a relevant time what the . . . reasons are.'

[72] See M. Fordham, *Judicial Review Handbook*, 5th edn (Hart, 2008), pp. 621–2.

[73] *R (D) v Home Secretary* [2003] EWHC 155; *R (Nash) v Chelsea College of Art and Design* [2001] EWHC Admin 538. And see *R v Westminster City Council, ex p. Ermakov* [1996] 2 All ER 302.

[74] *R (Wooder) v Feggetter* [2002] EWCA Civ 554.

[75] See e.g. *Pretty v United Kingdom* (2002) 35 EHRR 1.

3. Pragmatism, rights and the Strasbourg effect

(a) A pragmatic view

Lord Mustill confirms that what fairness requires is 'essentially an intuitive judgement'.[76] A 'broad common sense approach' is one way of characterising much of the jurisprudence.[77] Alternatively, we might describe the rise of procedural fairness in general, and the *Soneji*-type development in particular, as a manifestation of pragmatism in the public law field. As a way of judicial review contributing more liberally to good governance, there is obvious merit in this.

But things may be taken to excess. Even with procedural review we cannot assume the existence of a simple command theory of law: that judges dictate and administrators and politicians obey. Their relationship is far more complex (a theme developed in Chapter 16). The potential of flexible forms of tailoring to obscure the teaching or hortatory function of law[78] should not be glossed over. As Clark has said, 'Natural justice is more than a means to an end (a right decision in individual cases) . . . The essential mission of the law in this field is to win acceptance by administrators of the principle.'[79] The open-ended nature of the reasoning is apt to give ministers and officials ample scope for 'interpretation', a phenomenon illustrated by *Smith and West* (see p. 641 below).

Greater flexibility in procedural review does not always favour the individual. *Jeyeanthan* (see p. 629 above) shows how judicial discretion may operate to whittle down legislative protection. In fact, as red light theories would suggest, a dose of rigidity may be no bad thing. In Lord Woolf's own words, the key argument in *Jeyeanthan* for declaring a nullity was 'to discipline the Secretary of State', so sending a clear message about administrative procedures and the element of judicial control. It would also be foolish to ignore the evident scope for judicial prejudices or favouring of particular social groups. There is a history of striking differences in, for example, the treatment of disciplinary cases involving students (light-touch or pro-authority) and trade union members ('hard look' or sturdy individualism).[80] As the cases involving national security further serve to illustrate, transaction typing need not only be about achieving the 'optimum' in administrative justice.

The rise of procedural fairness also invites consideration of the judicial function – as well as of the courts' own procedures. Are judges properly equipped to identify, assess and 'weigh' competing considerations? Are there not problems of legitimacy in terms of the courts' own adjudicative role and sense of separate identity? Writing in the 1970s on the consequences of adopting a

[76] *R v Home Secretary, ex p. Doody*, p. 168.
[77] P. Leyland and G. Anthony, *Administrative Law*, 6th edn (Oxford University Press, 2008), p. 340.
[78] P. S. Atiyah, *From Principles to Pragmatism* (Clarendon, 1978).
[79] D. Clark, 'Natural justice: Substance and shadow' [1975] *PL* 27, 58, 60.
[80] J. Griffith, *The Politics of the Judiciary*, 1st edn (Fontana, 1977).

highly flexible form of procedural review, Loughlin[81] foresaw a need to admit a wider range of evidence, for example through intervention procedures (see Chapter 16). Judges would have to mould the judicial process in the image of administration. This gives the later judicial embrace of dignitary theory in *Doody* added significance.

(b) Interplay

The interplay of common law procedural fairness with the right to a 'fair and public hearing . . . within a reasonable time' in ECHR Art. 6 naturally assumes greater prominence with the HRA. In terms of *audi alteram partem*[82] however, the civil limb of the Convention right has had only a modest effect.[83] Such is the logic of a powerful indigenous tradition coupled with 'a floor of rights'; of the national courts moving earlier as in *Doody* to minimise differences; and of a threshold unknown to the common law ('the determination of civil rights and obligations'). Efforts to stretch the jurisdiction have again engendered greater variability in the standard of review.

'The lawyers' human rights clause' self-evidently reflects and reinforces an adjudicative model. While ascribed an autonomous Convention meaning, the terminology of 'civil rights and obligations' is itself bound up with the concept of private law as used in civilian systems.[84] On the one hand, faced with growing demands for procedural protection especially in terms of 'the regulatory state', the ECtHR has gradually expanded the application of Art. 6 in cases of administrative decision-making. Is the outcome 'decisive' for private rights and obligations?[85] Licensing decisions furnish many examples.[86] On the other hand, the Court has continued to follow the French model in working a distinction between civil law and public law, with the result of key administrative law areas such as taxes and immigration and citizenship not being amenable to the jurisdiction.[87] Meanwhile, as shown in *Runa Begum* (see p. 663 below), where the Law Lords preferred to sidestep the issue of whether a refusal of

[81] M. Loughlin, 'Procedural fairness: A study of the crisis in administrative law theory' (1978) 28 *Univ. of Toronto LJ* 215.

[82] The structural impact in terms of 'independence and impartiality' is discussed in a later section. And see further, S. Juss, 'Constitutionalising rights without a constitution: The British experience under Article 6 of the Human Rights Act 1998' (2006) 27 *Stat. Law Rev.* 29.

[83] M. Westlake, 'Article 6 and common law fairness' (2006) 11 *Judicial Review* 57.

[84] See J. Herberg, A. Le Sueur and J. Mulcahy, 'Determining civil rights and obligations' in Jowell and Cooper (eds), *Understanding Human Rights Principles* (Hart, 2001). And see now, J. Beatson *et al.*, *Human Rights: Judicial protection in the United Kingdom* (Sweet & Maxwell, 2008), Ch. 6.

[85] *Ferrazzini v Italy* (2002) 34 EHRR 45. The development is traceable to *Ringeisen v Austria* (1979–80) 1 EHRR 455 and *König v Germany* (1979–80) 2 EHRR 170.

[86] See e.g. *TreTraktorer Aktiebolag v Sweden* (1989) 13 EHRR 308. For illustration in the domestic context, see *R (Chief Constable of Lancashire) v Preston Crown Court* [2001] EWHC Admin 928.

[87] See respectively, *Ferrazzini v Italy* (2002) 34 EHRR 45, and *Maaouia v France* (2001) 33 EHRR 1037.

temporary accommodation amounted to determination of a civil right, the position as regards many state benefits has remained obscure.[88]

Viewed from the perspective of the national administrative law system, there clearly is something of a parallel with the expansion of procedural fairness post-*Ridge v Baldwin*. But we note too how the innately flexible common law reaches parts that the codification in Art. 6 cannot reach, both in the case of adjudicative and (see below) non-adjudicative procedures. There would also have been an easier 'fit' with the national system had the relevant 'civil right' been identified as the right to have administrative decisions made lawfully, so vindicating the classic role of judicial review.[89] As we see in a later section, Strasbourg's approach has placed the supervisory jurisdiction itself under pressure.

As regards the substance of judicial protection, the domestic case law shows the relationship of the Convention right with common law requirements taking various forms. The extra potential of legislative review – ss. 3–4 HRA – must obviously be factored in. The control-order case *MB*, where the Law Lords used the civil limb of Art. 6 to enhance 'knowing the case against' in the face of the statute, illustrates the resulting 'added value' (see p. 133 above). Conversely, lesser-known cases demonstrating a rough equivalence are all around. *Adlard*[90] is a good example. The Court of Appeal could find 'no warrant, whether in domestic or in Strasbourg jurisprudence,' for concluding that a local planning authority had to afford objectors an oral hearing. Either way, the practicalities pointed firmly in the opposite direction. On other occasions, we see the Convention right boosting or at least underpinning the common law development. Take reason-giving.[91] With the HRA on the statute book, the Privy Council was soon emphasising that Art. 6(1) would require closer attention to be paid to the duty to give reasons.[92] Today, reversing *Cunningham* etc. is unthinkable.

Determination 'within a reasonable time' is an issue for separate consideration by the reviewing judge.[93] Strasbourg jurisprudence confirms the variable content of the duty, with reference to such factors as complexity of the matter and nature of the applicant's interest;[94] the threshold of proving a breach is generally high.[95] The recent case of *R(FH)*[96] shows the connection with rationality testing. Against the backdrop of huge pressures on the asylum system (see p. 28 above), a group of claimants complained of several years' delay in

[88] *Salesi v Italy* (1998) 26 EHRR 187; *Mennitto v Italy* (2000) 34 EHRR 1122. And see P. Craig, 'The Human Rights Act, Article 6 and procedural rights' [2003] *PL* 753.

[89] See to this effect, Lord Hoffman's speech in *R (Alconbury Developments Ltd) v Environment Secretary*.

[90] *R(Adlard) v Environment Secretary* [2002] 1 WLR 1515.

[91] For the importance which the ECtHR ascribes to reasons, see *Helle v Finland* (1998) 26 EHRR 159.

[92] In *Stefan v General Medical Council* [1999] 1 WLR 1293.

[93] See *Porter v Magill* [2002] AC 357.

[94] *Davies v United Kingdom* (2002) 35 EHRR 720.

[95] See e.g. *Procurator Fiscal, Linlithgow v Watson* [2004] 1 AC 379.

[96] *R(FH) v Home Secretary* [2007] EWHC 1571.

deciding their status as refugees. Accepting that it was implicit in the legislation that asylum claims would be dealt with within a reasonable time, Collins J in applying *Wednesbury* read across the restrictive Art. 6 jurisprudence. The challenge duly failed:

> If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible . . . It follows . . . that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate [[97]] that a claim might be entertained.

Article 6(1) is said by Strasbourg to incorporate the principle of 'equality of arms'; each party must have a reasonable opportunity to present a case in conditions that do not place him at a substantial disadvantage.[98] The acid test is legal representation. From the standpoint of administrative law, the 'added value' has been most apparent at the punitive end. The *Ezeh* litigation,[99] which now requires a more generous approach to that on offer at common law in *ex p. Hone* (see p. 628 above), is the best example. The ECtHR held that where, as in cases of assault, the prison disciplinary offence corresponds to a crime, and the possible sanction extends to further deprivation of liberty, this chief element of judicialisation must be permitted. The Prison Rules have been amended accordingly.[100] At the other end of the spectrum, demands for legal aid under the civil limb of Art. 6, the development has – for the obvious reasons – been thin indeed.[101] The planning cases again show the important role of transaction typing. Faced with vast arrays of lawyers and other specialists, it would have been strange if objectors at major public inquiries had not complained of inequality of arms on grounds of inadequate public funding for legal representation. But as the national courts have been keen to stress, we are back here with the element of inquisitorial procedure (see Chapter 13). *Pascoe*[102] is one in a series of cases rejecting such complaints:

[97] See *SSHD v R(S)*, see p. 231 above.

[98] *Dombo Beheer NV v Netherlands* (1994) 18 EHRR 213 is the leading case. See C. Harlow, 'Access to justice as a human right' in P. Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999).

[99] *Ezeh v UK* (2002) 35 EHRR 691; (2004) 39 EHRR 1. See also *Black v United Kingdom* (2007) 45 EHRR 25.

[100] Prison (Amendment) Rules 2002, SI No. 2116.

[101] The famous exception being *Steel and Morris v United Kingdom* (2005) 41 EHRR 403 ('the Mclibel trial'). See also *Airey v Ireland* (1979) 2 EHRR 305.

[102] *Pascoe v First Secretary of State* [2007] 1 WLR 885. See also *R v Environment Secretary, ex p. Challenger* [2001] Env. LR 12 and *R (Hadfield) v SSTLGR* [2002] 26 EGCS 137.

> *Forbes J*: I accept that inquiry procedures are designed to be more user friendly and less complex than those found in the courtroom. Individuals are enabled to present their own cases, and inspectors will normally adjust the inquiry timetable to facilitate matters for those seeking to put their case . . . In fact, the claimant was much better placed than many litigants in person . . . because she benefited from a considerable amount of legal assistance and other support from witnesses and experts in an inquisitorial rather than an adversarial procedure.

(c) Test bed: Parole

In former times quintessential 'no-go' territory for the courts,[103] nowhere is the widening and deepening of procedural review made more evident than with prison administration in general,[104] and parole in particular. A notorious Court of Appeal decision in 1981 (later overruled in *Doody*), that the Parole Board need not give reasons for refusing to recommend early release, is a suitable benchmark for testing a sea-change in judicial attitudes to intervention. No advocate of transparency, Lord Denning reasoned curiously: 'I should think in the interests of the man himself – as a human being facing indefinite detention – it would be better for him to be told the reasons. But, in the interests of society as a whole at large – including the due administration of the parole system – it would be best not to give them.'[105]

The ECHR was a major driver – well ahead of the HRA. The key to this was the additional protection offered by Art. 5 and especially Art. 5(4). In *Weeks v United Kingdom*,[106] the ECtHR repudiated existing domestic procedures on the ground that the Board, whose sole power at the time was to make recommendations to the minister, was no court substitute. Nor was the fact of judicial review sufficient to remedy the inadequacy. A process of judicialisation was under way, featuring repeated court challenges. On the basis that it might then as 'a court' be Art. 5(4) compliant, the Board would progressively take on the responsibility for decisions on release – at the expense of the minister. The ECtHR rammed home the message in *Stafford*.[107] 'With the wider recognition of the need to develop and apply, in relation to mandatory life prisoners, judicial procedures reflecting standards of independence, fairness and openness, the continuing role of the Secretary of State . . . has become increasingly

[103] With legal accountability being considered fatal to discipline: *Arbon v Anderson* [1943] KB 252.

[104] For the rise of the common law in this context, see successively *R v Board of Visitors of Hull Prison, ex p. St Germain* [1979] QB 425, *Raymond v Honey* [1982] 2 WLR 465, and *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533. *Daly* signals the immediate impact of the HRA (see p. 118 above).

[105] *Payne v Lord Harris of Greenwich* [1981] 1 WLR 754.

[106] (1987) 10 EHRR 293. See also *Thynne, Wilson and Gunnell v* United Kingdom (1990) 13 EHRR 666, a broader ruling.

[107] *Stafford v United Kingdom* (2002) 35 EHRR 1121, so blurring the distinction previously made between discretionary and mandatory life sentences (see *Wynne v United Kingdom* (1994) 19 EHRR 333).

difficult to reconcile with the notion of separation of powers.' The scene was set for *Anderson*,[108] where the House of Lords declared the relevant statutory provision[109] empowering the minister incompatible with Art. 6.

Turning to the Board's own procedures, a pair of House of Lords cases in 2005 gives a convenient test of temperatures. *Smith and West*[110] raised the question of an oral hearing for prisoners released on licence but then recalled because of concerns about their behaviour. By now making thousands of recall decisions each year, the Board vigorously defended a policy of written representations in the vast majority of cases. The Court of Appeal held that fairness only required oral hearings in respect of disputed primary facts; the Board's assessment of risk to the public was something else. Focusing more on the deprivation of liberty, namely on the nature and impact of the decision for the individual, the House of Lords reversed. The leading speech of Lord Bingham demonstrates the particular strength of procedural fairness in the adjudicative-type situation; and, further, the particular attachment in the Anglo-American tradition to oral hearings:

> The common law duty of procedural fairness does not, in my opinion, require the Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the benefit of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.[111]

Showing the possibilities for both overlapping and differential forms of judicial protection, the case powerfully illustrates the complex interplay of common law with Convention rights. The claim for an oral hearing under Art. 5(4) also succeeded, on the basis that the revocation of the licence was a new deprivation of liberty. Procedural fairness, Lord Hope explained, 'is built into the Convention requirement because Article 5(4) requires that the continuing detention must be judicially supervised and because our own domestic law requires that bodies acting judicially . . . must conduct their proceedings in a way that is procedurally fair'. On the other hand, a challenge under the criminal limb of Art. 6 failed; though the prisoner might beg to differ, there was

[108] *R (Anderson) v Home Secretary* [2002] UKHL 46; though see, as regards determinate sentence prisoners, *R (Black) v Secretary of State for Justice* [2009] UKHL 1.

[109] S. 29 of the Crime (Sentences) Act 1997, repealed by the Criminal Justice Act 2003.

[110] *R (Smith and West) v Parole Board* [2005] UKHL 1.

[111] *Ibid*. [35]. Lord Bingham referred specifically to *Goldberg v Kelly* (1970) 397 US 254.

found to be no sufficient element of punishment and so no 'criminal charge'. The question whether, alternatively, there was a determination of 'civil rights and obligations' elicited no clear conclusion; even if founded, the majority did not think the prisoners would gain any greater protection. Noting that some determinations do not fall within either limb of Art. 6, Lord Bingham effectively underlined the continuing importance of the flexible common law approach.

Lord Hope's speech in *Smith and West* demonstrates another aspect of judicial assertiveness, the use of procedural review to specify administrative procedures:

> The common law test of procedural fairness requires that the Board re-examine its approach. A screening system needs to be put in place which identifies those cases where the prisoner seeks to challenge the truth or accuracy of the allegations that led to his recall, or seeks to provide an explanation for them which was not taken into account or was disputed when his recall was recommended by his supervising probation officer. Consideration then needs to be given to the question whether it is necessary to resolve these issues before a final decision is made as to whether or not the prisoner is suitable for release. If it is, an oral hearing should be the norm rather than the exception.[112]

The aftermath is instructive. The Board initially adopted the practice of granting an oral hearing to any recalled prisoner who requested one following an initial decision on the papers. However, an internal review two years later led to a substantial tightening of policy. The Law Lords' ruling was effectively 'read down' and procedural discretion reasserted:

> It appears that in many cases the hearing has not been used in order to challenge the recall decision at all and has turned out not to add anything to the information that had been before us on paper. In our view that was not what the House of Lords intended to happen . . . We have taken legal advice and the Board is now in a position to implement the judgment more strictly . . . With immediate effect, therefore, the Board will require reasons from the prisoner when applying for an oral hearing. These will be considered on a case by case basis and an oral hearing will not be granted simply because the prisoner asks for one. Applications will be granted only where it appears to the Board that a hearing is necessary and falls within the ambit of the House of Lords' ruling.[113]

The second case – *Roberts*[114] – concerned the adoption of special-advocate procedure (see p. 129 above) in a new situation. For the purpose of deciding whether to grant a life-sentence prisoner release on licence, the Board had taken the view that if relevant materials were disclosed to the claimant or his

[112] *Ibid*. [68].

[113] Parole Board, *Change of policy on granting oral hearings in Smith and West cases* (February 2007).

[114] *Roberts v Parole Board* [2005] 2 AC 738.

legal representatives the informant(s) would be put at risk. R duly complained that this prejudiced his right to be heard. Whereas in the control order cases the antiterrorism legislation expressly contemplated special advocate procedure, the relevant statute referred in the usual way to the Board taking steps 'incidental to or conducive to the discharge of its functions'.[115] The House held, 3–2, that the Board was acting within its powers and in principle fairly.[116]

The minority (Lords Bingham and Steyn) fastened on the constitutional dimension. In judging the matter in hand, the court had to consider the broader interests at stake; it should stand firm and perform the twin judicial roles of protecting basic rights and buttressing the democratic process. Familiar from *Simms* (see p. 119 above), the common law principle of legality lay conveniently to hand:

> *Lord Steyn:* It is not to the point to say that the special advocate procedure is 'better than nothing'. Taken as a whole, the procedure completely lacks the essential characteristics of a fair hearing. It is important not to pussyfoot about such a fundamental matter: the special advocate procedure undermines the very essence of elementary justice. It involves a phantom hearing only . . .
>
> If the words of the statute do not authorise the power which the Board exercised, the decision is ultra vires. In examining this question the starting point is that the persuasive burden rests on the Parole Board to demonstrate that its departure from ordinary fair procedures is authorised by the statute . . . Parliament has never been given the opportunity to consider the matter . . . If the decision of the Parole Board is upheld in the present case, it may well augur an open-ended process of piling exception upon exception by judicial decision outflanking Parliamentary scrutiny . . . If such departures are to be introduced it must be done by Parliament. It would be quite wrong to make an assumption that, if Parliament had been faced with the question whether it should authorise, in this particular field, the special advocate procedure, it would have sanctioned it. After all, in our system the working assumption is that Parliament legislates for a European liberal democracy which respects fundamental rights . . . The outcome of this case is deeply austere. It encroaches on the prerogatives of the legislature in our system of Parliamentary democracy. It is contrary to the rule of law. [117]

The majority (Lords Woolf, Rodger and Carswell) stressed the legislative expectation that the Board would make, in Lord Woolf's words, 'a practical judgement'. 'In determining the point of principle we are asked to decide, we cannot ignore the reality of certain criminal activity today.' Giving the case a utilitarian twist, the talk was of balancing 'a triangulation of interests' involving the prisoner, the public and the informant, and giving preponderant weight to protection of the public. Whatever Lord Steyn might say, special-advocates

[115] Criminal Justice Act 1991, Sch. 5 [1(2)(b)].

[116] A further challenge based on Art. 5(4) failed on the basis that until the Board's review was complete it was premature. For the sequel, see *R (Roberts) v Parole Board* [2008] EWHC 2714.

[117] *Roberts v Parole Board* [2005] 2AC 738 [88–9] [92–3] [97].

procedure was indeed a glass half-full: the Board had sought an acceptable compromise in exceptional circumstances. Lord Rodger raised the inevitable question: 'what is the alternative?'[118]

> One solution would be to disclose the information to the prisoner's representative and, if possible, to require the informant to give evidence, even though this would risk putting his life or health in jeopardy. That solution would be, to say the least, unattractive and might well give rise to significant issues under Articles 2 and 3 of the European Convention. The other solution would be for the Board to exclude from their consideration any evidence which could not be safely disclosed to the prisoner or his representative. In other words, the Board should close their eyes to evidence, even though it would be relevant to the decision which Parliament has charged them to take for the protection of the public. That solution too would be – again, to say the least – unattractive and, moreover, hard to reconcile with the Board's statutory duty not to direct a prisoner's release on licence unless they are satisfied that it is no longer in the interests of the public that he should be confined.

The *Roberts* case serves to expose underlying tensions in the contemporary model of procedural review. As represented by the majority and minority speeches respectively, the strong pragmatic strand in the common law development is not always reconcilable with a rights-centred view. The unusually strident tone of the judicial disagreement is telling.

4. Broader horizons

Viewed in terms of the transaction-type, *Ridge v Baldwin* was an easy case. What could be more natural than a dollop of adjudicative-style procedural justice in individual disciplinary proceedings? As the student of law and administration well knows however, there are many other forms of decision-making which present differently. The courts must grapple with the question of how far it is appropriate to read across elements of the adjudicatory model in which they are steeped. Predicated on the idea of the flexible rubric of 'procedural fairness' importing a qualitatively as well as a quantitatively different potential for the shaping of the administrative process, there is however the further question of a judicial role in elucidating other species of procedural requirement.

The change from analytical theory to procedural fairness could, after all, be read in different ways. On a narrower interpretation, the expansion of procedural protection did not mark a fundamental change in the nature of natural justice. So, as in the previous section, the working assumption would be that procedural fairness denotes the rendition of adjudicative-style restraint. A more radical interpretation was that abandonment of the 'judicial', 'quasi-judicial', 'administrative' classification ultimately freed the courts not only to discard discredited limitations on the area of review, but also to develop a new agenda of procedural choices no longer confined within a single framework of

[118] *Ibid.* [111].

social ordering. This view echoed classic green light theory in inviting administrative lawyers to question the ideal type of adjudication and to seek out alternative methods of administration (see Chapter 1), but contrariwise assigned the judges a pivotal position in moulding the decision-making process: in effect, 'hands on', not 'hands off'. As envisioned by MacDonald, the banner of 'fairness' stood for 'participation in decision-making'. Rather than ask what aspects of adjudicative procedures can be grafted onto this decisional process, the reviewing court should ask an alternative series of questions. 'What is the nature of the process here undertaken?' 'What mode of participation by affected parties is envisaged by such a decisional process?' 'What specific procedural guidelines are necessary to ensure the efficacy of that participation and the integrity of the process under review?'[119]

The model that English courts seem currently to be elaborating (though 'groping towards' would be a fairer description) is a cautious compromise position. An active 'informalist' mode of judicial supervision – namely, close evaluation of procedures other than against the 'formal' ideal-type of adjudication – is rightly seen as heady stuff, immediately bringing into question the courts' own competency and legitimacy. Conversely, the idea that courts not only mould the administration in their own image but also otherwise desist from fashioning process looks increasingly out of place amid stronger demands for legal accountability and transparency. Then again, the fact of a more difficult terrain impels a more circumspect – deferential – approach in the standard of review to the extent that the notion of procedural fairness can appear largely symbolic. Let us consider two sets of examples.

(a) Competitions

The need to compare applications in competitive situations inevitably causes difficulties in terms of procedural fairness. As illustrated previously with government contract (see Chapter 8), the courts will in the name of even-handedness give some protection to the individual *qua* individual, for example a proper opportunity to put a case.[120] We also know from *Camelot* (see p. 398 above) that the common law notion of a level playing field stretches to a franchisor not moving the goal posts. But what is the scope for procedural review directed to the process of comparison itself? EU law gives us one set of answers in the case of public procurement (see p. 383 above); formal competitions for scarce public resources or government largesse come however in all shapes and sizes.

A clue to the significance of *R (Asha Foundation) v Millennium Commission*[121] is its inclusion as one of the few cases summarised for civil servants in *Judge*

[119] R. MacDonald, 'Judicial review and procedural fairness in administrative Law' (1981) 26 *McGill LJ* 1, 19.

[120] A. Denny, 'Procedural fairness in competitions' (2003) 8 *Judicial Review* 228.

[121] [2003] EWCA Civ 88.

Over Your Shoulder.[122] A charitable organisation had applied unsuccessfully for a grant of £10 million from a lottery fund budget of £19 million. The reason given was truly boilerplate in character: 'Your application was less attractive than others.' It was later confirmed that Asha had been considered eligible for a grant but that the competition was substantially oversubscribed with eligible applicants. The Commission 'had formed its view as to the comparative merits of each eligible project', applying such criteria as degree of public benefit and long-term financial viability, as well as 'the geographical and culture equity' of grant distribution. Unimpressed, Asha sought 'meaningful reasons'; seeking to conjure a legitimate expectation to this effect, counsel duly reminded the court that it was otherwise impossible to tell whether or not the Commission had misdirected itself. Refusing the demand, Lord Woolf fastened on the complex, judgemental nature of the agency's role. Whereas a decision based on threshold criteria or a particular issue of fact would require specifics, the Commission's general explanation was suitably tailored to the context:

> When the Commission is engaged in assessing the qualities of the different applications . . . in competition with each other, the difficulties which would be involved in giving detailed reasons become clear. First, the preference for a particular application may not be the same in the case of each commissioner. Secondly, in order to evaluate any reasons that are given for preferring one application to another, the full nature and detail of both applications has to be known . . . The Commission would have had to set out in detail each commissioner's views in relation to each of the applications and to provide the background material to Asha so that they could assess whether those conclusions were appropriate. This would be an undue burden upon any commission. It would make their task almost impossible. It certainly would be in my judgment impracticable as a matter of good administration.

Even this is an oversimplification. As a distributing body, the Commission had effectively been tasked to make a whole series of mini-decisions about the contrasting merits of multiple applications and to produce a final package of decisions to budget. As against the classic template of bipolar, adversarial adjudication, this decisional process was inherently dynamic and polycentric in character (see p. 125 above): an aspect underscored by the sizeable knock-on effects on other applications of a grant to Asha. Viewed in this perspective, the idea of reconstructing the reasoning process for the particular application appears artificial. In determining the standard of reasons required, the judges must also look to the interests of third parties. The demand for 'meaningful reasons' in competitions sounds well, but what of requirements of commercial confidentiality or, as in the case of university admissions for example, of privacy?

Matters were recently taken a stage further in *Abbey Mine*.[123] The Coal Authority, a statutory agency, had preferred another company's application

[122] TSol, *Judge Over Your Shoulder* [2.65]
[123] *Abbey Mine Ltd v Coal Authority* [2008] EWCA Civ 353.

for a local mining concession, a decision confirmed following a review hearing held at Abbey Mine's request. Counsel argued that Abbey Mine should have been given details of the rival bid – edited if necessary to exclude commercially sensitive information – ahead of the review hearing. The Court of Appeal would have none of it. Reiterating the strong contextual character of procedural fairness, Laws LJ carefully defined the transaction type: 'rival applications for a licence to undertake a commercial venture'. Echoing *Asha*, it was appropriate in such cases to distinguish between a right to know of perceived difficulties with one's own case and a right to know about the competition:

> All the competitors are in the same boat. It would be obviously unfair if one applicant saw his opponent's bid, but the opponent did not see his. But if every applicant (there may sometimes, no doubt, be more than two) saw every other's bid, and was entitled to comment and challenge and criticise, the resulting prolongation and complexity of the decision-making process can scarcely be exaggerated . . . There is no question of sacrificing fairness to administrative convenience. The duty of fairness always takes its place in a practical setting.

In truth, the 'weighing' exercise pointed inexorably in this direction. Why would the notion of 'a level playing field' extend to being told the opposition's game plan?

(b) Consultations

The issue of public consultation, and in particular the judicial role in installing and elaborating relevant procedures, is a familiar battleground in administrative law. As well as formal rule-making process, local and community concerns feature prominently in the cases – charges for day-care perhaps, or the closure of a specialist hospital unit, or even the siting of a pedestrian crossing. At the other end of the scale, think on a huge reservoir for procedural challenge: the 70,000 consultation responses recently generated by plans for a third runway at Heathrow airport. As noted in Chapter 4, the courts' demands remain comparatively muted when set against those made in individual, adjudicative contexts. Together with the use of legitimate expectation to found a duty of consultation (*GCHQ* – see p. 107 above), enhanced statutory requirements, especially as with environmental law under EU tutelage, have given a modest if tangible development some additional impetus.

Bushell's case in 1980 is a key reference point (see p. 585 above). It illustrates how the dominant adjudicative framework of procedural review can operate in a subtle way to close off other procedural choices. Cross-examination of the department's witnesses on its traffic predictions being deemed inappropriate, no other procedural protection was imposed. A broader interpretation of 'fairness' would have meant a duty of consultation to provide objectors with an opportunity of involvement without depriving the minister of the

decision-making power. In fact, the House rejected a further procedural challenge, that by following revised methods of traffic calculation after the inquiry the minister took into account new evidence not disclosed to the objectors. As against a requirement to re-consult, Lord Diplock held that procedural fairness stopped at the door of the ministry:

> What is fair procedure is to be judged . . . in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached . . . Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office . . . The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise . . . This is an integral part of the decision-making process itself; it is not to be equiparated with the minister receiving evidence, expert opinion or advice from sources outside the department after the local inquiry has been closed . . . Once he has reached his decision he must be prepared to disclose his reasons . . . but he is . . . under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he receives from his department in the course of making up his mind.[124]

In the years following *GCHQ*, the courts began to make increasing forays into the area of consultations. The *Association of Metropolitan Authorities* case[125] illustrates the potential for intra-state litigation founded on the poor treatment of official stakeholders. A bland and tardy consultation letter addressed to the Association of Metropolitan Authorities (AMA) failed to satisfy mandatory procedural requirements for the making of new regulations. A well-known example of intervention on behalf of affected interests is the *British Coal* case,[126] where mass closures of collieries were suspended pending proper consultation under an established review procedure. Reflecting more pluralist ideas, the Court of Appeal reasoned that this alone could allow a discussion of policy issues (not that the Thatcher government was about to be deflected!). More recently, the judges have demanded better consultation in an ever-more diverse range of topics: from funding for the voluntary sector to tax on business, and on through public services and contracting out[127] to – in the *Eisai* case (see p. 314 above) – product regulation. Showing the potential of procedural fairness in mass consultations, the *Greenpeace* case (see p. 177 above) represents the high-water mark in this development.

So far, it may be said, but not so far. The *Bapio* case (see p. 176 above) can be seen now standing four-square against the model of active 'informalist' review.

[124] *Bushell v Environment Secretary* [1981] AC 75, 95–6, 102.. See also *R (Alconbury Developments Ltd) v Environment Secretary* [2003] 2 AC 295.

[125] *R v Social Services Secretary, ex p. Association of Metropolitan Authorities* [1986] 1 WLR 1.

[126] *R v British Coal Corp, ex p. Vardy* [1993] ICR 720.

[127] See respectively, *R (Capenhurst) v Leicester City Council* [2004] EWHC 2124, *R v British Waterways Board v First Secretary of State* [2006] EWHC 1019, and *R (Smith) v North Eastern Derbyshire Primary Care Trust* [2006] EWCA Civ 1019.

In warming to the constitutional argument against a freewheeling judicial role of shaping participative arrangements 'function by function', Sedley LJ looked to some practical reasons 'for being cautious' (to which must be added administrative efficiency and governmental effectiveness):

> It is not unthinkable that the common law could recognise a general duty of consultation in relation to proposed measures which are going to adversely affect an identifiable interest group or sector of society. But what are its implications? The appellants have not been able to propose any limit to the generality of the duty. Their case must hold good for all such measures, of which the state at national and local level introduces certainly hundreds, possibly thousands, every year. If made good, such a duty would bring a host of litigable issues in its train: is the measure one which is actually going to injure particular interests sufficiently for fairness to require consultation? If so, who is entitled to be consulted? Are there interests which ought *not* to be consulted? How is the exercise to be publicised and conducted? Are the questions fairly framed? Have the responses been conscientiously taken into account? The consequent industry of legal challenges would generate in its turn defensive forms of public administration.

Suppose that a duty of consultation is grounded; officials need to know what it entails. JOYS faithfully summarises a set of criteria approved by Lord Woolf in *ex p. Coughlan* (see p. 224 above):

> Where consultation is undertaken, whether or not it is strictly required, it has to be conducted properly, if it is to satisfy the requirement for procedural fairness. Four conditions have to be satisfied:
>
> - Consultation must be undertaken when proposals are still at a *formative stage*
> - Sufficient *explanation* for each proposal must be given, so that those consulted can consider them intelligently and respond
> - Adequate *time* needs to be given for the consultation process
> - Consultees' responses must be conscientiously *taken into account* when the ultimate decision is taken.
>
> Again, when you have consulted before making a decision and have given proper weight to the representations received, you will need to make it clear in your decision that you have done so. This does not mean that you have to recite all representations word for word, but you will have to show that you have grasped the points being made and taken them into account.[128]

Especially if read in tandem with the Cabinet Office code of practice (see p. 172 above), this suggests a more generous spirit, indicating a brighter future for the exercise of individual and collective 'voice'. Words like 'sufficient' and

[128] TSol, *Judge Over Your Shoulder* [2.45]. The criteria were originally set out in *R v Brent LBC, ex p. Gunning* (1985) 84 LGR 168.

'conscientiously' also serve, however, to point up the considerable challenges involved in teasing out and policing the appropriate standard. Even the editors of *de Smith's Judicial Review* have their doubts. 'Where consultations are invited upon detailed proposals which have already been arrived at, the duty of the court to ensure that genuine consideration has been given to critical representations is taxed to the utmost.'[129]

Decided cases show a strong dose of pragmatism, so emphasising the variable nature of the obligation. In determining how extensive the public involvement should be, the court may look for example to how far in the 'formative stage' planning and policy development has reached, and/or the wide implications or otherwise of the project.[130] *Coughlan* serves to underscore the importance of the particular judge's 'feel' for the case. Did the conduct of the local consultation found an alternative basis for resisting closure of the home? Hidden J was in unforgiving mood. Adopting the 'hard-look' approach, the judge replayed the process, seizing on specific items such as late notice of professional advice. Viewing matters more in the round, Lord Woolf thought differently:

> It has to be remembered that consultation is not litigation: the consulting authority is not required to publicise every submission it receives or (absent some statutory obligation) to disclose all its advice. Its obligation is to let those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under positive consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response. The obligation, although it may be quite onerous, goes no further than this . . . Although there are criticisms to be levelled at the consultation process [it] was not unlawful.

The courts' discretionary control over remedies in judicial review (see Chapter 16) must also be factored in. The very nature of the procedural demand renders it a prime candidate for denial of a remedy even where there is breach of a mandatory requirement. *Ex p Walters*,[131] which concerned the disposal of local authority housing stock, bears testimony to the role of competing considerations. The Court of Appeal rejected the suggestion that unfairness in the consultation led inevitably to the consequence that the procedure should be restarted and the scheme reconsidered:

> *Judge LJ*: It is not irrelevant for the Court to consider what the consultation process required in the particular case and its purpose, what those entitled to be consulted actually understood, and whether compliance . . . would in fact have had any significant impact on them and the decision . . . Where . . . there is overwhelming evidence that . . . judicial review

[129] Woolf, Jowell and Le Sueur, *de Smith's Judicial Review of Administrative Action*, p. 388.

[130] See e.g. *R (Fudge) v South West Strategic Health Authority* [2007] EWCA Civ 803, and *R (Wainwright) v Richmond LBC* [2001] EWCA Civ 2062, respectively.

[131] *R v Brent LBC, ex p. Walters* [1998] 30 HLR 328. The *AMA* case (see n 125 above) provides another example.

> . . . will certainly damage the interests of a large number of other individuals who have welcomed the proposals, and acted on the basis that they will be implemented, it would be absurd for the Court to ignore . . . the relevant 'disbenefits'.

The major environmental protection case of *Edwards*[132] gives a litmus test of current judicial attitudes. Notwithstanding the fears of local campaigners about increased levels of pollution, the Environment Agency had granted a permit for new processes at a cement plant. Predictably in this field,[133] the subsequent judicial review litigation raised points both of EU and domestic law. The broad thrust of the argument was that the Agency did not disclose enough information about the environmental impact of the plant to satisfy its statutory and common law duties of public consultation. Particular objection was taken to the fact that the agency had commissioned, but not released until after the public consultation, a report on likely effects on air quality from an in-house group of scientific experts. The House rejected complaints of breach of the relevant EU directive; the information supplied met the basic requirements of environmental impact assessment.[134] 'Gold-plated' implementing regulations,[135] which extended environmental protection measures to existing plants, proved trickier. A statutory duty to maintain a public register of relevant particulars was held not to preclude the informal garnering of information. 'In a complicated application, one would expect the Agency officials to have discussions with the applicant about matters of concern. It would be extremely inhibiting if the Agency ran the risk that its decision would be vitiated.'[136] From the standpoint of citizen participation however, is this not the slippery slope of 'therapy' and 'manipulation' (see p. 173 above)? Dissenting, Lord Mance spoke tartly of 'a remarkable lacuna'.

Evincing a greater spirit of openness, the lower courts sought in applying the common law to sidestep *Bushell*. Auld LJ explained that if, following public consultation, a decision-maker became aware of 'some internal material or a factor of potential significance to the decision to be made, fairness may demand that the . . . parties concerned should be given an opportunity to deal with it'. This was such a case: breaking new ground, the scientific predictions raised matters 'of which interested members of the public were unaware and might well fail to examine for themselves'.[137] In contrast, Lord Hoffman preached judicial restraint. This was not a case where the un-codified common law principles were needed - in the famous phrase – to 'supply the omission

[132] *R (Edwards) v Environment Agency* [2008] UKHL 22.

[133] R. Macrory, 'Environmental public law and judicial review' (2008) 13 *Judicial Review* 115.

[134] Arising under Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment.

[135] Pollution Prevention and Control (England and Wales) Regulations 2000, SI No. 1973.

[136] R (*Edwards) v Environment Agency* [2008] UKHL 22 [42] (Lord Hoffman). We touch here on a whole history of planning cases centred on informal methods of communication, most famously *Errington v Minister of Health* [1935] 1 KB 249. And see above, Ch. 13.

[137] *R (Edwards) v Environment Agency* [2006] EWCA Civ 877 [103] [105].

of the legislature'.[138] Quite the reverse: 'when the whole question of public involvement has been considered and dealt with in detail by the legislature, I do not think it is for the courts to impose a broader duty'.[139] 'If the agency has to disclose its internal working documents for further public consultation, there is no reason why the process should ever come to an end.'

The judges all agreed however on another way of skinning the cat. Even if there was a procedural deficiency, a dose of pragmatism should be administered at the remedial stage. By the time the case was heard, monitoring of the pollution levels had confirmed the agency's predictions. Lord Hoffman thought it 'pointless to quash the permit simply to enable the public to be consulted on out-of-date data'. The court had also to factor in 'the waste of time and resources, both for the company and the agency, of going through another process of application, consultation and decision'. The Rule of Law, in other words, had been overtaken by events.

5. Insider dealings

The rule against *bias*, JOYS explains patiently, 'helps to ensure that the decision-making process is not a sham because the decision-maker's mind was always closed to the opposing case'.[140] Raising the functional issue of *impartiality*, there may be concerns about the approach of a particular body or individual – personal prejudice perhaps, or a conflict of interest. Consistent with the rationale for procedural fairness of maintaining public confidence, the courts will typically be testing here for the appearance of bias (and not actual bias – hard to prove). As noted in Chapter 11, the *independence* of the decision-maker from external pressure or influence is a different but closely related question, which concerns the structural or institutional framework.[141] Bound up with the theory of separation of powers,[142] this is classically conceived of in terms of the courts themselves,[143] and thence, in accordance with the adjudicative model of reasoned proofs and arguments, the tribunal system. JOYS happily informs its readers of the polar opposite: 'civil servants appointed to carry out Government policy . . . can scarcely be "independent" in this sense'.[144]

It was the impartiality aspect that featured prominently at common law (*nemo iudex in sua causa*). Establishing a rule that the person who adjudicates

[138] Byles J, in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.
[139] *Furnell v Whangarei Schools Board* [1973] 2 WLR 92 is the classic authority.
[140] TSol, *Judge Over Your Shoulder* [2.47].
[141] For the Strasbourg perspective, see *Findlay v United Kingdom* (1997) 24 EHRR 221.
[142] R. Masterman, 'Determinative in the abstract? Article 6(1) and the separation of powers' (2005) *EHRLR* 629.
[143] *McGonnell v United Kingdom* [2000] 30 EHRR 289. And see Sir D. Williams, 'Bias, the judges and the separation of powers' [2000] *PL* 45.
[144] TSol, *Judge Over Your Shoulder* [2.50]. There are also general exceptions to the no bias rule on grounds of waiver and of necessity (no other decision-maker available) (but see *Kingsley v United Kingdom* (2001) 33 EHRR 288).

must have no pecuniary interest in the matter, such that a decision by the Lord Chancellor was set aside, the mid-Victorian case of *Dimes v Grand Junction Canal Proprietors*[145] is suitably hallowed authority. In contrast, reflecting a more pragmatic attitude to the design of institutional settings, the notion of independent adjudication as proclaimed in the Art. 6 Convention right had hitherto received little attention.[146] The HRA duly produced a flurry of activity, not only statutory, as in the case of certain tribunal structures,[147] but also in the domestic jurisprudence. Lord Steyn would soon be claiming 'no difference between the common law test of bias and the requirement under Art. 6 of the Convention of an independent and impartial tribunal'.[148]

The development is again shot through with judicial discretion in the form of transaction typing and variable intensity of review. Questions of institutional competence move centre-stage as the national courts are invited to engage in novel forms of what may be labelled 'structural procedural review'. A pragmatic or cautious accommodation of the Strasbourg jurisprudence, especially as regards judicialisation, is a fair description of much in the case law. Let us look more closely.

(a) Testing times

As a way of promoting the good governance value of integrity, cracking down on apparent bias by invalidating the decision sounds well. But over the years much ink has been spilt on the precise nature of the common law test. Giving 'justice must be seen to be done' paramountcy, the low threshold of 'reasonable suspicion' competed with 'real likelihood' (more respectful of local knowledge and legal certainty).[149] And through whose eyes was the matter to be judged? The ubiquitous 'reasonable man' perhaps?[150] The House eventually moved in the early 1990s to standardise in the criminal law case of *R v Gough*.[151] The court, conveniently considered by Lord Goff to personify the 'reasonable man', should think in terms of 'real danger' – a real possibility (though not the probability) of bias.

Testimony to the broad currents of judicial 'dialogue' in a shrinking world, the Law Lords immediately found themselves pincered. Courts elsewhere in the common law globe held resolutely to a test of reasonable apprehension or suspicion of bias;[152] viewing matters through judicial spectacles jarred with the

[145] (1852) 3 HL Cas 759.

[146] Though *R (Bewry) v Norwich City Council* [2001] EWHC Admin 657 suggests the existence of the right at common law.

[147] The general policy of the Constitutional Reform Act 2005 also fits: see p. 136 above.

[148] *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 [14].

[149] See respectively, *R v Sussex Justices, ex p. McCarthy* [1924] 1 KB 256 and *R v Barnsley Licensing Justices, ex p. Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167.

[150] As ventured by Lord Denning in *Metropolitan Properties Co v Lannon* [1969] 1 QB 577.

[151] [1993] AC 646.

[152] *Webb v The Queen* (1994) 181 CLR 41 (Australia). Likewise in Scotland: see *Bradford v McLeod* [1986] SLT 244.

Strasbourg approach of asking whether there is a risk of bias 'objectively' in the light of the circumstances which the court has identified.[153] The authority of *Gough* soon began to wither inside the domestic system; if maintaining public confidence is the rationale, then, in Lord Steyn's words, 'public perception of the possibility of unconscious bias is the key'.[154] *Pinochet*,[155] the famous case concerning efforts to extradite the former Chilean dictator, further complicated matters. The House had set aside its own decision on the ground that, by reason of his charitable connections with the third-party intervenor Amnesty International, Lord Hoffman was automatically disqualified. A welter of litigation followed on possible attributions of judicial bias with this effect: the courts sensibly held the line that *Pinochet* should be treated as exceptional. A judge 'would be as wrong to yield to a tenuous or frivolous objection as he would be to ignore an objection of substance'.[156] Yet had the House not so pinned its colours to the mast in *Gough*, this expensive and time-consuming detour could have been avoided by considering matters in terms of public perception and the appearance of bias.[157]

The Law Lords apparently recognised their error in *Porter v Magill*.[158] The case had its origins in the 'homes for votes' scandal which engulfed Westminster City Council in the 1990s, where the Conservative-led administration stood accused of corruptly pursuing a policy of council-house sales in marginal wards with a view to garnering political support. M was the local (district) auditor, tasked with policing the lawfulness of the council's expenditure and, *in extremis*, with enforcing financial penalties against named councillors or officials. After a lengthy investigation, he imposed massive surcharges – a very personal form of accountability. But had M overstepped the mark with some excitable comments at a press conference to announce his provisional findings? Proceeding on the basis that the auditor was required to act not only as investigator but also as prosecutor and as judge,[159] the House revisited the case law on appearance of bias. Lord Hope was pleased to confirm a 'modest adjustment':

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[160]

[153] See e.g. *Pullar v United Kingdom* (1996) 22 EHRR 391.

[154] *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 [14]. And see especially *Re Medicaments* [2001] 1 WLR 700.

[155] *R v Bow Street Metropolitan Stipendiary Magistrate, ex p. Pinochet Ugarte (No. 2)* [2000] 1 AC 119. See K. Mallinson, 'Judicial bias and disqualification after *Pinochet (No. 2)*' (2000) 63 *MLR* 119.

[156] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QBV 451 [21]. And see A. Olowofoyeku, 'The *Nemo Iudex* rule: The case against automatic disqualification' [2000] *PL* 456.

[157] See to this effect, Lord Hope's speech in *Meerabux v Attorney General of Belize* [2005] UKPC 12; also, *AWG Group v Morrison* [2006] 1 WLR 1163.

[158] [2002] 2AC 357.

[159] The ECHR Art. 6 requirement of an independent and impartial tribunal (see below) being dealt with through a complete rehearing by the Divisional Court.

[160] *Porter v Magill* [2002] AC 357 [103].

Expressly designed as a test 'in clear and simple language' which is in 'harmony' with Strasbourg and with other major jurisdictions, this formulation now rules the roost.[161] In the case itself, the very striking demonstration of audit technique was vindicated. The press conference was 'an exercise in self-promotion in which he should not have indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased'.

(b) Superwoman

So who is 'the fair-minded and informed observer'? As visualised by Lord Hope, this creation of fiction is really rather remarkable:

> The sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious . . . but she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses . . . She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She . . . will appreciate that the context forms an important part of the material which she must consider before passing judgment.[162]

Two recent House of Lords cases show 'superwoman' in action in the administrative law field. *Al-Hasan*[163] arose from a dispute about the lawfulness of an order for a prison squat search. The deputy governor of the prison presided over disciplinary proceedings, where the applicants were found guilty of disobeying the order and punished. A common law challenge[164] for the appearance of bias succeeded on the narrow ground that the deputy governor had been present when the prison governor approved the search and had not dissented. 'When thereafter . . . he had to rule upon [the order], a fair-minded observer could all too easily think him predisposed to find it lawful.' However, the further argument that the deputy governor could not bring the requisite independence and impartiality to the task because of his knowledge of the prison, and of the security concerns which occasioned the search, signally failed. The evident potential for institutional pressures notwithstanding, 'superwoman' would know her sociology:

> *Lord Rodger*: Nor should it be supposed that only professional judges are capable of the necessary independence of approach. That would be to disregard the realities of life in many organisations today. For example, on a daily basis, head teachers have to apply school rules

[161] For a case showing the positive application of the test, see *Davidson v Scottish Ministers* [2004] UKHL 34.
[162] *Helow v Home Secretary* [2008] UKHL 62 [2–3]
[163] *R v Home Secretary, ex p. Al-Hasan* [2005] 1 WLR 688.
[164] The facts of the case predated implementation of the HRA.

> which they have helped to frame. By virtue of their knowledge of the way the school works and of its problems, they will often be best placed to apply the rules sensitively and appropriately in any given situation. Again, it is not to be assumed that the head teachers' mere involvement in shaping the rules means that a fair-minded observer who knew how schools worked would conclude that there was a real possibility that they would not be able to apply the rules fairly. The same goes for managers in businesses and for officers in the Armed Forces who are committed to upholding the edifice of lawful orders on which the services rest. Equally, I have no doubt that an informed and fair-minded observer would regard prison governors, or their deputies, as being quite capable of interpreting and applying the prison rules fairly and independently, even though they are obviously committed to upholding them.

The place of the professional was directly in issue in *Gillies*.[165] A medical member of a disability appeal tribunal was sitting part-time, while also being contracted to supply expert reports on claimants for the Benefits Agency. Challenge was effectively being made to the workings of a local network; there was said to be a reasonable apprehension that 'doctors who prepared these reports would tend to lean in favour of accepting reports by other doctors in that class'. The Social Security Commissioners accepted the argument; the judges, however, would have none of it. A fair-minded observer would not perceive 'a Benefits Agency doctor'; instead she would appreciate the doctor's 'professional detachment'. Baroness Hale, a former member of the Council of Tribunals, sought to turn the argument on its head. Courts should trust gladly in the neutrality of the profession:

> The relevant facts of tribunal life include the great advantage, both to its users and to its decision-making, of being able to call upon the people with the greatest expertise in the subject matter of the claim. Given the wide variety of disabilities which come before the Disability Appeal Tribunals, it would not be practicable to have a specialist in the particular disability involved in the particular case. The greatest expertise in assessing the claimant's condition and applying the statutory criteria to it is likely to be held by those doctors who are experienced in making these assessments at the point of claim. To have such expertise available on the tribunal can only be an advantage to it.[166]

The trend discernible in these cases[167] of imputing a substantial degree of knowledge to the fair-minded observer clearly has much to commend it; as Baroness Hale suggests, the courts should beware disabling those who by reason of their background knowledge are best able to act. But is there not a danger of drifting too far back towards the elitist view of judicial spectacles promulgated in *Gough*?[168] Superwoman's cape, it seems, is ermine!

[165] *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2.
[166] *Ibid*. [40].
[167] See also *Taylor v Lawrence* [2003] QB 528 (the fair-minded and informed observer aware of English legal traditions and culture).
[168] S. Atrill, 'Who is a "fair-minded and informed observer"? Bias after Magill' (2003) 62 *CLJ* 279.

(c) Pressure points

As the Supreme Court of Canada has observed, 'the standards for reasonable apprehension of bias may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved'.[169] In other words, just as with *audi alteram partem*, matters become more complicated as the parameters of the doctrine expand.

The planning process is fertile territory for this type of litigation. Tackling corruption in property development is one thing, but what is to happen when an elected representative airs views about a particular project? Is this indicative of bias, so cutting against involvement in the legal process of decision by the planning authority? The demands especially of local democracy – positive engagement in producing and applying policy frameworks – point firmly in the opposite direction.

Going back in time, *Franklin's* case (see p. 622 above) gave a clear answer. The minister declared at a public meeting that the new town would go ahead with or without the co-operation of local people; he later confirmed the order. This act was, in Lord Thankerton's words, 'purely administrative' in character. 'The use of the word "bias" should be confined to its proper sphere. Its proper significance is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator.'

Almost half a century later, with this form of analytical theory safely entombed by *Ridge v Baldwin*, Sedley J would be found revisiting the matter in a case, *Kirkstall Valley*,[170] concerning alleged bias by members of an urban development corporation. His was a dual approach. First, a complaint that the decision-maker had some personal interest would be determined by the normal test for bias, that is to say irrespective of the nature of the decision-making function. 'What will differ from case to case is the significance of the interest and its degree of proximity or remoteness to the issue to be decided.'[171] Secondly, Sedley J elaborated the distinction between (lawful) predisposition – representatives publicly airing a view – and (actionable) predetermination – a closed mind in fact. Predetermination was an issue separate from bias, such that the court would (only) intervene on grounds of 'no-fettering' (see p. 217 above). 'The decision of a body, albeit composed of disinterested individuals, will be struck down if its outcome has been predetermined whether by the adoption of an inflexible policy or by the effective surrender of the body's independent judgement.'

The merit of this dual approach is the protection afforded not only to affected interests but also to policy and politics – members of the planning

[169] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 [47].

[170] *R v Environment Secretary, ex p. Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304. This was the era of the *Gough* test.

[171] See also *R v Amber Valley DC, ex p. Jackson* [1984] 3 All ER 501.

authority will be shielded from review provided there is no conflict of interest and they exercise judgement.[172] The distinction drawn between bias and predetermination jars, however, with the broad dynamic in procedural fairness of focusing on issues of content and not amenability. *Porter v Magill* opens up another possibility: testing for the appearance of predetermination subject to a high threshold.

This approach, which (given the evident potential for intervention) implies more judicial discretion, was assumed in *Condron*.[173] The chairman of a planning-decision committee in the Welsh Assembly had allegedly remarked that he was 'going to go with the inspector's report' in favour of a scheme for opencast mining. The subsequent decision to grant consent having been challenged, Richards LJ analysed the matter by reference to the normal test for bias. It was necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the viewpoint of the fair-minded and informed observer, 'there was a real possibility that . . . members were biased in the sense of approaching the decision with a closed mind'. This was 'a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render [the] decision-making impossible or unduly difficult'. The challenge failed; in light of the somewhat informal atmosphere of devolved government, superwoman would not apprehend a real risk.

In the 2008 case of *Persimmon Homes*,[174] the complaint went to the heart of the local democratic process. The fair-minded and informed observer, it was argued, would have perceived a real possibility of predetermination when councillors took a critical planning decision with elections pending; counsel conceded however that there were in fact no closed minds. Presented with 'little evidence . . . that members of the Committee were any more politically motivated than would normally be expected from elected policy makers',[175] the Court of Appeal was not disposed to intervene. The exact status of the more flexible *Condron*-type approach was left unresolved. Pill LJ referred to the test in *Porter* not being 'altogether excluded in this context', while Rix LJ spoke of 'a single test', and Longmore LJ of 'the test of apparent bias relating to predetermination'. Happily, all were agreed that the test was an extremely difficult one to satisfy in a situation of democratic accountability. The danger is that over time the high threshold will be whittled down.

The domestic courts have also been subject to increased demands to check for structural elements of bias. While the development is commonly associated with ECHR Art. 6 (below), two very recent cases serve to point up the wider

[172] For practical illustration, see *R v Chesterfield BC, ex p. Darker Enterprises Ltd* [1992] COD 466.

[173] *Condron v National Assembly for Wales* [2007] LGR 87, building in turn on *Georgiou v Enfield LBC* [2004] BGLR 497. See for criticism, J. Maurici, 'The modern approach to bias' (2007) 12 *JR* 56.

[174] *Persimmon Homes v R (Lewis)* [2008] EWCA Civ 746.

[175] In contrast to the situation in *ex p. Beddowes*, see p. 372 above.

possibilities, as also the potential problems. *In re Duffy*[176] concerned a challenge by Nationalists to the minister's appointment of two prominent Unionist activists to the seven-strong Parades Commission for Northern Ireland, a body tasked with facilitating local compromise and if necessary with issuing determinations on the routing of marches. This then was a pre-emptive strike; there were as yet no actual Commission decisions to attack for bias (as also no 'determination of civil rights and obligations'). *Wednesbury* was accordingly centre-stage. From a political standpoint, the minister's decision could be explained as bringing a warring faction 'inside the tent', so neutralising one source of conflict. But was this legally viable? Under the statute, the minister was so to 'exercise his powers of appointment . . . as to secure that as far as practicable the membership of the Commission is representative of the community in Northern Ireland'.[177]

Opening up a new vista of judicial regulation, the judges in Northern Ireland tackled the issue of trawling or targeting in public appointments head on. Disagreement was rife. The trial judge thought the appointment process unlawful because no account was taken of the possibility of encouraging applications from nationalist groups as well as from the strongly loyalist organisations which were targeted. The majority in the Court of Appeal opined that this was not a material factor requiring consideration but merely a matter which some might have considered; the trial judge had gone too far. The dissenting judge discerned an obligation on the minister to encourage applications also from amongst the nationalist residents affected by contentious parades; the trial judge had not gone far enough. Perhaps understandably, the Law Lords chose the safer option of focusing on the two appointments. The minister's own political model was trumped: 'those appointments', proclaimed Lord Carswell, 'failed to achieve the important goal of maintaining the public perception of the impartiality of all of the members of the Commission necessary for its general acceptance'. In accordance with the *doppelganger* test (see p. 43 above), the Secretary of State for Northern Ireland had acted as no reasonable Secretary of State for Northern Ireland could have acted.

The Court of Appeal decision in *R (Brooke) v Parole Board*[178] is the most striking example to date of structural procedural review. The case leads on from the successful struggles to have the Parole Board replace the minister as primary decision-maker on early release (*Stafford* etc.). The challenge could thus proceed on the basis that, both at common law and under ECHR Art. 5(4), the agency was required as a court to show objective independence of the executive. The judges are found examining wide-ranging complaints of ministerial influence – funding arrangements, appointments, etc. – over the adjudicative activities of the Board. The minister's argument that the court should

[176] [2008] UKHL 4.

[177] Public Processions (Northern Ireland) Act 1998, Sch. 1 [2(3)].

[178] [2008] 1 WLR 1950. The companion case of *R (Walker) v Justice Secretary* [2008] 1 WLR 1977 deals with problems of resources.

in orthodox fashion confine itself to correcting specific instances of injustice had been brushed aside. Nor, as the Divisional Court judgment shows, was the scrutiny light-touch:

> There is no question about the independence of mind and impartiality of the individual members of the Board. The issue is whether the relationship with the sponsoring Department of State, formerly the Home Office and now the Ministry of Justice, makes the Board too close to both the Executive and the principal party to all its decisions. We have found no sign of any attempt by the Department to influence individual cases, as distinct from the general approach to release decisions; that is so whether the individual cases are those of the claimants before us or any others. In some respects we have found that the structure of the Board is consistent with the necessary objective independence. But we are satisfied that the relationship of sponsorship is such as to create what objectively appears to be a lack of independence, and to cause the sponsoring Department sometimes to treat the Board as part of its establishment. That has led to inadequate protection for the security of tenure of members. It has also led to documented examples of the use of the powers of the Department which have not been consistent with the need to maintain the Board's objective independence; those have been powers of funding, of appointment and to give directions.

Judicial review on this scale puts in issue the courts' own institutional competence. Attention is immediately directed to the question of remedy. A declaration was granted, which solemnly recorded failure to demonstrate objective independence. However, while recognising that 'it was not appropriate . . . to tell the Secretary of State what action he ought to take', the Court of Appeal willingly provided multiple paragraphs of guidance 'on the areas where action is required'. As discussed further in Chapter 16, the judges will find themselves in a pickle if they go too far down this route.

6. 'Is judicial review good enough?'

ECHR Art. 6 further puts in issue the curative role of judicial review. On the one hand, the Strasbourg jurisprudence confirms that, for the purpose of deciding whether a body is 'independent', the court should – as in *Brooke* – look to the manner of appointment and term of office, the presence of procedural guarantees against external influence, and the general appearance of autonomy.[179] On the other hand, ranging beyond the classic realm of courts as primary decision-makers, by virtue of the increasingly generous interpretation of 'civil rights and obligations', conjures the unenviable prospect of administrative structures at large being vulnerable to challenge: judicialisation gone mad. 'The full judicial model' of Art. 6 falls to be tempered on grounds of constitutional principle – responsible government and democratic accountability – and practical convenience – managerial values of economy, efficiency and effectiveness.

[179] See e.g. on the Gaming Board, *Kingsley v UK* (2002) 35 EHRR 177.

The ECtHR has recognised the problem. The greater amenability to jurisdiction, whereby Strasbourg can effectively demand judicial supervision at the national level, comes with a more holistic approach to decisional processes. First, it need not be the case that each link in the administrative decision-making chain is 'independent'; a lack of independence in the administrative process may be cured by access to an independent judicial body with 'full jurisdiction'.[180] Secondly, 'full jurisdiction' is not to be equated with full decision-making power. Rather, in the words of Lord Clyde, 'full jurisdiction means a full jurisdiction in the context of the case'.[181] To this effect, the ECtHR spoke in *Zumbotel*[182] of the 'respect' that should be afforded decisions taken by 'administrative authorities on grounds of expediency'. The ECtHR judgment in *Bryan*[183] is more explicit. 'In assessing the sufficiency of the review . . . it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.'[184] But this in turn generates uncertainty inside the national administrative law system. There is no single answer to the question of whether judicial review, in its classic guise of a supervisory jurisdiction directed to errors of law and not of fact, has the necessary medicinal quality.

The hybrid nature of the planning process – judicial and administrative elements – saw British lawyers testing the matter in Strasbourg prior to the HRA.[185] The case of *Bryan* concerned an inspector's decision to uphold an enforcement notice. Since the minister could revoke the inspector's power of determination, the inspector could not constitute an independent tribunal. In view however of the specialised nature of the subject matter, and of the 'safeguards' entailed in the inspectorial procedure such as oral or written evidence, legal representation and reasons, the ECtHR held that the common law power to regulate findings of fact via 'irrationality' afforded the requisite measure of protection. *Bryan* thus epitomises the role of transaction typing in determining the question of independence and, further, the idea of 'composite procedure': whether, read together, the administrative and judicial parts of a decisional process effect compliance.

(a) Defensive posture

The House of Lords has now grappled with the issue in two big cases. Involving very different transaction types, they nonetheless share a common thread: defence of national administrative law traditions, the HRA notwithstanding.

[180] *Albert and Le Compte v Belgium* (1983) 5 EHRR 533 [29].
[181] *R (Alconbury Developments Ltd) v Environment Secretary* [154].
[182] *Zumbotel v Austria* (1993) 17 EHRR 116 [32].
[183] (1996) 21 EHRR 342.
[184] Ibid. [45].
[185] See also *ISKCON v United Kingdom* (1994) 18 EHRR CD 133.

The ECtHR having worked to temper 'the full judicial model', the Law Lords are seen moderating it to an extent which may well prove unsustainable in light of the evolving Strasbourg jurisprudence. These cases have a sharp constitutional edge. While both the national and supranational systems display strong elements of pragmatism, there also is an underlying friction between them.

Alconbury[186] was the post-HRA planning case waiting to happen. In issue was the statutory choice of 'call-in' procedure for major – controversial – developments: could there be compliance with Art. 6 when the minister was directly involved? Driving a proverbial 'coach and horses' through a carefully structured system replete with professional inputs, the Divisional Court answered 'no'. Article 6, it was said, meant a separation of powers; the Secretary of State could not be both a policy-maker and decision-taker. The Law Lords would have none of this. In line with classic common law authority,[187] the minister should not be treated as if he were a judge. Precisely because, in Lord Nolan's words, 'the decisions made by the Secretary of State will often have acute social, economic and environmental implications', the political element should be treasured. 'Parliament has entrusted the requisite degree of control to the Secretary of State, and it is to Parliament he must account for his exercise of it. To substitute for the Secretary of State an independent and impartial body with no central electoral accountability would not only be a recipe for chaos: it would be profoundly undemocratic.'[188] Lord Hoffman fastened on the threat of excessive judicialisation. 'The Human Rights Act 1998 was no doubt intended to strengthen the rule of law but not to inaugurate the rule of lawyers.'[189]

The House proceeded to hold judicial review good enough. Echoing *Bryan*, one approach was that of emphasising the procedural 'safeguards': in this case, inquiry by an inspector and subsequent notice and comment procedure. For Lord Slynn, it was these elements, combined with the availability of judicial review, which rendered the decision-making chain as a whole compliant with Art. 6.[190] Reference could also be made to the expansionary tendencies of judicial review – that is to say, an increasingly powerful 'prescription drug' (to ward off Strasbourg). Signalling future possibilities, wherein Art. 6 leads to further intensification of factual scrutiny in judicial review, Lord Clyde emphasised 'the extent to which . . . a decision may be penetrated by a review of the account taken . . . of facts which are irrelevant or even mistaken'.[191] (*E v Home Secretary* (see p. 513 above) would later cast fresh light on this).

[186] *R (Alconbury Developments Ltd) v Environment Secretary* ; and see M. Poustie, 'The rule of law or the rule of lawyers? *Alconbury*, Article 6(1) and the role of courts in administrative decision-making' (2001) *EHRLR* 657.

[187] *Johnson (B) & Co. (Builders) Ltd v Minister of Health* [1947] 2 All ER 395.

[188] *R (Alconbury Developments Ltd) v Environment Secretary* [60]. Note however the move to establish an Infrastructure Planning Commission for large-scale projects (see p. 587 above).

[189] *Ibid.* [91].

[190] *Ibid.* [45–54].

[191] *Ibid.* [169]. The speeches also made reference to proportionality.

Lord Hoffman went further, in a much-cited passage:

> If . . . the question is one of policy or expediency, the 'safeguards' are irrelevant. No one expects the inspector to be independent or impartial in applying the Secretary of State's policy and this was the reason why the court said that he was not for all purposes an independent or impartial tribunal. In this respect his position is no different from that of the Secretary of State himself. The reason why judicial review is sufficient in both cases to satisfy article 6 has nothing to do with the 'safeguards' but depends upon the *Zumbotel* principle of respect for the decision of an administrative authority on questions of expediency. It is only when one comes to findings of fact, or the evaluation of facts, such as arise on the question of whether there has been a breach of planning control, that the safeguards are essential for the acceptance of a limited review of fact by the appellate tribunal.[192]

A judicial policy with much to commend it, Lord Hoffman's aim is clear: insulate key administrative processes from the vagaries of a more context-specific structural procedural form of review (so distinguishing the reasoning (but not the result) in *Bryan*). Transaction typing grounded in considerations of institutional competence thus is the preferred option (*Zumbotel*). The conceptual difficulty is immediately apparent however. What does 'expediency' connote (and why should this not partly depend on the nature of the applicant's interest)? As cases such as *Bushell* remind us, there is much ink wasted on the so-called fact/policy distinction, more especially in terms of 'evaluation of facts'.[193] Paradoxically, in seeking so to distinguish factual matters, Lord Hoffman was incautious.[194] In closing down one avenue of challenge, his speech clearly signposted another – lack of 'essential' safeguards across seemingly vast swathes of routine decision-making. 'Proportionate dispute resolution' at the ground-floor level (see Chapter 10) was now in issue.

The second House of Lords case, *Runa Begum*,[195] promptly highlighted this aspect. RB was offered council accommodation as a homeless person. Complaining of racism and drug problems on the estate, that she had been mugged there, and that her estranged husband frequently visited the building, she refused the offer. As envisaged under the general scheme of Part VII of the Housing Act 1996, a senior housing manager conducted an internal review and decided that the offer was suitable. RB duly appealed to the county court, here exercising judicial-review-type powers. The judge accepted the argument that, since there were disputed facts, the council had breached Art. 6 by not referring the matter to an independent tribunal. The Law Lords again refused to play constitutional architect. On the contrary, explained Lord Hoffman, defences

[192] *Ibid*. [117].
[193] For further illustration in terms of Art. 6, see *Friends Provident Life & Pensions Ltd v Transport Secretary* [2002] 1 WLR 1450.
[194] His own word: *Begum (Runa) v Tower Hamlets LBC* [2003] 2 WLR 388 [40].
[195] *Begum (Runa) v Tower Hamlets LBC*.

against Strasbourg-inspired incursions in the general field of administrative law needed tightening:

> The rule of law rightly requires that certain decisions, of which the paradigm examples are findings of breaches of the criminal law and adjudications as to private rights, should be entrusted to the judicial branch of government. This basic principle does not yield to utilitarian arguments that it would be cheaper or more efficient to have these matters decided by administrators. Nor is the possibility of an appeal sufficient to compensate for lack of independence and impartiality on the part of the primary decision maker [196] . . . But utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare . . . Efficient administration and the sovereignty of Parliament are very relevant. Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes . . .
>
> Although I do not think that the exercise of administrative functions requires a mechanism for independent findings of fact or a full appeal, it does need to be lawful and fair . . . In any case, the gap between judicial review and a full right of appeal is seldom in practice very wide. Even with a full right of appeal it is not easy for an appellate tribunal which has not itself seen the witnesses to differ from the decision-maker on questions of primary fact and, more especially relevant to this case, on questions of credibility . . .
>
> In the case of the normal Part VII decision, engaging no human rights other than Article 6, conventional judicial review . . . is sufficient . . . The question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact . . . I entirely endorse . . . courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles. [197]

The concern not to over-judicialise dispute procedures shines through. The distinction made by Lord Hoffman between cases involving property rights – Art. 6 strongly enforced – and those involving social/regulatory schemes – the basic standard of 'lawful and fair' – is nonetheless questionable.[198] The boundary line may well be obscure, for example in planning. Issues of 'error cost' (to a vulnerable group), and of how 'correct' outcomes are constructed, are typically glossed over in the appeal to utilitarianism.

(b) Fresh challenge

In *Tsfayo*,[199] the ECtHR considered the Law Lords' efforts in a judgment difficult to decipher. The case arose from a refusal of a backdated claim for welfare

[196] See *De Cubber v Belgium* (1984) 7 EHRR 236.
[197] *Ibid*. [42–4] [47] [59].
[198] See further, P. Craig, 'The HRA, Article 6 and procedural rights' [2003] *PL* 753.
[199] *Tsfayo v United Kingdom* [2007] HLR 19.

entitlements. Rejecting T's evidence that she had not received the relevant correspondence, the local authority's housing benefit review board upheld the decision; there was no 'good cause' for her delay. A judicial review challenge for irrationality also failed. The ECtHR gave two main reasons for finding a violation of Art. 6.[200] First, the decision-making process was 'significantly different' from that in *Bryan* or in *Runa Begum*. In those cases, the issues to be determined 'required a measure of professional knowledge or experience and the exercise of discretion pursuant to wider policy aims', whereas in this case the Housing Benefit and Council Tax Benefit Review Board (HBRB) was deciding 'a simple question of fact', namely whether there was good cause. Nor were the factual findings 'merely incidental' to the reaching of broader judgements of policy or expediency. The ECtHR, in other words, saw no particular need to temper 'the full judicial model'. Secondly, the HBRB was not only lacking in independence from the executive, but was 'directly connected to one of the parties to the dispute'.[201] An adjudicative body composed of five members of the authority responsible for paying the benefit was tainted at source; there was a 'fundamental lack of objective impartiality'. The fact of HBRBs having already been replaced by a separate system of statutory tribunals[202] was naturally grist to the Strasbourg mill.

Whether or not *Tsfayo* is read expansively[203] will clearly be of considerable importance for the national administrative law system. Dealing with 'double-hatted' tribunal members is one thing, the idea that every minor case of 'pure' fact-finding needs a fully judicialised body quite another! What is also clear post-*Tsfayo* is the scope for expensive and time-consuming litigation on fine points of institutional design – wholly disproportionate.

Two later cases demonstrate the range of possibilities. *Wright*[204] concerned the provisional listing of care workers considered unsuitable to work with vulnerable adults: was the opportunity to petition the minister for removal from the list, coupled with judicial review of the exercise of his statutory power, Art. 6-compliant? The majority in the Court of Appeal thought not.[205] In light of (the second limb of) *Tsfayo*, it was necessary 'to have regard to the nature of the first stage breach . . . The more serious the failure to accord a hearing by an independent and impartial tribunal, the more likely it is that a breach of the process cannot be cured' by judicial review – in this case, 'a denial of one of the fundamental elements of the right to a fair determination', namely the right to be heard, locked up together 'with the (often irreversible) detrimental effect of the inclusion in the list'. On appeal, the House of Lords endorsed this approach and went on to make a declaration of incompatibility.

[200] *Ibid*. [45–7].

[201] A point previously made domestically in *R (Bewry) v Norwich City Council* [2001] EWHC Admin 657.

[202] Child Support, Pensions and Social Security Act 2000.

[203] See e.g. J. Howell, '*Alconbury* Crumbles' (2007) 12 *Judicial Review* 9.

[204] *R (Wright) v Health Secretary* [2008] 2 WLR 536 (CA); [2009] UKHL 3.

[205] For another such example, see *R (Q and Others)*, see p. 741 below.

Ali v Birmingham City Council[206] exposes the faultline between *Runa Begum* and *Tsfayo*. Part VII of the Housing Act 1996 was again in play; had homeless persons declined suitable accommodation? The authority's reviewing officer upheld several decisions to this effect, on the basis that in each case the applicant had received a letter from the council giving the appropriate statutory notice. They all denied this. The first limb in *Tsfayo* was duly invoked; as against a situation calling for specialist knowledge or regard to policy considerations (*Runa Begum*), was it not 'a simple issue of primary fact', namely a matter necessarily open for consideration on the merits by an independent and impartial tribunal? Thomas LJ was naturally horrified by the prospect. There would be 'significant implications for not only the statutory scheme but for the court and tribunal system, if this court were to hold that a full right of appeal was required on findings of primary fact . . . particularly if the appeal encompassed the re-hearing of evidence'. The court clung to *Runa Begum* as binding authority on Part VII and distinguished *Tsfayo* for the nature of the taint.

7. Conclusion

Procedural fairness is an important element in the invigoration of judicial review, at least since the landmark decision of *Ridge v Baldwin*. With significant shifts in the style and substance of judicial protection, and sudden bursts of activity, nowhere is the organic quality of the common law better illustrated. The traditional autochthonous elements of the *audi alteram partem* principle have increasingly been enriched by both ECHR and Community law requirements, most obviously in terms of legislative review but also at the level of principle, for example with reasons. At the same time we note a more circumspect approach to the standard of review in non-adjudicative contexts. Demands for more extensive development, as indicated by the fashionable value of transparency, are matched by genuine concerns about the competency and legitimacy of judicial decision-making based on a broad interpretation of 'fairness'.

Procedural fairness has become a soft-centred legal principle. The scope of judicial discretion manifests itself in a wide range of methodological choices, from the categorisation of functions to interest classification and balancing, and on through macro- and micro-forms of transaction typing. The consequence is a case law which often appears inchoate, due to great variability in the intensity of review, associated with an expanded coverage of *audi alteram partem* situations and, latterly, of the no-bias rule. Equally criticisable is the recourse to 'intuitive judgement' at the expense of theories of process. We find heart-warming 'motherhood statements' (see p. 514 above), utilised to screen the personal choices that judges stubbornly refuse to admit to.

From a broadly instrumentalist approach in earlier years, there has been a shift to dignitary values, attesting the Strasbourg role of 'judge over the judge's

[206] [2008] EWCA Civ 1228. See also *R (Gilboy) v Liverpool CC* [2008] EWCA Civ 751.

shoulder'. A chief 'hot-spot' is structural procedural review directed to the institutional position of the decision-maker. This involves the metamorphosis of a Convention guarantee of 'access to the court' in decisions involving civil rights and obligations into an inherently elusive framework governing both judicial and administrative procedures. As highlighted by *Tsfayo*, there are major problems of 'fit' inside the national polity.

Natural justice lies at the heart of the Anglo-American legal tradition and our courts are naturally proud of their record in establishing the principle and applying it. Looked at through the spectacles of the ECtHR, however, there is room for 'improvement'. But is the ECtHR raising the bar? Or is it inaugurating a world of judicial bureaucracy, where a rule-bound administration is further fettered by complex, costly and time-consuming administrative procedures dictated by judges unfamiliar with the world of administration? For the Law Lords, the challenge has been to limit the disruption to established national traditions and administrative structures, which they deem appropriate. The irony will not be lost on the reader!