§ Law in Context

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Judicial review and administration: A tangled web

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Writing in the early 1990s, a future High Court judge was blunt:

> To their shame public lawyers have taken little interest in the impact of judicial review. Yet surely it is the different aspects of this issue which are central to the whole enterprise. Has an applicant actually obtained substantial benefit as a result of successful judicial review? What of others in the same position or a similar position? Are standards of public administration in the relevant public authority better for having been exposed to judicial gaze? Has

there been any improvement in the standards of government in general following this and other instances of judicial review?[1]

In concentrating heavily on doctrinal analysis, public lawyers had tended to assume two key elements of a classical 'control' model of judicial review: that government decision-makers and officials (a) take their lead from courts and not vice versa, and (b) that if proffered the bridle they dutifully put it on. Yet in showing that the administrative process was not, and could not be, a succession of justiciable controversies, de Smith's famous characterisation of judicial review as sporadic and peripheral had also yielded an important clue. The courts as machinery for redress of grievance might need to temper their approach in certain situations; administrative responses to judicial intervention would be many and various.

Stress is rightly laid on the expressive functions of judicial review, whereby – not least these days with Convention rights – certain key values about how public bodies should behave are embodied and proclaimed. From the standpoint of effectiveness and compliance, however, the judicial contribution also falls to be read in terms of the many competing pressures and influences in public administration. Today, research points up a broad range of variables: from subject matter and frequency of court challenge and sculpting of legal remedies to changing organisational priorities and different institutional value systems, and on through hierarchical, cultural and personal factors to issues of legal awareness and expertise.

1. Litigation patterns

Compared with other administrative law machinery (tribunals and ombudsmen, let alone internal complaints procedures) the judicial review caseload is small (see Fig 15.6, p. 688 above). A fifteenfold increase in leave/permission applications since the early 1980s is certainly dramatic,[2] but it should not obscure the fact that 6,000+ cases a year is infinitesimal when measured against the scale of government decision-making. Human rights litigation explosion – what human rights litigation explosion? The graph shows a gentler upward curve since 2000.[3]

Of course the numbers only tell part of the story.[4] Fundamental to 'transforming judicial review' (see Chapter 3) is the sense of courts, with their high

[1] R. Cranston, 'Reviewing judicial review' in Richardson and Genn (eds.), *Administrative Law and Government Action* (Clarendon Press, 1994), p. 69.

[2] See NAO, *Citizen Redress: What citizens can do if things go wrong with public services*, HC 21 (2004/5).

[3] See further, V. Bondy, *The Impact of the Human Rights Act 1998 on Judicial Review* (Public Law Project, 2003).

[4] Statistics may also mislead because they are incomplete. Together with statutory appeals and reviews (see further below), we need to bear in mind here actions in contract and tort and also the crosscutting nature of Convention rights. Looking forwards, 'judicial review' in the Upper-tier Tribunal will need to be factored in.

prestige and profile, possessing an influence disproportionate to their caseload. The statistics cannot measure the 'ripple' effect of one decision on, perhaps, thousands of similar cases. The mere existence of judicial review may influence future administrative behaviour (see further below). Litigation has radiating effects, underpinning negotiation, etc., 'in the shadow of the law' in multiple venues outside the courts.[5] The fact remains however that large swathes of public administration have little or no direct contact with judicial review.

(a) Asylum and immigration plus

The judicial review caseload also is highly skewed. Immigration and asylum are the main drivers, with proportions of leave/permission applications of 40, 50, even 60 per cent.[6] As such, the much-advertised growth of judicial review in recent times is in large measure a function of strict immigration policies, the standard of decision-making in a department of state officially characterised as 'unfit for purpose', and the evident incentive for would-be migrants to litigate.[7] In the words of a former Treasury Solicitor, 'the vast majority' of the cases will be 'routine', 'simply . . . part of the process by which public decisions are properly tested and challenged'.[8]

The trend is the more striking because of repeated attempts at diversion out of AJR procedure, epitomised by *Swati* (see p. 689 above).[9] Indeed, the Administrative Court currently gives the impression of a specialist asylum and immigration court with add-ons. One alternative routing, applications to require that the Asylum and Immigration Tribunal reconsider, has also been seen swelling the court's business, with proportions of the secondary caseload of statutory reviews, appeals and applications touching 80 per cent.[10]

Experience teaches that, outside this core area, judicial review can be extremely diverse. We recall the judicial role in determining institutional relationships (as famously with central and local government in the 1980s),[11]

[5] For discussion of such 'bottom-up' or 'decentred' perspectives in this field, see R. Rawlings, 'Courts and interests' in Loveland (ed.), *A Special Relationship? American influences on public law* (Oxford University Press, 1995). And see further below.

[6] In the two years 2006–7 for example, immigration and asylum cases constituted 8,428 of 13,148 permission applications: *Judicial and Court Statistics,* Cm. 7273 (2007), and Cm. 7467 (2008), Table 1.12.

[7] R. Rawlings, 'Review, revenge and retreat' (2005) 68 *MLR* 378. C. Beaton-Wells, 'Australian administrative law: The asylum-seeker legacy' [2005] *PL* 267, gives a valuable comparative perspective.

[8] Dame Juliet Wheldon, 'Judicial review from the government perspective' (Sweet & Maxwell lecture, December 2005), p. 6. And see R. Thomas, 'The impact of judicial review on asylum' [2003] *PL* 479.

[9] See also Practice Direction to CPR Part 54, *Applications for permission to apply for judicial review in immigration and asylum cases – challenging removal* (2007).

[10] 7,036 of 8,601 cases in the two years 2006–7: *Judicial and Court Statistics,* Cm. 7273 (2007), and Cm. 7467 (2008), Table 1.14.

[11] M. Loughlin, *Legality and Locality: The role of law in central-local government relations* (Clarendon Press, 1996).

the push into commercial judicial review (litigation commonly outside the model of 'strong state' versus 'weak individual'), and of course all those 'public-interest advocates' (repeat players as well as 'one-shotters').[12] Empirical analysis of the non-immigration/asylum caseload confirms that 'the absolute numbers of cases involving most other decision areas have been small', and that, 'while challenges are brought against a broad spectrum of bodies, a high proportion . . . involves only a small number of public authorities'.[13]

A study of judicial review challenges to local authorities in England and Wales casts fresh light on this.[14] There were some 5,000 such applications for permission[15] in the period 2000–5, which constituted almost half the non-immigration/asylum caseload. Housing cases (broadly defined) were in the majority, with other significant areas being community care, planning, and education (together some 30% of the sample). Cue 'the London effect' (see p. 686 above): 60% of all local authority challenges were to decisions of London boroughs (which represented 14% of the population of England and Wales). Conversely, 80% of councils together attracted less than 20% of the challenges; 85% had on average fewer than two challenges annually.[16]

The sense of 'different worlds of judicial review litigation' is amply conveyed here. Peripheral in the sense of being unimportant to all save those directly concerned, the bulk of the cases involving inner-city authorities scarcely fitted the comfortable imagery of judicial review as top-tier dispute resolution. Part of the never-ending 'toil of resource management', the litigation typically involved 'a daily response to challenges by claimants seeking to protect their basic housing needs, often in emergency situations'.[17]

(b) Accessibility and outreach

Bottom-up studies of complaints-handling are, as we saw in Chapter 10, preoccupied with questions of accessibility and outreach. Judicial review has received much less attention in these terms. Yet as 'Rolls-Royce' machinery for the redress of grievance, the High Court does not come cheap![18] Costs

[12] For this celebrated distinction, see M. Galanter, 'Why the "haves" come out ahead: Speculations on the limits of legal change', 9 *Law and Society Review* (1974) 95.

[13] M. Sunkin, K. Calvo, L. Platt and T. Landman, 'Mapping the use of judicial review to challenge local authorities in England and Wales' [2007] *PL* 545, 546. And see, L. Bridges, G. Meszaros and M. Sunkin, *Judicial Review in Perspective*, 2nd edn (Cavendish, 1995).

[14] Sunkin *et al.*, 'Mapping the use of judicial review to challenge local authorities in England and Wales'.

[15] Of which 31% (1,582) were successful.

[16] Birmingham and Liverpool led the way among the few 'hot spots' of judicial review activity outside London.

[17] Sunkin *et al.*, 'Mapping the use of judicial review to challenge local authorities in England and Wales', pp. 556, 567. The 's. 55 litigation' discussed later in the chapter raises similar points.

[18] Control of litigation costs is today considered a major failing of the Woolf reforms: Sir A. Clarke, 'The Woolf Reforms: A singular event or an ongoing process?' (British Academy lecture, 2008). Another major inquiry is currently under way, chaired by Lord Justice Jackson.

traditionally fall on the loser, making them hard to predict at the start of the case, an obvious disincentive. 'Front-loading' the judicial review process has given matters a further twist, with the private claimant refused permission made liable for the opponent's costs of working up a defence.[19] Another major obstacle familiar from environmental litigation is the practice of requiring a cross-undertaking in damages in cases where interim relief halting development pending a final determination is requested.[20]

Practitioners complain of 'a large and growing gulf between those eligible for public funding and those who are able to afford to litigate a judicial review'.[21] Eligibility for legal aid, which provides both funding from the Community Legal Service[22] and costs protection, is today severely restricted. The scheme today takes account of the wider public interest[23] but cases still remain subject to a rigorous costs–benefit test. The impecunious litigant may also find a conditional-fee agreement (whereby the lawyer gets his fee on winning) let alone pro bono advice and representation, difficult to secure.[24]

The criteria for legal aid lock up together with the exercise of judicial discretion at the permission stage. For example, where permission is granted, there is a presumption that public funding should be granted or should continue. Conversely, with refusal of permission on the papers apt to see public funding withdrawn, the lack of costs protection may effectively undermine the right to renew an application at an oral hearing. Increased emphasis in funding decisions on alternative dispute resolution (ADR), as by refusing legal representation where an ombudsman system has not been tried, also underwrites the scope for diversion out of the judicial process.[25]

Operating here in defence of the public purse, the courts are understandably cautious about disapplying the general costs rules in judicial review litigation.[26] Occasionally a losing litigant will benefit from after-the-event protection ('no order as to costs') on the ground that he has acted in the public interest by

[19] As now demanded by the acknowledgement of service: *Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346. See also *Davey v Aylesbury Vale DC* [2007] EWCA Civ 1166.

[20] So protecting economic interests: see, e.g., *Belize Alliance of Conservation NGOs v Department of the Environment* [2003] UKPC 63. For critical analysis in terms of the Aarhus Convention, see Report of the Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (2008).

[21] R. Stein and J. Beagent, 'Protective costs orders' [2006] *Judicial Review* 206.

[22] For which the Legal Services Commission has responsibility under the Access to Justice Act 1999. For a convenient overview, see Report of the Working Group on Facilitating Public Interest Litigation, *Litigating the Public Interest* (Liberty, 2006).

[23] LSC Funding Code Criteria, s. 2.4. Third parties standing to benefit may also be asked to contribute. See further the reports by the LSC's Public Interest Advisory Panel.

[24] For the travails of 'the litigant in person', see Bridges, Meszaros and Sunkin, *Judicial Review in Perspective*, Ch. 3.

[25] LSC Funding Code, criterion 5.4. And see J. Findlay, 'Defending judicial review proceedings: Tactical issues' (2005) 10 *Judicial Review* 27. See also, for a broad comparative perspective, J. Resnik, 'Whither and whether adjudication?' (2006) 86 *Boston University Law Rev.* 1101.

[26] Resting easily with active case management, CPR 44 grounds overarching judicial discretion.

raising the matter.[27] Much has also been heard in the last few years of 'protective costs orders', whereby the court takes action to re-balance the financial equation and cap the element of uncertainty by declaring the claimant's maximum (or nil) liability in advance. Reflecting and reinforcing the rise of 'public-interest advocacy', the technique is specifically geared to those cases raising issues of 'general public importance' that 'the public interest requires . . . should be resolved' and where otherwise the applicant would probably have to discontinue the proceedings.[28] As such, the technique is both valuable and inherently limited. It is also an expensive method for arranging 'insurance', one that is prone to engender 'satellite litigation'.[29]

Rules on costs and legal aid are not the only major source of difficulty in terms of access to justice. The uneven distribution of legal expertise to cope with the specialist demands of the judicial review process has scarcely been ameliorated by the current system of legal aid franchising (which includes public law and human rights as a specified subject area of expertise). While clearly welcome, regionalisation of the Administrative Court (see p. 686 above) offers only modest relief. Yet research underscores the importance of professional assistance in the pursuit of formal legal claims.[30] The recent study of judicial review litigation against local government showed an evident correlation between high levels of challenge and concentrations of publicly funded lawyers.[31]

A classic ground-floor study of general legal practice in socially deprived communities in South Wales brings home some grim realities. Human rights litigation was not so much 'sporadic and peripheral' as 'unheard of':

> Under half of the [twenty-one] solicitors had used the HRA . . . It had not been used as a cause of action . . . Only one solicitor had used it as a primary argument . . . A key explanation . . . was uncertainty about how to access the rights . . . A related explanation . . . was a lack of recent, targeted, and practical training . . . A common theme . . . was reluctance to use the HRA for fear that it would give the impression of a weak case.
>
> These sole and small-practice practitioners are operating on tight financial margins . . . They describe themselves as being 'on a production line' with legal aid cases . . . Within such an economic and working environment it is unsurprising that solicitors have little time to consider and work within the new and challenging parameters of the HRA.[32]

[27] *New Zealand Maori Council v Attorney General of New Zealand* [1004] 1 AC466. Likewise, the public body may choose to waive its entitlement.

[28] *R (Corner House Research) v Trade and Industry Secretary* [2005] 1 WLR 2600; also *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749.

[29] *R (Buglife –The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corpn* [2008] EWCA Civ 1209.

[30] See generally H. Genn, *Paths to Justice* (Hart Publishing, 1999).

[31] Sunkin *et al*., 'Mapping the use of judicial review to challenge local authorities in England and Wales'.

[32] R. Costigan and P. Thomas, 'The Human Rights Act: A view from below' 32 *JLS* (2005) 51, 66–7. And see L. Clements, 'Winners and losers' (2005) 32 *JLS* 34.

(c) Iron hand?

At later stages (grounds of review and remedies) the judicial review caseload is diminished.[33] Having peaked at 1,414 in 2000, the numbers reduced rapidly with the CPR framework, totalling just 250–350 AJR cases annually over the last few years (see Fig. 15.6, p. 688 above). The incidence of cases in which public bodies actually experience 'the iron hand' of the court is of course lower still. In the two years 2006–7, 293 applications for review were both determined and allowed[34] – sporadic indeed!

And if the numbers of claims filed have mushroomed, the incidence of final hearings is back to the levels of the early 1980s,[35] with the ratio falling under the CPR from over 20 per cent to some 5 per cent. This recalls the sharpened disciplines – rationing – at the permission stage (see Chapter 15). The dominance of the judicial review caseload by immigration and asylum litigation accentuates the trend; the basic rule of thumb being that the higher the proportion of such cases, the higher the general rate of refusal of permission.[36]

The encouragement of negotiation and settlement via Bowman-type 'front-loading' and Woolf-style active case management must also be factored in. There is much to be said for this in terms of redress of grievance (subject to concerns about inequality of bargaining power),[37] responsive and efficient public administration, and regulating the judicial review caseload. It does however leave fewer opportunities for Administrative Court judges publicly to perform the educative or hortatory function.

2. Tempering: Rights and resources

It is common for courts to temper review by reference to the perceived needs of the administration. This may be done at several stages. In Chapter 15, we saw how this infused the courts' approach to their own procedures (all those 'safeguards' for access and proof). In the next section, we look at a similar tempering process at the stage of legal remedy.

In terms of the variable intensity of review that marks contemporary judicial review, tempering is probably necessary. There are, as we saw in earlier chapters, fewer 'no-go' areas. The courts no longer draw back, for example, in

[33] Judicial review cases do however comprise a significant proportion of higher appellate work: A. Le Sueur, 'Panning for gold: Choosing cases for top-level courts' in Le Sueur (ed.), *Building the UK's New Supreme Court: National and comparative perspectives* (Oxford University Press, 2004).

[34] *Judicial and Court Statistics*, Cm. 7273 (2007), and Cm. 7467 (2008), Table 1.12.

[35] M. Sunkin, 'What is happening to applications for judicial review?' (1987) 50 *MLR* 432.

[36] In 2006–7, claimant success rates in permission decisions in immigration/asylum cases and in other civil cases were 13% and 35% respectively.

[37] See the findings in V. Bondy and M. Sunkin, 'Accessing judicial review' (2008) *PL* 647, and, for a comparative view, R. Creyke and J. McMillan, 'Judicial review outcomes: An empirical study' (2004) 11 *Aust. J. of Administrative Law* 82. *Practice Direction (Administrative Court: Uncontested Proceedings)* [2008] 1 WLR 1377 facilitates agreed final orders.

the face of prerogative power but there is nonetheless an array of 'light-touch' approaches in matters touching on the paradigm case of national security, defence and foreign affairs, where 'deference', according to Laws LJ (see p. 138 above) should be nearly absolute.[38] Great respect is shown again for the operational discretion of the police, as we saw in *Gillan* (see p. 215 above).[39] In Chapter 7 we saw the courts affording space to regulatory expertise, a second type of deference. Other cases show eminent judges expressing concern about convoluted decision-making pathways *(Denbigh High School*, see p. 121 above; *Miss Behavin'*, see p. 122 above); the troublesome effects of non-discrimination law (*Prague Airport*, see p. 213 above); and onerous adjudicative arrangements (*Runa Begum*, see p. 663 above). All have on occasion been described as unduly burdensome for the administration. Behind the scenes, we find the Attorney-General urging on government lawyers the need to 'educate' judges about the potential administrative consequences of their decisions, not least with respect to resource allocation: it 'is essential to bring home to the court the complexity of the policy background, and the ramifications of unsettling policy decisions in what may, superficially at least, appear to be a discrete area capable of being ring-fenced'.[40] Thus in *Marcic* (see p. 315 above), Thames Water presented a substantial brief to the House of Lords to demonstrate the impact of an adverse liability decision on the countrywide programme for renewal of sewage facilities.

(a) At the sharp end

Let us now turn more specifically to some case law concerning vulnerable sections of society. What, if anything, has judicial review done for them? Legal challenges designed to secure additional resources, or at least maintain existing provision, for a potentially large class of persons are a familiar form of 'test-case activity' or 'public-interest litigation' (see further below). The Diceyan conception of judicial 'control' is largely negative, focusing on protection of the individual in the face of arbitrariness, overweening government authority and excess of power; Dicey indeed expressed his inherent mistrust of what he called 'collectivism'.[41] Here we find judicial review prayed in aid as an encouragement to government intervention on behalf of the under-privileged or,[42] in the terminology of human rights, in support of economic and social rights.

[38] See for a striking example *R v Home Secretary, ex p. Rehman* [2001] UKHL 47.

[39] See also *R v Chief Constable of Sussex, ex p. International Trader's Ferry Ltd* [1998] 3 WLR 1260.

[40] Lord Goldsmith, quoted in M. Sunkin, 'Judicial review and bureaucratic impact: Conceptual issues in researching the impact of judicial review on government bureaucracies' in Hertogh and Halliday (eds.), *Judicial Review and Bureaucratic Impact* (Cambridge University Press, 2004), p. 74. But see J. King, 'The pervasiveness of polycentricity' [2008] *PL* 101.

[41] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, 2nd edn (Macmillan, 1914).

[42] See generally S. Fredman, 'Social, economic and cultural rights' in Feldman (ed.), *English Public Law* (Oxford University Press, 2004).

Given the many competing calls on public authorities, not least when economic climes are harsh, this kind of litigation casts a fierce light on the interplay of courts with public administration.[43] How far should the judges go in entertaining pleas of local autonomy and democratic responsibility, of respect for the managerial disciplines of 'new public management' and of polycentricity? Alternatively, with individual claims attractively packaged in terms of welfare 'entitlements' or 'rights', to what extent can the courts grant remedies that seriously impinge on the budgetary allocations of individual public authorities? 'Government by judges' is a charge best avoided!

In this book, the *Coughlan* and *Herceptin* cases (see pp. 224 and 123 above) are striking examples of resource-oriented litigation hitting home. Two further pairs of cases, pre- and post-Human Rights Act (HRA) respectively, are, however, worth a closer look. All involve claims for resources against local authorities on behalf of highly vulnerable people. They point up a natural judicial propensity to 'play safe' with resource allocation,[44] decisions being grounded in precise statutory interpretation and reference to *vires*.

In *Barry*,[45] the council had assessed the elderly and severely disabled applicant as needing home-care assistance, including cleaning and laundry services. After central government reduced its funding, the council informed him, along with many others, that it was forced to prioritise and could no longer offer the services. The case was taken up by the Public Law Project, with an eye on similar developments across local government. It turned on the words 'necessary in order to meet the needs of that person' in s. 2 of the Chronically Sick and Disabled Persons Act 1970. Was the duty such as to provide an individual right to services so that the council was not entitled to take into consideration the resources available to it? The House of Lords (3–2) dismissed the claim:

> *Lord Nicholls*: A person's need for a particular type or level of service cannot be decided in a vacuum from which all considerations of cost have been expelled . . . Once it is accepted . . . that cost is a relevant factor in assessing a person's needs for the services listed in s. 2(1), then, in deciding how much weight is to be attached to cost, some evaluation or assumption has to be made about the impact which the cost will have upon the authority. Cost is of more or less significance depending upon whether the authority currently has more or less money . . .
>
> [It was argued that] if a local authority may properly take its resources into account . . . the s. 2(1) duty would in effect be limited to making arrangements to the extent only that the authority should decide to allocate money for this purpose. The duty, it was said, would collapse into a power. I do not agree. A local authority must carry out its functions under

[43] J. King, 'The justiciability of resource allocation' (2007) 70 *MLR* 197.

[44] E. Palmer, 'Resource allocation, welfare rights: Mapping the boundaries of judicial control in public administrative law' (2000) 20 *OJLS* 63. See also *Holmes-Moorhouse v Richmond upon Thames LBC* [2009] UKHL 7 and *R (Ahmad) v Newham LBC* [2009] UKHL 14.

[45] *R v Gloucestershire County Council, ex p. Barry* [1997] 2 All ER 1.

> s. 2(1) in a responsible fashion. In the event of a local authority acting with *Wednesbury* unreasonableness . . . a disabled person would have a remedy.
>
> *Lord Lloyd* (dissenting): In every case, simple or complex, the need of the individual will be assessed against the standards of civilised society as we know them in the United Kingdom . . . Resources can, of course, operate to impose a cash limit on what is provided. But how can resources help to measure the need? This . . . is the fallacy which lies at the heart of the council's argument . . . It cannot . . . have been Parliament's intention that [a] local authority . . . should be able to say 'because we do not have enough resources, we are going to reduce your needs.' His needs remain exactly the same. They cannot be affected by the local authority's inability to meet those needs . . . The solution lies with the Government. The passing of the 1970 Act was a noble aspiration. Having willed the end, Parliament must be asked to provide the means.

The case of *Tandy*,[46] decided by a unanimous but differently constituted House of Lords, went the other way. T, unable to attend school because of protracted illness, had previously been provided with five hours of home tuition a week. Faced with cuts in central-government funding, the LEA decided to reduce this to three hours a week. The House held, however, that availability of resources was irrelevant to the authority's duty under s. 298 of the Education Act 1993 to provide 'suitable education' to children of school age. The case of *Barry* was sharply distinguished as involving a 'strange' statutory provision that lacked definition, and less faith was put in *Wednesbury*, with local discretionary consideration of resources being effectively corralled as a matter of delivery:

> *Lord Browne-Wilkinson:* The argument is not one of insufficient resources to discharge the duty but of a preference for using the money for other purposes. To permit a local authority to avoid performing a statutory duty on the grounds that it prefers to spend the money in other ways is to downgrade a statutory duty to a discretionary power. A similar argument was put forward in the *Barry* case but dismissed by Lord Nicholls . . . apparently on the ground that the complainant could control the failure of a local authority to carry out its statutory duty by showing that it was acting in a way which was *Wednesbury* unreasonable . . . But with respect this is a very doubtful form of protection. Once the reasonableness of the actions of a local authority depends upon its decision how to apply scarce financial resources, the local authority's decision becomes extremely difficult to review. The court cannot second-guess the local authority in the way in which it spends its limited resources . . .
>
> Parliament has chosen to impose a statutory duty, as opposed to a power, requiring the local authority to do certain things. In my judgment, the courts should be slow to downgrade such duties into what are, in effect, mere discretions over which the court would have very little control. If Parliament wishes to reduce public expenditure on meeting the needs of sick children then it is up to Parliament so to provide. It is not for the courts to adjust the order of priorities as between statutory duties and statutory discretions.

[46] *R v East Sussex County Council, ex p. Tandy* [1998] AC 714.

These two authorities are emblematic of a difficult case law reaching back to the 1960s and 1970s in areas such as health, education and social work, where notions of entitlement are inextricably bound up with deployment of financial resources.[47] Matters have been compounded by a mishmash of intersecting and frequently amended legislative provisions so that (as Lord Nicholls has ruefully observed) identifying parliamentary intention 'is not always easy'. The rule of thumb applied by the courts is that the more specific and precise the duty, 'the more readily the statute may be interpreted as imposing an obligation of an absolute character'; or conversely – low intensity review – that the more general the terms of the duty, 'the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty'.

The case of *R (G)*, from which this quotation comes,[48] concerned the 'general duty . . . to safeguard and promote' welfare, imposed by s. 17(1) of the Children Act 1989 and, consistent with this, the duty to promote a family upbringing 'by providing a range and level of services appropriate to these children's needs'. The applicant argued that once the needs of the individual child had been established the authority was obliged to provide accommodation. The House of Lords (3–2) dismissed the challenge on the ground that such broad duties were not intended to be enforceable by individuals; it was sufficient that the authority maintained services for which his particular needs made him eligible. It was *Tandy's* turn to be distinguished with Lord Hope expressly linking the generic nature of the obligations to the practical realities confronting the respondents – two hard-pressed London boroughs:

> It is an inescapable fact of life that the funds and other resources available for the performance of the functions of a local social services authority are not unlimited. It is impossible therefore for the authority to meet every conceivable need. A judgement is to be exercised as to how needs may best be met, given the available resources. Parliament must be taken to have been aware of this fact when the legislation was enacted.

Happening post-HRA, this major piece of welfare law litigation also recalls the basic limitations of the ECHR in terms of socio-economic rights.[49] An attempt to invoke Art. 8 (respect for family life) was compromised by the wide margin of appreciation afforded in the Strasbourg jurisprudence.[50]

In *Spink*, s. 2 of the Chronically Sick and Disabled Persons Act 1970 was

[47] As documented in M. Partington and J. Jowell (eds.), *Welfare Law and Policy* (Pinter, 1979). There remains the possibility of the so-called 'default powers 'of ministers being prioritised at the expense of legal action by individuals: for classic authority, see *Watt v Kesteven* CC [1955] 1 QB 408 and *Wood v Ealing LBC* [1967] Ch. 487.

[48] *R (G) v Barnet LBC* [2003] 3 WLR 1194 [1199].

[49] As previously highlighted by *N v Home Secretary*, see p. 127 above. Positive potentials are on show in a case study of Article 3 and asylum seekers later in the chapter.

[50] See especially, *KA v Finland*, [2003] 1 FLR 201.

again before the courts.[51] The claimants argued that the council had to provide and pay for an expensive range of alterations to their home, such that their two severely disabled teenagers could properly enjoy the fruits of family life. The council contended that this depended on whether the parents could reasonably be expected to pay for the improvements. Following *Barry*, the Court of Appeal held that an authority, in determining whether it was 'necessary in order to meet the needs' to make arrangements, was entitled to consider this possibility:

> *Lord Phillips*: As a general proposition a local authority can reasonably expect that parents, who can afford the expense, will make any alterations to their home that are necessary for the care of their disabled children, if there is no alternative source of providing these. It is also reasonable to anticipate that some parents with means will not do so if they believe that this will result in the local authority making the alterations for them . . . A local authority can, in circumstances such as [these], properly decline to be satisfied that it is necessary to provide services to meet the needs of disabled children until it has been demonstrated that, having regard to their means, it is not reasonable to expect their parents to provide [them].

Convention rights again barely featured. There was no break in the line from *Barry* and the fact that 'loving parents' had 'demonstrated their devotion' allowed the court to side-step questions of disability and neglect raised potentially by Arts. 3 and 8.

3. Remedies: A precision instrument?

One of the most important aspects of grievance machinery is that it should provide effective redress. Here the conventional English machinery of judicial review has been seen to posses some notable capacities (powerful mandatory orders and injunctions). Chapter 15 also laid stress on the special attributes of the declaration (the judges' 'flexible friend') and on the expansion of the remedial tool-kit in part under European influence.

The image of 'the British motorway' (see p. 676 above) recalls some important constraints familiarly associated with the adjudicative procedure, however. Continuing pressures for more expansive uses of remedies, as also some judicial disagreement premised on different views of the courts' proper constitutional role, reflect this. For example, English judges have customarily not been enthusiastic to decide hypothetical issues or to lay down rules merely because some individual or group thinks it appropriate.[52] There are though an increasing number of 'exceptions',[53] bound up with the concept of the 'advi-

[51] *R (Spink) v Wandsworth LBC* [2005] EWCA Civ 302.

[52] *Gouriet v Union of Post Office Workers* [1978] AC 435 (Lord Diplock)

[53] To trace the development, see *Royal College of Nursing v DHSS* [1981] AC 800, *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112, *R v Home Secretary, ex p. Salem* [1999] 1 450, and *Kay v Commissioner of Police for the Metropolis* [2006] EWHC 1536.

sory declaration'.[54] Again, the domestic courts have routinely declined to intervene in active administration, although power now exists to make a substitute decision rather than referring the matter back to the original decision-maker[55], and experiments are beginning to be made with structural procedural review (see Chapter 14).

A major limitation on judicial process is the absence of procedures for monitoring impact and implementation. Unlike Parliament, courts cannot call for impact assessments or engage in 'post-litigation scrutiny'; unlike ombudsmen, they lack the ability to monitor treatment of similar cases. Take the case brought by Child Poverty Action Group (CPAG) on behalf of an unidentified class of welfare claimants (see p. 698 above) to establish endemic errors in the payment of benefits. Had the case been won by someone directly affected, an order to make back-payments would be possible, though a declaration of entitlement to back-payment is more likely. But a win by CPAG, which was not directly involved, would create problems of judicial remedy. The court might, in principle, order the department to take out and examine all the relevant files but, as noted earlier, English courts do not deal in 'structural injunctions'. This leaves a declaration that the decision was unlawful as the most likely remedy. The outcome then rests in departmental hands. The department may try to trace the class, as ombudsmen usually advise should be done. Legislation may be required to regularise the position and provide resources for compensation (see Chapter 17). Alternatively, a minister may opt for retrospective legislation depriving everyone of the fruits of the legal victory (see below). The utility of a successful challenge is thus questionable.

In judicial review an otherwise successful claimant has no automatic right to a remedy: even if the agency is held to have acted unlawfully, it is the court's prerogative to deny or fashion any relief. We caught sight of this element in a number of important cases:

- *Datafin* (prospective declaration only so as to avoid market disruption, see p. 317 above)
- *Bibi* (declaration on council house allocation re-written to draw the fangs of substantive legitimate expectation, see p. 225 above)
- *Edwards* (no quashing for failure of consultation in view of actual pollution levels, see p. 651 above)

Judge Over Your Shoulder (JOYS)[56] expands on the possibilities, explaining that relevant matters include:

- any prejudicial delay by the claimant in bringing the case
- whether the claimant has suffered substantial hardship
- any impact the remedy may have on third parties

[54] Sir J. Laws, 'Judicial remedies and the constitution' (1994) 57 *MLR* 213.
[55] See both CPR 54.19 and the Tribunals, Courts and Enforcement Act 2007 (TCEA), s. 141.
[56] TSol, *Judge over Your Shoulder*, 4th edn (Cabinet Office, 2006) [3.37].

- whether a remedy would have any practical effect or the matter has become academic
- the merits of the case
- whether the remedy would promote good administration.

Lord Bingham once sought to justify an element of judicial discretion on the ground that judicial review would enjoy greater legitimacy if it were seen 'as a precision instrument and not a juggernaut'. But given the evident threat to the rule of law and unfairness in sending the individual away empty-handed – not to say the elements of wasted time and expense at the end of a case – the technique should be 'strictly limited and the rules for its exercise clearly understood'.[57]

Yet as the parameters of judicial review expanded under the auspices of AJR procedure, so the extra so-called 'safeguard'[58] of the power to control remedy would take on greater prominence. This was the logic of the transaction typing on offer in *Datafin*, where judicial review was hardly a juggernaut![59] In certain situations, the courts may be surprisingly firm and, in the case of EU requirements, acutely aware of the need to rein in remedial discretion in order to ensure fulfilment of the Member State's obligations.[60] The typically open-ended criteria are nonetheless a recipe for uncertainty in individual cases, with much again riding on the attitude of the particular judge. The fact of considerable overlap with the permission criteria (see p. 671 above) underscores this point.

(a) Case examples

Involving some very different transaction types, a trio of cases will serve to illuminate the range of possibilities. Pointing up the particular difficulties presented by polycentric forms of decision-making, the first one is *Caswell*.[61] A pre-CPR case, it remains the leading authority on refusal of remedy by reason of 'undue delay' (see p. 690 above). Dairy farmers were permitted to produce only the amount of milk allocated to them under an EC quota system. The tribunal had fixed the applicants' quota on the basis of existing production, indicating – erroneously - that they could reapply for additional quota once the size of the herd increased. The applicants only became aware of the possibility of judicial review several years later through an article in the farming

[57] Sir T. Bingham, 'Should public law remedies be discretionary?' [1991] *PL* 64, 75. History did not always bear this out, as in a notorious line of cases excusing breach of natural justice: *Ex p. Fry* [1954] 1 WLR 730; *R v Aston University Senate, ex p. Roffey* [1969] 2 QB 538; *Glynn v Keele University* [1971] 2 All ER 89.

[58] Lord Woolf, 'Droit public, English style' [1995] *PL* 57.

[59] See also *R v Monopolies and Mergers Commission, ex p. Argyll Group plc* [1986] 1 WLR 763. The slightly earlier case of *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 115 had sent out similar messages in the context of an employment dispute.

[60] See to this effect, *Berkeley v Environment Secretary* [2003] 3 WLR 420.

[61] *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738.

press. Invoking the statutory discretion, the House of Lords refused to quash the decision and to compel a new allocation; only a declaration was available to mark the invalidity:

> *Lord Goff:* 'S. 31(6) of the Supreme Court Act 1981 recognises that there is an interest in good administration independently of hardship, or prejudice to the rights of third parties . . . In the present context that interest lies essentially in a regular flow of consistent decisions, made and published with reasonable despatch; in citizens knowing where they stand, and how they can order their affairs in the light of the relevant decision. Matters of particular importance, apart from the length of time itself, will be the extent of the effect of the relevant decision, and the impact which would be felt if it were to be reopened. The present case [concerns] a decision to allocate part of a finite amount of quota, and circumstances in which a reopening of the decision would lead to other applications to reopen similar decisions which, if successful, would lead to reopening the allocation of quota over a number of years. To me it is plain . . . that to grant the appellants the relief they sought in the present case after such a lapse of time had occurred, would be detrimental to good administration.

The case of *Caswell* sharply illustrates the clash of values in the judicial review process between on the one hand the rule of law function and effective redress[62] and on the other the efficiency of public administration and court process.[63] There was a strong case for individual protection in the form of financial interest, a claim buttressed by practical problems of access to justice; but, there were important practicalities of administration, with the impugned decision part of a system of rationing. Factoring in the interests of third parties not before the court, judicial review fell to be tempered.

The case of *Burke*,[64] our second selection, involves the difficult area of medical law and ethics. Highlighting the dangers of extravagant use of the judges' 'flexible friend', it bears directly on the constitutional role of the judiciary in this era of Convention rights. B suffered from a progressively degenerative condition similar to multiple sclerosis, which confined him to a wheelchair. He sought to challenge guidance from the General Medical Council to doctors dealing with the termination of life-prolonging treatment. In making a series of declarations under the auspices of ECHR Arts. 2, 3 and 8, only some of which specifically related to the case of the terminally-ill applicant, Munby J had taken it upon himself to rewrite large portions of the guidance. This involved substituting a 'quality of life' test for withdrawal of artificial nutrition and hydration for the tougher 'intolerability' test. On appeal, Lord Phillips took a more balanced view of the court's normative and expository role:

[62] As described in Ch. 17, compensation in such a case might have to be left to *ex gratia* procedures.

[63] The clash would typically be concealed in delay cases by the workings of 'permission'.

[64] *R (Burke) v General Medical Council* [2005] EWCA Civ 1003.

> *Lord Phillips*: It was not the task of a judge when sitting judicially – even in the Administrative Court – to set out to write a text book or practice manual. Yet the judge appears to have done just that . . . Indeed [the judgment] has been understood as bearing on the right to treatment generally, and not merely life prolonging treatment. It has led to the intervention in the proceedings before us [see p. 703 above]. The court should not be used as a general advice centre. The danger is that the court will enunciate propositions of principle without full appreciation of the implications that these will have in practice, throwing into confusion those who feel obliged to attempt to apply those principles in practice. This danger is particularly acute where the issues raised involve ethical questions that any court should be reluctant to address, unless driven to do so by the need to resolve a practical problem that requires the court's intervention . . .
>
> The first three declarations were extraordinary in nature in that they did not purport to resolve any issues between the parties, but appeared to be intended to lay down propositions of law binding on the world . . . The declarations as a whole go far beyond the current concerns of Mr Burke . . . It is our view that Mr. Burke's fears are addressed by the law as it currently stands and that declaratory relief, particularly in so far as it declares parts of the Guidance unlawful, is both unnecessary for Mr. Burke's protection and inappropriate as far as the Guidance itself is concerned.

Quashing the declarations the Court of Appeal nonetheless added as an expository footnote its view that it 'is of the utmost importance that the Guidance should be understood and implemented at every level throughout the National Health Service and throughout the medical profession . . . Having produced the Guidance, the task of the GMC . . . is to ensure that it is vigorously promulgated, taught, understood and implemented at every level and in every hospital.'

Burke sharply poses the question: will other judges prove strong enough to resist the temptation afforded by the 'flexible friend'?[65]

The third case, *R (C) v Justice Secretary*,[66] demonstrates more judicial disagreement over remedial discretion, this time in the parliamentary context of formal rule-making (see Chapter 4). The case concerned the permissible physical constraints imposed on young persons detained in secure training centres. The minister had laid amending regulations extending their use for the purposes of good order and discipline but had unlawfully failed to consult and to carry out a race equality impact assessment (as required by the amended s. 71 of the Race Relations Act 1971).[67] The Divisional Court declined to quash the statutory instrument, giving as reasons (i) that the Upper House had debated it under negative resolution procedure knowing of the failure to consult; and (ii) that the techniques were under active reconsideration. The Court of Appeal granted the remedy:

[65] See further, for divergent opinion in the House of Lords, *Oxfordshire County Council v Oxford City Council* [2006] UKHL 25.

[66] [2008] EWCA Civ 882.

[67] See further as regards s. 71, *R (Kaur and Shah) v Ealing LBC* [2008] EWHC 2062.

> *Keene LJ:* When delegated legislation is found to be ultra vires [this] should normally lead to the delegated legislation being quashed, and only in unusual circumstances would one expect to find a court exercising its discretion in such a way as to allow such legislation to remain in force. [68] Such legislation normally changes the law for the public generally or for a class of persons. It should not generally be allowed to stand if it has not come into being in accordance with the law, and certainly not merely because certain checks which should have been carried out beforehand are to be made subsequently. Such a course may well prejudge the outcome of those checks, and yet the public is expected to conduct its life in accordance with such delegated legislation in the meantime. That cannot normally be appropriate.

The judgment of Buxton LJ harks back to Dicey's theory of the 'balanced constitution' (see p. 4 above). (And compare the reasoning in *Huang*, see p. 147 above).

> *Buxton LJ:* There are two objections to reliance on the House of Lords debate, one practical and one of principle. The practical objection is that it is very hazardous to draw any conclusions from the observations of various speakers in a debate, and particularly a debate that is not pressed to a vote, as to what the majority of members understood, let alone decided or were prepared to overlook. To say or suggest that 'Parliament' had approved the failure to consult . . . is therefore an assumption too far. The objection of principle is that the Divisional Court's approach confuses two different constitutional functions. The legal obligation to take certain steps before laying legislation before Parliament is that of the executive. It is not Parliament's role to control that obligation: that is the function of the courts. Rather, the function of Parliament is simply to approve or disapprove the Amendment Rules as laid. Its failure to disapprove the Amendment Rules cannot supply the executive's failure to perform the legal obligations that it bears before laying the Amendment Rules in the first place.

4. In search of 'impact'

(a) Typology

Writing in the 1980s on the theme of legal 'control', Feldman[69] specified three different techniques of judicial intervention or effects on government:

- *directing*: the traditional judicial function of compelling government to adhere to stated legal powers and duties
- *limiting*: establishing the scope of, or setting the limits to the exercise of, discretion (for example, the common law rules against delegation and fettering of powers)
- *structuring*: making explicit values or goals that are to guide decision-making (for example, *Wednesbury* unreasonableness and the duty to act fairly).

[68] The Divisional Court had relied on remarks by Webster J in *R v Social Services Secretary, ex p. AMA* [1986] 1 WLR 1 to the opposite effect.

[69] D. Feldman, 'Judicial review: A way of controlling government?' (1988) 66 *Pub. Admin*. 21.

With 'directing', control is retrospective and specific. The agency is required to take steps to achieve legality, but there might be limited general impact or radiating effects. 'Limiting' potentially has a wider influence on the forms and structures of government (although liable today to be mediated by new modalities of 'governance' (the *Ealing* case, see p. 218 above)). In Feldman's view, 'structuring' affects administrators' day-to-day activities far more significantly than the other techniques, by reason of the greater exercise of prior control or provision of guidance.

This basic typology signals the way in which the various fire-watching functions of judicial review have assumed greater prominence in recent times. From this perspective, the general development in the grounds of review involves a shift of emphasis in favour of 'structuring' (as against the narrow *vires*-based explanation of judicial review exemplified by 'directing' and 'limiting').

The typology also casts light on some of the twists and turns in the cases. We can describe the House of Lords in *Barry* as refusing a request to perform the 'directing' function. Thus, Lord Nicholls was content with only 'structuring' in the form of *Wednesbury* unreasonableness. Conversely, we saw Lord Browne-Wilkinson in the *Tandy* case refuse to 'downgrade' the judicial contribution in this way. Another argument concerns the role of 'structuring'. As noted in Chapter 14, the hortatory or educative function of law, ultimately the internalising by administrators of legal values, may be threatened by flexible application of such an imprecise principle as 'fairness'. As the cases we have been discussing demonstrate only too clearly, the 'intuitive judgment' of courts can be difficult to fathom, let alone predict! Perhaps then it is not surprising to learn that ministers and officials 'complain that the principles of judicial review developed and applied by the courts are too uncertain'.[70]

Excessive structuring – too much juridification of the administrative process – also needs to be avoided. Notably in the *Denbigh High School* case (see p. 121 above), the Court of Appeal was seen moving beyond the expression of values or goals to prescribe in extraordinary detail the steps that headteachers should follow. Conversely, the results-oriented approach of the House of Lords serves both to underscore the importance of Convention rights in discussion of judicial review 'impact' and to limit it.

In view of today's multi-streamed jurisdiction, Feldman's classification can usefully be supplemented:

- *vindicating*: encompasses the transformative potential for judicial review of Convention rights (extending to positive obligations), while also reflecting the rise of merits-based scrutiny of public decision-making more generally.

[70] A. Le Sueur, 'The judicial review debate: From partnership to friction' (1996) *31 Government and Opposition* 8, 22; confirmed by S. James, 'The political and administrative consequences of judicial review' (1996) 74 *Pub. Admin.* 613.

(b) Formal reactions

'Formal' reactions to judicial review, typically a change to, or confirmation of, official agency policy, are usefully distinguished from 'informal' or behavioural or attitudinal ones, which are naturally more elusive. Whereas by definition the very many 'routine' cases can be expected to leave little individual mark, the sequels to particular, sometimes famous, pieces of litigation illustrate the very different ways in which government may respond to judicial decisions.[71] This aspect is further highlighted today by the rise of 'public-interest advocacy', the classic example being as in *Barry* the test case designed to achieve a marked 'ripple' effect, altering or sustaining administrative practice in large numbers of cases.

Negative responses include a strong type of formal reaction – valedictory legislation or nullification. This is classically illustrated in the aftermath of *Anisminic* (see p. 28 above). Another technique is to reaffirm or take the same decision twice as was done in *Padfield* (see p. 101 above). This highlights the limitations of procedural review that has the effect of returning the decision to the original decision-maker. Alternatively, there may be attempts at secrecy, such as by 'boiler-plate reasons'. Other stratagems familiar from the core litigation area of asylum claims bear directly on the court process: if not total ouster then attenuated forms of legal aid and statutory review (see p. 519 above).

As a long-standing public-interest advocate, the endeavours of CPAG are replete with examples of parliamentary sovereignty being used to 'trump' the judicial power. Ministers proved particularly adept at drawing the sting of those challenges designed to benefit a large class of persons that were successful.[72] Statutory provisions might be inserted to the effect that the ruling would not apply to other, similar, claims in the pipeline; alternatively, Parliament might be asked to restrict the back-dating of welfare payments to other, similarly placed individuals. Even on this traditional constitutional scenario however, valedictory legislation does not deprive judicial review of all its 'impact'. As a vehicle of interest representation, one of the functions of court process is to open up a particular policy to public debate. Following the celebrated *Fire Brigades* case (see p. 145 above), for example, the Government had to make substantial concessions when drafting a statutory scheme.[73]

With the multi-streamed jurisdiction, matters are typically more complex. Within the domestic arena, ministers' freedom of manoeuvre may be more circumscribed, partly with the aid of the expanded toolbox of legal remedies. No longer is the judicial power so easily 'trumped' by legislative power, if indeed

[71] Early studies are C. Harlow, 'Administrative reaction to judicial review' [1976] *PL* 116 and T. Prosser, 'Politics and judicial review: The Atkinson case and its aftermath' [1979] *PL* 59.

[72] T. Prosser, *Test Cases for the Poor* (CPAG, 1993). See especially *R v Social Fund Inspector, ex p. Stitt* [1990] COD 288 and *Bate v Chief Adjudication Officer* [1996] 1 WLR 814.

[73] G. Ganz, 'Criminal injuries compensation: The constitutional issue' (1996) 59 *MLR* 95.

it can be. From this perspective, 'transforming judicial review' (see Chapter 3) has a dual effect: not only biting more deeply on the policy-making sinews of government, but also limiting its capacity for a muscular response. The evident difficulties which ministers now face in securing ouster clauses, not least if EC law is in play (*Johnston*, see p. 30 above), and the requirement, through the 'representation-reinforcing' principle of legality (*Sims*, see p. 119 above), to use primary legislation when interfering with fundamental rights, illustrate this further element of judicial 'counter-reaction'.

Having strictly no effect on the validity, continuing operation or enforcement of legislation, the HRA, s. 4 declaration of incompatibility provides a different scenario. In the shadow of the (unincorporated) ECHR Art. 13 right to an effective remedy,[74] implementation is naturally the subject of anxious scrutiny by the Joint Committee on Human Rights.[75] Thus far, legislative action has consistently been taken to remove the defect,[76] underscoring and vindicating the 'dialogue model' of human rights protection (see Chapter 3). As shown in the aftermath of *A (No. 1)* however, there is also the possibility with successful claims of inconsistency or discrimination of 'levelling-down' (see p. 132 above).

(c) Influence: Interpretation and reinterpretation

As against 'red light' views of the chief role of courts, impact studies commonly emphasise 'the limited ability of judicial review to influence administrative decision-making'.[77] Lawyers themselves all too often conflate court orders with enforceability and compliance, so glossing over the kaleidoscopic quality of the relationship between judicial and administrative decision-taking – complex and dynamic, if not always beautiful, in all its varieties.[78]

A pioneering study into the effects on prison administration found 'a legalising of prison culture', with a marked emphasis on process – clear criteria, consistency, and reformed disciplinary procedures – as 'judicial review's most enduring impact'. A theme familiar from procedural fairness (see Chapter 14), the courts had 'been happiest' when imposing adjudicative style constraints. In contrast, in substantive terms:

[74] See now *Burden v United Kingdom*, App. 13358/05 (29 April 2008).

[75] JCHR, *Monitoring the Government's Response to Human Rights Judgments: Annual Report 2008*, HC 1078 (2007/8). By mid-2008, 15 declarations of incompatibility had become final in their entirety. A further 7 had been overturned on appeal.

[76] See for details, J. Beatson *et al.*, *Human Rights: Judicial protection in the United Kingdom* (Sweet & Maxwell, 2008), pp. 522–33.

[77] G. Richardson, 'Impact studies in the United Kingdom' in Hertogh and Halliday (eds.), *Judicial Review and Bureaucratic Impact*, p. 112. For a case study of what happens when judicial review is emphatically not 'sporadic and peripheral', see p. 738 below.

[78] That impact studies are plagued with methodological difficulty itself points up the deceptive simplicity of 'judicial control'. For a valuable comparative perspective, see B. Canon, 'Studying bureaucratic implementation of judicial policies in the United States', in Hertogh and Halliday (eds.), *Judicial Review and Bureaucratic Impact*.

> Judicial review has had less impact on either the framework of policy-making in relation to prisons or on the exercise of low level discretionary powers deemed essential to prison management . . . Judicial review operates primarily to correct aberrations in bureaucratic decision-making but ultimately tends to find itself powerless before the arbitrariness which is often the normality of prison life. This is perhaps why it has had so little impact on prisoners' living and working conditions, a field that probably is best left to the more detailed investigative work of bodies like the . . . Chief Inspector of Prisons.[79]

A study of 'judge-made regulation' in hard-pressed housing authorities points up the difficulty for this 'external control' in penetrating at the ground-floor level. Effectively framed by the availability of empty properties for allocation, the administrative routines were closely governed by such factors as agency relations and expediency:

> Legalistic perceptions of the 'law' will rarely be of more than minor significance. This is not to say that statute or case law has no hortatory role to play in structuring administrative behaviour . . . It is clear that the threat of judicial review can have a marked short term effect on senior officers' perception of the way the administrative process should be controlled. But legalism is an intruder into the administrative arena. It does not prescribe administrative behaviour, but challenges it. It does not facilitate the decision-making process, rather it gets in the way. It is not respected, but ignored. And if it cannot be ignored it is grudgingly accepted as an unrealistic impediment to rational decision-making.[80]

Some studies also suggest that where judicial review does have an influence it tends to be negative. Though a natural accompaniment[81] to 'transforming judicial review', concerns about 'defensive administration' – unduly cautious and inhibited decision-making in the context of threats of litigation (real or perceived) – are hardly new. Take the aftermath of the famous *Bromley* case (see p. 103 above). Confronted by the House of Lords with 'fiduciary duty', some authorities bowed to the spirit of the decision and altered direction, while others resorted to creative lawyering to secure established policy.[82] Further (a standard example of juridification):

> The need to demonstrate the reasonableness of the policy process by routinely consulting political and legal interests has led to greater formality in the organisational arrangements

[79] S. Livingstone, 'The impact of judicial review on prisons' in Hadfield (ed.), *Judicial Review: A thematic approach* (Gill & MacMillan, 1995), pp. 180–2. See also, M. Loughlin and P. Quinn, 'Prisons, rules and courts: A study of administrative law' (1993) 56 *MLR* 497.

[80] I. Loveland, 'Administrative law, administrative processes, and the housing of homeless persons: A view from the sharp end' (1991) 10 *J. of Social Welfare and Family Law* 4, 21–2. See further, I. Loveland, *Housing Homeless Persons: Administrative law and the administrative process* (Clarendon Press, 1995).

[81] See e.g. BRTF, *Better Routes to Redress* (2004).

[82] See *R v Merseyside County Council, ex p. Great Universal Stores Ltd* (1982) 80 LGR 639; *R v London Transport Executive, ex p. Greater London Council* [1983] 1 QB 484.

> of decision-making – in short, to greater bureaucracy. Accompanying the increasing rules and procedures [is] an extension in the amount of time spent in formal meetings and a growth in paperwork . . . The taking of legal advice, of visiting counsel, has now become an established feature of the local authority's policy-making process. . . The intrusion of the legal soothsayers erodes the authority of elected members in quite a fundamental way. [83]

Other research points up the limiting effects for generalist judicial review of highly specialised administrative contexts that are replete with their own institutional frameworks and cultures. For example, the influence on decision-making by the Mental Health Review Tribunal has been characterised as 'patchy at best':

> Admittedly, compliance with certain judicial requirements was high, but wherever there was a conflict between medical and juridical norms the former tended to prevail, even where the juridical norm related to process . . . The MHRT [may be] exceptional in the degree of reliance it has to place on disciplines other than the law. But it is not unique in having to relate to other systems, and reviewing courts must regularly issue rulings which could be expected to apply across competing systems. On the basis of the data from the MHRT, the influence of such rulings on subsequent bureaucratic decision-making is likely to be minimal unless some attempt is made to accommodate alternative value systems.[84]

Nor should it be surprising to learn of changing 'impact' over time. Take the review function performed by the Social Fund Inspectorate (now IRS), itself modelled on judicial review (see p. 503 above). At first, the small stream of court challenges to the agency:

> provided operational clarity to the new organisation. It also served a broader legitimating role. By linking the [inspectors'] approach to judicial review norms such as natural justice, the Commissioner was able to emphasise the legal nature of their task. That the IRS could be challenged in the courts and be held legally accountable was also of importance to the portrayal of IRS as an organisation bedded within the law . . . The ability to withstand judicial review scrutiny was adopted as a key internal measure of the quality of [inspectors'] decision taking . . . Judicial review decisions were also studied in detail and 'milked' for the guidance they offered and for identifying training needs.[85]

Later, however, with new-public-management-style concerns with efficient service delivery increasingly dominating, 'ensuring compliance with the pos-

[83] L. Bridges, C. Game, O. Lomas, J. McBride and S. Ranson, *Legality and Local Politics* (Avebury, 1987), pp. 110–11.

[84] Richardson, 'Impact studies in the United Kingdom', p. 126, drawing on G. Richardson and I. Machin, 'Judicial Review and Tribunal Decision-Making' [2000] *PL* 494.

[85] M. Sunkin and K. Pick, 'The changing impact of judicial review: The independent review of the social fund' (2001) *PL* 736, 746 –7. See also, T. Buck, 'Judicial review and the discretionary social fund: The impact on a respondent organisation' in Buck (ed.), *Judicial Review and Social Welfare* (Pinter, 1998).

sible expectations of judges' took a back seat. 'Juridical norms are expected to serve organisational goals rather than drive them.'[86]

As against simple 'cause and effect', that 'impact' involves interaction with other informing influences is an important sociological theme elaborated in another, more recent, study of judicial review and homelessness decision-making:

> In different ways, professional intuition, systemic suspicion, bureaucratic expediency, judgements about the moral desert of applicants, inter-officer relations, financial constraint and other values and pressures all played a part in how judicial review impacted upon decision-making in the three local authorities . . . The 'impact' of judicial review, of course, is not an 'either/or' matter, but is a question of degree. However, these research findings demonstrate that, despite extensive and prolonged exposure to judicial scrutiny, unlawful decision-making was rife in each authority. In different (and sometimes subtle) ways the local authorities' administrative processes displayed considerable evidence of values and priorities which were in conflict with the norms of administrative law.[87]

Attention is drawn to the contingent meaning of law in the bureaucracy; the way in which messages emanating from judicial review are subject to distortion through processes of interpretation and reinterpretation. 'What the court proclaims is not always what the agency understands . . . there is also an important need for adequate communication within the agency itself.' [88] In helping to point up conditions liable to promote impact – clarity and consistency in the case law, high levels of legal cognisance and competence inside the agency, legal conscientiousness or public service ethos of fidelity to law among officials – this usefully suggests some practical actions. The problem of course is execution across the length and breadth of government.

5. Mainstreaming?

One measure of the increased seriousness with which government regards judicial review is the steps taken to train staff to avoid taking attackable decisions. Already in 1983 the then Treasury Solicitor was complaining publicly about the number of cases the Crown was losing. Perhaps predictably, Sir Michael Kerry[89] identified limited legal awareness among officials as the root cause of government vulnerability. Challenge was here being made to tradi-

[86] *Ibid*., p. 759.

[87] S. Halliday, 'The influence of judicial review on bureaucratic decision making' (2000) *PL* 110, 116–7, 122. And see S. Halliday, *Judicial Review and Compliance with Administrative Law* (Hart Publishing, 2004).

[88] M. Hertogh and S. Halliday, 'Judicial Review and Bureaucratic Impact in Future Research', in Hertogh and Halliday (eds.), *Judicial Review and Bureaucratic Impact*, p. 280.

[89] M. Kerry, 'Administrative law and the administration' (1983) 3 *Management in Government* 170 and 'Administrative law and judicial review: The practical effects of developments over the last twenty five years on administration in central government' (1986) 64 *Pub. Admin*. 163.

tional civil service views of law and lawyers as peripheral to the administrative process, encapsulated in the confining of departmental lawyers to legal as opposed to policy matters.[90]

Reflecting and reinforcing the trend towards juridification of the administrative process, a more systematic approach designed to anticipate legal challenge became a priority for senior Whitehall officials.[91] As well as in-house legal training, emphasis was laid on such steps as more proactive use of lawyers at the planning stages of policy-making, more thorough review of case work by managers and greater use of counsel especially in the drafting of legislation. The first edition of the Treasury Solicitor's basic guide to judicial review for non-lawyer civil servants also appeared. *The Judge Over Your Shoulder* (JOYS) published in 1987 set out to 'highlight the danger areas' and 'enable warning bells to ring'. By 1994 the then Cabinet Secretary was claiming publicly that 'awareness of administrative law has greatly increased amongst civil servants'.[92]

Notwithstanding the hostile public comment in which ministers have sometimes chosen to indulge (see Chapter 3), later versions of JOYS evince, in the words of a former Treasury Solicitor, a more 'constructive spirit'.[93] Substantially rewritten in light of the HRA, the current edition aims 'to emphasise what is best practice in administrative decision-making, rather than what you can get away with'.[94] Perhaps hopefully, another former Treasury Solicitor believes that 'the principles of good administration . . . developed so assiduously by the courts now form part of every decision maker's frame of reference'.[95] Dame Juliet Wheldon also draws attention here to the 'particular responsibility' of the Government Legal Service; not least, one is tempted to add, in authoritarian times:

> Members of the GLS, as qualified lawyers bound by the same standards of professional ethics as those in practice, must provide objective advice on the legality of Government actions every day. That happens in the development of policy, and in litigation. It does not matter whether the matter is one of high policy or is mundane. My point is that the professional integrity of members of the GLS has a real role to play in embedding the rule of law within Government, and confirming it as a principle of institutional morality. Putting it another way, Government lawyers are the first line of defence when this principle is threatened.[96]

[90] B. Abel-Smith and R. Stevens, *Lawyers and the Courts* (Heinemann, 1967). See further, T. Daintith and A. Page, *The Executive in the Constitution* (Oxford University Press, 1999).
[91] Tracked by M. Sunkin and A. Le Sueur, 'Can government control judicial review?' (1991) 44 *Current Legal Problems* 161.
[92] R. Butler, Foreword to TSol, *The Judge Over Your Shoulder*, 2nd edn (Cabinet Office, 1994).
[93] A. Hammond. 'Judicial review: Continuing interplay between law and policy' [1998] *PL* 34, 39.
[94] TSol, *Judge over Your Shoulder* (2006 version) [1].
[95] Dame J. Wheldon, 'Judicial review from the government perspective', p. 7.
[96] *Ibid*., p. 8.

(a) Enter Convention rights

Efforts to promote legal learning inside government naturally intensified with the looming prospect of courts adjudicating under the HRA. Lord Chancellor Irvine spoke, no less, of creating a society 'in which our public institutions are habitually, automatically responsive to human rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take'.[97] A Human Rights Task Force was established by the Home Office, consisting of ministers, civil servants and representatives of public agencies and 'public interest' groups, and given special responsibility for producing and disseminating 'core guidance' for public authorities. 'Respect for Convention rights should be at the very heart of everything you do.' 'You should be able to justify your decisions in the context of the Convention rights, and show that you have considered the Convention rights and dealt with any issues arising out of such a consideration'.[98] Read in light of the subsequent House of Lords ruling in *Denbigh High School* (see p. 121 above), this might even be considered excessively 'positive'!

The scale of the task should not be underestimated. Human rights advocates had to contend here with the workings of multi-layered governance. Central government departments,[99] the new devolved administrations,[100] local authorities,[101] agencies etc.[102] engaged in frontline service provision would all need (continuous) guidance specifically geared to different policy domains. Nor should mere guidance or provision of information be confused with the altogether more demanding activity of 'mainstreaming' human rights principles and values in the administrative process.[103] There would soon be an increasing mound of evidence of problems of compliance.

A report in 2003 from the Audit Commission set the tone:

> The impact of the Act is in danger of stalling and the initial flurry of activity surrounding its introduction has waned . . . 58% of public bodies surveyed [in England] still have not adopted a strategy for human rights. In many local authorities the Act has not left the desks of the lawyers. In health, 73% of trusts are not taking action . . .

[97] Lord Irvine, *Evidence to JCHR*, HC 332-ii (2001/2) [38]. The place of human rights considerations in the legislative process was discussed in Ch. 4.

[98] Human Rights Task Force, *A New Era of Rights and Responsibilities: Core guidance for public authorities* 2000, pp. 3, 17.

[99] See Cabinet Office, *The Human Rights Act 1998: Guidance for departments*, 2nd edn (London, 2000).

[100] See e.g. National Assembly for Wales, *Human Rights Act Implementation: Action plan* (2000); R. Rawlings, 'Taking Wales seriously' in Campbell, Ewing and Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford University Press, 2001).

[101] L. Clements and R. Morris, 'The millennium blip: The Human Rights Act 1998 and local government' in Halliday and Schmidt (eds.), *Human Rights Brought Home: Socio-legal perspectives on human rights in the national context* (Hart Publishing, 2004).

[102] The NHS Litigation Authority would pioneer an online human rights information service, available on its website.

[103] S. Cooke, 'Securing human rights through promotion and training' 57 *NILQ* (2006) 205.

> The challenge for public bodies is to learn from legal cases in order to avoid similar litigation in the future; and to apply a human rights framework to the decision making across public services in order to achieve better service provision . . . Our assessment showed that 56% of public bodies were not monitoring case law developments on a regular basis . . . The problem is exacerbated in health because it is difficult to identify an appropriate officer who has responsibility for overseeing and monitoring developments.[104]

In urging agencies to adopt creative strategies and techniques of compliance, 'positively promoting human rights', the Audit Commission typically stressed the bottom line. Court cases had 'resulted in legal costs and penalties' and 'damage to an organisation's reputation'. 'Human rights' could do with a dose of 'meta-regulation' (see p. 244 above). As well as the ubiquitous demand for 'risk assessment', the Commission thus stipulated self-assessment tools and checklists, and standardised, periodic reviews of management arrangements. Also pointing up the important role which 'bureaucratic regulators' may play in determining the 'impact' of judicial rulings through follow-up, the Commission looked to include human rights activities as 'scoring elements' in its major inspectorial tool of comprehensive performance assessment.

According to a 2005 report from the Institute of Public Policy Research, the HRA had 'not yet been of demonstrable value in improving standards in public services'. The report referred specifically to:

> the fields of social services, health, social care and housing where a low understanding of the relevance of the Act to service provision combines with a consequent risk that vulnerable and marginalised people will experience breaches of their human rights . . . Most public authorities are struggling to implement a proactive human rights strategy and to achieve changes in practice and consequently the Act is not widely viewed as a tool to achieve better public services.[105]

The report also pointed up the inefficiencies involved in judicial 'firefighting'; even apparently 'successful' test cases had their downside. 'The public authorities concerned could have (and indeed should have) found ways of introducing human rights thinking at the stage when the policies were formulated. There could also have been more effective participation by those affected by the policies before they were implemented, which would probably have avoided the deleterious consequences that followed.'[106] Taking rights seriously was again said to require a strong dose of 'audit technique' involving both quantitative and qualitative indicators.[107]

[104] Audit Commission, *Human Rights : Improving public service delivery* (2003), pp. 3, 7, 15.

[105] F. Butler, *Improving Public Services: Using the human rights approach* (IPPR, 2005), pp. 4, 7. See also, F. Butler, *Human Rights: Who needs them? Using human rights in the voluntary sector* (IPPR, 2004).

[106] The case under discussion is *R v East Sussex CC, ex p. A* [2003] EWHC 167.

[107] As also human rights specifications in contracts with private providers of public services: see above, p. 365.

Concerns about mistaken compliance are common currency with the HRA. A central component of the legal framework is in issue here, the need to strike a fair balance with the wider public interest or rights of other individuals. If judges, according to other judges, sometimes get this wrong, why should one expect front-line staff, especially those working in difficult areas of risk assessment, and possibly subject to threats of judicial review, never to go overboard in respect for a person's rights?

As noted in Chapter 3, the perception of 'public protection versus human rights considerations'[108] has fuelled the debate over a British Bill of Rights (and Responsibilities). Predictably, the resulting government reviews present a more nuanced picture. The Home Office found some evidence of staff in the criminal justice system either being overcautious in applying the jurisprudence when making decisions or using human rights principles as a justification for an overcautious approach; this hardly amounted however to 'a culture of risk aversion'.[109] The Department for Constitutional Affairs' review was more concerned to stress the positive aspects developing over time:

> The evidence provided by Departments shows how the Act has led to a shift away from inflexible or blanket policies towards those which are capable of adjustment to recognise the circumstances and characteristics of individuals . . . As the principles have become more embedded – and in some cases in response to the fear of litigation – policies and practices have been adjusted to ensure compliance with Convention rights and they are a more explicitly recognised part of the decision-making process. In some cases, the attaching of this greater weight to human rights considerations has been a positive move, as shown by . . . decision making in prisons in England and Wales. At this end of the spectrum, it is fair to conclude that this greater weight was necessary and correct. However, at the other end of the spectrum lie examples where this is not the case, and where misinterpretation of the effect of the Convention rights has led to an undue focus upon rights and entitlement of individuals.[110]

A flurry of communications ensued – websites, a Home Office 'hot-line' for frontline staff, and yet more written guidance.[111] 'Myth-busting advice' on how rights should be balanced now took priority.[112]

We are back too with the case for an independent regulatory agency, with limited institutional support[113] for human rights being seen as contributing to

[108] As stated by e.g. the 'Bridges report': HM Inspectorate of Probation, *Serious Further Offence review – Anthony Rice* (2006).

[109] See JCHR, *The Human Rights Act: The DCA and Home Office Reviews*, HC 1716 (2005/6).

[110] DCA, *Review of the Implementation of the Human Rights Act* (2006), pp. 4, 25.

[111] DCA, *Guide to the Human Rights Act*, 3rd edn (2006) and *Human Rights, Human Lives: A handbook for public authorities* (2006).

[112] MoJ, *Guidance on the Human Rights Act for Criminal Justice System Practitioners* (2007).

[113] Otherwise than with the Northern Ireland Human Rights Commission; see C. Harvey, 'Human rights and equality in Northern Ireland' (2006) 57 NILQ 215. And see A. O'Neill, '"Stands Scotland where it did?" Devolution, human rights and the Scottish constitution seven years on' (2006) 57 *NILQ* 102.

a lack of impact in many sectors.[114] The judiciary, in other words, needs help. Pressing the case, the Joint Committee noted that 'litigation is an essential last resort in protecting the rights of the individual or groups, but is not the most effective means of developing a culture of human rights.' 'A human rights commission probing, questioning and encouraging public bodies could have a real impact . . . and complement the courts by preventing breaches of rights occurring through the spread of best practice and greater awareness.'[115]

In the event, one of the very first actions of the new Equality and Human Rights Commission has been the requisite 'benchmarking' exercise of an inquiry into 'how human rights works' in England and Wales.[116] With barriers on the use of human-rights principles in public-service provision as chief focus, the inquiry should further highlight the importance for 'impact' of interlocking roles of judicial review, regulation and inspection, and complaints handling. What Francesca Klug, the lead commissioner on the inquiry, calls the 'long road to human rights compliance'[117] is in truth never-ending.

6. Litigation saga

The scope for reaction and counter-reaction between government and judiciary is particularly well illustrated by the so-called 's. 55 litigation', a main preoccupation for the Administrative Court in the period 2003–5. Characterised by multitudinous individual claims and successive test-case challenges involving a key plank of government policy, this in fact is the most extensive 'litigation saga' to date with AJR machinery. Involving a full set of repeat players (Home Office, campaign groups, specialist lawyers), and eventually culminating in a major House of Lords precedent (*Limbuela*),[118] the affair casts further light on judicial review's function in redress of grievance and on the role and interplay with the common law of Convention rights.[119] Far from the happy idea of 'partnership', there is sharp conflict between the executive and the judiciary in the context of draconian legislation directed at a vulnerable group; exceptional caseload pressures also see tensions rising inside the judicial branch.

[114] F. Klug and K. Starmer, 'Standing back from the Human Rights Act: How effective is it five years on?' [2005] *PL* 716.

[115] As well as working to raise public awareness: JCHR, *The Case for a Human Rights Commission*, HC 489 (2002/3), p. 6. For the subsequent policy development, see A. Lester and K. Beattie, 'The new Commission for Equality and Human Rights' [2006] *PL* 197.

[116] Using its general power of investigation in s. 16 of the Equality Act 2006. The report is expected in mid-2009.

[117] F. Klug, 'The long road to human rights compliance' (2006) 57 *NILQ*186. And see D. Galligan and D. Sandler, 'Implementing human rights' in Halliday and Schmidt (eds.), *Human Rights Brought Home: Socio-legal perspectives on human rights in a national context* (Hart Publishing, 2004).

[118] *R (Limbuela) v Home Secretary* [2004] 3 WLR 561 (CA); [2005] 3 WLR 1014 (HL).

[119] See also E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Hart Publishing, 2007), p. 254–74.

(a) Scene-setting

Section 95 of the Immigration and Asylum Act 1999 empowered the minister to provide support to asylum-seekers who were destitute, as defined in terms of (no appropriate) accommodation and essential living needs. This would be the day-to-day responsibility of the National Asylum Support Service, a department established by the Home Office.[120] However, s. 55 of the Nationality, Immigration and Asylum Act 2002 provided for refusal of access to NAAS to those making 'late' asylum claims. Support was thus denied to large numbers of asylum seekers who applied for refugee status not at a port of entry but 'in-country'. Section 55 built in turn on another key aspect of government policy – restriction on would-be refugees taking paid employment.[121]

Set in the immediate context of a major bulge of asylum applications, s. 55 served several related policy objectives. By demanding prompt asylum claims, ministers could hit at those who were not genuine asylum seekers, as also those who had demonstrated ability to live without state support. The provision doubled as a way of reducing the (heavy) cost to the Treasury of asylum support and of limiting the attractiveness of the UK for asylum seekers. 'Encouraging' asylum seekers to make application at the ports was helpful to the authorities in determining matters like personal identity or country of origin, as also in making things more difficult for the (criminal) 'facilitators' or agents often accompanying these people.

On the EU front, ministers had successfully prepared the way in negotiations on a directive, securing a special exception to permit this type of statutory restriction.[122] That left ECHR Art. 3 (inhuman or degrading treatment) to contend with. Since the policy amounted to destitution by design, a declaration of incompatibility was in prospect if the legislation said nothing more. Showing the importance of statements of compatibility under s. 19 of the HRA (see p. 148 above), ministers were effectively pressured to demonstrate compliance on the face of the Bill.[123]

The upshot is an unusual statutory equation. First, the minister is forbidden from exercising a statutory function in certain circumstances. The Secretary of State 'may not provide or arrange for the provision of support' to an asylum seeker if he 'is not satisfied that the claim was made as soon as reasonably practicable after the person's arrival in the United Kingdom' (s. 55(1)). Secondly, constituting an exception to the exception to the power to provide for destitute people, 'this section shall not prevent . . . the exercise of a power by the Secretary of State to the extent necessary for the purpose of avoiding a breach of a person's Convention rights' (s. 55(5)(a)).[124] Thirdly, access to the

[120] See JCHR, *The Treatment of Asylum Seekers*, HC 60-1 (2006/7).
[121] See latterly on this aspect, *Tekle v Home Secretary* [2008] EWHC 3064.
[122] Council Directive 2003/9/EC of 27 January 2003, Art. 16(2). This was part of CEAS, the burgeoning Common European Asylum System.
[123] JCHR, *Twenty-third Report*, HC 1255 (2001/2).
[124] Exceptions were also made for children and for those with 'special needs'.

standard appeals machinery of an asylum support adjudicator is blocked (s. 55(10)).

Section 55(5)(a) locks up with the rule of administrative illegality in s. 6 of the HRA – acting in a way that is incompatible with a Convention right. The minister was thus permitted *and* obliged to arrange for the provision of support to avoid this happening. Lord Bingham in *Limbuela* would later elaborate on the somewhat fiendish complications (would the hard-pressed junior officer on the front line understand?):

> The Secretary of State . . . may only exercise his power to provide or arrange support where it is necessary to do so to avoid a breach and to the extent necessary for that purpose. He may not exercise his power where it is not necessary to do so to avoid a breach or to an extent greater than necessary for that purpose. Where (and to the extent) that exercise of the power is necessary, the Secretary of State is subject to a duty, and has no choice, since it is unlawful for him under s. 6 of the 1998 Act to act incompatibly with a Convention right. Where (and to the extent) that exercise of the power is not necessary, the Secretary of State is subject to a statutory prohibition, and again has no choice. Thus the Secretary of State (in practice, of course, officials acting on his behalf) must make a judgement on the situation of the individual applicant matched against what the Convention requires or proscribes, but he has, in the strict sense, no discretion.[125]

Section 55 was not the first such attempt at parsimony. By the time the Court of Appeal first considered the provision in *R (Q)*,[126] there was a whole history of judicial 'guerrilla warfare', the courts repeatedly attacking harsh measures and central government responding with various heavy armaments ranging from primary legislation to propaganda (use of the media). An alternative characterisation is that of a protracted 'litigation game' played for high stakes:

- *Ping* – secondary legislation is introduced in 1996 purporting to restrict entitlement to income support to those asylum seekers who claim asylum on arrival.[127]
- *Pong* – invoking the principle of legality, the regulations are said in the *JCWI* case (see p. 114 above) to be *ultra vires* as contemplating for some 'a life so destitute that . . . no civilised nation can tolerate it'.
- *Ping* – ministers immediately move a new clause to what becomes the Asylum and Immigration Act 1996, so reinstating the 1996 Regulations from the date of the statute; the Act also removes the right to housing benefit and assistance in respect of homelessness.
- *Pong* – asylum seekers thus deprived of the right to benefits are said, in the case of *M*,[128] still to be entitled to care and attention from local authorities, including accommodation, under the National Assistance Act 1948.

[125] Lord Bingham in *R (Limbuela) v Home Secretary* [2005] 3 WLR 1014 (HL) [5].
[126] *R (Q) v Home Secretary* [2003] 3 WLR 365.
[127] Social Security (Persons from Abroad) Miscellaneous Amendments Regulations 1996, SI No. 30.
[128] *R v Westminster City Council, ex p. M* (1997) 1 CCLR 85.

- *Ping* – (a) in establishing the central government scheme administered by the National Asylum Support Service (NASS), the Immigration and Asylum Act 1999 counters *M*,[129] excluding the operation of the 1948 Act in cases solely of destitution; (b) the Nationality, Immigration and Asylum Act 2002 amends the scheme, targeting late claims.
- *Pong* – administration of the s. 55 prohibition is successfully challenged in the High Court in *R (Q)*, both for breach of procedural fairness and for contravention of Convention Rights. Home Secretary David Blunkett is reported as being 'fed up' with the wishes of Parliament being overturned by judges: 'Parliament did debate this, we were aware of the circumstances, we did mean what we said and, on behalf of the British people, we are going to implement it.' [130]

(b) Twists and turns

Brought on behalf of six asylum seekers from Africa and the Middle East, some of whom were deeply traumatised, the proceedings in *R (Q)* had been launched within days of s. 55 being implemented; several hundred more claims were soon in the pipeline. Settling on the test for a late claim of whether the asylum seeker could reasonably have been expected to apply earlier, the Court of Appeal took a hard look at the practical workings. A product of poor management and organisation, the lack of procedural fairness was evident; for example, the purpose of the relevant interview was not properly explained and no clear opportunity was provided to rebut the suggestion that the applicant was lying. 'Fairness called for interviewing skills and a more flexible approach than simply completing a standard form questionnaire.' Further, *R (Q)* is the rare example of the national court deciding, for the purpose of the ECHR Art. 6 test of 'full jurisdiction' (see p. 661 above), that judicial review is insufficient: the inadequacies of the procedure 'rendered it impossible for the officials . . . to make an informed determination of matters central to the asylum seekers' civil rights'; 'the court conducting the judicial review was equally unable to do so'.

With Art. 3, the issue of resources cast a shadow; how could the Convention right be used to provide individual protection in such cases without being opened up so as to undermine the rationing of welfare services more generally?[131] In holding that Art. 3 might be engaged, the judges recognised the fact of more than passivity on the part of the state; denying individuals both the opportunity to work and any public assistance effectively differentiated these cases. As to the point at which a lack of support became inhuman or degrading, however, it was 'quite impossible by a simple definition to embrace all human conditions that will engage Article 3'.

[129] Though see *Kola v Secretary of State for Work and Pensions* [2007] UKHL 54.

[130] *The Times* 20 February 2003.

[131] See further, C. O'Cinneide, 'A modest proposal: Restitution, state responsibility and the European Convention on Human Rights' [2008] *EHRLR* 583.

The judges naturally referred to the test in Strasbourg jurisprudence of 'ill-treatment that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering'. Degrading treatment occurred where it 'humiliates or debases an individual showing lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'.[132] But the Court of Appeal went on to impose a high threshold on claims. Whereas the High Court judge had clearly prioritised protection of the individual, saying that 'a real risk' was sufficient, Lord Phillips spoke of a lesser form of public obligation:

> It is not unlawful for the Secretary of State to decline to provide support unless and until it is clear that charitable support has not been provided and the individual is incapable of fending for himself . . . He must, however, be prepared to entertain further applications from those to whom he has refused support who have not been able to find any charitable support or other lawful means of fending for themselves.

What then was the 'impact'? Showing the 'structuring' role of judicial review, the ruling impelled a clean-up of procedures. Sundry improvements were made to the interviewing process, with a view, the minister explained, to ensuring that individual cases received full and fair consideration.[133] Precisely illustrating the contingent meaning of law in the bureaucracy, the court's interpretation of the statutory formula was soon being reinterpreted within the administrative system. Guidance to officials thus placed the burden of demonstrating promptness firmly on the 'in-country' applicant,[134] standard (unpublished) practice being to allow twenty-four hours.[135] Meanwhile, the court's reasoning conjured up the prospect of a further wave of litigation, grounded in multiple or serial applications for asylum support invoking Art. 3. With the charities being all too easily overwhelmed, the Court of Appeal was soon handed a second bite at the cherry.

The case of *R (T)*[136] originally involved several asylum seekers, including S, who had been forced to beg for some considerable time, suffering psychological problems and malnutrition. The judge recognised the degrading treatment: the refusal of public support had 'debased' S and 'diminished his human dignity'. T had been living rough at Heathrow airport, becoming 'increasingly demoralised and humiliated' and finding it 'difficult to rest or sleep'. The Court of Appeal ruled against him however. 'It is impossible to find that T's condition . . . had reached or was verging on the inhuman or the degrading. He had

[132] *Pretty v United Kingdom* (2002) 35 EHRR 1 [52].
[133] HC Deb., col. 522w (1 May 2003).
[134] Home Office Immigration and Nationality Department, *Section 55 (Late Claims) 2002 Act Guidance* (2004 version).
[135] HC Deb., col. 1594 (17 Dec. 2003).
[136] *R (T) v Home Secretary* [2003] EWCA 1285.

shelter, sanitary facilities and some money for food. He was not entirely well physically, but not so unwell as to need immediate treatment.'

R (T) dramatically illustrates the strong factual element in the s. 55 litigation, hence the size of the task facing Administrative Court judges in adjudicating on complicated and fast-changing personal circumstances. So much, it may be said, for the austere view of judicial review proceedings promulgated by Lord Diplock in *O'Reilly v Mackman* (see p. 680 above). Would the Court of Appeal assist?

> What we were being asked to do by both sides in this case was precisely that which was said in *Q* to be impossible, namely to provide a simple way of deciding when Article 3 will be engaged . . . The reality is that each case has to be judged in relation to all the circumstances which are relevant to it . . . But we do consider that a comparison of the facts of S and T may be of assistance to those who have to decide where the line is to be drawn if the obligations imposed by the Convention are to be met . . . It is relevant to have in mind that the boundary – which is not a fixed or a bright line – lies somewhere between the two.

R (T) in fact illustrates how judges may undercut their own contribution, the techniques of 'directing', 'limiting', 'structuring' and 'vindicating' being largely absent. 'No bright line' might sound well in the rarefied atmosphere of the Court of Appeal, but it was apt to ring hollow down on the front line of decision-making. This case too was a recipe for litigation.

Confirmation was not long in coming from Maurice Kay J, the lead judge in the Administrative Court.[137] 'Asylum support cases account for approximately 800 cases in our current workload. Clearly they are having a significant impact on the ability of the Court to process cases in this and other areas. It is [our] experience that, factually, the great majority of cases fall somewhere between *S* and *T*.' The additional twist was the chief place in the litigation of interim relief. In such circumstances of utter destitution, it would typically be a matter of seeking an injunction aimed either at preventing eviction from emergency accommodation or at forcing the hand of NASS to provide some. Far from the idealised form of adversarial court process, studied or even leisurely, happenings at the 'preliminary' stage were never more vital:

> In such circumstances the judges usually grant interim relief on the papers. If, instead, they adjourn the applications into court, the Secretary of State is usually not represented. In some cases a judge refuses to grant the application for interim relief or for permission because he considers it to be premature. In many such circumstances he suspects that a further application before very long would succeed.

Maurice Kay J rightly emphasised the financial wastefulness of all these proceedings; why not use the asylum support adjudicators? Far from judicial

[137] *R (Q) v Home Secretary* [2003] EWHC 2507.

review as the 'apex' of a pyramid, 'the Administrative Court is being put in the position of having to act as a first-call dispute resolution forum in an area where there are established alternatives which are better equipped for the task'.[138] In the event, this became the forcing ground for the elaboration of urgency procedures in judicial review (see p. 687 above).

In an unusual move following consultation with colleagues, the lead judge offered the minister some further thoughts. What was said about the impact – or otherwise – of judicial review exposes the fallacy of simple assumptions about court 'control' of the administration:

> There has been some improvement in the Secretary of State's procedures and decision-making since *Q*, but there are still a significant number of cases in which the claimant has at least an arguable case to the effect that the guidance in *Q* has not been followed . . . The answer is simple. It resides in the proper instruction of officials so that they do not resort to generic stereotyping regardless of the accepted evidence to the contrary. The point of test cases is to provide clarification and guidance for those who operate the system at the grassroots. It is a waste of time and ultimately very expensive if the clarification and guidance are ignored. It is the responsibility of the Secretary of State to ensure that it is not.
>
> The main reason why the vast majority of applications are being made and are succeeding is that quite simply there is not in place an adequate and efficient decision-making procedure for the processing of representations and particularly further representations which are made by reference to Article 3. I do not doubt that the Secretary of State wants there to be such a procedure. However, what is in place falls miles short of achieving the targets that were set by the Secretary of State himself.

The following 'guidance' issued by the court recalls the role of remedies as a determinant of 'impact'. Without the American tool of structural injunctions (see p. 674 above), how could it be enforced?

> In an area in which such a large number of claimants are being granted interim relief because they have at least an arguable case, it is incumbent on the Secretary of State to establish an adequate and efficient decision-making procedure which applies the law as set out by the Court of Appeal, which does so within a timescale appropriate to self-evidently urgent issues and which does not give rise to the need for so many applications to this Court.

A report from the Mayor of London[139] provided further insights (and ammunition for the public-interest advocates). Despite a recent policy concession extending the normal claim period from twenty-four to seventy-two hours,[140]

[138] Matters might alternatively be characterised in terms of 'bureaucratic judicial review': P. Cane, 'Understanding judicial review and its impact' in Hertogh and Halliday (eds.), *Judicial Review and Bureaucratic Impact*.

[139] Mayor of London, *Destitution by Design* (2004): see also, Refugee Council and Oxfam, *Hungry and Homeless* (2004).

[140] HC Deb., col. 1594 (17 Dec. 2003).

it was reckoned that some 14,000 people annually might be caught by s. 55, and that 'a large majority of them will find no way out of destitution'. Much charitable relief was being offered, but so many asylum seekers were now living on the streets, especially in London, that there were local concerns about community safety and race relations.

(c) Culmination

The case of *Limbuela* provided the Court of Appeal with a third opportunity. Once again, the case involved several challenges with hundreds more waiting in the wings. There was an additional legal complication. Following the Delphic judgment in *R (T)*, Administrative Court judges had divided, with some giving injunctive relief on grounds of 'imminent breach' of Art. 3, others demanding clear evidence of physical or mental suffering ('wait and see'). The medical evidence in *Limbuela* included muscular pains, heartburn, gastritis, haemorrhoids and deafness.

The Court of Appeal also divided. Laws LJ preferred his form of 'spectrum analysis'[141] whereby the lawfulness of decisions exposing individuals 'to a marked degree of suffering, not caused by violence' depended on the degree of severity. Voicing respect 'for the political domain of State policy evolved in the general interest', he could see no 'exceptional features' in these cases requiring the minister to act. Yet as the majority recognised, it was precisely the generality of the problem that marked the cases out:

> *Jacob LJ:* Although one may not be able to say that there is more than a very real risk that denial of food and shelter will take [a] person across the threshold, one can say that collectively the current policy will have that effect [for] a substantial number of people. It must follow that the current policy . . . is unlawful as violating Article 3. And it follows that the treatment of the particular individuals the subject of these appeals in pursuit of that policy is also unlawful.

This did produce some impact through amendments to the administrative guidance. The caseworker now had to be 'positively satisfied' of some alternative form of support; specific mention was made of such items as 'adequate food', 'washing facilities' and 'night shelter'.[142]

Given the history of the matter, the House of Lords was understandably concerned, in Lord Hope's words, to provide as 'much guidance as we can to the Secretary of State as to the legal framework'. The heresy propounded by Laws LJ was firmly refuted. In Lord Hope's words: 'where the inhuman or degrading treatment or punishment results from acts or omissions for which the state is

[141] See further, *R (Gezer) v Home Secretary* [2003] 3 WLR 365.

[142] Home Office Immigration and Nationality Department, *Section 55 (Late Claims) 2002 Act Guidance* (2004 version), Annex H.

directly responsible there is no escape from the negative obligation on states to refrain from such conduct, which is absolute'.[143] Reasserting the approach taken by the Court of Appeal in *R (Q)*, the next step, explained by Lady Hale, was to differentiate these cases in terms of 'treatment' (and thus resources). 'The State has taken the Poor Law policy of "less eligibility" to an extreme which the Poor Law itself did not contemplate, in denying not only all forms of state relief but all forms of self sufficiency, save family and philanthropic aid, to a particular class of people lawfully here.' Furthermore, as the s. 55(5) language of 'avoiding' a breach itself showed, the policy of 'wait and see' was simply not good enough:

> *Lord Bingham:* When does the Secretary of State's duty under section 55(5)(a) arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation . . . But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.

Given the evident political sensitivities, perhaps it is not surprising to find the Law Lords at pains to downplay and so justify their role in promulgating this much guidance. As against some naked form of 'common law constitutional rights', the HRA provided useful cover (see Chapter 3). In Lord Hope's words, 'the function which your Lordships are being asked to perform is confined to that which has been given to the judges by Parliament' or as Lady Hale put it, the court was 'respecting, rather than challenging, the will of Parliament'.

Who won what? On the one hand, a major Home Office policy was undoubtedly blunted by the judges' use of Art. 3 to provide 'a last-resort safety net'.[144] Further amendment of the internal guidance would include Lord Bingham's 'imminent prospect' threshold for relief. 'It is vital that caseworkers assess each case individually, including via interview where necessary, and decide in accordance with this test whether it is necessary to grant support to avoid a breach of a person's Convention rights.'[145] In so requiring some extra resource allocation, the decision also brought much-needed relief to the Administrative Court. On the other hand, s. 55 remained on the statute book (and would continue to be used to refuse subsistence-only claims from applicants with

[143] See further, *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58.

[144] O'Cinneide, 'A modest proposal: Restitution, state responsibility and the European Convention on Human Rights', p. 601.

[145] Home Office Immigration and Nationality Department, *Section 55 (Late Claims) 2002 Act Guidance* (2007 version) [7.6].

accommodation).[146] Nor should we be particularly proud of judicial protection at a level just beneath 'destitution'.[147] The Home Office was, of course, free to explore other policy options. Responding to *Limbuela*, the minister announced new processes for 'handling late and opportunistic claims' for refugee status. Those 'who seek to play the system will receive a very quick asylum decision and so will, in reality, have very little access to benefit'.[148]

7. Conclusion

Evaluated as machinery for redress of grievance (see Chapter 10), the courts obviously score heavily in terms of independence, fairness (adjudication), public recognition and visibility. Judicial review also demonstrates important strengths as regards the criterion of effective redress, most obviously the mandatory orders. The very fact of a multi-streamed jurisdiction offers opportunities for judicial protection barely imagineable in the highly formalist and deferential era of the 'drainpipe' model. Once again, however, the expanded capacities of this elite form of administrative law technique ought not to obscure some inconvenient truths. Courts in general, and the judicial review process in particular, are difficult to access. Problems of cost, technical jargon and remoteness, and (dramatically illustrated by 'the London effect') with obtaining specialist legal advice, lock up together here with the various rationing devices elaborated by the courts and operated in typically discretionary style at each stage of the process (see Chapters 15–16). Meanwhile, the missing dimension of follow-up procedures recalls the basic limitations of institutional competence associated with the adjudicative form (see Chapter 14).

Today, we would not wish to describe judicial review litigation in asylum and immigration as sporadic and peripheral. The very fact of draconian countermeasures points up the bureaucratic impact of a large flow of individual challenges (that further constitute a chief reservoir for leading cases). However, at least from the quantitative angle, de Smith's aphorism otherwise retains much of its original force. Indeed, in terms of final hearings, and hence of court-imposed remedies, it is underscored today. Another striking feature is the low-level role in dispute resolution demanded of the courts in judicial review 'hot-spots' such as homelessness and temporary accommodation. Why, it may be asked, do the standard administrative law/judicial review textbooks not focus on this aspect?

All this bears on the contemporary judicial role of spreading the gospel of good governance and human rights (see Chapter 3), or, more modestly,

[146] JCHR, *The Treatment of Asylum Seekers* [91–2].

[147] S. Palmer, 'A wrong turning: Article 3 and proportionality' (2006) 65 *CLJ* 438 discusses the broader connotations of *Limbuela*.

[148] HC Deb., col. 2302W (24 November 2005). There would also be similar struggles about support and accommodation elsewhere in the system: J. Sweeney, 'The human rights of failed asylum seekers in the United Kingdom' [2008] *PL* 277.

of 'fire-watching'. In underwriting values of individualised justice, and of accountability or justification and transparency, judicial review has much to offer public administration. But with such inputs commonly experienced, if at all, at some remove – a feature only underscored by governance trends of agencification and fragmentation – it should not be surprising to learn of patchy effects on the quality or texture of administrative decision-making. While today the multi-streamed jurisdiction buttresses the judicial capacity to structure and confine official decision-making, it is not so easy to secure broad compliance! Perhaps this needs emphasising because of a strong 'top-down' focus in legal writings on the HRA, one that naturally tends to prioritise the role of elite players in enforcement. A 'bottom-up' account of access to justice among the socially excluded gives a very different picture.

Far from the classical model of legal 'control', the short history of Convention rights conveniently illustrates the need for a more holistic view of administrative law tools and techniques. While the courts' role of 'vindicating' is pivotal, their contribution to good governance is largely dependent on the exertions of others (including now the Commission for Equality and Human Rights) in fostering 'radiating effects'. Students of law and administration should take the message to heart.