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THE VIEW FROM THE BENCH

by Mr Justice Fordham
High Court Judge

Introduction

1. Your conference today is an opportunity to put your fingers on the pulse of judicial review. You are here because you are looking for that pulse. Together with your array of expert speakers, you will find it. You will listen to it. You will better understand what is happening in this living, breathing body of judicial review, law and practice. I am the warm-up act. Any my aim is modest. I am going to share some thoughts from where the Judge sits. In some areas of life, if you are on the bench, you are waiting for a chance to participate. It may never come. Your view from the bench is to watch everybody else. In my view from our bench, I have a series of low-level practical points and then two high-level topics. So, there will be principle, and there will be practice. But mainly practice. Everything I say is referable to something which you could have seen in a public courtroom or could find in the public domain. I will give you some signposts. And you will see from some of my practical examples that "the Bench" from which our "view" arises is often not a seat in the court-room. It is often our seat at our desk. I start with my low-level practical points.

The JR Guide

2. Every year in the autumn the Administrative Court now publishes its Judicial Review Guide. I can still remember receiving an "Annual" as an end of year present. And what a joy they could be. Lots of pictures and fun facts. We receive the JR Guide every year with joy and use it day to day. It has no pictures and no fun facts. But I commend it to you without hesitation. Here are some of its obvious virtues. (1) It is up to date. (2) It is produced by the Court. (3) It is freely available to all litigants and court users online. (4) The rules and practice directions which it identifies are hyperlinked. (5) The cases which it references is all hyperlinked. So – if you are looking for the test for permission, the discretionary bars, the approach to interim relief, the principles on anonymity and reporting restrictions, costs-capping orders, closed material procedure, rules and practice on documents for the court, deadlines, page limits, or anything else to do with practice and procedure – it is all there. And so, the final virtue. (6) Referring to the relevant paragraph in the Guide can save spelling it out. Which can make us more efficient.

To prove how great it is, I will use the Guide as a reference-point for all of my low-level practical points.

Using the JR Guide to Get Updated

3. Here is a practical tip. When you want to get yourself up to date on practice and procedure, go to the latest JR Guide online. Search for cases in the year of the Guide. This year, you would search "[2024]". The square bracketed year will immediately take you to any case decided in 2024, and to some decided in 2023 but reported in 2024, but to nothing else. You will be able to see the key point, in the text of the Guide. The reference will usually give you the relevant paragraphs. You can even click on the hyperlink and have a look. Then you can do the previous year "[2023]". You will find the recent cases that the editors of the Guide thought were important, and why. It will not take you long to do it.

Presenting Legislative and Other Instruments

4. The JR Guide 2024 says at §7.3.5 that the claim documents should include "relevant statutory material"; and at §22.1 that the Court should be provided with "legislative provisions … which the parties consider the Court will need to read at a particular hearing" and only those "to which it is necessary to refer for the fair disposal of the issues at the hearing".

5. Now we all know that if you want to interpret and understand a provision in an instrument – for example a statute – you will often need to consider the whole picture. This has been called the "internal context", meaning "how the provision in question relates to other provisions of the same statute and to construe the statute as a whole". That language comes from R (CXF) v Central Bedfordshire Council [2018] EWCA Civ 2852 [2019] 1 WLR 1862 at §20 (Leggatt LJ). It speaks of the clues that can so often be found in the rest of the instrument, by zooming out and looking in the round. It also speaks to how nervous it would make a Judge, when you receive just one or a few provisions or paragraphs, selected from within an instrument that matters. After all, we do not extract pages and headnotes from law reports. There is a balance to be struck. But this point about the value of the "internal context" must mean avoiding over-selectivity in providing materials from a statute, statutory instrument, policy guidance or other instrument. Maybe the Judge ought to have the whole, or at least the relevant Part or chapter. Will the Judge need to "read" them all? Will the advocates "refer" to them all? Maybe not. But maybe we still need to have them accessible; to be able to see them.

Presenting Case-Law

6. What about case-law? The JR Guide 2024 says at §22.1.2 that the authorities provided to the Court should be "only those authorities to which it is necessary to refer for the fair disposal of the issues". The Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 said at §8.1 that "advocates are required to state, in respect of each authority that

they wish to cite, the proposition of law that the authority demonstrates, and the parts of the judgment that support that proposition". It also said at §8.4 that an advocate should "demonstrate, in the context of the advocate's argument, the relevance of the authority or authorities to that argument and that the citation is necessary for a proper presentation of that argument".

7. Everyone knows that public law cases are intensely context-specific and fact-specific. So, advocates should be ready to answer the question: what proposition of law does this case demonstrate? Certainly, legal teams should be clear about why a case is being cited. The point I want to emphasise is that some Judges are persuaded that relevance to an argument, necessity for its proper presentation, and necessity for the fair disposal of the issues can extend beyond whether a cited case "demonstrates a proposition of law". Put another way, perhaps illustration of the application of a proposition of law can be a kind of "demonstration". Here is a signpost from the public law world of extradition and Article 8. Chamberlain J said this in Killoran v Belgium [2021] EWHC 1257 (Admin) at §56:

> ***decisions on Article 8 are intensely fact-specific. That must be borne in mind when referring to other decisions. Such decisions must not be treated as creating inflexible rules. Provided that they are not so treated, however, they can occasionally provide a useful yardstick by which to calibrate a decision about where the Article 8 balance lies.***

A similar idea is that a case may be received as "a helpful working illustration": see Meng v HSBC Bank Plc [2021] EWHC 342 (QB) [2022] QB 71 at §33.

Bundles

8. I have talked about presenting Judges with legislation, and about presenting Judges with case-law. I am continuing with that presentational theme. The JR Guide 2024 says at §21.4 that the Administrative Court always requires both hard copy and electronic bundles to be provided, unless there is an order to the contrary. Hard copy bundles must be double-sided and in ring binders. Annex 9 says this:

> ***All bundles must be text based, not a scan of a hard copy bundle. If documents within a bundle have been scanned, optical character recognition should be undertaken on the bundle before it is lodged. (This is the process which turns the document from a mere picture of a document to one in which the text can be read as text so that the document becomes word-searchable, and words can be highlighted in the process of marking them up.) The text within the bundle must therefore be selectable as text, to facilitate highlighting and copying.***

Here are some obvious points, but I want to make them. First, some Judges still use hard-copy, at least some of the time, because that is how they can best receive and handle information. Second, single-sided bundles double the number of times a Judge has to put down one bundle and pick up another; and makes materials half as portable. Third, ring binders – rather than swish hard binding – mean you can move things around into a personal core bundle. Fourth, when an electronic bundle is "selectable as text" that means

a Judge can search; and can eventually then block and paste. You are hearing all this in a "View from the Bench". Are you surprised? Don't be. Document-management is central to what we do. Welcome to our world.

Updating Bundles

9. The JR Guide 2024 says this at §21.4.4 and again at Annex 9 §12:

> ***If it is necessary to prepare an updated electronic bundle after the original bundle has been sent to the judge, it should not be assumed that the judge will accept it as a complete replacement. The judge may already have started to mark up the original. Inquiries should be made of the judge as to their preference. Absent a particular direction, a substitute bundle should be made available, but any additional pages should also be provided in a separate supplementary bundle with those pages appropriately numbered and/or sub-numbered…***

The fact that I am including this tells you two things. First, it matters to us. Second, these tiny little low-level practical things which may be delegated down to the most junior team member can involve choices that matter to us.

Unilateral Communications with the Court

10. My next low-level practical point is about how parties communicate with the Court, when they send emails or make phone calls. Again, I can take it from the JR Guide 2024 at §7.9.6:

> ***CPR 39.8 provides that any communication between a party to proceedings and the Court must be disclosed to, and if in writing (whether in paper or electronic format) copied to, the other party or parties or their representatives (with some exceptions)…***

Rule 39.8 says it applies to any communication in which any representation is made to the court on a matter of substance or procedure but does not apply to communications that are purely routine, uncontentious and administrative; that disclosure is not required if there is a compelling reason for not doing so, which is clearly stated in the communication; and that written communications required under the rule to be copied to the other party or parties or their representatives must state that they are being copied to them.

11. Perhaps it is obvious that this is a "cardinal principle", and that it is "inappropriate and unjust to seek to communicate with the Court without this transparency": Bell v Brabners LLP [2021] EWHC 560 (QB) at §4. But the Court does receive correspondence which is not copied to the other parties when it should be. And it may not be obvious is that this is happening. You would need to look carefully at the "cc" line of any email. You would not know what happened after a phone conversation. Here are two signposts. In one case, where the claimant was a serving prisoner reliant on correspondence by post, I recorded that I had found unilateral email communications between the Government Legal Department and the Court, and that I had made an order requiring these all to be put in a paginated bundle and served on the claimant: R (Black) v SSJ [2024] EWHC 1376

(Admin) at §6. In another case, the appellant had sent an email for the Judge, following receipt of the confidential draft judgment, and did not cc the respondent or its lawyers. I said the "idea of a litigant seeking unilaterally to communicate with a Judge, behind the other party's back" was "alarming": Ramaswamy v GMC (No.2) [2023] EWHC 2809 (Admin) at §24. The JR Guide 2024 warns at §7.9.6: "If a party fails to comply with the rule … the Court may impose sanctions".

Interposing a Judge for Procedural Directions

12. The JR Guide 2024 says this at §§17.21 to 17.2.3:

> ***It will very often be possible to point to a reason why the claimant's interests would be better served if an application for … permission to apply for judicial review were determined quickly. However, this is not enough to justify using the Court's procedures for urgent consideration. Those procedures are made available only for urgent cases where there is a genuine need for the application to be considered urgently. Such a need may arise where … there are compelling reasons for applying for abridgement of time for service of the Acknowledgment of Service or other procedural directions and, if the directions are to be effective, it is necessary for the application to be considered urgently. Litigants and their representatives should consider carefully the period within which their application needs to be considered. It is not acceptable to request consideration in a period shorter than genuinely required …***

So, there can be a scenario where a Judge is asked to make an order for "abridgement of time for service of the Acknowledgment of Service (AOS) or other procedural directions"; but where there have to be "compelling reasons"; and litigants and their representatives needing to "consider carefully" what is "genuinely required". I have previously used the phrase "interposing a Judge" for this scenario. Under the rules there are 21 days for acknowledgments of service, a short window for reply, after which an informed single Judge will make a decision and give any directions, including anonymity and any expedition for the case.

13. By receiving my "view from the Bench", you are enabling me to gather in one place some things that I have said before about interposing Judges. On the Courts and Tribunals Judiciary website at "judgments" there is a published Order dated 10 October 2022 in R (NT) v Newcastle City Council CO/3485/2022. This is a signpost. It also means that what I am about to say has been said before, in the public domain. I said this:

> ***I cannot understand why the Claimant's representatives should seek to interpose a Judge, to look at an application at some stage after 7 days from the issue of the claim, to then determine whether to give 7 days from a Court Order for the AOS. The AOS is due in any event 21 days within service of the claim…***

Court Orders are publicly accessible from the records of the court. In R (Dhamrait) v SSHD CO/2089/2022 the Order dated 13 June 2022 says:

> ***This is yet another case in which the Claimant's solicitors in judicial review seek to "interpose" a Judge, prior to consideration of permission for judicial review, for the purposes of making***

directions to truncate the timetable for an AOS … What can and should happen in this case is for the Home Secretary, within the 21 day timeframe given by the rules, to respond to the claim and assist the Court, including with appropriate candid disclosure, so that a fully informed permission stage judge considering the papers can grasp the nettle as appropriate including viability of the claim and, if viable, any (possibly heavy) expedition. That is also the appropriate and proportionate allocation of judicial resources.

In R (Parviz Khan) v SSJ CO/4550/2022 the Order dated 25 April 2024 says:

Each case is fact-specific, but my own view is that I have misgivings about whether it is appropriate for the Claimant's team to seek to 'interpose' a Judge to read the papers and make a direction about how soon after the AOS the papers should be considered by them or another Judge. 'Interposing' Judges unnecessarily is a vice which undermines the efficiency of the Court process… If there is truly a need for expedition, to be considered by a Judge before the permission-stage has been reached in the ordinary way, I would expect to see an N463 or N244 not a 'non-urgent application'.

The Timing of Pre-Reading

14. The JR Guide 2024 says this about substantive hearings, at §20.5:

In addition to the skeleton arguments, not less than 7 days before a substantive hearing, the parties must file: an agreed list of issues; an agreed chronology of events (with page references to the hearing bundle); and an agreed list of essential documents for the advanced reading for the Court (with page references in the hearing bundle to the passages relied on) and a time estimate for that reading. These are important documents, designed to assist the Court in preparing for the case and in understanding the scope of the dispute and the dates of the key material events. Because these documents must be agreed by all parties, the parties should liaise in good time before the deadline …

Lists of suggested essential pre-reading also apply to claim documents, permission hearings and interim relief hearings. As the Guide reflects, our pre-reading stage is important.

15. If you were thinking about Judges' pre-reading for hearings you could study sitting patterns in the Court's published Cause List. You would be able to work out when Judges are sitting in the Administrative Court for a stint, and what days they are not in the court-room. You would not know which days are writing days and which days are reading days. You would see the substantive hearings we do, and the lists of shorter hearings that we do, in batches. You would quickly deduce some things about the pre-reading. My signpost is a case called R (Karimi) v Sheffield City Council [2024] EWHC 93 (Admin) where I engaged in what I called "judicial sharing". I said there (at §10), and I say to you:

It is a common misconception that Judges pre-read cases the day before the hearing, or perhaps the evening before the hearing. The true position is that we frequently have to pre-read cases ahead of that. We also have to decide which cases to pre-read, when and in what order. We want to be able to prepare a case by pre-reading, in one sitting, with confidence that we have everything we need, including any skeleton arguments or other materials that are designed to assist us. It is

therefore a vice to supply materials late in the day. It is a vice to do so unheralded, with no prior warning…

Dealing with Consequentials

16. The JR Guide 2024 says this at §11.6.2:

> ***A reserved judgment will be "handed down" by the Court at a later date… [B]efore the hand down date the judge will provide a draft of the judgment to legal representatives in the case. The sole purpose of doing so is to enable the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and to prepare themselves for the publication of the judgment.***

So, the time window is to be used by the parties to provide the Court with two things, not one. One is suggestions for the correction of errors. The other is submissions on consequential matters. It follows that, where this works, the Judge can make an Order and deal with all consequential matters at the time of the hand-down, recording at the end of the judgment what we did and why. Not weeks or months later, when the whole case is cold, depriving the readers of a judgment of its bottom line; what order the Court made; what happened about remedies; what happened about costs; what happened about permission to appeal.

Open Justice and Paper Determinations

17. I have reached my final low-level practical point. The JR Guide 2024 says at §§11.4.1 and 24.4.1 that in those situations where the Court determines the claim substantively on the papers, because there is consent by all parties to the outcome or to that mode of determination: "The open justice principle applies to a determination made on the papers …" But if the open justice principle applies, there is a question about whether the Court's reasoned Order should be promulgated publicly, not just left on a publicly-accessible court file. The same open justice question arises when other matters are decided on the papers. One option Judges have is to embody the decision and reasons in a brief judgment with a neutral citation. Again, I am saying here what I have said in the public domain when I give these signposts which illustrate the scope for using that practice: R (DLR) v York Magistrates' Court [2023] EWHC 2817 (Admin) (quashing); R (BN) v Hounslow LBC [2023] EWHC 3083 (Admin) (stay); R (MS) v Manchester City Council [2024] EWHC 693 (Admin) (discontinuance); London Borough of Barking and Dagenham v Aziz [2024] EWHC 1584 (Admin) (costs); R (Alhasan) v Director of Legal Aid Casework [2024] EWHC 1676 (Admin) (recusal); R (Carr) v Assistant Coroner for North Wales [2024] EWHC 1983 (Admin) (venue).

Classifications and Sub-Species

18. I round of this View from the Bench with two high-level themes. First, I take the theme of classifications and sub-species of grounds for judicial review. It is forty years since the GCHQ case gave us unlawfulness, unreasonableness and unfairness. Lord Diplock

used different words. These are a valuable broad classification of grounds for judicial review. Whenever anyone identifies a ground for judicial review, we can ask where in the broad classification it belongs. Six years ago the Supreme Court decided in R (Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25 [2019] AC 96. They told us (Lord Carnwath at §41) that:

> ***substantive unfairness … is not a distinct legal criterion. Nor is it made so by the addition of terms such as 'conspicuous' or 'abuse of power'. Such language adds nothing to the ordinary principles of judicial review, notably in the present context [unreasonableness] and legitimate expectation. It is by reference to those principles that cases such as the present must be judged.***

The point about unreasonableness is that it reflects the built-in latitude for the primary decision-maker. It is important never to lose sight of that. Unlawfulness is hard-edged substantive review. Unreasonableness is soft substantive review. Unfairness is about process. Generally speaking, unreasonableness governs substantive unfairness. It also generally governs the law on relevancies and irrelevancies (we think of R (Friends of the Earth) v Transport Secretary [2020] UKSC 52 [2021] 2 All ER 967 at §119), and on legally adequate inquiry (we think of R (Plantaganet Alliance Ltd) v Justice Secretary [2014] EWHC 1662 (Admin) at §§99-100). So, it is a classification. It also involves an overarching principle. And within it, there are sub-species: like relevancies and irrelevancies; like legally adequate inquiry. This is all interconnected. And it is the unreasonableness part of Gallaher.

19. But the Supreme Court put unreasonableness alongside legitimate expectation. That is interesting, because in 1999 the Court of Appeal had broken free from the conventional reasonableness test in relation to substantive legitimate expectations. That was R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213. Then in 2004 the Court of Appeal decided that a material error as to an established and verifiable fact was a public law error. That was E v SSHD [2004] EWCA Civ 49 [2004] QB 1044. But what is the broad classification for that ground for judicial review? In E itself the material error of fact was said to give rise to "unfairness" (§66), which was the "basis" of the public law error (§91). But this was not procedural unfairness. So it must have been substantive unfairness. The Court of Appeal has said "material mistake of fact, following E, is a rare but accepted head of challenge": Kanhirakandan v SSHD [2023] EWCA Civ 1298 at §50. The editors of De Smith treat E material error of fact as a specific category of unreasonableness (see §6-032).

20. All of which takes me to R (Law Society) v Lord Chancellor [2018] EWHC 2094 [2019] 1 WLR 1649. This is a case which is cited to us a lot, in our day to day work. It was decided by two people who have since changed their jobs. One was the then Leggatt LJ. The other was the then Carr J. They told us that "unreasonableness" is a better description than "irrationality". They also told us that unreasonableness has two aspects. One is the outcome which is beyond the range of reasonable decisions. The other is where the

reasoning process involves a demonstrable flaw, like a gap in reasoning, or having regard to an irrelevancy, or an E material error of fact.

21. These cases show us these things. The grounds for judicial review develop. We have our generalities, like fairness and reasonableness and lawfulness. We have our specifics, like legal irrelevancies, legally sufficient enquiries and material errors of fact. Finding the legally correct generality may be important in finding the legally correct approach to the specific.

Intensity of Review

22. My second high level theme – and my final topic – is intensity of review. In R (SC) v Secretary of State for Work and Pensions, before that case got to the Supreme Court, Leggatt LJ said this in the Court of Appeal of unreasonableness. He said "the intensity of the court's review will vary according to the context": see [2019] EWCA Civ 615 [2019] 1 WLR 5687 at §90. The following year, the Court of Appeal said "it is fundamental that … the intensity of review … will always depend on fact and context": R (Packham) v SST [2020] EWCA Civ 1004 [2021] Env LR 10 at §51. Many other similar quotes are available.

23. You can therefore expect that Judges are encountering two questions, in our day to day work. One is the question whether intensity of review should be being addressed in every case, to see whether anything heightens the intensity or dilutes it. This question arises because we are dealing with something said to be "fundamental"; and which is "always" the case. The other is the question of what "intensity of review" means. In Packham the Court of Appeal distinguished between two "conceptually different" ideas. One was about how "closely" the Court will "scrutinise the reasoning for a decision". The other is "the extent to which a court will accord a margin of judgment or discretion to a decision-maker" which will also "always depend on fact and context". These are different things. And so, they said, the Court "may closely scrutinise the reasoning for a decision" and "yet still conclude it is proper to accord the decision-maker a broad margin of discretion". That makes me think of a birdwatcher looking across a valley for a particular species of bird; then looking with binoculars, while still looking for the same species of bird. Well, whether you are looking for a bird or whether you are finding a pulse, I hope you enjoy your day.

Fordham J

6.12.24