South West Administrative Lawyers Association Lecture

Judicial Review and the Rule of Law

Bristol: 15 June 2017

1. Thank you for inviting me to give this year's SWALA lecture. It is a genuine pleasure to be here. I am honoured to be the Liaison Judge for the Administrative Court on the Western Circuit and proud to return to the great city of Bristol.

2. Lord Diplock once commented that the development of judicial review had been the most significant development in the law of this country in his professional lifetime. That was in the early 1980s. If that was true then it is even more so now. Although judicial review has historic origins going back many centuries, there can be no doubt about two things.

3. First there has been a remarkable increase in the volume of litigation, particularly in what is now called the Administrative Court, in the last 40 years or so. When the predecessor to the Administrative Court, the Crown Office List, was created in 1980, there were only a few hundred cases brought each year in that jurisdiction. Just a few years earlier, following the recommendations of the Law Commission, the rules relating to the old prerogative orders had been reformed. In 1977, under what was then called the "new" Order 53 of the Rules of the Supreme Court, a procedure known as the application for judicial review was first created.

4. Today many thousands of cases are started in the Administrative Court every year, even though there has been a dramatic reduction in the number in the last few years, as the majority of immigration judicial review cases are now heard in the Upper Tribunal. Recent figures published by the Ministry of Justice show that, last year (2016), there were 1,832 claims for judicial review brought against the Home Office, which was the government department facing the largest number of such claims, and that was an increase of 18% on the previous year.

5. In 1980 there were just four High Court judges nominated to sit in the Crown Office List. Today almost all the judges of the Queen's Bench Division sit in the Administrative Court, as do several judges of the Family and Chancery Divisions. Many others sit in the Administrative Court as additional or deputy High Court judges, including here in Bristol.

6. The second point is this. It is arguable that the substantive law of judicial review represents the greatest contribution which the common law has made in the last 50 or 60 years. It is still a body of law which remains essentially the creation of the judges. In that sense it is reminiscent of the development of commercial law by the common law courts in the 18th century and the development of the law of negligence in the first half of the 20th century. Parliament has intervened in this area of law to a limited extent but has done so not so much to amend the substantive content of public law; rather to regulate procedure and remedies and to deal with ancillary matters such as costs. I will return to that later.

7. Two further but fundamental comments can perhaps be made. The first is that judicial review of the lawfulness of the actions of the Executive is vital to maintenance of the rule of law. As Lord Denning was fond of saying, citing Dr

Thomas Fuller: "Be you never so high, the Law is above you."[1] Judicial review is the practical, day-to-day manifestation of this country's commitment to the rule of law. That is the idea that even the government is subject to the law.

8. One aspect of this is that the law protects everyone, not just saints but sinners as well. Every judge on appointment takes an oath or makes an affirmation to "do right to all manner of people ... without fear or favour, affection or ill-will." Last year I decided an application for judicial review brought by Joanne Dennehy, a notorious murderer of three men, who is one of only two women in this country currently serving a whole life order. Her claim for judicial review failed save on one ground which was conceded by the defendants in the light of a decision of the Supreme Court. In that judgment I said:

> "It is important to recall that everyone within the jurisdiction is entitled to the protection of the law, including the protection of their human rights. That includes even someone who has committed the most serious crimes. This is because ours is a society governed by the rule of law."[2]

9. The second fundamental point is this. There is no contradiction between democracy and judicial review. As Lord Bingham famously remarked in the Belmarsh case (2004),[3] the enforcement of the law by an independent judiciary is now regarded as a cornerstone of a democratic society. This has particular relevance in the context of judicial review. This is because the purpose of judicial review is primarily to give effect to the will of Parliament. Usually there will be legislation which governs the powers and duties of a public authority. The function of the court is to ensure that the authority acts in accordance with that legislation: that it does not exceed its powers or abuse them and that it complies with its duties.

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[1] See, for the origins of this phrase, Tom Bingham, The Rule of Law (Allen Lane, 2010), p.4 and fn.8.
[2] R (Dennehy) v Secretary of State for Justice [2016] EWHC 1219 (Admin), at para. 178.
[3] A v Secretary of State for the Home Department [2005] 2 AC 68, at para. 42.

10. In doing so the courts are not usurping the function of the democratically accountable legislature. Far from it, they support it and implement what Parliament has required of the Executive. In that context, it is important to bear in mind that there is a separation of powers between the Executive and the legislature. Although it is well known that there is no separation of *persons* between those two institutions, nevertheless there is an important distinction between their respective *functions*.

11. Although there is a constitutional convention that Ministers of the Crown should always be members of one or other of the Houses of Parliament, there is a vital distinction in law between the Queen in Parliament (which is the legislature) and Her Majesty's Government (which is the Executive). One case in which this fundamental distinction had apparently been forgotten by the government concerned an application for judicial review brought by the Child Poverty Action Group and which I decided in 2012.[4] In that case the incoming coalition government had decided not to establish the Child Poverty Commission which was required by the Child Poverty Act 2010. In admirable compliance with the duty of candour, which rests on public authorities in judicial review proceedings, a witness statement was filed on behalf of the Secretary of State, which explained that a ministerial meeting had been held, at which it was decided that the Commission would not be established because new legislation would be drafted with a view to setting up an alternative body.

12. In granting the application for judicial review, I noted the eloquent words of Lord Bridge in X Ltd v Morgan Grampian Ltd:

[4] R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2012] EWHC 2579.

> "The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations, the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law."[5]

13. It follows from that dual sovereignty of Parliament and the courts that the Executive as such enjoys no sovereignty. It is accountable to Parliament for the wisdom of its policies and accountable to the courts for the legality of its actions. As Lord Diplock put it in the National Federation case: "It is not ... a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge."[6]

14. In the CPAG case I said (at para. 31) that:

> "the executive enjoys no power to amend or repeal primary legislation in the absence of delegation by Parliament itself."

15. I went on to say that:

> "In the present context, however meritorious the new Government in 2010 may have thought its proposed replacement commission might be, it was not entitled ... to pre-empt any primary legislation that Parliament might or might not pass in the future if so invited. ... The new Government may have had good reason to adopt a different policy from that of the previous government. However ... they were not entitled as a matter of law to ignore, or to fail to comply with, primary legislation as laid down by Parliament itself."

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[5] [1991] 1 AC 1, at 48.
[6] R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses [1982] AC 617, at 644.

16. Although, as I have said, the vast majority of judicial review cases concern the implementation of the will of Parliament as expressed in legislation governing the powers and duties of the Executive, there are occasions when judicial review will involve controlling the Royal Prerogative. This was most notably seen earlier this year in the decision of the Supreme Court in the Miller case,[7] which of course concerned the question whether the Government would be entitled to invoke Article 50 of the Treaty on European Union without express authorisation by Parliament. As is well known the Supreme Court held that the Royal Prerogative did not confer such a power and that an Act of Parliament was indeed required. That Act has now been passed and Article 50 has now been triggered, starting the process of the United Kingdom's departure from the European Union (or "Brexit"). Although the legal nature of prerogative powers is still controversial, it is arguable that it simply represents the residual body of powers which are conferred upon the Crown not by Parliament but by the general law of this country, in other words by the common law.

17. As most law students will know, the fundamental principles of modern administrative law were established by the House of Lords in a small but important series of cases in the 1960s. The principal cases were Ridge v Baldwin;[8] Padfield;[9] and Anisminic.[10]

18. In Ridge v Baldwin (1962) Lord Reid observed that:

> "We do not have a developed system of administrative law – perhaps because until fairly recently we did not need it."[11]

[7] R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5 [2017] 2 WLR 583.
[8] [1964] AC 40.
[9] Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997.
[10] Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147
[11] p.72.

19. Just 20 years later, Lord Diplock was able to comment in O'Reilly v Mackman,[12] that:

> "We did [by 1977] have ... a developed system of administrative law, to the development of which Lord Reid himself ... had made an outstanding contribution."

20. The importance of the decisions in Padfield and Anisminic cannot be overstated. They provide the jurisprudential foundations for modern administrative law. In Padfield the House of Lords made it clear that there is no such thing as an unfettered discretion: however broadly a discretionary power may be worded, that power must always be exercised so as to promote the policy and objects of the Act of Parliament which conferred it. In Anisminic the House of Lords removed the distinction between errors of law within the jurisdiction and jurisdictional errors.[13] That means in practice that the Executive and inferior bodies have no power to get the law wrong. It is always for the courts to say what the law is. That is fundamental to the rule of law in this country.

21. The common law continues to retain its ability to create new concepts of public law. I will give examples from three contexts.

22. The first is the development of the doctrine of legitimate expectation. This phrase was first used in the courts of this country, as far as I have been able to discover, in 1969 by Lord Denning in Schmidt v Secretary of State for Home Affairs.[14] At first it was thought to give rise only to procedural rights of fairness. In other words, even though a person did not have a legal right

[12] [1983] 2 AC 237, at 279-80.
[13] See further R (Cart) v Upper Tribunal [2012] 1 AC 663, at para. 18 (Baroness Hale of Richmond JSC).
[14] [1969] 2 Ch 149.

which was being taken away, if he or she had a legitimate expectation, then the rules of natural justice or, as we more commonly say today, the duty to act fairly or the right to procedural fairness would apply. In due course the courts began to develop a doctrine of substantive legitimate expectation, particularly in the context of tax cases: see the classic decision of the Divisional Court in MFK Underwriting Agents (1990).[15] That developed into a general doctrine, applicable across the whole range of public law, in the Court of Appeal decision in Coughlan (1999).[16]

23. The second main development to which I would point is even more recent. This concerns the relevance of policies to the making of public decisions. The conventional view used to be that, since discretionary powers can never be fettered, a failure to act in accordance with a policy was not a ground for judicial review. There was no obligation to adopt a policy. There was no obligation to publish any policy that there was. If there was a policy, there was no obligation to act in accordance with it. The highest that it was sometimes put was that the policy was a relevant consideration which should be taken into account. All that has changed.

24. The leading authority now is the decision of the Supreme Court in Lumba (2011).[17] It now appears to be the case that policies must be adopted, at least in cases where Convention rights are affected, because of the requirement that an interference with those rights must be in accordance with law. If a policy is adopted, it should normally be published. There may of course be good reason not to do so, for example in the interests of national security. Furthermore, it will normally be a requirement of public law that a

[15] R v Inland Revenue Commissioners, ex p. MFK Underwriting Agents Ltd [1990] 1 WLR 1545.
[16] R v North and East Devon Health Authority, ex p. Coughlan [2001] QB 213.
[17] R (Lumba) v Secretary of State for the Health Department [2012] 1 AC 245.

discretionary decision is taken in accordance with whatever policy the public authority concerned has at that time. Merely taking it into account will no longer suffice. And if there is to be a departure from the policy there will have to be a good reason for doing so, which will be scrutinised by the court.

25. Finally, and very importantly, it has now been clearly established by the Supreme Court, in the case of Tesco Stores v Dundee (2012),[18] that the interpretation of a policy is a question of law for the court to determine; it will not suffice that an interpretation has been adopted by a public authority which was reasonably open to it. That said, it is still important to bear in mind that a policy is precisely that; it is not legislation and should not be interpreted as if it were. This point was made in Tesco Stores itself and was reiterated by the Supreme Court last month in Hopkins Homes.[19] In Hopkins Homes the Supreme Court also stressed that it is only the question of interpretation of a policy which is a question of law for the court to determine; when it comes to the application of a policy (correctly interpreted), that is a matter for the decision-maker, not for the court. It is important not to elide the two.[20]

26. The third area of law in which the common law continues to develop is the duty to give reasons for administrative decisions. This is particularly interesting because there are many pieces of legislation which impose an express statutory duty to give reasons on a public authority. It might be thought, at first sight, that, in those situations where there is no legislation imposing a duty to give reasons, no such duty will arise at all. However, that would be too simplistic an approach.

[18] Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 [2012] 2 P & CR 9.
[19] Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 WLR 1865, paras.22-25 (Lord Carnwath JSC); and para. 74 (Lord Gill).
[20] *Ibid*., para. 26 (Lord Carnwath JSC); and paras. 72-73 (Lord Gill).

27. As Elias LJ put it in the recent case of Oakley: "It is firmly established that there is no general obligation to give reasons at common law ...".[21] This was confirmed by the House of Lords more than 20 years ago in Doody.[22]

28. However, as was illustrated by the facts of Doody itself, there are a number of exceptions to the general principle.

29. The first is where, as in Doody, the nature of the decision requires disclosure of reasons to be given on grounds of fairness.

30. The second exception is where there was something "aberrant" in the particular decision which calls out for explanation: see R v Higher Education Funding Council, ex p. Institute of Dental Surgery.[23] An example of such an aberrant decision is provided by the Court of Appeal decision in R v Civil Service Appeal Board, ex p. Cunningham.[24]

31. Thirdly a duty to give reasons has been imposed where failure to do so may frustrate a right of appeal, because without reasons a party will not know whether there is an appealable ground or not: see e.g. Norton Tool Company Ltd v Tewson.[25]

32. Fourthly there may be a legitimate expectation that reasons will be given: an example of this, again cited by Elias LJ, is Martin v Secretary of State for Communities and Local Government,[26] in which it was held by Lindblom LJ that there was a legitimate expectation that inspectors would give reasons in a written representations planning appeal which was generated by the Secretary of State's long established practice of giving reasons in such cases. This is a

[21] Oakley v South Cambridgeshire District Council [2017] EWCA Civ 71, at para. 29.
[22] R v Secretary of State for the Home Department, ex p. Doody [1994] AC 531.
[23] [1994] 1 WLR 242 (Sedley J, as he then was).
[24] [1999] 4 All ER 300.
[25] [1973] 1 WLR 45, cited by Elias LJ in Oakley at para. 31.
[26] [2015] EWHC 3435 (Admin).

good example of where the concept of legitimate expectation can arise without there being any need for a promise; a past practice will suffice.

33. Fifthly there may be cases in which, if no reasons are given by a public authority, the court may infer that the decision is irrational: see the decision of the House of Lords in Padfield. However, as Elias LJ explained in Oakley at para. 33:

> "Even then ... the applicant may not be given full reasons, merely such explanation of the reasoning as meets the particular ground of challenge. Moreover, if the basis of the claim is too speculative – as it may well be when no reasons are available – the application is likely to fail at the leave stage."

34. The existence of so many exceptions to the apparently general principle that there is no general obligation to give reasons at common law led Lord Clyde to express the opinion, almost 20 years ago, in Stefan v General Medical Council that:

> "There is certainly a strong argument for the view that what was once seen as exceptions to a rule may now be becoming examples of the law, and the cases where reasons are not required may be taking on the appearance of exceptions."[27]

35. As Elias LJ observed in the Oakley case, there are powerful reasons why it is desirable for administrative bodies to give reasons for their decisions. They include improving the quality of decisions by focussing the mind of the decision-maker and so increasing the likelihood that the decision will be lawfully made. I would add to that that it is to be hoped that that process of focussing the mind will lead to decisions that are quite simply better decisions

[27] [1999] 1 WLR 1293, at p. 1300.

and not only ones that are lawful. Secondly to promote public confidence in the decision making process. Thirdly by providing, or at least facilitating, the opportunity for those affected to consider whether the decision was lawfully reached, so that for example they may be able to exercise any right of appeal or challenge a decision by way of judicial review if there are grounds for doing so. In this way the giving of reasons helps to promote the rule of law. Finally, the giving of reasons helps to respect the individual's interest in understanding – and perhaps therefore more readily accepting – why a decision has been made.

36. On the other hand, there are, as Elias LJ also recognised in Oakley, potential disadvantages in imposing a duty to give reasons. They include the possible undue burden, especially if there are many decisions of a routine kind which have to be taken by a public authority. They also include, exceptionally, "some powerful public interests, such as national security, which could justify withholding reasons".[28]

37. Oakley itself was a planning case. As is well known, there are many circumstances in which there is a statutory duty to give reasons in the context of planning law: for example where planning permission is refused or where it is granted but only subject to conditions. However, for a long time there used to be no statutory duty to give reasons where permission was granted. This was only introduced by a legislative amendment to the relevant regulations with effect from 2003 and was then removed 10 years later, in 2013.

38. In Oakley itself, the result was that, despite the removal of that statutory duty, the Court of Appeal imposed a duty to give reasons – as a matter of common

[28] See para. 27.

law – in the circumstances of that particular case. Elias LJ was of the view that the abrogation of the express duty to give reasons in such cases was not inconsistent with that outcome.[29] This was because, he said, the abrogation of that duty was not intended to reduce transparency. However, the Court of Appeal did not decide the case ultimately on the broad grounds which were advanced before it. Rather it decided the case on the narrower argument presented before it and having regard to the particular circumstances of that case. That was the view clearly expressed by Sales LJ, in his concurring judgment, and also the view of Elias LJ, with whose judgment Patten LJ agreed. As Elias LJ said, "the courts develop the common law on a case by case basis ...".[30]

39. The Oakley case, which was decided as recently as February this year, provides a good illustration of the continuing ability of the common law to develop in a creative way in the area of administrative law.

40. As I have mentioned, Parliament has on the whole been content to leave the development of the substantive grounds for judicial review to the courts. It can reasonably be presumed that Parliament has not wished to reverse the developments to which I have referred because it has not taken the opportunity to pass legislation altering the content of public law.

41. Nevertheless, there have been some pieces of legislation which have introduced new substantive obligations on public authorities. The main one to which I would draw attention here is the public sector equality duty, now contained in section 149 of the Equality Act 2010. Originally this was enacted in the context of racial equality by an amendment to the Race Relations Act

[29] See para. 54.
[30] At para. 55.

1976, made by Parliament in the year 2000 in order to implement one of the main recommendations of Sir William Macpherson in the Stephen Lawrence Public Inquiry.

42. One case I would mention in particular in this context is the decision of the Court of Appeal in Elias.[31] In that case (in which I appeared for the Claimant, when I was still at the Bar) it was held that there had been a breach of what was then section 71 of the Race Relations Act, since the Secretary of State had failed to have due regard to the matters set out in that section *before* the policy under challenge had been arrived at. As Arden LJ put it (at para. 274):

> "It is the clear purpose of section 71 to require public bodies to whom that provision applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them. This is a salutary requirement, and this provision must be seen as an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation."

43. Earlier in her judgment Arden LJ set out what those aims of anti-discrimination legislation are, in terms that are relevant to the maintenance of equality of all persons before the law, which is a facet of the rule of law itself:

> "The adverse effects of unlawful discrimination are manifold. Discrimination can have a severe negative psychological effect on the individual involved, as well as a loss of dignity and self-esteem, and induce a sense of alienation. This sense of alienation can lead to a mistrust of institutions, such as the police or the justice system. This mistrust is detrimental to social cohesion. The co-operation of minority groups is particularly important in the fight against crime and terrorism …"[32]

44. More usually Parliament has legislated in the field of administrative law to make changes to matters of procedure, remedies and costs. This is true for

[31] R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213.
[32] Para. 269.

example of the amendments made by the Criminal Justice and Courts Act 2015 to the Senior Courts Act 1981, in particular section 31. The court may be required to refuse permission or, at the substantive stage, any remedy if it is highly likely that the outcome for the applicant would not have been substantially different even if the conduct complained of had not occurred.[33] However, the court may disregard those requirements if it considers that it is appropriate to do so "for reasons of exceptional public interest."[34] This perhaps underlines the fundamental difference between judicial review proceedings and ordinary civil litigation. At the end of the day, judicial review is not just about the vindication of the private rights of a particular applicant; it is about upholding the rule of law in the public interest.[35]

45. Before I leave matters of practice and procedure I should mention two important relatively recent innovations. The first is the publication of the Administrative Court Guide in 2016. This has quickly become established as a vital tool for everyone involved in the work of that court. Particular gratitude is owed to David Gardner, the lawyer based in Cardiff who has done a lot of the work which went into production of that Guide, with Mrs Justice Whipple and Mr Justice Lewis. A revised edition of that Guide is due out shortly.

46. The second important development is the creation in 2014 of the Planning Court as a distinct, specialist part of the Administrative Court. As you will know the Planning Court sits in court centres such as Bristol as well as in London. It has its own procedures, which are set out in Part 54 and the Practice Directions relating to it. Generally speaking the Planning Court aims

[33] Section 31(2A) and (2D) of the Senior Courts Act 1981.
[34] Section 31(2B) and (2E).
[35] See e.g. R v Secretary of State for the Environment, ex p. Kirkstall Valley Campaign Ltd [1996] 3 All ER, at 325 (Sedley J).

to and does achieve a more rapid resolution of disputes than is the case more generally, even in the Administrative Court.

47. Finally, I want to say a few words about the importance of the Administrative Court in Bristol and more generally on the Western Circuit. It is very important that, so far as possible, administrative law work which concerns the West country should be issued and heard here. That means hearings taking place not necessarily only in Bristol but in other parts of the South West too.

48. Not only are there good local solicitors and barristers able and willing to do the work; the judges are here too. In particular I would like to mention that the new Designated Civil Judge for this area, Judge Barry Cotter QC, sits regularly in the Administrative Court and is authorised to sit in the Planning Court.

49. I will do everything that I can, as the liaison judge, in order to support and reinforce that process. The trend is in the right direction. More claims for judicial review which relate to the West Country are now being issued here than ever before. I would urge you to issue claims for judicial review here if you can. Even if they are not issued here, it may well be that they will be suitable for transfer here. The lawyers in the Administrative Court Office will be alert to look out for cases that are potential candidates for transfer and have recently been given delegated powers to make a "minded to transfer" order. If necessary, I consider representations as to venue as the Liaison Judge. Of course there may be good reasons why a case should be heard in London even though it has a close connection with this region. However, in suitable cases a transfer order will be made. In that context please bear in mind that cases can often be listed for hearing much more quickly here than in London, even without an order for expedition.

50. Before I conclude I should return to the main theme of my lecture, that is the link between judicial review and the rule of law. There is no better guide to the many meanings of the phrase "the rule of law" than the wonderful book which bears that title which was published by Lord Bingham in the last year of his life, seven years ago. The aspect of the rule of law on which I have focussed in this lecture was the subject of chapter 6 of his book, on 'The Exercise of Power', in which he suggested that judicial review is the exercise of a constitutional power which the rule of law requires. Lord Bingham recognised that this does not always endear itself to those in power, of whatever political persuasion. However, he ended with these salutary words:

> "There are countries in the world where all judicial decisions find favour with the powers that be, but they are probably not places where any of us would wish to live."