

## THE STATE OF THE JURISDICTION: LORD BINGHAM'S LEGACY

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1. There is no better way to illustrate and celebrate Lord Bingham's contribution to administrative law than through his own words. What follows is a tapestry, no doubt just one from many, capable of being woven using strands of Lord Bingham's judicial analysis, which will for decades to come guide and equip practitioners, academics and judges in the field of public law and human rights.
2. At the heart of judicial review is the constitutional role of the Court in upholding the rule of law. As explained (as Sir Thomas Bingham MR) in *R v Ministry of Defence, ex p Smith* [1996] QB 517, 556D-E although the court is not "thrust into the position of the primary decision-maker" and so does not have "the constitutional role ... to regulate the conditions of service in the armed forces of the Crown", nevertheless:

**[the court] has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision-makers, it must not shrink from its fundamental duty to 'do right to all manner of people'.**
3. As he later famously pointed out (as Lord Bingham) in *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68 at [42], although "the judges in this country are not elected and are not answerable to Parliament", "the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself".
4. So, Government must respect the function of the fiercely independent judiciary, and the conclusions which the Courts reach. As Lord Bingham explained in *Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-*

*Burnett* [2005] UKPC 3 [2005] 2 AC 356 at [12]: "independence of the judges (or, put negatively, the protection of judges from executive pressure or interference) is all but universally recognised as a necessary feature of the rule of law". And as he had put it in *In re McFarland* [2004] UKHL 17 [2004] 1 WLR 1289 at [7]:

**Just as the courts must apply Acts of Parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree with them or not, so Parliament and the executive must respect judicial decisions whether they approve of them or not, unless and until they are set aside.**

5. In the exercise of its constitutional role, the Court applies dynamic and developing common law principles of review. Judicial review's dynamism is encapsulated in this warning, enunciated as Sir Thomas Bingham MR in *R v Inland Revenue Commissioners, ex p Unilever Plc* [1996] STC 681 at 690f, and which should be on every Administrative Court judge's pencil case:

**precedent should act as a guide not a cage.**

*Unilever* was the case that broke substantive fairness out of the cage of legitimate expectation, ensuring that no public authority could again with impunity perpetrate "conspicuous unfairness". The flexibility of judicial review is illustrated by those cases of 'blameless unfairness', where judicial review can lie even though the public authority is not itself necessarily at fault. Bingham LJ had captured the spirit of this in *Khan v Secretary of State for the Home Department* [1987] Imm AR 543, 555:

**If a procedural mishap occurs as a result of a misunderstanding, confusion, failure of communication, or perhaps even inefficiency, and the result is to deny justice to the applicant, I should be very sorry to hold that the remedy of judicial review was not available.**

6. Public law does not thrive in a cage. Nor therefore does it speak in absolutes. This is why, for example, in the context of 'justiciability' we found Lord Bingham avoiding the

word “never” in this passage in *R v Jones* [2006] UKHL 16 [2007] 1 AC 136 at [30], when describing the:

**Well-established rules that the courts will be very slow to review the exercise of prerogative powers in relation to the conduct of foreign affairs and the deployment of the armed services ...**

He even added, for good measure, that:

**I do not suggest that these rules admit of no exceptions.**

7. Nor is public law yet fully developed. The topics which need principled evolution and development include public law costs; accountability under international law; scrutiny of primary legislation; monetary remedies. These will be for the post-Bingham era. But there is no harm pointing the way or giving a hint. Take public tort law and Lord Bingham’s dissent in *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23 [2005] 2 AC 373. There, he said (at [49]) that “the concept of duty has proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not”. What he felt was needed was (at [50]) that “the law of tort should evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems”. That is the common law way.
8. Common law principles carry immense force. This was dramatically illustrated in the torture-tainting case (*A v Secretary of State for the Home Department* [2005] UKHL 71 [2006] 2 AC 221) where Lord Bingham characterised (at [11]-[12]) the common law prohibition on torture “as a constitutional principle” and explained at [52] that the “principles of the common law, standing alone” were sufficient to “compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice”. The common law may also provide the primary means in the current law for international law obligations to be applied and enforced. As Lord Bingham

put it (in the *A* case at [27]):

**If, and to the extent that, development of the common law is called for, such development should ordinarily be in harmony with the United Kingdom's international obligations and not antithetical to them.**

9. In judicial review, once a common law standard of the required conduct of a public authority has been found to be infringed, the Court will be slow to refuse the claimant a remedy. So, for example, when it is being suggested that a procedural default was not 'material' and caused no unfairness overall, principled rigour is needed. As Bingham LJ famously explained in *R v Chief Constable of the Thames Valley Police, ex p Cotton* [1990] IRLR 344, 352:

**While cases may no doubt arise in which it can properly be held that denying the subject of a decision an adequate opportunity to put his case is not in all the circumstances unfair, I would expect these cases to be of great rarity. There are a number of reasons for this: 1. Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance. 2. As memorably pointed out by Megarry J in *John v Rees* [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens. 3. It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed. 4. In considering whether the complainant's representations would have made any difference to the outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision. 5. This is a field in which appearances are generally thought to matter. 6. Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.**

10. The proper handling of judicial review grounds is a balancing exercise. Public law charts a principled middle course reconciling the imperatives of judicial vigilance and restraint. Take the basic reasonableness test. As Lord Bingham CJ explained in *R v Secretary of State for the Home Department, ex p Hindley* [1998] QB 751 (DC), 777A:

**The threshold of irrationality for purposes of judicial review is a high one. This is because responsibility for making the relevant decision rests with another party and not with the court. It is not enough that we might, if the responsibility for making the relevant decision rested with us, make a decision different from that of the appointed decision-maker. To justify intervention by the court, the decision under challenge must fall outside the bounds of any decision open to a reasonable decision-maker.**

However, as he then pointed out in *R v Director of Public Prosecutions, ex p Manning* [2001] QB 330, at [23]:

**the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress ... and if the test were too exacting an effective remedy would be denied.**

11. The public law Court shoulders a special responsibility in the context of human rights. The common law recognises and defends certain basic, constitutional rights. For example, "the right to personal freedom", explained Lord Bingham in *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68 at [36], has a "fundamental importance", reflected in "the long libertarian tradition of English law ... upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day". Equally, as he put it in *R v Shayler* [2002] UKHL 11 [2003] 1 AC 247 at [21] "The fundamental right of free expression has been recognised at common law for very many years".
12. Well before Parliament got round to it in 1998, human rights standards had begun to emerge at common law. It was Sir Thomas Bingham MR who endorsed David Pannick QC's formulation, in *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554D-G, that:

**The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is**

**important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.**

Lord Bingham had earlier recognised the procedural implications of the developing 'anxious scrutiny' doctrine. As he had explained (as Bingham LJ in *R v Secretary of State for the Home Department, ex p Sittampalam Thirukumar* [1989] Imm AR 402, 414) in the context of asylum decisions, they were:

**decisions ... of such moment that only the highest standards of fairness will suffice.**

13. Under the Human Rights Act 1998, the judge's role can clearly be seen to be, not secondary or deferential, but a primary function involving value judgments applying an intense scrutiny. Each Convention right carries its jurisprudence, capable of brilliantly concise yet comprehensive exposition at Lord Bingham's hand (see eg. his treatment of Article 2 in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653 and *R (Middleton) v West Somerset Coroner* [2004] UKHL 10 [2004] 2 AC 182). The protection of Convention rights means (*R v Shayler* [2002] UKHL 11 [2003] 1 AC 247 at [33]) that: "in any application for judicial review alleging [a] violation of a Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible". And the national court "should not without strong reason dilute or weaken the effect of the Strasbourg case-law" (*R (Ullah) v Secretary of State for the Home Department* [2004] UKHL 26 [2004] 2 AC 323 at [20]).
14. As to the judge's HRA function, as Lord Bingham put it in *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 53 [2008] 3 WLR 549 at [25]: "the court cannot abdicate its function of deciding whether as a matter of law the [statutory] scheme, as promulgated and operated, violate[s] the ... [Convention] right". And as regards the need for a primary judgment, consider the force of this trilogy of observations. First, in *R v Secretary of State for the*

*Home Department, ex p Daly* [2001] UKHL 26 [2001] 2 AC 532 at [23], that: "domestic courts must themselves form a judgment whether a convention right has been breached (conducting such inquiry as is necessary to form that judgment)". Next, in *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68 at [40], that: "domestic courts must themselves form a judgment whether a Convention right has been breached". Finally, in *R (SB) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15 [2007] 1 AC 100 at [30], that:

**The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time ... Proportionality must be judged objectively, by the court.**

15. If it can be said that practitioners spend their time spinning plates, perhaps it can be said that judges walk a tightrope. As with every aspect of public law, the protection of human rights involves an intricate and sometimes difficult balancing act. Consider these from among Lord Bingham's statements of basic principle as to how that balance is approached. First, in *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27 [2004] 2 AC 368 at [20], explaining that proportionality "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention". Secondly, in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681, 703C, that: "While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies". Thirdly, in *A v Secretary of State for the Home Department* [2004] UKHL 56 [2005] 2 AC 68 at [39], explaining that "while any decision made by a representative democratic body must of course command respect, the degree of respect will be conditioned by the nature of the decision".

16. Beyond the world of human rights, are the everyday aspects of administrative law. Statutory interpretation is at its heart. Here too there is a balanced approach, involving authoritatively expounded key principles. Here, in his words, are some of them:
- (1) From *R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13 [2003] 2 AC 687 at [8], that: "The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose"; and at [15], that there is a "constitutional imperative that the courts stick to their interpretative role and do not assume the mantle of legislators".
  - (2) From *R v J* [2004] UKHL 42 [2005] 1 AC 562 at [15], that: "It is the duty of the court to give full and fair effect to the meaning of a statute. In a purely domestic context such as this, it cannot construe the statute by reference to any extraneous legal instrument. It must seek to give effect to all the provisions of a statute. It cannot pick and choose, giving effect to some and discounting others. It has no warrant, in a case ... where no Convention right is engaged, to resort to the unique interpretative technique required by section 3 of the Human Rights Act 1998. If a statutory provision is clear and unambiguous, the court may not decline to give effect to it on the ground that its rationale is anachronistic, or discredited, or unconvincing".
  - (3) From *R v Z (Attorney General for Northern Ireland's Reference)* [2005] UKHL 35 [2005] 2 AC 645 at [16]-[17]: "the task of the court is to interpret the provision which Parliament has enacted and not to give effect to an inferred intention of Parliament not fairly to be derived from the language of the statute"; and "the interpretation of a statute ... is directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief".

- (4) From *R (Jackson) v Attorney General* [2005] UKHL 56 [2006] 1 AC 262 at [28]: "in accordance with long-established principles of statutory interpretation, the courts will often imply qualifications into the literal meaning of wide and general words in order to prevent them having some unreasonable consequence which Parliament could not have intended".
  - (5) From *Seal v Chief Constable South Wales Police* [2007] UKHL 31 [2007] 1 WLR 1910 at [5]: "In construing any statutory provision the starting point must always be the language of the provision itself".
17. In that everyday public law world, the judicial review jurisdiction operates ultimately through the practical and effective application of a series of basic principles, many of which Lord Bingham had the opportunity concisely to encapsulate. There are very many examples. Here is a mere handful of them:
- (1) On the permission filter: *R v Secretary of State for Trade and Industry, ex p Eastaway* [2000] 1 WLR 2222, 2227H ("The requirement of permission to apply for judicial review is imposed primarily to protect public bodies against weak and vexatious claims").
  - (2) On power not being unfettered but held on trust: *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme* [2001] 2 AC 349, 381B (Lord Bingham: "no statute confers an unfettered discretion on any minister"); then, in *Magill v Porter* [2001] UKHL 67 [2002] 2 AC 357 at [19(2)] ("It follows from the proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves").
  - (3) On alternative remedies: *Kay v Lambeth London*

*Borough Council* [2006] UKHL 10 [2006] 2 AC 465 at [30] ("if other means of redress are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review").

- (4) On disclosure: *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53 [2007] 1 AC 650 at [3] ("The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly") and at [4] ("Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence ... the document itself is the best evidence of what it says").
- (5) On vitiating consequences: *Secretary of State for the Home Department v JJ* [2007] UKHL 45 [2008] 1 AC 385 at [27] ("An administrative order made without power to make it is, on well-known principles, a nullity").
- (6) On a straightforward reasonableness test: *In Re Duffy* [2008] UKHL 4 at [28] ("the decision ... was one which a reasonable Secretary of State could not have made if properly directing himself in law, if seized of the relevant facts and if taking account of considerations which, in this context, he was bound to take into account").
- (7) On *Creednz* and relevancies: *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [2008] 3 WLR 568 at [40] ("A discretionary decision is not ... vitiated by a failure to take into account a consideration which the decision-maker is not obliged by the law or the facts to take into account, even if he may properly do so").
- (8) On merits review: *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [2008] 3 WLR 568 at [41]: "The issue ... is not whether his decision was right or wrong, nor whether the

[Court] agrees with it, but whether it was a decision which the Director was lawfully entitled to make".

18. Under Lord Bingham's management the law reports have become, perhaps more than ever before, a gold mine of principled but pithy exposition, analysis and working illustration. By the time of his retirement almost every item within the public law judicial toolkit, examined and adjusted, had come to bear the Bingham kite-mark: tried and tested. Best of all, the electronic databases are now full of authoritative, block-and-paste, Lord Bingham soundbites from which future generations of practitioners, academics and judges will gratefully crib.
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