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THE VIEW FROM THE BENCH

by Mr Justice Fordham
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Introduction

1. At your judicial review conference today you will hear from experts. Among them are expert practitioners and expert academics. There will be different perspectives. From time to time, the subject-matter will probably overlap. I understand you will hear later this morning from one expert commentator, about some leading cases of 2025. Then I understand that you will hear this afternoon from another expert commentator about some most influential cases of 2025. In my View From The Bench I will also mention the occasional case decided in 2025. But where there is overlap, may there be affirmation and extra illumination. Perhaps it will be in a Venn diagram of overlapping circles, each with its own colour, where the mix of blended colours in the overlapping parts can produce for us all a distinct and vibrant new colour.

2. If you sit on the Bench, where my colleagues and I sit, what will land in your lap are those cases which people bring to Court, the issues which the parties in those cases raise, and the authorities which the advocates in those cases cite to the Court. That is what we then see, through our adjudicative umpiring prism. What we make of it all is in our judgments, released in the public domain, speaking for themselves and available to be scrutinised. Sometimes, we will have the chance to step back and take a broader look. Many Judges receive law reports or updates. Judges will try to keep up with legal developments. Some Judges will be involved in writing Court guides or other books. Some Judges get to deliver speeches. Some Judges get to teach other Judges, or learn from other Judges. In the summer of 2025, for reasons which do not matter, I had the opportunity to try to catch up on five years of judicial review. I am going to draw on that experience in giving this view from the Bench. A Bench can be a place to sit down and look around, to then describe what you see. Much of what I say will be about basics. But that is not something I can ever apologise for. Basics really matter.

The Judges' Annual

3. I will start with something intensely practical. Our Court Guide is the annual Administrative Court Judicial Review Guide. It came out in September 2025, with Sheldon J at the keyboard. I have spoken about the Guide before. But I commend the Guide to you once again, emphasising its golden virtues. (1) It is up to date. (2) It is produced by the Court. (3) It is freely available online. (4) The rules described and referenced are hyperlinked. (5) The case law described and referenced is hyperlinked. (6) Switched-on people make reference to the Guide.

Encapsulations

4. I turn to the case-law, with this observation. Recent encapsulations are always handy. You may say they contain nothing new. You may be right. But having an up to date map is never a bad thing. Even if it is for the reassurance that the road network has not radically changed. As you may know, Judges' speeches are published on the Judicial website. So, if you are interested in the case references or quotes, you will be able to access them.

The essence of judicial review

5. Here are three crisp and handy encapsulations of the essence of judicial review itself. First, from the Privy Council decision in National Bank of Anguilla v Chief Minister of Anguilla [2025] UKPC 14 (24 March 2025), where Lord Reed and Lady Rose said (at §91) that the Court's "function in judicial review proceedings of protecting the rule of law".

6. Second, from another Privy Council case, Ayers-Caesar v Judicial and Legal Service Commission [2025] UKPC 15 (also 24 March 2025), where Lord Reed and Lady Rose (again) elaborated (at §89): "Judicial review … is designed to protect the public interest in the lawful use of the powers conferred under public law, as well as the private interests of those who may be affected by the abuse of those powers".

7. Thirdly, this practical and memorable description from the High Court. In R (TPL1) v SSD [2025] EWHC 1729 (Admin) [2025] ACD 129 (8 July 2025) was an Afghan Relocations and Assistance Policy case. At §86, Dingemans LJ said: "Judicial review is intended to provide a speedy audit of the legality of public decision making". I can see that description of judicial review as a "legality audit" catching on.

Candour at the permission stage

8. While I have the National Bank of Anguilla case in view, let me point out an illustration of a practical procedural point of significance. It is about the temporal reach of the duty of candour in judicial review. Lord Reed and Lady Rose confirm (at §91) that the judicial review "duty of candour … applies at the stage of an application for [permission]". As

they explain: "That approach is in accordance with principle: the reasons underlying the recognition of the duty of candour – the importance of enabling the court to perform its function in judicial review proceedings of protecting the rule of law, and the fact that material information will often be solely within the knowledge of the [defendant] – can be relevant at the [permission] stage". They also add that: "similar considerations can be relevant in the parties' dealings with each other at the pre-action stage, as a matter of good practice".

Consultation triggers

9. Switching from judicial review practice to the grounds for judicial review, my next example of a handy encapsulation states some basics. What are the triggers for a duty to conduct a consultation? In R (Liberty) v SSHD [2025] EWCA Civ 571 [2025] 3 WLR 543 (2 May 2025), Underhill LJ restates (at §§64-65) that "the kinds of case" where "a duty to consult may arise at common law" are "where: (i) there has been a promise to consult; (ii) there has been an established practice of consultation; and (iii), where exceptionally a failure to consult would lead to conspicuous unfairness". It is interesting to see the language of "conspicuous unfairness" having this transplant, after what was said about it in R (Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25 [2019] AC 96 at §41.

Retro-reasons

10. Here is another encapsulating example. This time, it is at the intersection of grounds for judicial review and judicial review practice. It is about retro-reasons. In Shvidler v Secretary of State for Foreign, Commonwealth and Development Affairs [2025] UKSC 30 [2025] 3 WLR 346 (29 July 2025), Lord Sales and Lady Rose encapsulate the position for us all when they say this (at §127): "[in] a challenge to a decision on conventional domestic public law grounds, where the focus is on the reasoning and decision-making process at the time the decision was taken … it is generally not permissible for the decision-maker to defend its decision by reference to reasons which were not in its mind when the decision was taken, but were brought forward only afterwards".

Anxious scrutiny

11. My next handy encapsulation case addresses how "anxious scrutiny" in common law reasonableness can increase the need for justification and narrow the latitude afforded. In R (Spitalfields Historic Building Trust) v Tower Hamlets LBC [2025] UKSC 11 [2025] PTSR 700 (26 March 2025), Lord Sales reminds us (at §54): "where an individual's human rights are in issue … anxious scrutiny of a decision which interferes with those rights may be called for … The more substantial the interference with human rights, the more the court will require by way of justification before it will be satisfied that the decision falls within the range of decisions which are rationally open to the public authority within the parameters of its discretion"; and (at §55) that "other values may be recognised in law as being of similar significance and weight so as to lead to a similar

approach to the application of the rationality rule and a corresponding narrowing of the lawful parameters of the relevant discretionary power". The High Court has discussed anxious scrutiny too. There is R (KP) v Secretary of State for Foreign, Commonwealth and Development Affairs [2025] EWHC 370 (Admin) at §77; and also in R (Alnoor) v SSHD [2025] EWHC 922 (Admin) [2025] 4 WLR 57 at §28.

Restraint

12. When considering the intensity of reasonableness or proportionality review and the breadth of latitude for evaluative judgment, it has now become very familiar to see the language of "constitutional" and "institutional" reasons. These are ideas which fit together, just as they roll off the tongue. As Lord Reed told us in U3 v SSHD [2025] UKSC 19 [2025] HRLR 12 (12 May 2025) at §65: "In carrying out a review of a discretionary decision by the person entrusted by Parliament to take that decision, and in particular when assessing the reasonableness of a decision, a court … will always attach weight to the assessment made by the primary decision-maker. That is a matter of particular significance in the present context, for two reasons, which might be described as institutional and constitutional".

13. Along the same lines, in Shvidler the Supreme Court spoke (at §124) of "the context relevant to determining the measure of respect" as including "the extent to which the courts are more or less well placed to adjudicate, on grounds of relative institutional expertise and democratic accountability" and (at §125) "the respective constitutional responsibilities of the courts and the public authority whose actions are under challenge and their respective institutional competencies".

Proportionality Appeals

14. One of the questions addressed in Shvidler was why appellate courts sometimes (see §142) substitute their own view on a question of proportionality and sometimes afford a latitude to the evaluative judgment on proportionality by the court whose adjudicative view from the Bench is what is under appeal. Shvidler takes a fresh look at delineating and explaining the distinction between the two types of case.

15. It gives as an "example" (at §160) of those "paradigm cases where it is likely that a review approach on appeal is appropriate" is a "one-off decision of a judge or an official which depends entirely on the application of well-established law and principles to the facts of the individual case".

16. By contrast (at §144) a "fresh determination approach" is described as "appropriate where it is important that the appellate court should give its own opinion about the proportionality of a measure and its compatibility with Convention rights", such as "where the decision will provide guidance for other cases or where the subject matter has major social or political significance so that the public will rightly expect the senior judges in the appellate court to exercise their own judgment as to whether the measure in

question is proportionate and lawful or not". These are the prisms through which proportionality appeals are viewed.

Statutory Interpretation

17. My next topic is statutory interpretation. As it was put in R (Castellucci) v Gender Recognition Panel [2025] EWCA Civ 167 [2025] HRLR 11 (at §32): "The modern approach to statutory interpretation has been authoritatively settled by the Supreme Court in a number of recent decisions". There is now a string of Supreme Court cases which have restated, and then repeated, the basic principles of statutory interpretation, going back to basics. It really started with R (O) v SSHD [2022] UKSC 3 [2023] AC 255 at §29 (Lord Hodge). The familiar overarching feature within the "[n]ormal principles of statutory interpretation" is this: "The courts in conducting statutory interpretation are seeking to ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision" (see Darwall v Dartmoor National Park Authority [2025] UKSC 20 [2025] AC 1292 at §15). That quote is from the May 2025 judgment about the right to camp in Dartmoor. Other cases are available. Lots of them, in fact. You can take your pick. But you are unlikely to need a case below the Supreme Court, or earlier than O in 2022.

Defendant Courts

18. I want to talk next about defendant courts. We know that judicial review is a challenge to public authorities. We also know that some public authorities are courts and tribunals. Where there is no remedy by way of appeal, judicial review is very similar to an appeal on a point of law: see eg. Hussaini v Islington LBC [2025] EWCA Civ 22 [2025] PTSR 1094 (17 January 2025) at §20. But in judicial review the public authority court is the defendant to the claim. In judicial review, the opposition party in the proceedings before the defendant court is the interested party. If it were an appeal, the interested party would be the respondent, and the court would not be a party at all.

19. There are some important recent decisions about defendant courts. They are a fresh look. They explain that the passive role which defendant courts are expected to adopt is no mere practice or convention. It reflects a core principle of neutrality, linked to judicial independence and impartiality.

20. In The Father v Worcestershire County Council [2025] UKSC 1 [2025] 2 WLR 155 (29 January 2025), Lord Sales and Lord Stephens say this (at §71ii): "a court of inferior jurisdiction may be a defendant in a judicial review claim, but where that happens the court is generally expected to play an entirely passive role, and is not required to file evidence in an attempt to justify and defend the order it has made; nor is it appropriate for it to seek to defend its decision by adversarial argument. Its judgment explains its reasons and if there is to be adversarial argument in relation to the judicial review claim then, other than in wholly exceptional circumstances, it is for the party in whose favour the order was made to advance submissions to defend it".

21. Aligned to that thinking is a significant Privy Council judgment from 30 May 2024 called Special Tribunal v Estate Police Association [2024] UKPC 13 [2024] 1 WLR 4252. In that case, Lord Leggatt said this (at §56): "for a court or tribunal whose decision is challenged in proceedings for judicial review … actively to oppose the claim or to … adopt a neutral stance in the proceedings cannot nowadays be seen as a matter of choice; it is an approach that is required by internationally recognised principles of judicial independence and impartiality". He added (at §57): "A tribunal … compromises its independence and impartiality if it takes part in proceedings brought to challenge its decision in an adversarial way, in effect aligning itself with the interests of the successful party to the dispute on which it has adjudicated". He also said (at §58): "a more active participation than is usual may be justified to ensure that the [judicial review] court is informed of relevant law and potential arguments… In providing any assistance, however, the tribunal and its advocate should view their role as similar to that of an amicus or advocate to the court. It is essential that they maintain a strictly neutral stance and avoid adopting an adversarial role in the proceeding".

22. This principled approach to courts as defendants in judicial review may resonate in different ways. One of them is about retro-reasons. I have also given you the Shvidler encapsulation. In the Special Tribunal case, Lord Leggatt had said this about retro-reasons and defendant courts (at §57): "A court or tribunal has no interest of its own … in trying to prevent a successful challenge to its decision. Its sole function is that of an independent and impartial adjudicator of disputes that come before it. [It] acts inconsistently with that function and compromises its independence and impartiality if … [it] seeks to defend its decision by adding to the reasons that it gave when the decision was made rather than leaving those reasons to speak for themselves".

Alternative Remedy

23. I am staying in 2024 for the case of In Re McAleenon [2024] UKSC 31 [2024] 3 WLR 803 (16 October 2024). It is a fresh look at alternative remedies. It addresses in a new way two issues previously encountered. First, there was the suggestion of an ombudsman as an alternative remedy precluding judicial review. The Supreme Court says (at §63) that: "The general position is that the opportunity to complain to an ombudsman does not affect the right of an individual to bring a judicial review claim against a public authority… The role of an ombudsman is intended by Parliament to supplement control of public authorities by the courts through judicial review, not to replace it… Judicial review therefore has priority as against a complaint to the ombudsman …"

24. Second, there was the idea of private law remedies against a waste facility operator as an alternative remedy, where the claimant was wishing to raise issues of legality of inaction of its public authority regulator. Not so. The claimant (see McAleenon at §54) "was entitled to choose which claim she wished to bring" and "assess that her overall objective might best be promoted by ensuring that the defendant regulators did their job properly".

The court (at §55) had "no role to say that the claimant should have sued someone else by a different claim. The question of whether a claimant has a suitable alternative remedy available to them falls to be addressed by reference to the type of claim the claimant has chosen to bring and what relief they have sought against the particular defendant". And so (at §56) the claimant's "judicial review claim against the defendant regulators … was that they were failing to comply with their public law duties, and those other types of action would neither address that issue nor give a remedy in relation to it".

Reset Cases

25. Many of the hundreds of judgments in judicial review cases give us handy encapsulations. You would expect any judgment of any judicial review court to identify the relevant law, and then apply that law. Sure enough, that is what all judgments do. But there are some cases which we receive and read which appear deliberately to "reset" the legal position. These reset cases are especially important for all of us. They are signalling the law rebooting, or starting a new chapter. Sometimes, they are signalling that what was said and decided previously may need now to be treated with especial caution.

Unlawful Policy Guidance

26. A good example of what I mean by a Reset Case came back in July 2021, with R (A) v SSHD [2021] UKSC 37 [2021] 1 WLR 3931. There were two key points. First, the judicial review court will intervene where a public authority by issuing a policy has "positively authorised or approved unlawful conduct by others" (§38). Second, the unlawfulness of a public authority's policy guidance is not generally a function of "risk". The Supreme Court also went on to suggest three categories (see §46): (i) a positive statement of law inducing a breach of duty; (ii) breach of an advisory duty; and (iii) a misleading attempt at a comprehensive legal description.

27. I realise that a December 2025 annual conference may be an odd place to be speaking about a July 2021 reset case. But we are now able to look at the case-law which has flowed under the bridge since the reset case of A was decided. Having done so, here are some observations. Many of the cases involve asking whether any of the A categories is applicable. Some of the cases involve focusing on the key point: whether the policy guidance has positively authorised or approved unlawful conduct by others. Some judges have emphasised that the three A categories were only intended to be illustrations. None of the cases focus on "risk". Nearly five years of cases after A illustrate what is perhaps important about Reset Cases. (1) It is important to identify and tune in with a Reset Case. (2) It is important to appreciate the headline messages. (3) It is important not to treat judicial observations as though they were statutory provisions. The three categories in A are illustrative: see R (CPH) v SSHD [2025] EWHC 848 (Admin) at §146; echoing R (Cardona) v SSHD [2021] EWHC 2656 (Admin) [2022] 1 WLR 1855 at §70.

Statutory Materiality

28. A more recent Reset Case may be R (Bradbury) v Brecon Beacons National Park Authority [2025] EWCA Civ 489 [2025] 4 WLR 58 (16 April 2025). There, the Court of Appeal was looking at the statutory materiality test: whether it appears to the court that it is highly likely that the outcome for the claimant would not be substantially different if the conduct complained of had not occurred. Bradbury speaks (at §71) of "evaluating the significance of the error on the decision-making process" and (at §74) focusing "on the impact of the error on the decision-making process that the decision-maker undertook". Bradbury has a clear emphasis on a backward-looking, objective analysis. It may have something to say to any judge who is poised to refuse judicial review because: "I don't think, if things had been done in a legally correct way, the outcome would have been different". I would not be surprised to see Bradbury frequently cited.

Conclusion

29. Thank you for inviting me to move from the Bench onto the virtual stage of your conference. Thank you for allowing me to give this view. I have illustrated some handy encapsulations, some fresh looks, some Reset Cases. All in the world of legality auditing. You can see them on the map, alongside the expert analysis through the rest of this day. Enjoy the Venn diagram. Prepare for the shades of colour, and the magic of colour overlaps. Enjoy the day.

Fordham J

5.12.25