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FUTURE PERSPECTIVES FROM PAST EXPERIENCE

Looking for clues as to how the public law case-law develops

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Introduction

1. Many of the themes of your – trends and forecasts, back to the future – conference today are about what the future holds for public law and for human rights. You will have sessions on the future relationship between public law and the executive; a better future through public law; new policies in immigration and asylum; whether public law can protect in the areas of children's rights, protest rights, social housing, artificial intelligence, and so on. You have a full day ahead, with lots of time to look forward and think about what is going to happen in the future. But for those of you cannot wait to look forward, I am going to be one of the speakers who hold you back. I am asking you to turn around. Look at the road behind us. Let us think about how the case-law has developed. Perhaps this past experience can help us when we look forward. We may find future perspectives from past experience. We may find clues as to how the public law case-law develops. Come back in time with me.

A Short List of Developments

2. I am going to start by giving a short list of developments over a 50 year period from 1955. How many, from the following short list, are developments that you would have predicted? Can you see yourself involved in the case where the argument was developed? Would you have spotted the way forward? How would you have contested it? How would you have advised? Here is the list. It is all very familiar:

3. If a finding of fact is unsustainable on the evidence, that is an error of law (1955). Standards which have been applied to public bodies acting judicially or quasi-judicially are also applicable to public bodies acting administratively (1963). Standards which have been applied to public bodies exercising statutory powers also apply to a non-statutory body set up under the prerogative (1967). A public authority acts unlawfully if their action serves to frustrate the purpose of the relevant legislation (1968). Or if they fail to take sufficient steps to acquaint themselves with relevant information (1976). Judicial review has to be conducted with all the cards face up on the table (1986). Despite the

case-law to the contrary, injunctions are available against the Crown (1993). The greater the intrusion with fundamental rights, the more that will be required to show reasonableness (1995). Fundamental rights are protected by a principle of legality which informs whether a measure is ultra vires (1997). Even in the absence of procedure rules, protective costs orders can be made in public interest cases (2005). There can be judicial review of primary legislation (2005).

4. All of this, and much more, happened within 50 years of 1955. How much of it would you have foreseen, if you had attended the annual conference of the PLP (trends and forecasts) in 1954? By the way, those case references are: Edwards v Bairstow [1956] AC 14 (July 1955); Ridge v Baldwin [1964] AC 40 (March 1963); R v Criminal Injuries Compensation Board, ex p Lain [1967] 2 QB 864 (April 1967); Padfield v Minister of Agriculture Fisheries & Food [1968] AC 997 (February 1968); Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014 (October 1976); R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 941 (April 1986); M v Home Office [1994] 1 AC 377 (July 1993); R v Ministry of Defence, ex p Smith [1996] QB 517 (November 1995); R v SSHD, ex p Pierson [1998] AC 539 (July 1997); R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 [2005] 1 WLR 2600 (March 2005); R (Jackson) v Attorney General [2005] UKHL 56 [2006] 1 AC 262 (October 2005). Now, to help us think about how the case-law develops, here are ten further examples:

Limbuela

5. In November 2005, the House of Lords decided that the Home Secretary was not entitled to withdraw statutory asylum support to late-claim asylum-seekers who would be obliged to sleep in the street, or be seriously hungry, or be unable to satisfy the most basic requirements of hygiene. The case was R (Limbuela) v SSHD [2005] UKHL 66 [2006] 1 AC 396. The background was that there had been two decisions of the Court of Appeal in 2003. What had happened after those two cases was described by Lord Brown (at §81). By the time the issues returned to the Court of Appeal for a third time, on an expedited appeal in May 2004, "there were then 666 similar cases" all of which "already the subject of interim relief orders", and all "awaiting determination in the Administrative Court". That means 669 interim injunctions – including the Limbuela cases – granted by High Court Judges and Deputy High Court Judges, in urgent judicial review claims brought by lawyers, arguing that the Home Secretary was acting unlawfully. The Courts resolve concrete disputes between parties, in cases brought before them. We can say this. The public law case-law develops because people get help with problems, evidence is prepared, and arguments are designed and presented.

A v SSHD

6. Rewind a year. In December 2004 a nine-judge House of Lords decided that an emergency derogation instrument which permitted the preventive detention of foreign suspected terrorists was incompatible with human rights. The case was A v SSHD [2004] UKHL 56 [2005] 2 AC 68. What mattered in A was the orientation of the case. It was a

discrimination case. A simple, powerful point unlocked the case. Lord Bingham expressed it (at §68): "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another". The question was not whether preventive detention of suspected terrorists could be justified. The question was whether preventive detention of foreign suspected terrorists could be justified, if British suspected terrorists posed the same threat. It could not be justified. Which, by the way, was exactly what the Special Immigration Appeals Commission had decided at first instance. We can say this. The public law case-law develops through the power of ideas which are straightforward.

E v SSHD

7. Earlier the same year, in February 2004, the Court of Appeal decided that a material error as to an established and verifiable fact was a public law error, whether for the purposes of statutory appeal on a point of law or judicial review. The case was E v SSHD [2004] EWCA Civ 49 [2004] QB 1044. In E, the Court identified a list of criteria which had to be met. But they also said that where those criteria were met the material error of fact gave rise to "unfairness" (§66), and they said that it was this "unfairness" which was the "basis" of the public law error they were identifying (§91). Of course, "unfairness" is a very familiar theme in public law. Later cases on material error of fact have focused on the listed criteria. The Court of Appeal has said this: "Subsequent case law confirms that material mistake of fact, following E, is a rare but accepted head of challenge" (Kanhirakandan v SSHD [2023] EWCA Civ 1298 at §50). The reference in E itself to "unfairness" – at least as the next step in the law – was a helpful, and perhaps necessary, link to something trusted and conventional. We can say this. The public law case-law develops by invoking trusted and conventional broad principles.

Daly

8. Earlier the same decade, in May 2001 the House of Lords decided that a policy of examining a prisoner's correspondence with their legal advisers, in the absence of the prisoner, was unlawful. The case was R v SSHD, ex p Daly [2001] UKHL 26 [2001] 2 AC 532. Lord Bingham said (at §21) that the "degree of intrusion" was "greater than is justified by the objectives the policy is intended to serve, and so violates the common law rights of prisoners", repeating (at §23) that this was the application of "common law principles". By now, the Human Rights Act 1998 had been enacted and brought into force. We can say this. The public law case-law develops, by treating fundamental rights as having a constitutional common law underpinning, not just a statutory source.

Coughlan

9. In July 1999, at the end of the previous decade, the Court of Appeal decided that a local authority promise that a residential care home placement was "for life" could engender a substantive legitimate expectation whose non-fulfilment would not be lawful, even if it met a reasonableness test, unless it involved an overriding objective justification. The case was R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213. Rewind two and a half years. In November 1996 the Court of Appeal had decided that

breach of a substantive legitimate expectation was governed by the reasonableness test; and anything else was "heresy". That was R v SSHD, ex p Hargreaves [1997] 1 WLR 906. So, how did the law develop? Here is what did not happen. In Coughlan, the Court did not say Hargreaves was wrong. Rather, it said that Hargreaves was different: it was confined to its particular context. It was distinguishable. Here is a challenge for you. Find a line of cases in which the Hargreaves approach has been followed. Ask yourself whether Hargreaves has been parked in the layby, while Coughlan has driven off down the road. We can say this. The public law case-law develops, by avoiding collisions.

Khawaja

10. In the previous decade, in February 1983, the House of Lords (Lords Fraser and Wilberforce, with Lords Scarman, Bridge and Templeman) decided that whether someone was an "illegal entrant" for the purposes of the Immigration Act 1971 was a precedent fact question for the Court to decide objectively as a primary decision-maker and with fresh evidence; not a question for secondary reasonableness review on the basis of the material which was before the Home Office. That was R v SSHD, ex p Khawaja [1984] 1 AC 74. Again, rewind two and a half years. In July 1980 the House of Lords (Lords Fraser and Wilberforce, with Viscount Dilhorne and Lords Salmon and Russell) had decided – unanimously – that whether someone was an "illegal entrant" for the purposes of the Immigration Act 1971 was a question for secondary reasonableness review on the basis of the material which was before the Home Office; not a precedent fact question for the Court to decide objectively as a primary decision-maker and with fresh evidence. That was R v SSHD, ex p Zamir [1980] AC 930. Louis Blom-Cooper QC and Michael Beloff QC opened their submissions in Khawaja with this: "In arriving at its decision the Court of Appeal was bound by Zamir. But that case ought to be reviewed" (79G). In response, Simon Brown and Andrew Collins argued (91B) that Zamir was rightly decided, and "should not be departed from", being "a unanimous decision" which "was very recent". Lord Fraser, who had been on the panel which originally refused permission to appeal in Khawaja – but then granted it – went on to say in his judgment that "I am clearly of the opinion that the decision in Zamir, to which I was a party, was erroneous". We can say this. The public law case-law develops, by trying again, and thinking again.

Anisminic

11. Back 15 years, it is now nearly 60 years ago. In December 1968, the House of Lords decided that the Foreign Compensation Commission had made a determination involving a legal error which could be corrected on judicial review, notwithstanding a statutory provision which said that determinations could not be questioned in any proceedings. That was Anisminic v Foreign Compensation Commission [1969] 2 AC 147. The headnote writer in the law reports thought the Court had decided that the determination was a nullity because the Commission's error of law, in some sense, went to its "jurisdiction". The public law position became this: (a) all errors of law are correctable by judicial review; and (b) all public law errors make a decision a nullity. And all of that was attributed to Anisminic, as interpreted in later cases. Anisminic had a relatively

narrow ratio, and the significance later attached to it may not have been apparent at the time, because "what landmark cases decide and what they are later regarded as authority for may be very different". So said Professor Feldman, quoted by Lord Carnwath in R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22 [2020] AC 491 at §51. We can say this. The public law case-law develops, by unlocking the true potential of what has already been said and decided.

Gallaher

12. Fast forward to more recent times. Let us take three years in a row. In May 2018 the Supreme Court decided that it was not substantively or conspicuously unfair or an abuse of power to apply reduced penalty assurances only to those retailers to whom those assurances had been given, and not to other retailers. The case was R (Gallaher Group Ltd) v Competition and Markets Authority [2018] UKSC 25 [2019] AC 96. Lord Carnwath said (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". We can see unreasonableness in Gallaher. We saw unfairness in E. We can also see the reference in Gallaher to the distinct head of substantive legitimate expectation. That is a reference to Coughlan, which distinguished Hargreaves and then overtook it. Unreasonableness is a good greenhouse within which there can be growth. Its virtue is that it emphasises the built-in latitude for the primary decision-maker. We see that – for example – in the law on sufficiency of enquiry and the identification of relevant and irrelevant considerations. As it happens, the editors of De Smith treat E material error of fact as a specific category of "unreasonableness" (§6-032), whereas – as we have seen – E itself spoke of substantive "unfairness". We can say this. The public law case-law develops, by making sure that things grow in what is seen as the best place.

Miller

13. In September 2019 the Supreme Court decided that the Prime Minister's advice to the Sovereign to prorogue Parliament was unlawful because the effect was frustrating the constitutional accountability of Government to Parliament. The case was R (Miller) v Prime Minister [2019] UKSC 41 [2020] AC 373. Judicial review was available to determine the existence of prerogative power, leaving aside whether it was available to determine the legality of the exercise of the power. We can say this. The public law case-law develops, by using distinctions, which characterise what has been decided in a narrower rather than a wider way.

Johnson

14. Finally, in June 2020 the Court of Appeal decided that the failure of the Work and Pensions Secretary to adjust the universal credit scheme to solve a dysfunction was unreasonable, tested by asking questions as to relative advantage and disadvantage, purpose, and whether a reasonable balance had been struck. The case was R (Johnson) v

Work and Pensions Secretary [2020] EWCA Civ 778 [2020] PTSR 1872 at §§49-50, applying R (Law Society) v Lord Chancellor [2018] EWHC 2094 [2019] 1 WLR 1649 at §113. Identifiable purpose. The balance of advantage and disadvantage. A balance being struck. These all sound familiar. We can say this. The public law case-law develops, by deploying familiar ideas in new ways.

Conclusion

15. So, those are ten cases from the last 60 years. And from them, here are ten things we can say about how the public law case-law develops. It develops because people get help with problems, evidence is prepared, and arguments are designed and presented. It develops through the power of ideas which are straightforward. It develops by invoking trusted and conventional broad principles; by treating fundamental rights as having a constitutional common law underpinning, not just a statutory source; by avoiding collisions; by trying again, and thinking again. It develops by unlocking the true potential of what has already been said and decided; by making sure that things grow in what is seen as the best place; by using distinctions, which characterise what has been decided in a narrower rather than a wider way; and it develops by deploying familiar ideas in new ways. These are just a few examples. These are just a few clues. There are many more. You will have your own.

Back to the Future

16. Now you can turn back around, and think about the future. I will leave you to it. But I do so, leaving you with these high-altitude messages. They are relevant to what you may expect or predict in the future public law case-law. First, in R (Elgizouli) v SSHD [2020] UKSC 10 [2021] AC 937, Lord Reed told us (at §170) that "the common law is subject to judicial development, but such development builds incrementally on existing principles"; and Lord Carnwath told us (at §193) that "the power of the courts to develop the common law" is to be "exercised with caution". Secondly, in Al Rawi v Security Service [2011] UKSC 34 [2012] 1 AC 531, Lord Dyson gave us (at §69) the reason why "never say never" is "often an appropriate catchphrase to use in the context of the common law". The reason is this. It is because: "Nobody can predict how the law will develop in the future". I hope you have an interesting day, especially when you are trying to do precisely what Lord Dyson said was impossible.

Fordham J 16.10.24