Tailored Judicial Review Doctrine, Tailoring Judicial Review Doctrine

Abstract: *It has long been recognised that judicial review involves applying general grounds of judicial review to specific legal and subject-matter contexts. In this article we show that at the intersection between the horizontal and vertical dimensions of judicial review often lie bodies of "tailored" judicial review doctrine that are the product of a "tailoring" process. "Tailored doctrine" is not "bespoke" doctrine. It is adapting from a template that already exists. The products of tailoring – here, tailored judicial review doctrine - can look very diverse, but the process of tailoring involves common steps of legal inquiry and analysis. We illustrate our argument with examples taken from the planning, parole, and immigration detention contexts. Identifying the existence of tailored doctrine and the tailoring process has implications for how judicial review doctrine is evaluated, and for understanding the nature of the legal expertise deployed in judicial review.*

Keywords: Judicial Review, Immigration, Planning, Parole, Administrative Law Expertise

It is well recognised that the work of a court in judicial review involves applying generally applicable legal grounds to particular areas of administrative decision-making. This has led several commentators to comment on the existence of the "vertical" and the "horizontal",[1] or the "specific" and the "general",[2] dimensions of judicial review.

[1] E.g. M. Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 8(1) *Australian Journal of Administrative Law* 6, 9.

Conceptualising the nature of the "meeting point"[3] between these two axes is, however, challenging. Given the many different administrative decision-making contexts, there is a lot of case law to analyse. This variety, furthermore, has led some commentators to doubt there is any room for meaningful horizontal principles to operate at all.[4]

In this article, we argue that at the intersection between the horizontal and vertical dimensions of judicial review often lie bodies of "tailored" judicial review doctrine. By tailored doctrine, we mean legal principles which articulate what a decision-maker exercising a *particular* legal authority is required to do in order to perform its function consistently with the grounds of review and without legal error. The process of creating these bodies of doctrine can, in turn, be understood as an exercise in judicial "tailoring". The work of a tailor involves taking generic clothing and adjusting it so that it is contoured to the shape of an individual. Tailoring is different to creating bespoke clothing: it is not creating from scratch, but adapting from a template that already exists. The products of tailoring – here, tailored judicial review doctrine - can look very diverse, but the process of tailoring involves common steps.

The structure of this article is as follows. The first section discusses three examples of "tailored" judicial review doctrine, taken from the planning, parole, and

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[2] P. Daly, "The State of the Art in Contemporary Administrative Law" (2021) 28(1) *Australian Journal of Administrative Law* 20.

[3] M. Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 8(1) *Australian Journal of Administrative Law* 6, 9.

[4] See the following examples from very different perspectives: A.C. Hutchinson, 'Why I Don't Teach Administrative Law (And Perhaps Why I Should)' (2016) 53 *Osgoode Hall Law Journal* 1033; T.R.S Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?' (2002) 61 CLR 87, 88, 116-7; D. Knight, 'Contextual Review: the Instinctive Impulse and Unstructured Normativism in Judicial Review' (2020) 40 Legal Studies 1, 3.

immigration detention contexts. In the second section we look at these examples in a more cross-cutting way to better understand the "tailoring" process. We explain why, although the bodies of doctrine vary from one another, they are better understood as instances of tailored, not bespoke, law. We then go on to identify three questions with which the courts can be seen to be concerned across these examples. First, what is the nature of the legal authority exercised by the decision-maker? Secondly, what "sub-tasks" are involved in decision-making? Thirdly, what is the decision-maker's institutional capacity? These questions provide a useful common starting point for the tailoring process. In the third section we argue that drawing attention to tailoring is important for at least two reasons: for how judicial review doctrine is evaluated, and for understanding the nature of the legal expertise deployed in review.

Three points should be noted before turning to our analysis. First, we focus on the case law of England and Wales, but our analysis has relevance in other common law jurisdictions.[5] Second, the existence of tailored doctrine and the process of tailoring will be familiar to many practitioners whose day-to-day work entails interacting with these bodies of doctrine. However, as we argue in the third section - and although there are some notable exceptions - neither has been a major focus in administrative law scholarship. Third, our central purpose in writing this article is to provoke discussion and further analysis. We see this as the start of a discussion about tailoring, not an exhaustive discussion of it.

[5] See generally W. Bateman & L. McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45 FLR 153, 156.

Tailored Judicial Review: Three Examples

The traditional structure of textbooks and university courses on judicial review organises the subject around a list of general "grounds of review".[6] The content of the list continues to be contested but includes at least the following: error of law; material mistake of fact; failure to consider relevant, and ignore irrelevant, considerations; improper purpose; procedural unfairness; bias and apparent bias; the provision of inadequate reasons; improper delegation; fettering of discretion; irrationality and breach of legitimate expectations. The core work involved in the doctrinal study of judicial review is commonly taken to be that of understanding and critiquing the contents of this list.

These doctrines, by distinguishing legal errors which warrant judicial intervention from other types of complaint, establish the broad legal architecture in which judicial review takes place. An applicant can only succeed in judicial review if they can point to an error of one of these kinds.[7] However, understanding the grounds of the review in the abstract is only a starting point in understanding how courts *reason* in judicial review. In adjudication, the general grounds of review are applied in specific legal and institutional contexts. While this feature of judicial review is often remarked upon, it is rarely explored in detail or conceptualised.[8]

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[6] For discussion of the origins of this conception of the subject see C. Harlow & R. Rawlings, 'Administrative Law in Context: Restoring a Lost Connection' [2014] PL 28.

[7] See e.g. *Browne v Parole Board* [2018] EWCA Civ 2024, [34].

[8] There are notable exceptions. See e.g. R. Kirkham & E. O'Loughlin, 'Judicial Review and Ombuds: a Systematic Analysis' [2020] PL 680; R. Thomas & J. Tomlinson, *Immigration Judicial Reviews: An Empirical Study* (Palgrave Macmillan 2021); R. Thomas, *Administrative Law in Action* (Bloomsbury 2022), ch. 8.

In this section we argue that the "meeting point" between the general grounds of review and specific administrative contexts is often characterised by the existence of bodies of tailored judicial review doctrine. That is, legal principles which articulate what the grounds of review require of a decision-maker in exercising a *particular* function. We illustrate the existence of tailored judicial review doctrine through a discussion of three bodies of case law concerned with challenges to planning application decisions, parole decisions, and the immigration detention of foreign national offenders.

These three examples are illuminating partly because they encompass "routine"[9] types of challenge which arise commonly in judicial review.[10] They therefore provide valuable illustrations of how reviewing courts craft legal doctrine in categories of case where they regularly confront similar questions about how the horizontal intersects with the vertical. At the same time, our examples vary considerably from one another in terms of subject-matter, the identity of the decision-maker(s), and the interests at stake. As will be seen, tailored judicial review doctrine often cuts across several grounds of review. That said, our discussion broadly stays within the realms of what is often called review for "abuse of discretion"[11] – that is review on the grounds of relevancy, improper purpose, and rationality – as opposed to review of procedures or the interpretation of statute.

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[9] J. Bell & E. Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' [2021] PL 505, 510.

[10] See e.g. V. Bondy, L. Platt and M. Sunkin, *The Value and Effects of Judicial Review* (Public Law Project, 2015), 11; J. Bell & E. Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' [2021] PL 505, 510-11.

[11] Language used, for instance, in M. Elliott & J. Varuhas, *Administrative Law* (5th edn, Oxford: OUP 2017), ch. 7-8.

Planning Permission

Since 1947, the "development"[12] of land has been subject to the general requirement to obtain planning permission.[13] Determining applications is a significant administrative task. In quantitative terms, 459,300 applications were, for instance, received in the tax year ending March 2022.[14] In qualitative terms, there is often a good deal at stake: planning disputes are "polycentric"[15] and often involve the weighing up of many competing interests and values.

Primarily, determining applications for planning permission is the responsibility of local authorities.[16] However, the Secretary of State also has the power to call in applications[17] and hear appeals.[18] The Secretary of State usually delegates full decision-making power to a quasi-independent, expert body known as the Planning Inspectorate (PINS). Decisions by PINS are sometimes "recovered" and taken personally by the Secretary of State.[19] Nevertheless, irrespective of how applications for permission are

[12] Town and Country Planning Act 1990 (TCPA), s.55.

[13] TCPA, s.57.

[14] Department for Levelling Up, Housing and Communities, *Planning applications in England: January to March 2022* (available: Planning applications in England: January to March 2022 (publishing.service.gov.uk) (accessed 28 November 2023)).

[15] See e.g. *R. (Spurrier) v Secretary of State for Transport* [2019] EWHC 1070 (Admin), [2020] P.T.S.R. 240, [177]-[184].

[16] Note the existence of a separate statutory scheme implemented by the Secretary of State for "nationally significant infrastructure projects": Planning Act 2008.

[17] TCPA, s.77

[18] TCPA, s.78.

[19] See generally *R. (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 WLR 1389.

determined, legal challenges are made either via an application for judicial review, or a statutory appeal limited to points of law.[20] A significant body of planning case law has emerged.[21] Indeed in 2014 a specialist division within the Administrative Court was created to manage the case load more expediently.[22]

The discretion to determine planning applications is often described as "planning judgement".[23] While the weight to be given to different factors is for the decision-maker,[24] planning judgment is legally structured by both legislation (primary and secondary) and the case law that has developed around it. This is also a field crowded with both local and central government policy. The first, main statutory provision structuring planning decision-making is section 70(2) of the Town and Country Planning Act 1990, which places planning authorities under a duty to have regard to "the provisions of the development plan" and, among other more specific matters, "any other material considerations". The second is s.36(8) of the Planning and Compulsory Purchase Act 2004 which places planning authorities under a duty to determine application in accordance with the development plan, unless "material considerations indicate otherwise".[25] The development plan is a collection of policy documents that

[20] TCPA s.288.

[21] See e.g. www.landmarkchambers.co.uk/resources/guides/planning-court-case-explorer (last accessed 28 November 2023, and on this date recorded 766 cases determined since the creation of the Planning Court).

[22] D. Elvin QC, 'The Planning Court' (2014) 19(2) JR 98.

[23] *Suffolk Coastal DC v Hopkins Homes Ltd* [2017] UKSC 37, [2017] 1 W.L.R. 1865, [55].

[24] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 (HL), 780.

[25] Note that this provision has been amended by Levelling-Up and Regeneration Act (LURA) 2023 to accommodate for instances in which a national development management policy (NDMP) is applicable. However, no NDMPs have been enacted at the time of writing and the LURA amendment does not affect

local authorities are required to keep under review.[26] As will shortly be seen, the term "material considerations" has generated interpretive questions. Broadly, however, the courts have taken it to refer to "any consideration which relates to the use and development of land".[27]

Acting in accordance with these statutory provisions requires planning authorities to undertake a variety of different sub-tasks. It is often necessary, for instance, to interpret and apply provisions in the development plan,[28] to interpret and apply other policy documents,[29] to form a view on whether a factor constitutes a "material" matter[30] (in the case of some developments), to complete an assessment of environmental impacts,[31] and to consider the degree of weight to be given to competing considerations.[32] Across a substantial body of case law, courts have developed specific legal doctrines which articulate what, in relation to these various administrative tasks, a planning authority is required to ensure so that the exercise of their planning judgement does not fall into error. Let us provide one illustration.

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the analysis developed in this article.

[26] Planning and Compulsory Purchase Act 2004 (PCPA), s.15(1); Town and Country Planning (Local Planning) (England) (Amendment) Regulations 2017 (SI 2017/1244), reg. 4.

[27] *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65 (QB), 77.

[28] *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13, [2012] PTSR 893, [19].

[29] *R. (Samuel Smith Old Brewery) v North Yorkshire CC* [2020] UKSC 3, [2020] 3 All ER. 527 [21]-[22].

[30] See generally *Stringer v Minister of Housing and Local Government* [1971] 1 All ER 65 (QB), 77.

[31] Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017/571) (shortly to be replaced by Environmental Outcome Reports: LURA, Part 6).

[32] *R. (Corbett) v Cornwall CC* [2020] EWCA Civ 508, [2020] JPL 1277.

Development, especially of a large-scale, often creates pressures on the existing community and its infrastructure.[33] Legislation enables planning authorities to impose conditions on the grant of planning permission[34] which provides one statutory route through which these impacts may be ameliorated.[35] But planning permission should not be capable of being bought and sold[36] and the decision to incorporate such conditions may only be on the basis of considerations which are "material". The question accordingly arises of the extent to which planning authorities can require developers to provide wider community benefits through the imposition of planning conditions.

The issue has arisen many times[37] and has come to be structured by the so-called "*Newbury* criteria". These provide that:

> … conditions imposed must be for a planning purpose and not for any ulterior one, and… they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them…[38]

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[33] See generally *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 (HL), 773-777.

[34] TCPA, s.70.

[35] See also TCPA, s.106; LURA, Part 4.

[36] *R. (Wright) v Resilient Energy Severdale Ltd* [2019] UKSC 53, [2019] 1 WLR 6562, [37].

[37] See e.g. *Bradford CC v Secretary of State for the Environment* (1987) 53 P & CR 55 (CA); *R. v Plymouth CC, ex parte Plymouth and South Devon Cooperative Society Ltd* (1993) 67 P & C.R. 78 (CA); *R. (Sainsbury's Supermarkets Ltd) v Wolverhampton CC* [2010] UKSC 20, [2011] 1 A.C. 437; *Aberdeen City and Shire Strategic Development Planning Authority v Elswick Development Co Ltd* [2017] UKSC 66, [2017] P.T.S.R. 1413.

[38] *Newbury DC v Secretary of State for the Environment* [1981] A.C. 578 (HL), 99.

In the context of community benefits, this test provides structured guidance to planning authorities on how to determine the extent of the *legal* (ir)relevance of a proposed community benefit. The first criterion requires the planning authority to consider whether the benefit is connected to a planning purpose - defined as "one which relates to the character or the use of land"[39] - and not an "ulterior" objective[40] The third provides a safeguard for developers against conditions which impose a highly unreasonable practical burden on them.[41] The second criterion is usually critical in cases concerning community benefits. It requires planning authorities to determine whether there is a "sufficiently close nexus between the… benefits to be provided and the proposed change in the character of the use of the land".[42] Or, to put it another way, planning authorities must ascertain whether the proposed benefit is designed to "overcome a legitimate planning objection to a development".[43] A benefit "which has nothing to do with the development apart from that it is offered by the developer"[44] cannot lawfully be considered.

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[39] *Westminster CC v Great Portland Estates Plc* [1985] A.C. 661 (HL), 670.

[40] *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1958] 1 QB 554 (CA), 572.

[41] E.g. *Hall & Co v Shoreham-by-the-Sea UBC* [1964] 1 WLR 240.

[42] *R. (Wright) v Resilient Energy Severdale Ltd* [2019] UKSC 53, [2019] 1 WLR 6562, [37].

[43] *Good Energy Generation Ltd v Secretary of State for Communities and Local Government* [2018] EWHC 1270 (Admin), [72] (note this case concerned the lawfulness of a s.106 agreement but this statement was made in the context of discussing the test of materiality at common law more broadly).

[44] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759 (HL), 770 (note this case concerned the lawfulness of a s.106 agreement but the statement is applicable to the law on planning conditions).

Parole

Our second example concerns another area in which a large body of doctrine has developed – judicial review of Parole Board decisions. While once an advisory body, the Parole Board now exercises final decision-making power[45] on applications by prisoners for release. The Board's powers to release different types of prisoner are established in multiple places, across a statutory framework. However, release decisions are governed by a common statutory standard: namely, that the Parole Board shall only direct release if "satisfied that it is no longer necessary for the protection of the public".[46]

There is an ongoing debate in the case law concerning the nature of this test. At times, courts have spoken of the Board as balancing public safety against the interests of the prisoner.[47] More recently, several senior judges have doubted the appropriateness of the notion of balance. On this view, while the Board should be mindful of the "risk of injustice",[48] the prisoner's interests necessitate a rigorous approach to the consideration of evidence rather than operating as an independent factor to be traded off against public safety. Whichever view is correct, the primary task of the Parole Board is that of assessing risk.[49]

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[45] Subject to right to request reconsideration (Parole Board Rules 2019 (SI 2019/1038) ("PBRs"), rule 28) and judicial review.

[46] Crime (Sentences) Act 1997, s. 28(6)(b).

[47] Eg., *R. v Parole Board, Ex p Watson* [1996] 1 WLR 906, 916-17.

[48] See discussion in *R. (Pearce) v Parole Board of England and Wales* [2023] UKSC 13, [2023] 3 All E.R. 527, [66]-[71].

[49] The Parole Board, *The Parole Board Decision-Making Framework* (October 2019).

Challenges to Parole Board decisions have generated a rich body of case law. Most cases concern challenges brought by prisoners but there are examples of where the Secretary of State[50] or a third party challenges a decision[51] – the later giving rise to standing issues.[52] As Parole Board decisions engage liberty, there is a body of doctrine concerning both the Human Rights Act 1998 (particularly Article 5 ECHR)[53] and procedural fairness in relation to common law rights.[54]

Our focus here is on the body of doctrine that has developed on how the Parole Board considers the evidence before it. Parole Board risk assessments have been described as "multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment".[55] The Parole Board works with a great deal of, sometimes conflicting, evidence. That evidence includes a dossier[56] compiled by the Secretary of State, through the Public Protection Casework Section.[57] Dossiers contain an array of information often including details of the prisoner's offending, detention and release history, sentencing remarks, pre and post-trial reports, and a range of "current reports on the prisoner's risk factors, reduction in risk and performance and behaviour

[50] *R. (Secretary of State for Justice) v Parole Board* [2020] EWHC 3490 (Admin).

[51] *R. (McCourt) v Parole Board for England and Wales & Ors* [2020] EWHC 2320 (Admin).

[52] *DSD and Others v Parole Board and Others* [2018] EWHC 694 (Admin), [2019] QB 285, [105]-[115].

[53] E.g. *R. (Brooke) v The Parole Board & Anor* [2008] EWCA Civ 29.

[54] *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115.

[55] *DSD and Others v Parole Board and Others* [2018] EWHC 694 (Admin), [2019] QB 285, [133].

[56] Criminal Justice Act 2003 (CJA), s 239.

[57] JUSTICE, *A Parole Board Fit for Purpose* (2022) 48-53.

in prison".[58] The Parole Board also has statutory power to collect further evidence[59] and will often be required to afford the prisoner an oral hearing.[60]

Like planning decisions, the exercise of judgment by the Parole Board involves a variety of sub-tasks. In Parole Board decision-making there will therefore often be "issues which fall for determination first, as essential staging posts en route to the determination of the ultimate issue".[61] As the Divisional Court recently explained, these staging posts:

> …differ from case to case. Some will be pure factual issues, e.g. is it established that the prisoner engaged in violent conduct in prison on a particular occasion? Others will turn on the Board's assessment of expert evidence, e.g. does the prisoner have a personality disorder? Others are evaluative questions which rely on prior factual findings but also turn on the exercise of professional judgment, e.g. what is the level of risk that the prisoner will reoffend?[62]

How the Board should approach these different "staging posts" so as to avoid legal error has been the subject of judicial review. Recent case law has, for instance, focused on the scope of the Parole Board's duty to make further inquiries,[63] its freedom to depart from the views of expert report writers[64] and the (ir)relevance of the risk of offending after the expiry of a sentence.[65]

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[58] See PBRs, Schedule 1 for details.

[59] CJA, s 239(3).

[60] *Osborn v Parole Board* [2013] UKSC 61, [2014] AC 1115.

[61] *R. (Bailey) v Secretary of State for Justice* [2023] EWHC 555 (Admin), [2023] WLR 2519, [10].

[62] *R. (Bailey) v Secretary of State for Justice* [2023] EWHC 555 (Admin), [2023] WLR 2519, [10].

[63] *DSD and Others v Parole Board and Others* [2018] EWHC 694 (Admin), [2019] QB 285.

[64] *R. (Osbourne) v Parole Board* [2022] EWHC 3306 (Admin).

[65] *R. (Dich) v Parole Board* [2023] EWHC 945 (Admin).

A recent and prominent issue of contention has concerned the correct approach to unproven allegations of wrongdoing. Historically, the Parole Board had assumed that unproven allegations are legally irrelevant in a risk assessment. This assumption was displaced by the Divisional Court judgment in *DSD*,[66] giving rise to the question of what general public law standards of rationality and fairness require of the Board when the evidence before it refers to an unproven allegation. The Supreme Court has recently offered comprehensive guidance in *Pearce*.[67] Broadly, that guidance directs the Board to attempt initially to investigate and make findings of fact, on the balance of probabilities, about both the allegation and the surrounding circumstances. However, in circumstances in which this is not reasonably practicable, often because of the unobtainability of reliable evidence, the Board has discretion to give unproven allegations "such weight as it considers appropriate in a holistic assessment of all the information before it, where it is concerned that there is a serious possibility that those allegations may be true". That discretion, however, must be exercised with "considerable caution" and the giving of unreasonable weight to an allegation will constitute a public law error.[68]

Immigration Detention of Foreign National Offenders

Individuals who are not UK nationals are liable to be deported if they are convicted of serious criminal offences[69] and may be detained pending removal. A detainee is entitled to "written reasons at the time of his initial detention, and thereafter monthly".[70] This

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[66] *DSD and Others v Parole Board and Others* [2018] EWHC 694 (Admin), [2019] QB 285.

[67] *R. (Pearce) v Parole Board of England and Wales* [2023] UKSC 13, [2023] 3 All E.R. 527.

[68] *R. (Pearce) v Parole Board of England and Wales* [2023] UKSC 13, [2023] 3 All E.R. 527, [87].

[69] Immigration Act 1971, s.3(5); UK Borders Act 2007, ss. 32-33.

[70] Detention Centre Rules 2001 (SI 2001/238) (DCRs), rule 9(1).

requirement necessitates monthly reviews, a function which is discharged in the case of foreign national offenders (FNOs) through specialist organisations within the Home Office known as the Criminal Casework Directorate and (for certain high-risk offenders) Operation Nexus.[71] The review process has also been strengthened in recent years[72] through the introduction of Case Progression Panels, which perform further reviews at three-monthly interviews, and a Detention Gatekeeper.[73]

The central task of a caseworker performing a review is to determine whether there is a lawful basis for continued detention. The power to detain FNOs is defined in the Immigration Act 1971 as follows:

> Where a deportation order is in force against any person, he may be detained… pending his removal or departure from the United Kingdom.[74]

This power "is, on its face, very broad".[75] In exercising it, however, the Secretary of State is required to comply with 'basic public law duties.'[76] As in planning and parole cases, the courts have developed doctrine which governs decision-making in this area, often known as the *Hardial Singh* principles.[77] In an oft-cited passage in *I*, Dyson LJ summarised their effect as follows:

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[71] *Assessment of Government Progress in Implementing the Report on the Welfare in Detention of Vulnerable Persons: A Follow-up Report to the Home Office by Stephen Shaw* (July 2018), 71.

[72] See *Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw* (January 2016).

[73] *Assessment of Government Progress* (2018), 74-78.

[74] Immigration Act 1971, Sch.3, para 3(2).

[75] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [198].

[76] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [30].

[77] *R. v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704 (QB).

> i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
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> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.[78]

These principles identify four categories of legal error which will render continued detention unlawful. The first arises where the Secretary of State authorises detention for a purpose other than effecting a deportation order. For instance, in the unusual case of *Ibori* the applicant wanted to leave the UK but was detained because the Secretary of State was seeking a confiscation order against his assets.[79] The fourth arises where due to serious administrative error[80] the Home Office fails to effectuate a deportation order expeditiously.

The second and third principles are often dealt with together. Collectively they require an assessment of whether there is a "sufficient prospect of the Home Secretary

[78] *R. (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] I.N.L.R. 196, [46]. This formulation was approved by the majority of the UK Supreme Court in *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [22], [171], [189], [250], albeit note the dissenting comments of Lord Phillips ([261]-[265]).

[79] *R. (Ibori) v Secretary of State for the Home Department* [2017] EWHC 1207 (Admin). See also *R. (AA (Nigeria)) v Secretary of State for the Home Department* [2010] EWHC 2265 (Admin) (detention could not be lawfully used to prevent suicide).

[80] E.g. contrast *R. (Abid) v Secretary of State for the Home Department* [2017] EWHC 1962 (Admin) and *Louis v Home Office* [2021] EWHC 288 (QB).

being able to [remove an individual from the UK] to warrant the detention or continued detention of the individual, having regard to all the circumstances".[81] This is an inquiry which, like decision-making in the planning and parole contexts, consists of numerous "sub-tasks" or "staging posts". It will often be relevant to consider whether, in light of practical difficulties in obtaining travel documents[82] or otherwise arranging travel,[83] there continues to be a "sufficient prospect of removal".[84] In considering the reasonableness of a period of detention, an assessment will also have to be made of a range of considerations including the risk posed by the FNO of absconding[85] and/or reoffending,[86] the relevance (if any) of ongoing legal challenges and of any refusals to depart the UK on voluntary terms.[87]

Questions arise about how these and other considerations are to be factored into decision-making. The courts have developed a series of further legal principles. For example, the question arose early in the case law of what, if any, weight the Home Office should place on the fact that a detainee is pursuing legal challenges in the UK which had the practical effect they could not be removed.[88] Detailed guidance on this

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[81] *R. (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, [45].

[82] E.g. *R. v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704 (QB).

[83] E.g. *R. (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] I.N.L.R. 196.

[84] *R. (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, [45].

[85] *R. (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888, [2003] I.N.L.R. 196, [27]-[29].

[86] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [106]-[110].

[87] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [122]-[128].

[88] E.g. *R. (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin).

issue was offered by Lord Dyson in *Lumba*.[89] The case law distinguishes between hopeless and meritorious claims. Where a hopeless claim is lodged with the aim of delaying removal, the time period for which a FNO is detained pending resolution of the claim is "deducted from the period of time which has elapsed".[90] In contrast, "there is no automatic rule"[91] in the case of meritorious claim: whether continued detention is reasonable will depend on other factors including especially the risks of absconding and reoffending.

Tailoring Judicial Review

The previous Section described three pockets of doctrine that are products of their contexts. The cases discussed contain few explicit references to the general grounds of review or to the "classic" cases that are understood to govern judicial review of discretion. Rather, each of the areas of judicial review discussed above has its own "landmark" cases: *Newbury*, *Pearce*, *Hardial Singh*, etc. These are not isolated examples.[92]

The bodies of tailored judicial review doctrine discussed above vary and are highly contextualised. They are, however, instances of *tailored*, and not *bespoke*, judicial review doctrine. The legal principles established by cases such as *Newbury*, *Pearce*, and *Hardial Singh* act as "doctrinal mediators"[93] between the general grounds of review and a specific decision-making context. They articulate what a decision-

[89] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [111]-[121].

[90] *AO v Home Office* [2021] EWHC 1043 (QB), [14].

[91] *AO v Home Office* [2021] EWHC 1043 (QB), [14].

[92] For example, there is a court approved compilation of leading planning cases governing various aspects of planning law: Incorporated Council of Law Reporting, *Leading Planning Cases* (2020).

maker is required to do to act consistently with the general grounds of review when performing a particular aspect of their statutory role.

This can easily be seen in the planning and parole contexts, where the courts often explicitly emphasise that review is undertaken on "ordinary public law principles".[94] The three-stage test elaborated in *Newbury*, for instance, explicitly incorporates elements of review for improper purpose, relevancy, and unreasonableness. The case law culminating in *Pearce* is the product of legal analysis in which the doctrines of fairness and irrationality are shaped to the statutory and institutional context of a Parole Board considering the information before it. [95] In particular, under its institutional and statutory framework a task of the Parole Board is to rationally draw expert inferences from the information put before it.[96]

The review of immigration detention of FNOs might seem different.[97] Here, courts have repeatedly emphasised that review of the "reasonableness" of detention is

[93] J. Bell, 'Embracing the Unwanted Guests at the Judicial Review Party: Why Administrative Law Scholars Should take Planning Law Seriously' in M. Lee & C. Abbot (eds), *Taking English Planning Law Scholarship Seriously* (London: UCL Press 2022).

[94] See e.g. *Gathercole v Suffolk CC* [2020] EWCA Civ 1179, [2021] PTSR 359 at [57]; *R (Fylde Coast Farms Ltd) v Fylde BC* [2021] UKSC 18, [2021] 1 WLR 2794, [34]. *Browne v Parole Board* [2018] EWCA Civ 2024, [59].

[95] *R. (Pearce) v Parole Board of England and Wales* [2023] UKSC 13, [2023] 3 All E.R. 527.

[96] *R (McCourt) v Parole Board for England and Wales & Ors* [2020] EWHC 2320 (Admin); *R (Samuel) v Secretary of State for Justice* [2020] EWHC 42 (Admin); *R. (Hutt) v Parole Board* [2018] EWHC 141 (Admin), [14]; *Khan v Parole Board* [2015] EWHC 2528 (Admin), [11]-[17].

[97] See e.g. Dame E. Laing, 'Two Cheers for Judicial Activism' (22 Nov 2016 Policy Exchange) https://judicialpowerproject.org.uk/debating-judicial-power-papers-from-the-alba-summer-conference) accessed 28 November 2023; J. Finnis, 'Two Too Many?' (24 Nov 2016 Policy Exchange) https://judicialpowerproject.org.uk/john-finnis-two-too-many-2/ accessed 28 November 2023.

not to be undertaken by asking whether the conclusion of the caseworker was "so unreasonable that no reasonable public authority could have come to it".[98] Rather, it is "for the court to determine the legal boundaries of administrative detention",[99] meaning that "the conscientious decision of a public official about the reasonableness of a period of detention can… be overturned if the Court reaches a different view"[100] on considering the evidence available at the time of decision-making.[101] This, at times, has led commentators to characterise the *Hardial Singh* principles as a departure from ordinary public law principles – a "bespoke" test of lawfulness[102] - rather than an application of them.

This view, however, overlooks that the *Hardial Singh* principles do derive from the conventional grounds of review.[103] As various judges have emphasised, they are a manifestation of the "long-established principle of UK public law that statutory powers must be used for the purpose for which they were conferred and not for some other purpose".[104] The courts have, in line with the well-established principle that "statutory

[98] *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA); *R. (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, [60]-[62].

[99] *R. (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804, [62].

[100] *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931, [57].

[101] *R. (MH) v Secretary of State for the Home Department* [2009] EWHC 2506 (Admin), [105]; *Fardous* (107), [42]-[43]. Although see now Illegal Migration Act 2023, s.12.

[102] Language used throughout e.g. A. Schymyck, 'The Hardial Singh Principles and the Principle of Legality' [2021] PL 489.

[103] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [30], [189], [198]-[199].

[104] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [199].

powers should be interpreted in a way which is least restrictive of liberty",[105] adopted a relatively narrow interpretation of the power to detain FNOs, according to which the object of detention is to permit detention for a "period which is reasonably necessary" to "enable[e] the machinery of deportation to be carried out".[106] That courts ask whether the evidence provided an "objective"[107] basis for concluding that detention remains reasonably necessary to effect removal flows from this construction.

That *Hardial Singh* review is concerned with ensuring that detention powers are only used in accordance with the statutory purpose is reflected in the court's practice. Our close analysis of the cases has not uncovered a clear-cut example of a case in which detention was unlawful *solely* because of duration. Indeed, the courts have repeatedly rejected attempts by counsel to argue for a "tariff" of acceptable periods of detention. As the Court of Appeal put it in *Fardous*:

> There is no period of time which is considered long or short. There is no fixed period where particular factors may require special reasons to make continued detention reasonable.[108]

The central question in a *Hardial Singh* case, in other words, is not whether a person has been detained for a period of time which is so lengthy that it has become unreasonable. It is whether the evidence discloses an objectively reasonable basis for concluding that detention remains in line with its statutory purpose. The test is a test of

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[105] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [108]; *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931, [19]. See especially *Liversidge v Anderson* [1942] AC 206 (HL) (Lord Atkin).

[106] *R. v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 W.L.R. 704 (QB), 706.

[107] *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931, [42]-[43].

[108] *Fardous v Secretary of State for the Home Department* [2015] EWCA Civ 931, [38].

legal error which is at the 'meeting point' between general doctrines of legal error and the specific context of immigration detention.

On the matter of *Hardial Singh*, it is finally worth noting that s.12 of the Illegal Migration Act 2023 introduces important changes to the statutory power to detain FNOs. S.12 in part codifies the *Hardial Singh* requirements by specifying, for instance, that detention must be for a period "reasonably necessary to enable… removal to be carried out"'[109] More importantly, however, it also purports to make the "opinion of the Secretary of State" determinative. The intention behind this provision is clearly to alter the nature of the legal exercise a court performs in judicial review.[110] It remains to be seen how it will be interpreted by courts. In any event, the enactment of s.12 does not diminish the importance of *Hardial Singh* as a useful illustration of tailored judicial review doctrine.

Highlighting the existence of tailored law sheds some light on the nature of the "meeting point" between the horizontal and vertical in judicial review. Specifically, it draws attention to the existence of overlooked bodies of doctrine which perform crucial legal work in giving meaning to the grounds of review in specific areas. It is important, however, to go further and to think about the *process* which leads to the creation of tailored law.

Staring at a Savile Row business suit tailored for someone who is six foot and underweight does not get you very far in constructing a suit for a summer wedding for someone who is five foot and overweight. The same is true for tailored judicial review doctrine. Recognising the existence of tailor*ed* doctrine is important. It is also important

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[109] Illegal Migration Act 2023, s.12(1)(b).

[110] See Home Office, *Detention: General Instructions* (28 September 2023), 9.

to understand and scrutinise the tailor*ing* process that produce it. Tailor*ing* is very much an active part of adjudicating in judicial review challenges. Legislative amendments[111] often require courts to apply the general grounds of review to new or amended statutory functions[112] and even wholly novel decision-making schemes.[113] Furthermore, as the discussion in the first section illustrates, tailored judicial review doctrine for an area does not emerge fully formed from a single case. Judicial review entails a continual and gradual process of contouring general legal standards to the specific.

Gestures are commonly made to the importance of tailoring in at least two ways. First, it has often been said that statutory construction is central in judicial review cases.[114] In *Tameside*, for instance, Lord Wilberforce remarked on the need for "each statute or type of statute [to] be individually looked at".[115] Secondly, reference is often made to the importance of "context" in the application of the grounds of review.[116] As Lord Mance said in *Kennedy*, "the nature of judicial review in every case depends upon the context".[117] While these statements point to the importance of tailoring, they are not

[111] J. Bell & E. Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' [2021] PL 505, 515.

[112] See e.g. LURA, s.93; Illegal Migration Act 2023, s.12.

[113] *Crest Nicholson Operations Ltd v West Berkshire DC* [2021] EWHC 289 (Admin) (concerning the regime for assessment and planning for radiation risk introduced by Radiation (Emergency Preparedness and Public Information) Regulations 2019 (SI 2019/703)).

[114] *R. (O) v Secretary of State for the Home Department* [2022] UKSC 3, [31]-[32]; Lord Justice Sales, 'Modern Statutory Interpretation' (2016) 38 Stat L Rev 125.

[115] *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 (HL), 1047.

[116] *R. (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, [28]. See also e.g. *R. (Din) v Secretary of State for the Home Department* [2018] EWHC 1046 (Admin), [2].

[117] *Kennedy v The Charity Commission* [2014] UKSC 20, [2015] AC 435, [51].

very helpful in elucidating what tailoring involves. Moreover, emphasis on statutory and other context without more has sometimes led to concern. Some see the emphasis on statute as proof that the subject is a multitude of specific areas with little in common - judicial review is seen as vertical all the way down.[118] References to the importance of context, furthermore, have given rise to concerns about the lack of a "doctrinal scaffolding"[119] to structure judicial review reasoning, particularly in the judicial review of discretion.[120]

In this section we begin to embark on the task of making clearer sense of what the tailoring process entails. To do so, we look at the three case studies in a more cross-cutting way. We identify three questions which underpin how the court has undertaken tailoring in these areas. Our argument is that these three questions form an important starting point for the tailoring process. They are not the only questions a court asks in tailoring judicial review doctrine but identifying them begins to illuminate what the process entails.

What is the Legal Authority of the Decision-Maker?

The tailoring of judicial review first and most obviously requires an understanding of the nature of the decision-maker's legal authority. That is an exercise in understanding how the power of a decision-maker to act is demarcated and delimited. It is a multifaceted but structured legal inquiry[121] and one that is necessary to the application

[118] D.G.T. Williams, "The Case-Law of Administrative Law" (1982) 6 Trent Law Journal 1, 8.

[119] D. Knight, 'Contextual Review: the Instinctive Impulse and Unstructured Normativism in Judicial Review' (2020) 40 Legal Studies 1.

[120] J. Varuhas, 'Taxonomy and Public Law' in M. Elliott, J.N.E. Varuhas & S. Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart 2018), 51.

[121] See the discussion in *R. (O) v Secretary of State for the Home Department* [2022] UKSC 3 [31]-[32].

of the general grounds of review: what is improper, what is relevant, what is irrational all flow from an understanding of the nature of the legal authority a decision-maker is exercising.

The vast majority of administrative decision-making functions are created and governed by legislation, meaning that ascertaining the decision-maker's authority is often primarily a matter of statutory construction.[122] Courts are not here working with just a few statutory phrases. Statutory schemes are often complex architectures, constituted by multiple pieces of primary and secondary legislation.[123] There is also a significant role for policy documents.[124] It is for this reason that most judicial review judgments start out with a careful analysis of the legal framework within which a decision-maker is operating.[125] Ascertaining the nature of a decision-maker's legal authority is akin to the tailor taking a first set of measurements.

In some instances, understanding the nature of the decision-maker's authority is straightforward. In others, there may be contention about the essential nature of the function. As noted above, for instance, there continues to be no settled judicial view on whether the Parole Board's task is properly characterised as a balancing exercise. In areas of administrative decision-making where judicial review challenges are frequent, there will also often be past precedents articulating the nature of the decision-maker's authority. Sometimes these precedents are further consolidated in policy documents. For

[122] Prerogative and common law powers raise separate issues which cannot be considered here.

[123] Law Commission Report of England and Wales, *Simplifying the Immigration Rules* (HC 14, Law Comm Report No 388 2020).

[124] E. Fisher, 'Why Doctrinal Administrative Lawyers Need to Think More About Policy' (2022) 29 Australian J of Admin Law 254.

[125] J. Bell & E. Fisher, 'Exploring a Year of Administrative Law Adjudication in the Administrative Court' [2021] PL 505, 515.

instance, the legal understanding of the power to detain FNOs developed across *Hardial Singh* and subsequent case law have been explicitly incorporated into the *Detention: General Instructions*[126] and other related documents.[127] It is also the case, that sometimes legal principles such as the principle of legality have a role to play in determining the scope of authority.[128]

The wide variety of statutory tasks[129] performed by administrative decision-makers means that the legal authority underpinning those tasks is not easily taxonomised.[130] It may be tempting, for instance, to distinguish circumstances where administrative decision-makers are placed under duties from those in which they are afforded a power. Duties, however, frequently have discretionary elements. Planning authorities, as has been seen, have a presumptive duty to give effect to the local development plan.[131] They retain, however, broad discretion to depart from it if there are overriding "material considerations".[132] Furthermore, documents within plans may point in different directions, necessitating a discretionary weighing exercise.[133]

Correlatively, statutory functions framed as discretionary powers often have mandatory components. The Parole Board's power to direct release, for instance, is

[126] *Detention: General Instructions* (2023), 9.

[127] Home Office, *Detention and Case Progression Review* (28 September 2023).

[128] A. Schymyck, 'The Hardial Singh Principles and the Principle of Legality' [2021] PL 489.

[129] Joanna Bell, *The Anatomy of Administrative Law* (Oxford: Hart 2020), ch 3.

[130] See broadly J. Varuhas, 'Taxonomy and Public Law' in M. Elliott, J.N.E. Varuhas & S. Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart 2018); P. Craig, 'Taxonomy and Public Law: A Response' [2019] PL 281.

[131] PCPA, 2004 s.38(6).

[132] PCPA, 2004 s.38(6).

[133] *R. (Corbett) v Cornwall Council* [2020] EWCA Civ 508.

framed as a discretionary power. As the power is subject to the mandatory condition that the Board is "satisfied it is no longer necessary for the protection of the public that the prisoner should be confined",[134] however, a risk assessment is essentially mandatory. The duty/power dichotomy is not, therefore, a particularly useful as a mode of illuminating what happens within administrative decision-making.

Similarly, it may be tempting to group together statutory tasks which deal with similar subject matters. Parole hearings and FNO immigration detention reviews, for instance, clearly have common elements: both involve determining whether detention should continue and often involve risk assessment. There are, however, many important differences between the tasks being performed and thus the legal authority of the decision-maker. The statutory purposes of detention in these contexts are different, as are the core questions that need to be addressed. The Parole Board and Home Office caseworkers also work with very different materials.

The hard analytical work of determining legal authority can be seen particularly clearly when a court is dealing with a form of legal authority that has not been subject to review before.[135] In areas where decision-making is frequently the subject of judicial review – like planning, parole and immigration detentions of FNOs –previous precedents often articulate an understanding of that authority. The important point is that determining legal authority is a first step in relating the specific to the general.

What is (are) the Relevant Sub-Task(s) Under Review?

Understanding the nature of the decision-maker's legal authority, while important, is only one step in the tailoring process. The exercise of that authority typically requires

[134] Crime (Sentences) Act 1997, s. 28(6)(b).

[135] E.g. *Crest Nicholson Operations Ltd v West Berkshire DC* [2021] EWHC 289 (Admin).

the decision-maker to engage in a number of different types of activities. While there is an "ultimate issue"[136] to be addressed - Is it necessary for public safety to detain a prisoner? Is continued detention of an FNO reasonably necessary to effect removal? – answering that question often requires the decision-maker to complete multiple sub-tasks. Among other things, these may include: gathering information or evidence; resolving contested issues of fact; drawing inferences and forming a judgment on credibility or robustness; interpreting and applying legal, policy or other documents; determining whether a matter is relevant and, if so, how it should factor into decision-making; weighing conflicting evidence, objectives or values.

Thus, while the formal target of a judicial review challenge is the public authority's ultimate decision, the challenge will often focus more specifically on the way in which the public authority approached one or more of the "staging posts"[137] of decision-making. By way of example, consider again *Pearce*.[138] The target of the challenge in *Pearce* was the Parole Board's decision to refuse release. Had the challenge been successful, it is this decision which is likely to have been quashed. However, the essence of the applicant's challenge was that the Board had erred in its approach to a crucial component of its decision-making, namely, that of identifying the extent to which an unproven allegation of criminal wrongdoing could be incorporated into its risk assessment. In resolving a judicial review challenge, therefore, a court will need to identify the particular "staging post", or sub-task, the applicant is arguing is marred by legal error.

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[136] *R. (Bailey) v Secretary of State for Justice* [2023] EWHC 555 (Admin), [2023] WLR 2519, [10].

[137] *R. (Bailey) v Secretary of State for Justice* [2023] EWHC 555 (Admin), [2023] WLR 2519, [10].

[138] *R. (Pearce) v Parole Board of England and Wales* [2023] UKSC 13, [2023] 3 All E.R. 527.

Consider again, for example, the planning context. As explained above, the bulk of planning decision-making takes place at local government level. The usual process has two stages. Initially, a planning officer (an employee with planning expertise) compiles a report. Final decision-making power is then exercised by a planning committee, which votes on whether to accept the officer's recommendation. This institutional context gives rise to important questions about the respective balance of responsibility between the officer and the committee in ensuring compliance with public law obligations.[139] Is it, for instance, the responsibility of the officer to detail every mandatory relevant consideration in their report? If a report contains a misconstruction of a policy, is the committee taken to have acted on it?

The courts have developed a body of guidance to deal with such issues – known as the "*Mansell* principles". Broadly, the core responsibility of the planning officer is to avoid materially misdirecting the committee. The basic principles for scrutinising an officer's report for a material misdirection were articulated by the Court of Appeal, in an oft-cited passage, as follows:

> Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice he or she gave."[140]

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[139] *Dover District Council v CPRE Kent* [2017] UKSC 79, [2018] 2 All ER 121, [5]-[14].

[140] *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452, [42].

The courts have developed similarly specific principles in cases concerned with alleged defects in decision letters issued by PINS[141] and the Secretary of State.[142]

What is the Capacity of a Decision-Maker?

The *Mansell* criteria, highlight how the institutional context is relevant in the tailoring of the grounds of review. As Mark Aronson puts it, "if functionality and the real world mean anything, they require the court to have some sense of the administrator's institutional settings".[143] That context has many dimensions – institutions not only shape subtasks but also understandings of legal authority. More significantly, what is understood as the institutional capacity of a decision-maker will have a significant role to play in the tailoring process. By capacity we mean the capability that makes them presumed competent to discharge the legal authority they have.[144] Capability is most obviously understood as expertise, but it is not only expertise.[145]

As the examples discussed in the first section illustrate, the identity of administrative decision-makers varies considerably. In some areas the decision-maker is

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[141] *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283, [19]; *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [6].

[142] See e.g. *Secretary of State for Communities and Local Government v Allen* [2016] EWCA Civ 767.

[143] M. Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 8(1) *Australian Journal of Administrative Law* 6, 14.

[144] E Fisher and S Shapiro, *Administrative Competence: Reimagining Administrative Law* (Cambridge: CUP 2020), p.16.

[145] On the multifaceted nature of expertise see Fisher & Shapiro, *Administrative Competence* (2020), Ch.2.

a single person, such as a Home Office caseworker. In others, the decision-maker is a group, as in the case of the Parole Board which often acts as a two or three-person panel and in doing so is expected to wield expertise.[146] In the planning context we see something different. The same legal authority may be exercised by different types of institutions: local authorities, the Secretary of State, or the Planning Inspectorate. Decision-making at the local government level, as seen above, proceeds through a two-stage process. A court not only needs to understand the identity of the decision-makers but also the ways in which they interact with one another.[147]

The processes used to make decisions also vary. The basic materials which inform decision-making are gathered in different ways and take a variety of forms:[148] formal documents, written reports, oral evidence, etc. Decision-making itself also takes place in different ways. Decisions of the Parole Board are produced in a manner familiar to lawyers, namely through deliberation and the production of written reasons. Local planning authorities, in contrast, reach decisions by voting on whether to endorse the recommendations of a planning officer.[149]

An assessment of these different identities and processes all contribute to an understanding of what is the expected capacity of the decision-maker and that understanding is a factor in tailoring review. Pointing to the legal relevance of "planning judgement" underscores the importance of decision-makers exercising administrative

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[146] *Oral Hearing Guidance: Parole Board* (October 2022, Version 2.0) https://www.gov.uk/government/publications/guidance-on-oral-hearings--2 accessed 24 November 2023.

[147] See the discussion of *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, [2019] PTSR 1452 at pp XXX - XXX above.

[148] J. Bell and E. Fisher, 'Judicial Review of "Fact Work": Beyond the Law/Fact Distinction' J. Tomlinson and A. Carter (eds) *Facts in Public Law Adjudication* (Oxford: Hart, 2023).

[149] *Dover District Council v CPRE Kent* [2017] UKSC 79, [2018] 2 All ER 121, [5]-[14].

intelligence.[150] In reviewing how the Parole Board assesses the information before it, it is important to consider what their expertise is. Leveson LJ has described that expertise in the following way:

> [The Board] is fully entitled, indeed obliged, to undertake a proactive role in examining all the available evidence and the submissions advanced, and it is not bound to accept the Secretary of State's approach. The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment.[151]

Note here that Leveson LJ in discussing the expert capacity of the Parole Board is setting out what is expected of the Board and the processes it goes through.[152]

The issue of *how* courts develop an understanding of the capacity of decision-makers, like understanding the nature of its legal authority, is multifaceted. The natural starting point is, of course, the background legislative framework. Legislation (both primary and secondary) commonly makes provision for the constitution of decision-makers[153] and subjects them to procedural requirements.[154] The legislative framework is often incomplete, however. Statutes sometimes explicitly delegate responsibility to work out the details of how a decision-maker is to be constituted, and how it should

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[150] S. Ruiz-Tagle, 'The Urban Constitution: Handling Complexity and Disagreement Through Intelligent Decision-making' (DPhil, Faculty of Law, University of Oxford, 2022).

[151] *DSD and Others v Parole Board and Others* [2018] EWHC 694 (Admin), [2019] QB 285, [117].

[152] See generally *Browne v Parole Board* [2018] EWCA Civ 2024, [53]; *R. (Bousfield) v The Parole Board for England and Wales* [2021] EWHC 3160 (Admin) [31]; *R (McCourt) v Parole Board for England and Wales & Ors* [2020] EWHC 2320 (Admin); *R. (Alvey) v Parole Board* [2008] EWHC 311 (Admin), [26].

[153] See e.g. Climate Change Act 2008, Pt 2 setting out the powers of the Climate Change Committee.

[154] Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

proceed.[155] Public authorities, furthermore, often have express[156] or implied powers to delegate statutory functions assigned to them.[157]

In consequence, a full understanding of the decision-making process will often require a court to look beyond the terms of the statutory framework. Published guidance and policy may give a clearer indication of who takes decisions and how.[158] Otherwise, courts may gain insight from the parties' evidence and, especially in relation to areas of administrative decision-making where judicial review is a common occurrence, prior case law.

Two Reasons Why Judicial Review Scholars Need to Think More About Tailoring

Our purpose in setting out the three questions in the previous section was not to argue that courts have always explicitly structured the tailoring process by asking them in the order in which we set them out. Reviewing courts do, however, commonly engage explicitly with these questions or otherwise operate from an understanding of the answers to them. We are also not arguing that answering these questions produces a fully formed body of tailored administrative law. The questions are the *starting point* of the tailoring process. Addressing them provides courts with an understanding of the

[155] PBR 2019, r 4.

[156] Most notably Local Government Act 1972, s.101.

[157] *R. (CC of West Midlands Police) v Birmingham Justice* [2002] EWHC 1087 (Admin), [2003] A.C.D. 18; *DPP v Haw* [2007] EWHC 1931 (Admin), [2008] 1 W.L.R. 379. Note also the operation of the *Carltona* principle in the operation of Ministerial functions: *Carltona Ltd v Commissioner of Works* [1943] 2 All E.R. 560 (CA).

[158] See. e.g. *Detention: General Instructions* (2023).

decision-making function to which the law is being tailored. They are the legal equivalent of taking measurements of the body to which clothes are to be fitted.

Some readers may recognise tailored law and the tailoring process as obvious features of judicial review. This may be especially true of practitioners who specialise in particular branches of public law: planning, immigration, tax, etc. It is not only judges who are engaged in the process of tailoring, but also lawyers in crafting their legal arguments. Repeating "incantations"[159] such as that a decision must be "so outrageous in its defiance of logic or accepted moral standards"[160] or "so unreasonable that no person acting reasonably could have come to it"[161] does not progress a legal argument very far. Neither does simply emphasising that the decision-maker is an expert.[162] Counsel must think carefully about how best to make an argument about what the general grounds of review require of a decision-making exercising a particular statutory function.[163]

Tailored, and the tailoring of, judicial review doctrine has not, however, received much attention in scholarship. As noted in the first section, the traditional structure of textbooks and university courses on judicial review focuses on the general grounds of review. In drawing attention to tailoring we are not arguing that the grounds of review are unimportant. Far from it. As we explained above, the grounds establish the legal template on which judicial review takes place and therefore warrant close

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[159] *R. v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 A.C. 418.

[160] *Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 (HL), 410.

[161] *Champion v Chief Constable of the Gwent Constabulary* [1990] 1 W.L.R. 1 (HL) at 16.

[162] *R. (Mott) v Environment Agency* [2016] EWCA Civ 564, [70]. For critique of how Beatson LJ's reasoning has been relied on in subsequent case law see J. Bell & E. Fisher, 'The "Heathrow" Case: Polycentricity, Legislation and the Standard of Review' (2020) 83(5) MLR 1072.

[163] *DSD and Others v Parole Board and Others* [2018] EWHC 694 (Admin), [2019] QB 285.

study and scrutiny. What we are arguing, rather, is that judicial review adjudication is about much more than articulating general grounds of review in the abstract. Cases far more often turn on questions concerning the application of existing bodies of tailored doctrine, and on how the general grounds should be tailored to new contexts.

Identifying tailored judicial review doctrine and the process of tailoring has implications for many different aspects of doctrinal and theoretical public law scholarship and open up many new avenues for inquiry and debate. Here we flag two.

Evaluation of Judicial Review Doctrine

Our analysis so far has been an exercise in thick description.[164] That is, it has gone beyond surface description to explore the logics underlying the reasoning in these cases. By describing tailoring, we are attempting to provide a more accurate account of judicial review. Our argument, however, has implications for scholarship concerned with evaluation too.

Our analysis suggests that in evaluating judicial review doctrine, there is limited value in focusing only on the tailored end product. There also needs to be focus on the tailoring process, that is, how authority, sub-tasks and capacity were factored into the court's reasoning. Richard Kirkham and Elizabeth O'Loughlin have recently called upon "public lawyers [to] invest more time identifying and rationalising [the] different"[165] doctrinal frameworks which shape administrative law adjudication in different categories of case. We echo this invitation. We also have no doubt that there

[164] Elizabeth Fisher 'Imagining Method in Administrative Law Scholarship' in Carol Harlow (ed) *Research Agenda for Administrative Law* (Cheltenham: Edward Elgar 2023), 10.

[165] R. Kirkham & E. O'Loughlin, 'Judicial Review and Ombuds: a Systematic Analysis' [2020] PL 680, 700.

will be better and worse exercises in tailoring. By "better" or "worse" we are referring to the rigour and the logic of the reasoning.

To give a more specific example, scholars have sometimes articulated the central question in judicial review as being whether it is the courts or the public authority which is better placed to decide an issue.[166] This framing suggests that a reviewing court has two options in a case concerning review of discretion: either it must "defer" to the superior competence of the public authority or it must make the ultimate decision for itself. Another, more subtle, way of thinking is to posit a spectrum of different review intensities,[167] with courts engaging in more or less searching review, demanding more or less "by way of justification",[168] depending on the issue at hand. Recognising the multifaceted nature of administrative decision-making, however, shows that matters are much more complex than both approaches suggest.[169]

An example will help to illustrate the point. Finnis has criticised the decision in *Hardial Singh* for overstepping the proper boundaries of the judicial role, and enabling judges to make decisions about the appropriate duration of detention using an uncertain reasonableness test.[170] By paying attention to the tailoring process, however, we can see how the courts identify the multiple sub-tasks involved in deciding whether to detain or

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[166] M. Elliott & R. Thomas, *Public Law* (4th edn, Oxford: OUP 2020), ch. 12.

[167] D. Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge: CUP 2020), ch. 4; L. McDonald, 'Thinking about Doctrine in Administrative Law' in J. Goudkamp, M. Lunney & L. McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (Oxford: Hart 2021).

[168] *R. v Ministry of Defence ex parte Smith* [1996] Q.B. 517 (CA), 554.

[169] See Fisher & Shapiro, *Administrative Competence* (2020), Ch 9 discussing scope of review.

[170] J. Finnis, 'Two Too Many?' (24 Nov 2016 Policy Exchange) https://judicialpowerproject.org.uk/john-finnis-two-too-many-2/ accessed 28 November 2023.

to continue to detain an individual and the capacity of Home Office case-workers to carry out each of these sub-tasks. For example, one sub-task is an assessment of the risk that the individual will abscond and therefore not be available for deportation.[171] This risk assessment task is generally regarded by the courts as the proper province of the case-worker, unless clear indications that the individual was low risk have been ignored.[172] Another sub-task is assessing the risk that the individual might re-offend.[173] The courts also regard this as primarily within the expertise of the case-worker. However, this step is open to criticism on the basis that it is irrelevant to the statutory purpose.[174] Ex hypothesi, the individual has already served their sentence for the crime they have committed, and continuing to detain them to prevent future offences is a serious restriction on liberty largely unconnected to the purpose of deporting them, other than in the loose sense that they are being deported (and therefore being detained pending deportation) because they pose a risk to society.

A further set of sub-tasks relates to the obtaining of travel documents in order to effectuate deportation: this might involve simple administrative activities such as contacting an embassy, or a more complex decision that all possible avenues for obtaining travel documents have been exhausted.[175] Here, the courts tend to assess decision-making on a common sense basis, using acquired knowledge of Home Office practice derived from published guidance and previous case-law. Perhaps it is absurd that the full force of the High Court is brought to bear on seemingly mundane decisions,

[171] E.g. *R. (M) v Secretary of State for the Home Department* [2021] EWHC 636 (Admin).

[172] E.g. *R. (JXL) v Secretary of State for the Home Department* [2023] EWHC 510 (Admin).

[173] *R. (Muqtaar) v Secretary of State for the Home Department* [2012] EWCA 1270, [2013] 1 W.L.R. 649.

[174] *R. (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 A.C. 245, [107].

[175] E.g. *R. (Kedienhon) v Secretary of State for the Home Department* [2017] EWHC 3373 (Admin).

but detainees have no other means of challenging the lawfulness of their detention, and detention often becomes unlawful because basic administrative tasks have not been carried out efficiently and effectively.

From this perspective, we can see that *Hardial Singh* and judicial review is less about allocating decision-making power between courts and public authorities. It is far more about courts understanding the nature of the different components involved in an administrative decision-making process and articulating what the general principles of public law require a public authority to do to fulfil those components lawfully. It is no accident that the modern formulation of *Hardial Singh*, laid down in *I*, is set out in four parts, and a full statement of all the principles at play in these cases would require further elaboration under each of the four headings. It is hard to capture all of this if we just focus on the characterisation of the end product of the tailoring process. And nor do simple binaries about intensive/deferential review aid in understanding what tailoring entails as a form of legal inquiry.[176]

The Expertise That Judicial Review Entails

That leads onto our second point. We are not just administrative law scholars, but also teachers of administrative law. Teaching is about fostering the requisite expertise in a subject. Recognising the importance of tailoring has implications for how that expertise is understood. Most obviously, it points to the limits of just teaching the grounds of review as a series of tests. The expertise that needs to be taught is how to think about different forms of legal authority, sub-tasks and capacity. To teach judicial review we should not just be teaching rules, we need to be teaching techniques. We need to be teaching how to tailor well.

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[176] Fisher & Shapiro, *Administrative Competence* (2020), Ch 1.

In practical terms, given the multifaceted nature of the administrative state and the inevitable time constraints in any course, a case-study methodology may be the most appropriate. Students could be taught, or encouraged to research through independent study, some examples of administrative decision-making.[177] This would require a comprehensive study of the statutory framework, the published policy and guidance, and any body of tailored case-law applicable to the specific area.

It also requires greater attention to the legal implications of administrative structure. In company law the nature of the corporate form is a mainstay of teaching. The equivalent is not true for the teaching of administrative law,[178] where a focus on law and a focus on administration have sometimes been characterised as binary alternatives.[179] What our arguments above highlight, however, is that students' understanding of judicial review reasoning would be enhanced, not diminished, by paying close attention to the institutional context in which particular rules or tests for identifying errors of law are articulated by the judges.

The challenge of developing appropriate expertise is not limited to students. There are underexplored questions about the extent to which the judicial review process – focused as it is on legal argument, usually without cross-examination of witnesses – appropriately enables the courts themselves to develop a full understanding of the

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[177] Thomas, *Administrative Law in Action* (2022).

[178] Fisher & Shapiro, *Administrative Competence* (2020), 24.

[179] Fisher & Shapiro, *Administrative Competence* (2020), Ch 1; Harlow & Rawlings, *Law and Administration* (4th edn, Cambridge: CUP 2022), Ch. 1.

institutional context[180] in which they are applying the grounds of review.[181] As Mark Aronson noted there is "no relevant equivalent of the Brandeis brief",[182] meaning that a "judge's sense of an administrator's 'real world' settings comes partly through the submissions of counsel, but more generally through the fact that judges themselves also live in the 'real world'".[183] Aronson was speaking of the Australian legal context, but the sentiment applies in the legal system of England and Wales. Judges' general knowledge of public administration will vary according to their practice background and the number of cases they have previously decided on a particular topic. While developments such as tribunal reform[184] and the creation of the Planning Court[185] have increased specialism, the Administrative Court, and certainly the appellate courts, remain generalist to a large degree. While a full exploration of the issue falls well beyond the scope of this article, the question of whether a judge operating within these procedural and institutional parameters can acquire an appropriately clear sense of the

[180] Questions also arise about which features of institutional context are relevant to the legal issue at hand. E.g. on the (ir)relevance of resources, see *R v Gloucestershire County Council, ex parte Barry* [1997] A.C. 584 (HL); *R. (Imam) v London Borough of Croydon* [2023] UKSC 45.

[181] See e.g. discussion in I. Loveland, 'Reforming the Homelessness Legislation? Exploring the Constitutional and Administrative Legitimacy of Judicial Law-making' [2018] PL 299; Lord Carnwath, 'Where Next for Judicial Review? Some Lessons from Eight Years in the Supreme Court' (2020) 25 JR 321, [27].

[182] M. Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 8(1) *Australian Journal of Administrative Law* 6, 15.

[183] M. Aronson, 'Judicial Review of Administrative Action: Between Grand Theory and Muddling Through' (2021) 8(1) *Australian Journal of Administrative Law* 6, 16.

[184] Tribunals Courts and Enforcement Act 2007.

[185] D. Elvin QC, 'The Planning Court' (2014) 19(2) JR 98.

authority, sub-tasks and capacity of the decision-maker under review, and how this could be improved, would benefit from detailed scholarly analysis.

Conclusion

In this article we have presented a thick descriptive account of how the "horizontal" and "vertical" dimensions of judicial review intersect. Through a discussion of three examples, we have highlighted the existence of the "tailored" bodies of doctrine which are commonly developed at these intersections in order provide structured guidance as to how the general grounds of review apply to a specific instance of decision-making. We have also emphasised the importance of tailoring and identified three elements – legal authority, subtasks and capacity – which form its starting point.

As emphasised in the introduction, our aim is to promote further discussion and our analysis here is far from exhaustive. That said, making tailoring visible is valuable in itself. Doing so draws attention to an important set of reasoning processes that are often central in judicial review adjudication, but which have not received much attention in the academic literature. Think about how often the eyes of scholars and students of administrative law skip over judicial discussion of the statutory and institutional context in search for what the court has to say about the applicable general "test".[186] Our point is that those parts of a judgment are not provisional ground-clearing: they are playing a central role in a courts' legal reasoning.

[186] W. Wade & C Forsyth, *Administrative Law* (11th edn, Oxford: OUP 2014), 5: 'administrative law may be said to be the body of general principles which govern the exercise of powers and duties by public authorities… all the detailed law about their composition and structure, though clearly related to administrative law, lies beyond the scope of the subject.' See also P. Daly, 'The Signal and the Noise in Administrative Law' (2017) 68 *University of New Brunswick Law Journal* 68.

We therefore invite those studying judicial review to pay more attention to both tailored judicial review doctrine and the processes that go into creating it. Doing so raises important questions about for how judicial review doctrine is best evaluated and how we understand and promote the nature of the legal expertise brought to bear in administrative law adjudication. Those questions have no easy answers, but they do underscore that, when it comes to judicial review, there is still much for scholars to understand.