

Ministerial Override Certificates and the Law/Fact Distinction—A Comparison Between Australia and the United Kingdom

*The Hon Justice Mark Leeming**

1 Introduction

To what extent should Australian and British courts continue to look to one another? To the extent that they do, how cautious or critical should that examination be? Should the approach be the same in private law and in public law? Within the last year, Lord Neuberger and Sir Anthony Mason have expressed divergent views on those questions. Lord Neuberger has twice written for a unanimous Supreme Court in *private law* appeals in which a comparative approach was adopted. In the first, in part influenced by Australian developments, and in a passage emphasised when giving the seventh John Lehane Memorial Lecture in August 2014 in Sydney, he said:

As overseas countries secede from the jurisdiction of the Privy Council, it is inevitable that inconsistencies in the common law will develop between different jurisdictions. However, it seems to us highly desirable for all those jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law round the world.¹

Even more recently, in an appeal on passing-off, his Lordship also said:

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¹ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] AC 250 [45]; see also Lord Neuberger, 'Equity – The soul and spirit of all law or a roguish thing?' (Lehane Lecture 2014, Supreme Court of New South Wales, 4 August 2014) and the consideration of Australian, New Zealand, Irish and North American cases in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] AC 822 [241]–[43] (Lord Carnwath).

[I]t is both important and helpful to consider how the law has developed in other common law jurisdictions – important because it is desirable that the common law jurisdictions have a consistent approach, and helpful because every national common law judiciary can benefit from the experiences and thoughts of other common law judges.²

Sir Anthony Mason, by contrast, said in an interview last year that there was limited value in comparative jurisprudence in the case of *public law*, as opposed to private law decisions. He said:

Now, early on, I was inclined to think that cases from other jurisdictions had very high value and I must say that as time has passed, my view has qualified to some extent. There are a number of reasons for that. One is the sheer volume of cases from overseas jurisdictions. Another is the fact that, in order to understand the significance of an overseas decision and its value to Australian jurisprudence, you have to have a very good understanding of the milieu in which that decision came into existence. This is particularly true of public law decisions. It's more true of public law decisions than private law decisions. And you can make a very big mistake by, as it were, relying on or taking advantage of, an overseas decision if you don't have sufficient background knowledge. You can find that the decision was dictated by some consideration that is not expressed in the judgments but really is foreign to Australian circumstances.³

This article focuses on public law. It seeks, in light of those remarks, to examine the current approach in the United Kingdom to two administrative law topics of recurring importance: the approach taken by courts to Ministerial override certificates, and the distinction between questions of fact and questions of law.

² *Starbucks (HK) Ltd v British Sky Broadcasting Group plc* [2015] UKSC 31, [50].

³ Katy Barnett, 'Sir Anthony Mason Reflects on Judging in Australia and Hong Kong, Precedent and Judgment Writing' in *Opinions on High (The University of Melbourne 28 July 2014)*, <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/28/barnett-mason/>> accessed 10 September 2015.

2 Review of Ministerial Override Powers

Statute often confers upon Ministers a special power, commonly only to be exercised personally, whose effect is to cause a particular subject matter to stand outside the general regulatory regime. The breadth of the contexts in which such a power is conferred suggests that analysis of decisions where judicial review has been sought will likely be unhelpful.⁴ This article focuses upon a narrower category of power, namely where there has been executive action, an executive investigation and decision on the merits, and then a power to be exercised by a Minister to veto what would otherwise be the operation of the mechanism. Some examples are found in Australian legislation conferring rights to land on indigenous people: s 42 of the *Native Title Act 1993* (Cth), s 63W of the *Mining Act 1971* (SA) and s 36(8) of the *Aboriginal Land Rights Act 1983* (NSW), which provides for a certificate which is ‘final and conclusive evidence’ and ‘shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever’ of whether land is needed or likely to be needed as residential land or for an essential public purpose and therefore is not ‘claimable Crown land’. The Commonwealth Minister’s power under s 501 of the *Migration Act 1958* (Cth) to refuse or cancel a visa if of the opinion that a person does not pass the character test is not dissimilar, but does not directly involve a redetermination of issues already decided on the merits.

In Australia, notwithstanding the most robust privative clause, exercises of such powers by Ministers are unquestionably reviewable for jurisdictional error.⁵ The British approach is necessarily different, jurisdictional error as a separate category of reviewable error having been effectively abolished⁶ some years before the same term was given an expanded and constitutionalised meaning in the Australian legal system.⁷ In the

⁴ See e.g. *Customs Act 1901* (Cth) s 77EA (power to order the detention of imported goods in the public interest) sought to be reviewed in *H K Systems Australia Pty Ltd v Debus* [2008] FCA 1704.

⁵ See e.g. *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 [94]-[104], appeal dismissed [2009] NSWCA 151; *NBMZ v Minister for Immigration and Border Protection* (2014) 220 FCR 1, [6]-[10], [141]ff (quashing a decision under s 501).

⁶ Following *Anisimic Ltd v Foreign Compensation Commission* [1968] UKHL 6, [1969] 2 AC 147, *R v Hull University Visitor; ex p Page* [1992] UKHL 12, [1993] AC 682. For the (minor) exceptions, see Mark Leeming, *Authority to Decide* (Federation Press 2012), 76-9.

⁷ Notably, by *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Court of NSW* (2010) 239 CLR 531.

United Kingdom, a line of authority from Court of Appeal was confirmed, on 26 March 2015, by a divided Supreme Court, in *R (Evans) v Attorney General*.⁸ Mr Evans is a journalist who works for the Guardian. He applied, under the Freedom of Information Act 2000, for access to letters from the Prince of Wales to Ministers written between 2004 and 2005. These have been called the ‘black spider’ letters, due to the handwriting style.⁹ The litigation over the last seven years may have created or (to use the language of the Upper Tribunal) at the least ‘massively extended’ a relatively novel constitutional convention: ‘preparation for kingship’.¹⁰ Disclosure was ordered by the Upper Tribunal, something which can no longer occur,¹¹ having considered a balancing process familiar to Australian regimes between the public interest in maintaining the exemption and the public interest in disclosing the information.

The Upper Tribunal has, despite its name, the status of a superior court of record.¹² It is presided over by a High Court judge. It produced reasons for its decision of 297 paragraphs, after seeing the Prince’s correspondence, and heard evidence, tested by cross-examination, as to basis of the claim and the consequences of disclosure. An appeal on a question of law lay from that decision. However, rather than exercising a right of appeal, the Attorney-General invoked s 53(2) of the Freedom of Information Act 2000. Section 53 entitles an ‘accountable person’ – a Cabinet Minister or the Attorney General – personally, to serve a certificate within 20 days after a decision has been made:

[S]igned by him stating that he has on reasonable grounds formed the opinion that, in respect of the request or requests concerned, there was no failure falling within subsection (1)(b) [i.e. a failure to comply with the duty imposed by the Act].

⁸ [2015] UKSC 21.

⁹ For those interested in what is said may be deduced from handwriting style, see Homa Khaleeli, ‘Prince Charles Letters: What Does a Graphologist Make of Them?’ *The Guardian* (Sydney 29 March 2015) <www.theguardian.com/uk-news/shortcuts/2015/mar/29/prince-charles-letters-graphologist> accessed 10 September 2015.

¹⁰ See *Evans v Information Commissioner* [2012] UKUT 313 (AAC) [103], [105]–[106].

¹¹ See Freedom of Information Act 2000 s 37 (as amended by the Constitutional Reform and Governance Act 2010). As a result of this change, communications with the Sovereign, other members of the Royal Family or the Royal Household are now subject to an absolute exemption, instead of the qualified exemption which applied in 2004 and 2005. The amending legislation has prospective effect only.

¹² See *R (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663.

The Attorney General's certificate, and seven page statement of reasons, is readily available to read online.¹³

Judicial review was sought of the Minister's exercise of the power. The Divisional Court described the veto power as a 'constitutional aberration', but nevertheless dismissed an application for judicial review.¹⁴ The Court of Appeal unanimously allowed an appeal, but granted leave to the Attorney to appeal to the Supreme Court.¹⁵ Most recently, the Supreme Court divided 5:2 in favour of permitting disclosure. The two majority judgments were written by Lords Neuberger (with whom Lords Kerr and Reed agreed) and Mance (with whom Lady Hale agreed). Lords Hughes and Wilson dissented.

2.1 The Judgment of Lord Neuberger

Lord Neuberger commenced with statements that the effect of a valid exercise of the Ministerial power was to 'override a decision of the Upper Tribunal, which is a judicial body and which has the same status as the High Court'.¹⁶ He went on to discuss a line of British authority which has dealt with override decisions. One such case was *R v Secretary of State for the Home Department ex p Danaei*,¹⁷ where an Iranian asylum-seeker's account of his life-history was disbelieved by the delegate, but accepted by the special adjudicator, who dismissed the claim on other grounds. Danaei thereafter applied for exceptional leave to remain. When that was rejected by the Secretary of State on the grounds that he did not accept the account of the facts which had been accepted by the special adjudicator, judicial review was sought and granted and an appeal dismissed. Judge LJ said:

The desirable objective of an independent scrutiny of decisions in this field would be negated if the Secretary of State were

¹³ Attorney General, 'Exercise of the Executive Override under Section 53 of the Freedom of Information Act 2000' <www.gov.uk/government/uploads/system/uploads/attachment_data/file/8604/Statement_of_Reasons_Prince_of_Wales16.10.12.pdf> accessed 16 September 2015.

¹⁴ *R (Evans) v Attorney General* [2013] EWHC 1960 (Admin), [2014] QB 855 [2] (Lord Judge CJ).

¹⁵ *R (Evans) v Attorney General* [2014] EWCA Civ 254, [2014] QB 855; see also CJS Knight, 'The Veto in the Court of Appeal' (2014) 130 LQR 552. The judgment was given by Lord Dyson MR, with whom Richards and Pitchford LJJ agreed. In what follows, I do not deal at all with a subsidiary argument, namely, that access to some of the correspondence was required by a European Directive.

¹⁶ *Evans* (n 10) [2].

¹⁷ [1997] EWCA Civ 2704.

entitled to act merely on his own assertions and reassertions about relevant facts contrary to express finding made at an oral hearing by a special adjudicator who had seen and heard the relevant witnesses. That would approach uncomfortably close to decision-making by executive or administrative diktat. If therefore the Secretary of State is to set aside or ignore a finding on a factual issue which has been considered and evaluated at an oral hearing by the special adjudicator he should explain why he has done so, and he should not do so unless the relevant factual conclusion could itself be impugned on *Wednesbury* principles, or has been reconsidered in the light of further evidence, or is of limited or negligible significance to the ultimate decision for which he is responsible.¹⁸

A second was *R v Warwickshire County Council; ex p Powergen plc*,¹⁹ where similarly a planning inspector, after full inquiry, had held that a council was not entitled to refuse planning consent. As it was put by Simon Brown LJ, ‘because of its independence and because of the process by which it is arrived at’, the inspector’s conclusion had become ‘the only properly tenable view on the issue of road safety’.²⁰

A third was *R (Bradley) v Secretary of State for Work and Pensions*.²¹ The Parliamentary Commissioner for Administration had conducted a statutory investigation into certain alleged maladministration. The Secretary of State rejected her findings of maladministration and her recommendation. His decision was the subject of a judicial review challenge. The Court of Appeal applied *Danaei*. Sir John Chadwick summarised his approach in the following terms:

I am not persuaded that the Secretary of State was entitled to reject the ombudsman’s finding merely because he preferred

¹⁸ *Ibid.* Simon Brown LJ wrote to the same effect: ‘It does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who heard all the evidence unless only: (1) the adjudicator’s factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones—none of which is suggested here; (2) fresh material has since become available to the Secretary of State such as could realistically have affected the adjudicator’s finding.’

¹⁹ [1997] EWCA Civ 2280.

²⁰ *Ibid.*

²¹ [2008] EWCA Civ 36, [2009] QB 114.

another view which could not be characterised as irrational. As I have said earlier in this judgment, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act: he must have a reason (other than simply a preference for his own view) for rejecting a finding which the ombudsman has made after an investigation under the powers conferred by the Act.²²

Those decisions were followed by the Court of Appeal in *Evans*, where Lord Dyson said:

I do not consider that it is reasonable for an accountable person to issue a section 53(2) certificate merely because he disagrees with the decision of the tribunal. Something more is required. Examples of what would suffice are that there has been a material change of circumstances since the tribunal decision or that the decision of the tribunal was demonstrably flawed in fact or in law. This was the approach suggested by Simon Brown LJ in *Ex p Danaei* [1998] INLR 124 in relation to the Secretary of State's decision which contradicted the earlier decision of the special adjudicator. It seems to me to be particularly apt in relation to section 53(2). [...]

On the approach of the Divisional Court to section 53(2), the accountable person can override the decision of an independent and impartial tribunal which (i) is reasonable, (ii) is the product of a detailed examination (fairly conducted) of the issues after an adversarial hearing at which all parties have been represented and (iii) is not challenged on appeal. All that is required is that the accountable person gives sensible and rational reasons for disagreeing with the tribunal's conclusion. If section 53(2) has that effect, it is a remarkable provision not only because of its constitutional significance (the point emphasised by the Divisional Court), but also because it seriously undermines

²² Ibid [91].

the efficacy of the rights of appeal accorded by sections 57 and 58 of the 2000 Act.²³

This approach was criticised in the Law Quarterly Review:

[I]t is also fairly clear that [s 53] was intended to be a last-gasp opportunity for government to overturn disclosure of information it strongly felt would not be in the public interest to disclose. The Court of Appeal makes no attempt to provide any other meaning to s 53. The interpretation given to it denudes s 53 of almost the entirety of its purpose without even acknowledging the fact. There is a strong argument that the veto is constitutionally aberrant, illegitimate even, but it is what Parliament has provided.²⁴

Against that background, Lord Neuberger said that there were ‘two constitutional principles which are also fundamental components of the rule of law’:

First, subject to being overruled by a higher court or (given Parliamentary supremacy) a statute, it is a basic principle that a decision of a court is binding as between the parties, and cannot be ignored or set aside by anyone, including (indeed it may fairly be said, least of all) the executive. Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen. Section 53, as interpreted by the Attorney General’s argument in this case, flouts the first principle and stands the second principle on its head. It involves saying that a final decision of a court can be set aside by a member of the executive (normally the minister in charge of the very department against whom the decision has been given) because he does not agree with it. And the fact that the member of the executive

²³ *Evans* (CA) (n 15) [38]-[39].

²⁴ *Knight* (n 15) 554.

can put forward cogent and/or strongly held reasons for disagreeing with the court is, in this context, nothing to the point: many court decisions are on points of controversy where opinions (even individual judicial opinions) may reasonably differ, but that does not affect the applicability of these principles.²⁵

His Lordship considered that s 53 fell ‘far short’ of being sufficiently clear to permit a Minister to overturn a decision of the Upper Tribunal, merely because he or she takes a different view.²⁶ That applied not merely to findings of fact such as those considered in *Bradley* but also to opinions and balancing exercises.²⁷ That led to a narrow construction being given to the ‘reasonable grounds’ required by the power under s 53(2). The dispositive portion of his Lordship’s reasons was:

[I]t is obviously true that the expression ‘reasonable grounds’ could, as a matter of ordinary English, have the meaning and effect adopted by the Divisional Court (as described in para 47 above). However, like any other expression, its meaning is highly dependent on its context. As Lord Dyson said in the Court of Appeal at para 37, in the context of section 53 the appropriate question is whether it would be reasonable for the accountable person to make a decision contrary to an earlier decision on precisely the same point. In the present context, I agree with him that it is not reasonable for an accountable person to issue a section 53 certificate simply because, on the same facts and admittedly reasonably, he takes a different view from that adopted by a court of record after a full public oral hearing. I would add that the 2000 Act was passed after the *Powergen* and *Danaei* cases had been decided, and they both precluded executive decisions which conflicted with earlier decision of tribunals which were not even part of the judiciary. So it is not as if the grounds for this conclusion could have been unforeseen by Parliament.²⁸

He concluded:

²⁵ *Evans* (n 8) [51]-[52].

²⁶ *Ibid* [58].

²⁷ *Ibid* [67].

²⁸ *Ibid* [88].

[The fundamental composite principle] is that a decision of a judicial body should be final and binding and should not be capable of being overturned by a member of the executive. ... On the first ground, which involves domestic law, the position is more nuanced: the relevant legislative instrument, the FOIA 2000, through section 53, expressly enables the executive to overrule a judicial decision, but only ‘on reasonable grounds’, and the common law ensures that those grounds are limited so as not to undermine the fundamental principle, or at least to minimise any encroachment onto it.²⁹

2.2 The Judgment of Lord Mance

Lord Mance also considered that it was necessary to construe ‘reasonable grounds’ in its context, but gave a slightly expanded meaning:

When the court scrutinises the grounds relied upon for a certificate, it must do so necessarily against the background of the relevant circumstances and in the light of the decision at which the certificate is aimed. Disagreement with findings about such circumstances or with rulings of law made by the tribunal in a fully reasoned decision is one thing. It would, in my view, require the clearest possible justification, which might I accept only be possible to show in the sort of unusual situation in which Lord Neuberger contemplates that a certificate may validly be given. This is particularly so, when the Upper Tribunal heard evidence, called and cross-examined in public, as well as submissions on both sides. In contrast, the Attorney General, with all due respect to his public role, did not. He consulted in private, took into account the views of Cabinet, former Ministers and the Information Commissioner and formed his own view without *inter partes* representations. But disagreement about the relative weight to be attributed to competing interests found by the tribunal is a different matter, and I would agree with Lord Wilson that the weighing of such interests is a matter which the statute contemplates and which

²⁹ *Ibid* [115].

a certificate could properly address, by properly explained and solid reasons.³⁰

His Lordship then considered the 15 paragraphs containing the Attorney-General's reasons for the certificate, and demonstrated – devastatingly – that they failed to grapple with the evidence before the Tribunal. For example, the Attorney-General's certificate said that the communications fell 'squarely within' the convention on preparation for kingship, without 'engag[ing] with, or begin[nin]g to answer, the problems about this apparently wholesale acceptance of Professor Brazier's thesis about the emergence of a new or highly expanded constitutional convention, which the Upper Tribunal had so forthrightly and on its face cogently rejected'.³¹ He said that the certificate:

[D]oes not even address the problem that the Prince of Wales himself had accepted that advocacy communications of the sort under consideration would be incompatible with his role as king and are actions which he would have to cease undertaking. It does not address the fact that advocacy correspondence of the kind under discussion has no precedent, is not undertaken as part of and is not necessary as part of any preparation for kingship.³²

And so on: 'The Attorney General's certificate does not engage with or give any real answer to this closely reasoned analysis and its clear rebuttal of any suggestion that a risk of misperception could justify withholding of disclosure'.³³ He concluded:

It follows from all the above that the Attorney General's certificate proceeded on the basis of findings which differed, radically, from those made by the Upper Tribunal, and in my view it did so without any real or adequate explanation. The Upper Tribunal's findings and conclusions were very clearly and fully explained. I do not consider that it was open to the Attorney

³⁰ Ibid [130].

³¹ Ibid [137].

³² Ibid.

³³ Ibid [142].

General to issue a certificate under section 53 on the basis of opposite or radically differing conclusions about the factual position and the constitutional conventions without, at the lowest, explaining why the tribunal was wrong to make the findings and proceed on the basis it did. As it is, the certificate asserted the existence of a tripartite convention wide enough to cover the Prince of Wales's advocacy communications; it asserted in particular that they fell within the preparation for kingship convention, would be of very considerable practical benefit and were an important means of preparation; it further asserted that publication would cause them to cease or would cause misperception, and that the fact that the communications, made in a representational capacity, involved deeply held personal views and belief was a reason for non-disclosure. These assertions were in very direct contradiction with the Upper Tribunal's findings, without any substantial or sustainable basis being given for the disagreement.³⁴

2.3 The Dissenting Judgments of Lords Hughes and Wilson

Lords Hughes and Wilson rejected the narrower construction given to 'reasonable grounds' by the majority, holding in substance that the statutory language was too clear and the Court of Appeal antecedents too slender to support a narrower construction. It was for the Cabinet Minister or Attorney General to form his or her own view on the balancing process required by the Act. Lord Wilson distinguished between a Ministerial override on an issue of *law* (which would have unlawfully encroached on separation of powers), but said that questions of the *evaluation of public interests* were entirely different.³⁵ It being clear that no question of law was involved, his Lordship considered that the circumstances of the case 'constituted a paradigm example of the area of the section's lawful use'.³⁶ He considered that the disagreement between the Upper Tribunal and the Attorney-General was based not on a different factual premise, but on a different evaluation of the balancing process.

³⁴ Ibid [145].

³⁵ Ibid [171].

³⁶ Ibid [178] (Lord Wilson).

2.4 Consideration

The 27 letters have now become available. Given the scale of the litigation, they are somewhat underwhelming. They show that the Prince has admonished, exhorted and criticised government policy in a range of areas, including the sale of National Health Service property, the equipping of military forces in the Middle East, and, especially, the plight of English farmers, in terms which may strike Australian eyes as inappropriate for a person next in line to become Head of State. But that is not the point of this article.

Evans is a decision with no *ratio*. Lords Neuberger and Mance courteously but expressly disagreed with each other's approaches, although the outcome is apt to be the same in many if not most cases. The differences recall subtleties which remain to be analysed definitively in Australian law. Judicial review for failure to adhere to an (express) statutory requirement for a decision to be based on reasonable grounds closely resembles the justification for *Wednesbury* unreasonableness given by (amongst others) Brennan J in *Attorney-General (NSW) v Quin*³⁷ and by Gageler J in *Minister for Immigration and Citizenship v Li*,³⁸ namely, an (implied) statutory requirement that power be exercised reasonably. What precisely is comprehended by 'reasonableness', and in particular the extent to which it includes other familiar grounds of judicial review, is not fully settled. The broader approach, seen for example in the reasons of French CJ and Hayne, Kiefel and Bell JJ in *Li*,³⁹ resonates with that taken by Lord Neuberger. Lord Mance's approach resembles what the High Court said in *Li* as to the relationship between unreasonableness and lack of justification.⁴⁰

Between the majority and the minority in *Evans*, there is a debate – familiar to Australian eyes⁴¹ – over the contextual construction of very familiar words, in this case 'reasonable grounds'. There will always be occasions where different judges consider that there is room for statutory language to bear different meanings. No one now could believe, as Jeremy Bentham seems to have believed, that 'it is possible for the laws of a sophisticated

³⁷ (1990) 170 CLR 1, 36.

³⁸ (2013) 249 CLR 332, 370-371.

³⁹ *Ibid* 350-351, 362-366.

⁴⁰ See John Basten, 'Proportionality and Judicial Review', (Paper presented at Land and Environment Court Annual Conference, Sydney, 29 May 2015) 5-7.

⁴¹ Cf the 'protean expression' 'adversely affect' considered in *Independent Commission Against Corruption v Cunneen* (2015) 89 ALJR 475.

society to be formulated in terms of indisputable comprehensibility'.⁴² Professor Raymond has referred in this context to the 'ineluctable ambiguity of natural language'.⁴³ The distinction between questions of law and questions of fact was central to all judgments. This is the topic to which I now turn.

3 The Fact/Law Distinction – An Overview

The distinction between questions of fact and questions of law is fundamental in both the Australian and British legal systems, and not merely in administrative law. It is basal throughout a criminal trial, and it determines whether a criminal appeal lies as of right⁴⁴ or whether a judge may submit a question of law to the Court of Criminal Appeal.⁴⁵ Despite its importance in this area, it is far from simple. As it has been put by the President of the Court of Appeal, the distinction is 'slippery' and there are inevitably difficult aspects of it.⁴⁶ It was in this context that Lord Devlin famously said:

The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries.⁴⁷

There is no compelling reason why this badly-named distinction ought be the same in the very different context of administrative law, but, as will be seen below, Lord Devlin's statement has been applied and extended in administrative law in the United Kingdom.

⁴² Rupert Cross, 'Blackstone v Bentham' (1976) 92 LQR 516, 520-521.

⁴³ James Raymond, 'Saving the Literal' in Tom Gotsis (ed) *Statutory Interpretation, Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales 2007) 201-205.

⁴⁴ See Criminal Appeal Act 1912 (NSW) s 5(1). It and its other Australian counterparts are largely modelled upon the Criminal Appeals Act 1907. The compromise that led to the distinction is discussed in Rosemary Pattenden, *English Criminal Appeals 1844-1944* (Clarendon Press 1996) 92-95.

⁴⁵ See Criminal Appeal Act 1912 (NSW) ss 5A, 5B, 5BA, 5BB.

⁴⁶ Margaret Beazley, 'The Distinction Between Questions of Fact and Law: A Question Without Answer?' (2013) 11(3) *The Judicial Review* 279, 310.

⁴⁷ Patrick Devlin, *Trial by Jury* (Stevens 1956) 61; see also *Da Costa v The Queen* (1968) 118 CLR 186, 194 (Windeyer J).

3.1 The Position in Australia

In administrative law, the distinction matters because of common law doctrines and statutes. Common law doctrines such as error of law on the face of the record which apply in the exercise of Class 4 of this Court's jurisdiction inevitably require consideration of whether a claimed error is one of law, or mixed law and fact, or fact. Many statutes give rise to an 'appeal' delineated by 'questions of law', or 'error of law' or 'in point of law'.⁴⁸ These include the various administrative 'appeals' – such as from a Commissioner of the Land and Environment Court exercising Class 1 jurisdiction to a judge of that Court,⁴⁹ decisions of the Court in Classes 1, 2, 3 and 8 to the Supreme Court⁵⁰ a case stated by the Valuer-General.⁵¹ They also include questions stated to the Court of Criminal Appeal in the exercise of this Court's Class 5 jurisdiction.⁵²

The notion of curial review of administrative tribunals confined to questions of law is well-entrenched and once again has an English source. The system of 'appeal' by way of a stated case on a question of law, which could be brought unilaterally without the consent of the tribunal, flourished in the growth of tribunals in the nineteenth century with the rise of the administrative state, especially in relation to taxation, and has been studied insightfully by Professor Chantal Stebbings.⁵³ As will be seen below, commonly in the current system of administrative law in the United Kingdom, tribunal review by 'appellate' panels, and curial review of such 'appellate' tribunals, is likewise confined by reference to questions of law or errors of law.

Despite (a) a common history, (b) the use of the same terms in statutes and common law doctrines and (c) functional similarities in the systems of administrative review, there appears to be a large divergence between Australia and the United Kingdom. Famously, in the former instance it is not easy to distinguish, in any particular context, what amounts to a question

⁴⁸ See *Kostas v HIA Insurance Services Pty Ltd* (2010) 241 CLR 390, [87]-[91] (Hayne, Heydon, Crennan and Kiefel JJ).

⁴⁹ See Land and Environment Court Act 1979 (NSW) s 56A(1).

⁵⁰ See Land and Environment Court Act 1979 (NSW) s 57(1).

⁵¹ Valuation of Land Act 1916 (NSW) s 42.

⁵² Criminal Appeal Act 1912 (NSW) s 5AE; see, eg, *Environment Protection Authority v Riverina (Australia) Pty Ltd (No 2)* [2014] NSWLEC 191.

⁵³ Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press 2006) 241ff.

of law as opposed to a question of fact. In *Director of Public Prosecutions (Cth) v JM*, a snapshot of the current Australian position may be found:

No doubt, it is important to recognise that s 302(2) of the [Criminal Procedure Act 2009 (Vic)] permits reservation of only questions of law for determination by the Court of Appeal. As cases like *Blue-Metal Quarries*, *Federal Commissioner of Taxation v Broken Hill South Ltd* and *Collector of Customs v Agfa-Gevaert Ltd* all show, it may therefore be necessary to distinguish between questions of law and questions of fact. And drawing that distinction may not be easy. As this Court said in *Agfa-Gevaert*, ‘no satisfactory test of universal application has yet been formulated’ for doing so.⁵⁴

In *Collector of Customs v Agfa-Gevaert Ltd*,⁵⁵ a unanimous High Court identified an error of law in giving legal meaning to the term ‘silver dye bleach reversal process’. The Court applied what Kitto J had said in *NSW Associated Blue-Metal Quarries v Federal Commissioner of Taxation*⁵⁶ that the determination whether an ‘Act uses an expression ... in any other sense than that which they have in ordinary speech’ is always a question of law:

All that is required for a reviewable question of law to be raised is for a phrase to be identified as being used in a sense different from that which it has in ordinary speech.⁵⁷

The position in the United Kingdom appears to be very different.

3.2 The Position in the UK: *Jones v First Tier Tribunal*

In *Jones v First Tier Tribunal*,⁵⁸ the question was whether the severely injured driver of a lorry could claim under a Criminal Injuries Compensation Scheme which turned on him being a victim of ‘criminal injury’, a statutory term which was relevantly defined to include a ‘crime of violence’. Mr Jones’ lorry had collided with another lorry ahead of him, which had braked

⁵⁴ (2013) 250 CLR 135, [39] (citations omitted).

⁵⁵ (1996) 186 CLR 389.

⁵⁶ (1956) 94 CLR 509, 511–2.

⁵⁷ *Agfa Gevaert Ltd* (n 55) 397.

⁵⁸ [2013] UKSC 19, [2013] 2 AC 48 (*Jones*).

suddenly when Mr Barry Hughes jumped out in front of it. Mr Hughes was killed instantly, and the Court proceeded on the basis that he had intended to kill himself.

All members of the Supreme Court agreed with Lord Carnwath, who reviewed a line of decisions which gave deference to the decisions of the Tribunal and its predecessors, starting with the judgment of Lawton LJ in *R v Criminal Injuries Compensation Board ex p Webb*:

It is for the board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence. [...] I do not think it prudent to attempt a definition of words of ordinary usage in English which the board, as a fact finding body, have to apply to the case before them. They will recognise a crime of violence when they hear about it, even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences.⁵⁹

The inchoate deference to the board's construction of 'crime of violence' seen in that passage has become more formal, largely (so it seems) as a consequence of Lord Hoffmann's influence. In *Moyna v Secretary of State for Work and Pensions*,⁶⁰ Lord Hoffmann referred to Lord Devlin's statement that there are two categories of questions of law in a criminal trial, and added:

Likewise it may be said that there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question.⁶¹

In *Serco Ltd v Lawson*,⁶² the issue was the application of the Employment Rights Act 1996 to 'peripatetic' employments, involving substantial work

⁵⁹ [1987] QB 74, 79-80 (Lawton LJ), followed in *R (August) v Criminal Injuries Compensation Appeals Panel* [2001] QB 774 (QB) and in Scotland in *C, Petitioner* 1999 SC 551 (OH).

⁶⁰ [2003] UKHL 44, [2003] 4 All ER 162.

⁶¹ *Ibid* [26]-[27].

⁶² [2006] UKHL 3 ('*Serco*').

outside the UK. The decision is probably more widely known as a conflict of laws case, but it reiterates the law/fact distinction, because a question of law was identified. Lord Hoffmann said:

Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to section 94(1), namely that it applies to peripatetic employees who are based in Great Britain. Whether one characterizes this as a question of fact depends, as I pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post-section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. In the present case I think not only that the Tribunal was entitled to reach the conclusion which it did but also that it was right.⁶³

In an article in *Public Law* six years ago, Lord Carnwath had written of these developments:

The idea that the division between law and fact should come down to a matter of expediency might seem almost revolutionary. However, the passage did not attract any note of dissent or caution from the other members of the House. That it was intended to signal a new approach was confirmed in another recent case relating to a decision of an employment tribunal, *Lawson v Serco*. [...] Two important points emerge from [*Serco*]. First, it seems now to be authoritatively established that the division between law and fact in such classification cases is not

⁶³ *Ibid* [34] (emphasis added).

purely objective, but must take account of factors of ‘expediency’ or ‘policy’. Those factors include the utility of an appeal, having regard to the development of the law in the particular field, and the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other. Secondly, even if such a question is classed as one of law, the view of the tribunal of fact must still be given weight.⁶⁴

Before returning to *Jones*, three observations may be made. First, the candid emphasis on ‘expediency’ is very different from the Australian approach, which more closely respects and adheres to the precise language of the statute. Whatever view be held as to the utility in assaying a taxonomy of appeals ‘on a question of law’ or ‘with respect to a question of law’ or from decisions which ‘involve a question of law’, it is plain in Australia that the starting point is the language of the statute,⁶⁵ which must mean that those textual distinctions are important. The focus in Australia is on the wide variety of ‘appeals’ differently formulated by reference to ‘questions of law’ or ‘error of law’.

Secondly, on one view the United Kingdom approach seems highly circular. The scope of the (evidently limited) statutory appeal is construed by the appellate body by reason of what it thinks is the appropriate scope of the appeal, and seemingly in light of the particular facts of the case. Indeed, if what is said in *Serco* about ‘at least at this stage in the development of a post-section 196 jurisprudence’ is taken at face value,⁶⁶ it suggests that the scope of the appeal turns on the extent to which a body of law has been worked out by the tribunal.

Thirdly, whatever one’s attitude to these developments be, it must be said that there is at least a high degree of transparency in what is occurring. In November 2013, Lord Carnwath wrote:

In 19 years as a judge of administrative law cases I cannot remember ever deciding a case by simply asking myself whether

⁶⁴ Lord Carnwath, ‘Tribunal Justice, A New Start’ [2009] PL 48, 63-64. Lord Carnwath was formerly Senior President of Tribunals. The same emphasis on policy may be seen in *Day v Hosebay Ltd* [2012] UKSC 41, [2012] 4 All ER 1347, esp [26]-[29] on whether the meaning of ‘house’ is a question of law.

⁶⁵ See *Kostas* (n 48) [89] (French CJ).

⁶⁶ *Serco* (n 62) [34] (Lord Hoffmann).

an administrative decision was ‘beyond the range of reasonable responses’, still less whether it has caused me logical or moral outrage. Nor do I remember ever asking myself where it came on a sliding scale of intensity. My approach I suspect has been much closer to the characteristically pragmatic approach suggested by Lord Donaldson in 1988, by way of a rider to what Lord Diplock had said in *CCSU*: ‘the ultimate question would, as always, be whether something had gone wrong of a nature and degree which required the intervention of the court and, if so, what form that intervention should take’. If the answer appears to be yes, then one looks for a legal hook to hang it on. And if there is none suitable, one may need to adapt one.⁶⁷

Finally, if all that seems foreign to Australian eyes, it nevertheless appears to have been well-established when the 2007 administrative law reforms were enacted. It is, to say the least, arguable that when in 2007 appeals to the Upper Tribunal and thence to the High Court turned on error of law, the principles already established by the House of Lords were confirmed by the same statutory language. Indeed, there are suggestions in the extrinsic materials to that effect.⁶⁸ In particular, because the content of a ‘question of law’ turns on factors of ‘expediency’ or ‘policy’, the restructuring of administrative law in the United Kingdom and the creation of the Upper Tribunal in 2007,⁶⁹ gave rise to new questions, which were raised in Lord Carnwath’s article, and then repeated in *Jones*:

⁶⁷ Lord Carnwath, ‘From Judicial Outrage to Sliding Scales—Where Next for *Wednesbury*?’ (ALBA Annual Lecture, 12 November 2013) 18–19 <www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf> accessed 27 October 2015 (citation omitted).

⁶⁸ See, e.g. Department of Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (White Paper, Cm 6243, 2004) [7.19]: ‘An appeal from a first instance tribunal should generally be limited to a point of law, although for some jurisdictions this may in practice be interpreted widely, for instance to allow for guidance on valuation principles in rating cases. The general principle is that an appeal hearing is not an opportunity to litigate again the factual issues that were decided at the first tier. The role is to correct errors and to impose consistency of approach.’

⁶⁹ Pursuant to the Tribunals, Courts and Enforcement Act 2007, which in turn followed the 2001 report of Sir Andrew Leggatt, ‘Tribunals for Users: One System, One Service’ (2001) <<http://webarchive.nationalarchives.gov.uk/+http://www.tribunals-review.org.uk/leggatthtm/leg-ov.htm>> accessed 27 October 2015, and a White Paper, Department of Constitutional Affairs (n 68).

[W]hat if there is an intermediate appeal on law only to a specialist appellate tribunal? Logically, if expediency and the competency of the tribunal are relevant, the dividing line between law and fact may vary at each stage. Reverting to Hale LJ's comments in [*Cooke v Secretary of State for Social Security* [2002] 3 All ER 279 [5]-[17]], an expert appellate tribunal, such as the Social Security Commissioners, is peculiarly fitted to determine, or provide guidance, on categorisation issues within the social security scheme. Accordingly, such a tribunal, even though its jurisdiction is limited to 'errors of law', should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, 'issues of law' in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words, expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field.⁷⁰

At the conclusion of his judgment, Lord Carnwath said:

For the purposes of the present appeal it is unnecessary to consider further the working out of these thoughts. In the present context, they provide support for the view that the development of a consistent approach to the application of the expression 'crime of violence', within the statutory scheme, was a task primarily for the tribunals, not the appellate courts.⁷¹

Lord Walker, Lady Hale and Lord Sumption agreed, as did Lord Hope, who added that:

I agree with Lord Carnwath for all the reasons he gives that it is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues, bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law

⁷⁰ *Jones* (n 58) [46] (Lord Carnwath).

⁷¹ *Ibid* [47].

and fact, so that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals.⁷²

3.3 Response to *Jones*

There is a large difficulty in resorting to ‘expediency’ and ‘policy’ where *both* internal appellate review, *and* curial review, are circumscribed by ‘error of law’. As Lord Carnwath said, it may be perceived to be desirable for internal review to be relatively broad, and curial review to be relatively narrow. One example is where an appellate tribunal gives what in the United Kingdom are known as ‘factual precedents’ to first instance decision-makers within the tribunal – there are often issues warranting guidance which fall outside a ‘question of law’.⁷³ But if that is the position, then the *same* language in the *same* administrative review regime is given *different* meanings.

There is a further consequence, not yet worked out in these cases. In the United Kingdom, essentially all errors of law are jurisdictional,⁷⁴ and there is no notion of non-jurisdictional error of law on the face of the record. How that is to be reconciled with the pragmatic flexibility given to ‘error of law’ remains to be seen.⁷⁵

If all that seems foreign, the question of what was a ‘crime of violence’ returned to the Court of Appeal in *Criminal Injuries Compensation Authority v First-Tier Tribunal (Social Entitlement Chamber)*,⁷⁶ where a dog which was known to be aggressive approached a cyclist who swerved into the path of a car and was severely injured. It was common ground that an offence under the Dangerous Dogs Act 1991 had been committed; what was controversial

⁷² Ibid [16].

⁷³ See e.g. *Secretary of State for Home Department v MN and KY (Scotland)* [2014] UKSC 30, [2014] 4 All ER 443, [28]-[30], [44]-[51] (Lord Carnwath) on the use of (anonymous) linguistic analysts in asylum cases.

⁷⁴ Following *Anisimic* (n 6) and *Hull University Visitor* (n 6). For the exceptions, see Mark Leeming (n 6) 76-9.

⁷⁵ Cf ‘Judges facing such difficult questions are sometimes tempted to manipulate the distinction between law (which is always jurisdictional) and fact (which may be non-jurisdictional and so need only comply with the “rationality standard”): William Wade and Christopher Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 216.

⁷⁶ [2014] EWCA Civ 65.

was whether there was a ‘crime of violence’. The Tribunal awarded substantial damages on the basis that the injuries were directly attributable to a crime of violence. The Court of Appeal, conscious of what had been held in *Jones*, found that the Tribunal had given no reasons for finding that there was a crime of violence, and concluded that where there was at most negligence on the part of the owners of the dog. It followed that it was wrong in law to conclude that such a crime had been committed.

Jones was criticised by Christopher Forsyth, in part because it ‘sits uneasily with the growing acceptance in other cases of error of material fact as a ground of judicial review’.⁷⁷ He wrote:

This pragmatic approach to the distinction between law and fact is difficult to reconcile with the general thrust and purpose of the law of jurisdiction: to place objective limits on powers. And if ‘law’ and ‘fact’ are to be manipulated by the courts to ensure the best use of the expertise of tribunals (as *Jones* suggests) on grounds that have nothing to do with law or fact, should we not call them Laurel and Hardy or Wallace and Gromit! Perhaps more realistically one might call them ‘questions of correctness’ and ‘questions of rationality’.⁷⁸

This may be contrasted with the Australian position. A Federal Magistrate who proceeded on the basis that the (specialist) tribunal was arguably correct in its construction of the law was found in *Minister for Immigration and Citizenship v Yucesan*⁷⁹ to have committed error, on the basis that ‘every legal question has one right answer’.⁸⁰ As Mark Aronson long ago said:⁸¹

⁷⁷ This tendency is not confined to the United Kingdom. Elias CJ has said, ‘Indeed, I am attracted to the simpler view that error of law is reached whenever a body entrusted with a determination of fact has reached a conclusion that is clearly wrong or is unreasonable’: *Vodafone, Telecom, Commerce Commission* [2011] NZSC 138 [16] (cf the more conventional approach of Blanchard, McGrath and Gault JJ at [50]-[58], by reference to *Edwards v Bairstow* [1955] UKHL 3, [1956] AC 14, 36 (HL) and *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport Ltd* [1993] 1 WLR 23, 29-33 (HL)).

⁷⁸ Christopher Forsyth, ‘Doctrine, Conceptual Reasoning, and Certainty in the Legal Process’ (Process and Substance in Public Law Conference, Cambridge, September 2014).

⁷⁹ (2008) 169 FCR 202.

⁸⁰ See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (5th edn, Lawbook Co 2013) 194.

⁸¹ Mark Aronson, ‘Unreasonableness and Error of Law’ (2001) 24(2) *UNSWLJ* 315, 337.

Misunderstanding the governing law has always been an error of law in its own right, and that should include misunderstanding the legal meaning of a statutory term, ordinary or special. Misunderstanding is the error, and that can occur in relation to ordinary as well as technical terms. In other words, the proper meaning of *any* legal term should itself be a question of law.

The United Kingdom approach appears to be foreign to fundamental notions of the role of the judiciary in this country, notably the importance of Marshall CJ's statement in *Marbury v Madison*.⁸²

It is emphatically the province and duty of the judicial department to say what the law is.

See for example the (appropriately) strongly worded criticism in *Commissioner of Taxation v Indoороopilly Children Services (Qld) Pty Ltd*,⁸³ where Allsop J observed that this statement has repeatedly been recognised as central to the administration of justice and to the relationship between the judiciary and executive.⁸⁴

4 Conclusions

The Australian and United Kingdom systems of administrative law face the same problems regarding the scope of internal and curial review, and use similar language, but at least in the respects touched on in this paper, they address those questions in very different ways. That suggests a level of caution should meet a submission framed on the basis of British support for a proposition about the scope of 'question of law' or 'error of law'. However, it is also useful to compare the experience, which in large measure seems driven by the absence of something familiar in Australian systems: review as of right on a question of law, capable of being expanded to questions of fact or mixed questions of fact and law by leave.⁸⁵

⁸² 5 US 137, 111 (1803).

⁸³ (2007) 158 FCR 325, [2]-[6] (Allsop J, Stone and Edmonds JJ agreeing).

⁸⁴ *Ibid* 327, by reference to *Quin* (n 38) 35-36; *Corporation of the City of Enfield v Development Assistance Commission* (2000) 199 CLR 135, [42]-[44] and *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, [116].

⁸⁵ See e.g. *Crimes (Appeal and Review) Act 2001* (NSW) s 53.

It also seems fair to say that the full workings out of the pragmatic resort to 'expediency' have not as yet occurred in the United Kingdom. The same is probably true in Australia of the constitutionalisation of 'jurisdictional error'. What is clear is that questions of internal coherence have meant that divergence on critical points has led to cascading consequences throughout both legal systems.

There are also other quite distinct considerations underlying the development of the law in the two countries. In Australia, entrenched review for 'jurisdictional error' has seen an expansion of that term, but nevertheless the preservation of non-jurisdictional error of law on the face of the record as a separate category, is of vital importance where there is not a privative clause.⁸⁶ In the United Kingdom, the broad notion of the British 'constitution' and the relationship between British and European law influence developments in ways that can be difficult for an outsider to appreciate fully. Indeed, just as we do not expect Australian constitutional law to resemble that in England and Wales (let alone Scotland), perhaps it should be small surprise that administrative law has also diverged. The caution expressed by Sir Anthony Mason at the outset of this paper appears to be well-founded. That said, I wholly endorse what Lord Neuberger said recently about the assistance gained from considering how a legal system with a common ancestor addresses similar problems.⁸⁷

⁸⁶ See (for recent examples) *Elias v Director of Public Prosecutions* [2012] NSWCA 302, [5]-[7]; *Bindaree Beef Pty Ltd v Riley* (2013) 85 NSWLR 350, 368-69 [63]-[69]; *Sinkovich v Attorney General of New South Wales* (2013) 85 NSWLR 783, 801-802 [74]-[76]; *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Secretary of the Treasury* [2014] NSWCA 112, [48]-[58]; *Roads and Maritime Services v Porret* (2014) 86 NSWLR 467, 479 [59].

⁸⁷ *Starbucks (HK) Ltd (n 2)* [50].