

Two topics from Administrative Law in Australia and the United Kingdom

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A. 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 the examination be? Two conflicting views expressed earlier this year, on 16 and 28 July, may be mentioned. One is that of Lord Neuberger PSC, writing for a unanimous Supreme Court, and in a passage emphasised when giving the seventh John Lehane Memorial Lecture in August in Sydney, which nevertheless bears repetition:¹

“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.”

The other is that of Sir Anthony Mason, who said in an interview that there was limited value in comparative jurisprudence in the case of public law, as opposed to private law decisions:²

“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

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¹ *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45; [2014] 4 All ER 79 at [45]. See also the consideration of Australian, New Zealand and North American cases in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822 at [241]-[243].

² Katy Barnett, ‘Sir Anthony Mason Reflects on Judging in Australia and Hong Kong, Precedent and Judgment Writing’ on Opinions on High (28 July 2014), <<http://blogs.unimelb.edu.au/opinionsonhigh/2014/07/28/barnett-mason/>>.

decision was dictated by some consideration that is not expressed in the judgments but really is foreign to Australian circumstances.”

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

B. The fact/law distinction - overview

The distinction between questions of fact and questions of law is fundamental in 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 right³ or whether a judge may submit a question of law to the Court of Criminal Appeal.⁴ Despite its importance in this area, it is far from simple. It was in this context that Lord Devlin famously said:⁵

“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.”

There is no 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.

In administrative law, the distinction matters because of statutes – statutes which give an “appeal” delineated by “questions of law”, or “error of law” or “in point of law”.⁶ These include the various administrative “appeals” – such as that from decision-makers within the former Administrative Decisions Tribunal (now NCAT) to the Appeal Panel,⁷ or from the Administrative Appeals Tribunal to the Federal Court,⁸ or from a Commissioner of the Land and Environment Court exercising Class 1 jurisdiction to a judge of that Court and ultimately to the Court of Appeal.⁹ The distinction is central to common law

³ See *Criminal Appeal Act 1912* (NSW), s 5(1). It and its other Australian counterparts are largely modelled upon the *Criminal Appeals Act 1907* (UK). The compromise that led to the distinction is discussed in R Pattenden, *English Criminal Appeals 1844-1944*, Clarendon Press, Oxford, 1996, pp 92-95.

⁴ See *Criminal Appeal Act 1912* (NSW), ss 5A, 5B, 5BA, 5BB.

⁵ *Trial by Jury*, 1956, 61.

⁶ See *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [82]-[91].

⁷ See *Civil and Administrative Tribunal Act 2013* (NSW), s 80.

⁸ *Administrative Appeals Act 1975* (Cth), s 44.

⁹ See *Land and Environment Court Act 1979* (NSW), s 56A and 57(1).

doctrines such as error of law on the face of the record, which in turn informs grounds of review under s 5(1)(f) of the *AD(JR) Act*. Further, common law doctrines such as the “no evidence ground” themselves raise an error of law.¹⁰

The notion of curial review confined to questions of law administrative tribunals 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.¹¹ 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, it is not easy to distinguish, in any particular context, what amounts to a question of law as opposed to a question of fact. In *Director of Public Prosecutions (Cth) v JM*,¹² 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] 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.”

In *Agfa-Gevaert*, 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* (1956) 94 CLR 509 at 511-2 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.¹³

¹⁰ See *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [90]-[91].

¹¹ C Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press, Cambridge, 2006), pp 241ff.

¹² [2013] HCA 30; 87 ALJR 836 at [39].

¹³ *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 397.

“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.”

The position in the United Kingdom is very different.

(b) *Jones v First Tier Tribunal*

In *Jones v First Tier Tribunal*¹⁴ 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 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 JSC, 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 parte Webb*.¹⁵

“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...”

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*,¹⁶ 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

¹⁴ [2013] UKSC 19; [2013] 2 AC 48.

¹⁵ [1987] QB 74 at 79, followed in *R (August) v Criminal Injuries Compensation Appeals Panel* [2001] QB 774 and in Scotland in *C, Petitioner* 1999 SC 551.

¹⁶ [2003] UKHL 44; [2003] 4 All ER 162 at [26]-[27], emphasis added.

will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question ... ”

In *Lawson v Serco*,¹⁷ the issue was the application of the *Employment Rights Act 1996* to “peripatetic employments”, involving substantial work 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:¹⁸

“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...”

In an article in *Public Law* five years ago,¹⁹ 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 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

¹⁷ [2006] UKHL 3; [2006] 1 All ER 823.

¹⁸ [2006] UKHL 3; [2006] 1 All ER 823 at [34], emphasis added.

¹⁹ “Tribunal Justice, A New Start” [2009] *PL* 48 at 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 at [26]-[29] on whether the meaning of “house” is a question of law.

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.”

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,²⁰ 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, 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:²¹

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

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

²⁰ See *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; 241 CLR 390 at [89].

²¹ “From judicial outrage to sliding scales – where next for *Wednesbury*?” (cited by C Forsyth, “Doctrine, Conceptual Reasoning, and Certainty in the Legal Process”, pp 13-14), at <http://www.supremecourt.uk/docs/speech-131112-lord-carnwath.pdf>.

were confirmed by the same statutory language. Indeed, there are suggestions in the extrinsic materials to that effect.²² 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 2007,²³ (which, despite its name, is a superior court of record and is amenable to judicial review),²⁴ gave rise to new questions, which were raised in Lord Carnwath’s article, and then repeated in *Jones*:²⁵

“[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 paras 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.”

At the conclusion of his judgment, Lord Carnwath said:²⁶

“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.”

²² For example, see para 7.19 of the White Paper: “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.” See <http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>.

²³ Pursuant to the *Tribunals, Courts and Enforcement Act 2007* (UK), which in turn followed the 2001 report of Sir Andrew Leggatt, *Tribunals for Users, One System, One Service* and a White Paper, *Transforming Public Services: Complaints, Redress and Tribunals* (tabled July 2004).

²⁴ See *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28; [2012] 1 AC 663.

²⁵ [2013] UKSC 19, [2013] 2 AC 48 at [46].

²⁶ [2013] UKSC 19, [2013] 2 AC 48 at [47].

Lord Walker, Lady Hale and Lord Sumption agreed, as did Lord Hope, who added at [16]:

“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 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.”

(c) Response to *Jones*

There is a very 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”.²⁷ But if that is the position, then the *same* language in the *same* administrative review 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,²⁸ 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.²⁹

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)*,³⁰ 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* (UK) had been committed; what was controversial was whether there was a “crime of violence”. The tribunal awarded substantial damages on the basis that the injuries were directly

²⁷ See for example *Secretary of State for Home Department v MN and KY (Scotland)* [2014] UKSC 30; [2014] 1 WLR 2064 at [28]-[30] and [44]-[51] on the use of (anonymous) linguistic analysts in asylum cases.

²⁸ Following *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and *R v Hull University Visitor; ex parte Page* [1993] AC 682. For the exceptions, see M Leeming, *Authority to Decide*, Federation Press, 2012, pp 76-79.

²⁹ 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”)...”: H W R Wade and C F Forsyth, *Administrative Law*, Oxford University Press, 11th ed, 2014, p 216.

³⁰ [2014] EWCA Civ 65; [2014] WLR (D) 45.

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 is 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”.³¹ He wrote:³²

“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’.”

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*³³ to have committed error, on the basis that “every legal question has one right answer”.³⁴ As Mark Aronson long ago said:³⁵

“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.”

³¹ 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 at [16] (cf the more conventional approach of Blanchard, McGrath and Gault JJ at [50]-[58], by reference to *Edwards v Bairstow* [1956] AC 14 at 36 and *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at 29-32).

³² C Forsyth, “Doctrine, Conceptual Reasoning, and Certainty in the Legal Process”, draft paper presented at a conference “Process and Substance in Public Law”, Cambridge, 17 September 2014.

³³ [2008] FCAFC 110; 169 FCR 202.

³⁴ See M Aronson and M Groves, *Judicial Review of Administrative Action*, Lawbook Co, 5th ed 2013, p194.

³⁵ M Aronson, “Unreasonableness and Error of Law” (2001) 24(2) *UNSWLJ* 315.

The United Kingdom approach is 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*:³⁶

“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 Indooroopilly Children Services(Qld) Pty Ltd*,³⁷ 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.³⁸

C. Review of Ministerial override powers

Legislation not uncommonly establishes a mechanism for review of executive action, often including merits review, but reserves a power to be exercised by a Minister to veto what would otherwise be the operation of the mechanism. One example is found in *Aboriginal Land Rights Act 1983* (NSW), s 36(8), 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”.

In Australia, notwithstanding the most robust privative clause, exercises of such powers by Ministers are unquestionably reviewable for jurisdictional error.³⁹ There is a line of authority in the English Court of Appeal, presently culminating in *Evans (On the Application Of) v The Information Commissioner*,⁴⁰ taking a significantly different approach. The hearing is set down before the Supreme Court on 24 and 25 November.⁴¹

³⁶ 5 US 87 at 111 (1803).

³⁷ [2007] FCAFC 16; 157 FCR 325 at [2]-[6] (Allsop J, Stone and Edmonds JJ agreeing).

³⁸ [2007] FCAFC 16; 157 FCR 325 at [5], by reference to *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36; *Corporation of the City of Enfield v Development Assistance Commission* [2000] HCA 5; (1999) 199 CLR 135 at [42]-[44] and *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* [2000] HCA 11; 200 CLR 591 at [116].

³⁹ See for example *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 at [94]-[104].

⁴⁰ [2014] EWCA Civ 254; [2014] 2 WLR 1334, noted (2014) 130 *LQR* 552.

⁴¹ The Supreme Court website provides dates, and bench compositions, of imminent appeals as well as an overview of the issues involved. Thus the proposed bench of Lord Neuberger, Lady Hale, Lord Mance, Lord Kerr, Lord Wilson, Lord Reed and Lord Hughes is revealed at <http://supremecourt.uk/cases/uksc-2014-0137.html>.

The litigation concerns letters from the Prince of Wales to Ministers, which were the subject of a freedom of information application, and which may have created a new constitutional convention: preparation for kingship. Disclosure was ordered by the Upper Tribunal. An appeal lay (on questions of law) 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* (UK), and issued:

“a certificate 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) [ie a failure to comply with section 1(1)(a) or (b)].”

Perhaps unsurprisingly, 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.⁴² The Court of Appeal allowed an appeal. The judgment was given by Lord Dyson, the Master of the Rolls, with whom Richards and Pitchford LJ agreed.

Lord Dyson relied on a line of decisions empowering review of such decisions on grounds which appear to be fairly readily made out; indeed, those decisions were a powerful reason to apply a narrower construction to s 53. One was *R v Secretary of State for the Home Department ex parte Danaei*,⁴³ where an Iranian asylum-seeker’s account was disbelieved by the delegate, but accepted by the special adjudicator, who dismissed the claim on other grounds. He 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 by Collins J, and an appeal dismissed. Judge LJ said:⁴⁴

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

⁴² *R (Evans) v Attorney General* [2013] EWHC 1960 (Admin); [2013] 3 WLR 1632.

⁴³ [1997] EWCA Civ 2704.

⁴⁴ 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.”

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.”

Another was *R (Bradley) v Secretary of State for Work and Pensions*.⁴⁵ 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:⁴⁶

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

In *Evans*, Lord Dyson said:⁴⁷

“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 *Danaei* 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**

⁴⁵ [2009] QB 114, [2008] EWCA Civ 36.

⁴⁶ [2009] QB 114, [2008] EWCA Civ 36 at [91] (emphasis added).

⁴⁷ [2014] EWCA Civ 254; [2014] 2 WLR 1334 at [38]-[39].

Court), but also because it seriously undermines the efficacy of the rights of appeal accorded by sections 57 and 58 of the FOIA.”

This reasoning seems to be highly controversial even in the United Kingdom, as the (unusual) grant of leave directly from the Court of Appeal reveals, as does the criticism in the latest *Law Quarterly Review*:⁴⁸

“[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.”

There is force in the argument that the premise of the section was that the Minister disagreed with a decision, on grounds that fell short of giving rise to appellable error. Those would appear to be the circumstances to which the provision was squarely directed. Further, on one view what this line of authority indicates is either a willingness to imply an obligation of *reasonableness* in exercises of Ministerial override, or else to significantly expand review for want of rationality. That suggests another consideration may be in play. Prominent in the litigation is a claim that the veto power is not compatible with EU law; there is a powerful incentive for the legislation to be construed so as to comply with EU law. The link between the two is sometimes harder to see.⁴⁹ Finally, the references to the *constitutional* aspects of the legislation are, naturally, to be understood very differently from constitutional arguments in Australia.

D. Conclusion

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.⁵⁰

⁴⁸ C Knight, “The Veto in the Court of Appeal” (2014) 130 *LQR* 552 at 554.

⁴⁹ Another example may be seen in *Bank Mellat v Her Majesty’s Treasury (No 2)* [2013] UKSC 38; [2014] AC 700 at [5] and [52]; a third was the “discovery” of a right to privacy vindicated in *Douglas v Hello! Ltd* [2001] QB 967 (cf *Earl Spencer v United Kingdom* (1998) 25 EHRRCD 105).

⁵⁰ See for example *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 substantial consequences throughout the legal system.

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 a privative clause.⁵¹ 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 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 at least in some instances to be well-founded. That said, there is almost always merit in considering how a legal system with a common ancestor addresses similar problems.

⁵¹ See (for recent examples) *Elias v Director of Public Prosecutions* [2012] NSWCA 302 at [5]-[7]; *Bindaree Beef Pty Ltd v Riley* [2013] NSWCA 305 at [63]-[69]; *Sinkovich v Attorney General of NSW* [2013] NSWCA 383 at [74]-[76]; *Public Service Association and Professional Officers’ Association Amalgamated Union of NSW v Secretary of the Treasury* [2014] NSWCA 112 at [48]-[58]; *Roads and Maritime Services v Porret* [2014] NSWCA 30 at [59].