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*Judicial Review:  
Practical Lessons,  
Insights and Forecasts*

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*April 2010*

*VUW-NZCPL002*

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI



# Judicial Review: Practical Lessons, Insights and Forecasts

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Cheryl Gwyn and I have been given the invidious task of addressing you on "practical lessons, insights and forecasts" about judicial review. Our response to that challenge will inevitably be superficial. The body of judicial review and administrative law keeps growing and getting more and more complicated. As a guide, the 2nd edition of Dr Graham Taylor's leading text on Judicial Review (which I commend to you) was recently launched.<sup>1</sup> It has grown from a compact 360 pages in the first edition, to over 800 pages in the 2nd. So rather than wowing you with detail, I want to address the general themes of judicial review, making three particular points.

Forgive me, too, if I start with a rather unhelpful first proposition.

**KEY POINT 1: The discipline of judicial review is confusing and uncertain, particularly in some key areas, such as substantive review, review involving human rights or review in areas where the state has departed from the classic model of undertaking public functions.**

Fifty years ago, a much wiser person than me equated judicial review cases with "a cocktail".<sup>2</sup> Into a vessel, a young Robin Cooke said, are poured an Act of Parliament, which "does not provide a plain answer"; a handful of "conflicting and sometime antiquated" canons of statutory interpretation ("the modern Alice-in-Wonderland" attitude to the meaning of words, as he described it); a number of irreconcilable precedents and the outlook of the presiding Judge – which "lends a distinctive flavour".<sup>3</sup> They are all "stirred together by argument". What will be the "dominating ingredient" in the final mix "is something of a matter of chance".<sup>4</sup>

And, to some degree, I think that metaphor holds true in 2010 as much as it did in 1960. I am comforted by the fact that some senior judges have recently made similar points. Our Chief Justice has spoken recently of a "repositioning of administrative law", where "[o]ld boundaries, always porous", between law and policy, fact and law, process and substance, private and public, legislative and administrative "with which [the courts] have tried to provide bright lines and rules", need to be reconsidered or re-justified.<sup>5</sup> Also, in the controversial *MedLabs* decision, Justice Hammond complained our approach to judicial review was "leavened with confusion" and

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<sup>1</sup> GDS Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010).

<sup>2</sup> Robin Cooke "The Changing Face of Administrative Law" (1960) 36 NZLJ 128 at 133.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Sian Elias "Righting Administrative Law" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) at 71.

"distinctly problematic".<sup>6</sup> While he noted that the procedural grounds of review and those concerned with the decision-maker's reasoning processes are reasonably settled and well understood,<sup>7</sup> he suggested those grounds relating to the decision itself – or substantive review – are covered in "fog of the pea souper" variety.<sup>8</sup>

Now, I may win no brownie points from the conference organising committee by embracing that proposition as my marquee point! But I think that understanding and accepting the uncertain and discretionary nature of the High Court's supervisory jurisdiction is important.<sup>9</sup> Administrative law is the aggregation of a number of general principles of good administration.<sup>10</sup> In simple terms, these are the tripartite requirements to act fairly, reasonably, and in accordance with the law.<sup>11</sup> But the courts are rightly alert to the fact that, as it has been famously put, "in law, context is everything".<sup>12</sup> Those principles bite differently in different decision-making or legislative contexts. And, of course, which judge sits on a particular case will also colour the approach, perhaps more so than in some other areas of law.

But what does that mean from a practical perspective for government lawyers confronting immediate problems: advising Ministers and officials, assessing litigation risk and framing cases for court?

First and foremost, it means that reliance on precedent becomes a risky business. The potpourri of judicial review cases is not necessarily coherent or logical. Different approaches are seen in different contexts. Judges do not take well to being bombarded with a plethora of cases from the across the generality of administrative law.

Secondly, determining prospects of success and litigation risk needs to take account of broader public law principles and the underlying drivers for the judges. The judicial review bible – *Judge Over Your Shoulder* – starts with the tripartite statement of grounds of review or principles of good administration.<sup>13</sup> As Lord Cooke expressed it, "fairly, reasonably and in accordance with the law".<sup>14</sup> Or the negative formulation from Lord Diplock in *CCSU*: "illegality,

<sup>6</sup> *Lab Tests Auckland Ltd v Auckland District Health Board* [2009] 1 NZLR 776 at [370].

<sup>7</sup> *Ibid* at [382].

<sup>8</sup> *Ibid* at [384].

<sup>9</sup> For some discussion of the discretionary state of law, see Dean R Knight "Simple, Fair, Discretionary Administrative Law" (2008) 39 VUWLR 99 and JL Caldwell "Discretionary Remedies in Administrative Law" (1986) 6 Otago L Rev 245.

<sup>10</sup> Peter Cane *Administrative Law* (Oxford University Press, New York, 2004) at 18.

<sup>11</sup> Sir Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart *Judicial Review in the 1980s: Problems and Prospects* (Oxford University Press, Auckland, 1986) at 5.

<sup>12</sup> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [28].

<sup>13</sup> Crown Law Office "A Judge Over Your Shoulder: A Guide to Judicial Review of Administrative Decisions" (Wellington, 2005) at [7].

<sup>14</sup> Cooke, above n 11, at 5.

irrationality, and procedural impropriety".<sup>15</sup> These tripartite principles are often teamed with the *Chief Constable v Evans* mantra that the judicial review is about "process not merits".<sup>16</sup>

In simple cases, where the question is a straightforward one about the meaning of legislation or basic process rights in a typical administrative or quasi-judicial decision-making process, the courts will readily supply straight-forward answers without need to refer to precedent or principles of judicial review. But, in trickier cases, the tripartite grounds overlap, merge, and tend to break-down – as the Chief Justice noted.<sup>17</sup> More and more often, it seems the courts are drawn to make some evaluation about the "merits" of a case. Categorisation of the question under the different grounds of review is therefore only partly helpful. As the most recent edition of *Judge Over Your Shoulder* acknowledges, it is sometimes "difficult to completely sever" process from the merits.<sup>18</sup>

More helpful, I think, is understanding the underlying principles and tensions that trigger judges' reaction to these problems. One of England's leading administrative law silks, Michael Fordham QC, suggests that judicial review cases turn on the courts calibrating an appropriate balance between two competing tensions: vigilance and restraint.<sup>19</sup> *Vigilance* is driven by the desire to uphold the Rule of Law and to protect the rights, interests and expectations of citizens.<sup>20</sup> The courts will strive to intervene and are more likely to substitute their view for the view of the decision-maker. This is sometimes equated with the "red" light.<sup>21</sup> On the other hand, *restraint* is based on the separation of powers principle and recognises the limits of judicial review. First, it acknowledges the constitutional allocation of power by the legislature to public bodies and officials. Courts are only charged with reviewing decisions, not making them (as Fordham describes it, "the forbidden method").<sup>22</sup> Secondly, it recognises the limits of the judicial function (public servants are often better equipped to grapple with certain questions than judges). Thirdly, it builds on the notion that judges are only but one of the many accountability mechanisms that control public power. These themes of restraint mean the courts will be cautious about intervening and give a reasonable amount of latitude (or deference) to the decision-maker's judgement. Sometimes this is equated with the "green" light.<sup>23</sup>

**KEY POINT 2: Recognising that the courts are grappling with competing tensions of vigilance and restraint is a better way of understanding the great morass of judicial review cases.**

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<sup>15</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 950.

<sup>16</sup> *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 165.

<sup>17</sup> Sian Elias, "Righting Administrative Law" in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, Oxford, 2009) at 71.

<sup>18</sup> Crown Law Office, above n 13, at [12].

<sup>19</sup> Michael Fordham *Judicial Review Handbook* (4th ed, hart Publishing, Oxford, 2004) at 270.

<sup>20</sup> *Ibid* at [12.1].

<sup>21</sup> Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Butterworths, London, 1997) at 23.

<sup>22</sup> Fordham, above n 19, at 305.

<sup>23</sup> Harlow and Rawlings, above n 21, at 31.

Of course, neither tension necessarily prevails absolutely and most judicial review cases represent a mediated compromise between these two principles (the so called "amber" light).<sup>24</sup> The competing themes or constitutional principles are perhaps just a different way of capturing the idea that the depth of judicial scrutiny varies according to context.

To some extent, the orthodox grounds encapsulate these ideas, employing an "off-the-shelf" balance between the themes, at least in simple cases. In relation to the "illegality" ground, the courts are absolutely vigilant in ensuring the proper interpretation of law. It is part of their constitutional role as "interpreters of written law and expounders of the common law" as Lord Cooke said in *Bulk Gas*.<sup>25</sup> No latitude is afforded and the decision-maker must correctly understand and apply the law.<sup>26</sup> That is, they must act with a correct interpretation of statutory power, be faithful to its implied purpose, and must consider the relevant, legally mandated considerations, as well as disregarding irrelevant ones. Under the head of "procedural impropriety", the courts feel comfortable and empowered to address questions of process and are extremely vigilant to ensure that the hearing and deliberation processes are faithfully observed, particularly where the process in issue is similar to a court-like process. The courts are careful to ensure the decision-maker has provided a fair hearing and the decision is not tainted by bias. The *Wednesbury* approach builds in "latitude" or "margin of discretion" for the decision-maker under the "irrationality" ground and only mandates intervention in extreme cases of abuse.<sup>27</sup> These are the famous "four corners" of discretion, within which courts should not stray.<sup>28</sup> Restraint is exercised in relation to any those matters which are considered to amount to, or are closely aligned with, the "merits" of a decision: fact-finding, judgement, discretion, weight, and balancing.

As the boundaries between these grounds blur, though, this categorical approach does not really work. When confronted with the resultant uncertainty, I think the competing themes of vigilance and restraint are a better way to capture the major trends and themes in judicial review cases.

While this approach is a helpful way of analysing cases, it would be mistake to think that the courts have explicitly embraced the idea of the variable intensity of review. This notion remains extremely contentious, particularly as it relates to variable forms of unreasonableness. The idea of variable intensity and more intense forms of unreasonableness than *Wednesbury*'s traditional high threshold has a reasonable amount of currency in the High Court and with some members of the Court of Appeal.<sup>29</sup> Concepts like "hard look",<sup>30</sup> "anxious scrutiny",<sup>31</sup> "simple or intermediate

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<sup>24</sup> Carol Harlow and Richard Rawlings *Law and Administration* (2nd ed, Butterworths, London, 1997) at ch 10.

<sup>25</sup> *Bulk Gas Users Group v Attorney General* [1983] NZLR 129 at 113.

<sup>26</sup> *Peters v Davison* [1999] 2 NZLR 164.

<sup>27</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] All ER 680.

<sup>28</sup> *Ibid*, at 643.

<sup>29</sup> See generally Michael Taggart "Proportionality, Deference, *Wednesbury*" [2008] NZ L Rev 423 and Dean R Knight "A Murky Methodology: Standards of Review in Administrative Law" in Claudia Geiringer and

unreasonableness"<sup>32</sup> have been deployed, particularly in immigration cases and those dealing with technical environmental planning cases. The *Wolf v Minister of Immigration* case still stands as one of the leading High Court decisions on this approach.<sup>33</sup>

Most of the Supreme Court and a number of other judges appear much more sceptical. The Chief Justice has suggested degrees of unreasonableness amounts to "dancing around on the heads of pins"<sup>34</sup> and the idea of a spectrum of unreasonableness was "a New Zealand perversion of recent years".<sup>35</sup> Or an "intensity of anxiety",<sup>36</sup> as another judge described it. They seem to want to consider such questions in the round and simply, without developing further techniques to guide the calibration of intensity. But we are yet to see that debate explicitly addressed in a formal court decision of our highest court. A prediction: the Supreme Court will reject the language of variable intensity or degrees of unreasonableness; however, it will acknowledge that the depth review will differ in different circumstances.

Importantly though, the variation in the depth of scrutiny is not only given effect to under the unreasonableness ground. The oscillating balance between vigilance and restraint is also seen in a number of other judicial techniques. Some examples to illustrate.

Questions of law – the determination of meaning and purpose – are where we usually see absolute vigilance.<sup>37</sup> But when defining the purpose of legislation, which must be observed with fidelity, obviously the courts can construe it in broad or narrow terms. In one of the few administrative law cases in the Supreme Court, *Unison Networks v Commerce Commission*, the Court re-affirmed the purpose principle, but imputed a broad, open-textured purpose to the legislation.<sup>38</sup> In setting the implied parameters in a generous way, the Court allowed the Commerce Commission greater scope to make policy choices about the appropriate threshold for controlling electricity line companies.<sup>39</sup> An example, perhaps, of judicial restraint.

Fact-finding is traditionally seen as the "merits" and subject to *Wednesbury* unreasonableness. But not always.

Dean R Knight (eds) *Seeing the World Whole: Essays in Honour of Sir Kenneth Keith* (Victoria University Press, Wellington, 2008) 180.

<sup>30</sup> *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58 at 66.

<sup>31</sup> *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514 at 531.

<sup>32</sup> *Wolf v Minister of Immigration* [2004] NZAR 414. See also *Baker v Minister of Citizenship and Immigration* [1999] SCR 817.

<sup>33</sup> *Wolf*, *ibid.*

<sup>34</sup> *Ye v Minister of Immigration* (NZSC, Transcript, 21-23 April 2009, SC 53/2008), at 181

<sup>35</sup> *Astrazeneca Ltd v Commerce Commission* (NZSC, Transcript, 8 July 2009, SC 91/2008) at 52.

<sup>36</sup> Above n 34.

<sup>37</sup> Michael Fordham "Surveying the Grounds: Key Themes in Judicial Intervention" in Peter Leyland and Terry Woods (eds) *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, London, 1997). at 186

<sup>38</sup> *Unison Networks v Commerce Commission* [2008] 1 NZLR 42 at [55] and [64].

<sup>39</sup> *Ibid* at [77].

Sometimes a factual issue is framed an error of law, where the court can express its own view on whether it is correct.<sup>40</sup> Take, for example, a situation where an entitlement to government assistance hinges on whether someone is living in "accommodation" and assistance is declined because a person is living in a guest house without cooking or laundry facilities.<sup>41</sup> Is it an error of law about the meaning of "accommodation"? Or a factual error, where the room has wrongly been classified as accommodation? Different conclusions are evident.

The presence of a particular fact is sometimes framed as a pre-condition to the exercise of a statutory power. Certain administrative action is only permitted if a particular fact is established. For example, if a refugee has "committed a war crime",<sup>42</sup> if a local authority has "adequate information"<sup>43</sup> about environmental effects, if "it is desirable to protect shareholders or otherwise in the public interest",<sup>44</sup> etc. Again, the courts have applied different approaches to reviewing such fact-finding by public bodies and officials in these circumstances: (a) the decision-maker must have correctly determined the factual question, in the eyes of the court (effectively, the application of the sometimes described jurisdictional fact doctrine);<sup>45</sup> (b) the decision-maker's conclusion must be reasonable, perhaps only in the simple sense; and (c) the decision-maker's conclusion must not be manifestly unreasonable.<sup>46</sup> Variability once again.

Similarly, presented with the high threshold set by *Wednesbury* on the merits, some courts have explored sub-grounds of substantive review which enable greater vigilance to be applied: disproportionality, inconsistent treatment, substantive legitimate expectation, substantive fairness. It is probably true that only substantive legitimate expectation has nowadays crystallised as an orthodox sub-ground (although a claim usually fails on the preliminary question of whether a reasonable expectation exists). The other emerging grounds remain in strange states of metamorphosis. Most New Zealand courts have rejected the idea of a free-ranging proportionality ground, except in particular circumstances such as pure Bill of Rights cases;<sup>47</sup> cases involving disproportionate penalties;<sup>48</sup> and, perhaps, cases involving challenges to local authority bylaws.<sup>49</sup>

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<sup>40</sup> *Tamil X v Refugee Status Appeals Authority* [2010] 2 NZLR 73 at [271] per Baragwanath J.

<sup>41</sup> *Puhlhofer and another v Hillingdon London Borough Council* [1986] All ER 467.

<sup>42</sup> *Tamil X*, above n 40.

<sup>43</sup> *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.

<sup>44</sup> *Hawkins v Minister of Justice* [1991] 2 NZLR 530.

<sup>45</sup> *Tamil X*, above n 40 and *R (on the application of A) v Croydon London Borough Council* [2010] 1 All ER 469.

<sup>46</sup> *Hawkins*, above n 44.

<sup>47</sup> *R v Hansen* [2007] 3 NZLR 1 and *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754.

<sup>48</sup> *R v Barnsley Metropolitan Borough Council, ex parte Hook* [1976] 1 WLR 1052 and *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154.

<sup>49</sup> *McCarthy v Madden* (1914) 33 NZLR 1251, *Conley v Hamilton City Council* [2008] 1 NZLR 789 and Dean Knight "Brothels, bylaws, prostitutes and proportionality" NZLJ [2005] 423.

Inconsistency has only partly been recognised, as a touchstone of unreasonableness.<sup>50</sup> Further, substantive fairness – once popular in the late 1980s and early 1990s – has probably now been overtaken by the variegated forms of unreasonableness.<sup>51</sup> Regardless, these emerging sub-grounds represent some potential for greater judicial vigilance.

The other common curial technique is to more explicitly suggest that some matters are not suitable for judicial determination, except in extreme cases. That is, the principle of non or limited justiciability. There are some famous cases where this was employed. In the *Curtis* case, the Court of Appeal dodged the question of the legality of the disbanding of the air strike force, largely being it was a political question, which the government of the day should be held accountable for through political – not legal – processes.<sup>52</sup> In *Mercury Energy*, the Privy Council doubted that commercial decisions of SOEs would be reviewable, in the absence of "bad faith, corruption or fraud".<sup>53</sup> That is, a form of limited justiciability.

A number of recent Court of Appeal cases have similarly emphasised such restraint when faced with questions outside the typical bureaucratic scenario. In the *Medlabs* decision, the Court affirmed the principle that review of commercial contracting decision was unlikely without bad faith, corruption or fraud – or something analogous – even as it relates to procedural and conflict of interest questions.<sup>54</sup> A similar approach is evident in the *Air New Zealand v Wellington Airport* case, in a challenge to the landing charges set by the Airport.<sup>55</sup> Limited justiciability has also been hinted at in the review of decisions of (legislatively-mandated) adjudicators under the Construction Contracts Act, even to the extent that it may preclude the courts from remedying some legal errors in interpreting contracts.<sup>56</sup> Outside the commercial sphere, the Court of Appeal ruled in the *Boscawen* case that the Attorney-General's reporting function under section 7 of the Bill of Rights was non-justiciable, essentially on constitutional grounds.<sup>57</sup> In doing so, the Court perhaps left the door open for review in the hypothetical situation of a bad faith refusal to undertake the function.

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<sup>50</sup> *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 60 and *Murphy v Rodney District Council* [2004] 3 NZLR 421.

<sup>51</sup> *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641, *Northern Roller Milling Co Ltd v Commerce Commission* [1994] 2 NZLR 747, and Melissa Poole "Legitimate Expectation and Substantive Fairness: Beyond the Limits of Procedural Propriety" [1995] NZ Law Rev 426.

<sup>52</sup> *Curtis v Minister of Defence* [2002] 2 NZLR 744 at [26]-[28].

<sup>53</sup> *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 at 391.

<sup>54</sup> *Diagnostic Medlab Ltd v Auckland District Health Board* [2007] 2 NZLR 832.

<sup>55</sup> *Air New Zealand Ltd v Wellington International Airport Ltd* [2009] 3 NZLR 713 at [103]. See also *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646

<sup>56</sup> *Willis Trust Co Ltd v Green* HC Auckland CIV-2006-404-809 25 May 2006, *Taylor v LaHatte* HC Auckland, CIV-2007-404-6843 24 Jun 2008, Ren "Judicial Review of Construction Contract Adjudicators" [2005] NZLJ 461.

<sup>57</sup> *Boscawen v Attorney-General* [2009] 2 NZLR 229 at [36].



These cases highlight the ability to manipulate doctrine to achieve different balances between vigilance and restraint, depending on context.

**KEY POINT 3: Across all grounds of review, there is a reasonably common set of contextual factors which feed into the balance between vigilance and restraint.**

The courts implicitly rely on a reasonably consistent set of factors which colour their degree of intensity. In only a few cases, such as *Wolf* and perhaps *Medlabs*, do we see these factors canvassed explicitly. But they are common touchstones which seem to be material in a wide range of cases. They are not rocket-science and I'll only sketch them to finish.

First, *the nature of power or decision under review*. Is the decision a hard-edged one? Or a soft-edged one? Questions of law which are typically hard-edged are "objective and measurable" facts. There is one right answer and the courts exhibit great vigilance. In contrast, questions of policy, political matters, factual evaluations, balancing judgements are soft-edged. Reasonable people can differ on them and expect restraint from the courts. When Parliament delegated the decision-making function, how was it framed? Loosely? Narrowly? Subjectively? Objectively? Is the function legislative, administrative, or quasi-judicial? These questions will influence the degree of vigilance and restraint.

Secondly, *the nature of decision-maker and decision-making process*. Here the courts are looking whether there is a need for institutional comity or respect. Not stepping on toes, if you like. How good are the courts at dealing with such questions, relative to the decision-maker? They are good at legal interpretation; but not inquisitorial and wide-ranging enquiries. They are good at cases affecting one or a few people who are present, but not good at making polycentric decisions that affect the public at large. Does the decision-maker have particular, and better, expertise at answering such questions? Are they representative and better equipped to address moral and social issues? Do they have particular commercial acumen? Can they better engage with the public on these matters? Are they elected and accountable to the public? How high are they in the bureaucratic hierarchy? Importantly, also, how will the imposition of any requirements or constraints affect the efficiency and effectiveness of the administrative process?

Thirdly, *the nature of effect on individual*. Here the focus is on the gravity of the effect on the individual. The greater the effect on someone's rights, the greater the judicial vigilance. This probably explains the recent greater vigilance in immigration cases and ones touching on human rights.<sup>58</sup> But it also tracks the move in some cases to enforce expectations, where citizens have relied on to their serious detriment.<sup>59</sup>

Finally, *the nature of other controls*. The courts will find less need to interfere in decisions which are subject to a myriad of other robust controls and accountability mechanisms. Things

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<sup>58</sup> See above n 29.

<sup>59</sup> *R v North East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850, PP Craig "Substantive Legitimate Expectations and the Principles of Judicial Review" in M Andenas (ed) *English Public Law and the Common Law of Europe* (London, 1998) and Søren J Schønberg *Legitimate Expectations in Administrative Law* (Oxford University Press, Oxford, 2000).

like, strong ministerial, parliamentary or electoral accountability; direct supervision by other public functionaries like the Ombudsman and Auditor-General; and any other weighty informal or internal controls designed to protect against abuse. However, they will be more vigilant if they think these controls are absent or weak.

So, in conclusion, the most practical advice I can tender to you today is the suggestion that it is important not to lose sight of the big picture in judicial review. Keep in mind the underlying constitutional principles, themes and tensions that colour judicial review.