Access To Justice Effective Remedy And Rule Of Law:
The Adequacy Of Judicial Review

Introduction: legal error is normal

1. The ideal judge is a supremely intelligent woman. She is especially empathetic. She has limitless expertise in every field and infinite patience. We can trust her to do right. She is perfect justice. Let’s place her on a pedestal.

2. Of course no judge is that good. At first instance they are expected to do only the best they can on the evidence with the resources to hand. Judges make mistakes and legal error is accepted. To cure material error in the court we have a two tier system of appeal to (i) the Court of Appeal and (ii) the Supreme Court.

3. The appellate system is highly respected for the way it sifts the caseload for the finest points of law. It enjoys great esteem. It’s the closest we get to the pedestal. Yet by definition not every deserving case can reach the top. In the Supreme Court it is not enough that there is material error in the court below. To get a hearing in the apex court the point must be a point of public importance.

4. 9 times out of 10, if it was your case and the Judge got it wrong and the Court of Appeal got it wrong also, you would be left smarting with the injustice of it all, but with no prospect of further appeal. The European Court of Human Rights in Strasbourg is often mistakenly regarded as an appeal court against the decisions of the Supreme Court. It isn’t.

5. Built into our legal system is a ready acceptance of imperfect justice. Judges, when they act as primary decision makers, are trusted to get on with it and the parties to live with their (the Judges’) mistakes. Such is life. In general the appellate courts do not substitute their decision on the merits for that of every misfiring judge. Victory on appeal will likely result in a re-hearing at best.

6. On the other hand, if the senior appellate courts do take hold of a point, particularly, the Supreme Court, our elaborate system of appeals is the jewel in the human rights crown. And the same legal system that protects us against material error by Judges is also our safeguard against material error in the public administration, for example,
of the parol board, the police, immigration control, housing, education or in any number of other decisions, where the primary decision maker is not a judge, but a minister, central or local government officer or regulatory body.

**Difference between appellate and supervisory jurisdiction**

7. There are also these differences. Firstly, instead of the apex court being 2 steps away (i) the EWCA (ii) UKSC, it is now 3 steps away and before access can be obtained to the appellate courts, there must be judicial review in the High Court. In which instance, the Judge will not act as the primary decision maker, instead the High Court exercises supervisory jurisdiction. In my experience, the supervisory jurisdiction of the High Court is indistinguishable from that of any senior appellate court and one which ordinarily does not permit it to substitute its own decision on the merits.

8. Secondly, whereas decision makers in public administration must act reasonably, they are not expected to be like judges.

9. You will agree then with me, that assuming our legal system conforms to human rights norms, which I will come to, access to justice or effective remedy against the decisions of public administration is only ever going to be rough and ready. Unless of course your case is the diamond in the rough and the full majesty of the law clicks into gear and your case is taken up by the highest courts.

**Legal Heresy**

10. For the most part, ministers and officials are trusted to get on with the enormous breadth of public administration with little or no interference from the court, which brings me to the subject of this paper: when must ‘effective remedy’ be a guarantee of an independent decision by the court on the merits?

11. This important question is tantamount to heresy in judicial review thinking. It is of a kind that would send the current Minister of Justice into an apoplectic rage against crazy unelected judges.

12. It is important when examining this question to identify the kinds of reasons which typically, but by no means exhaustively, motivate the court’s chief concern on judicial review not to substitute its decision for that of the primary decision maker.

**Reasons why supervisory court does not substitute its decision on the merits**

13. The rule that the court should not substitute its view for the decision below is a technique employed by appeal courts for keeping the number of appeals low or manageable when refusing to go behind decisions, for example, in jury trials or
family cases or professional negligence claims. The justification for not intervening is a precautionary principle. The point being that to understand the decision you really had to be there in court on the day to see and hear the parties give their evidence. A court exercising a supervisory role is in no position to do this. So it is slow to detect a material error below.

14. A second technique is illustrated by the employment tribunal and the reasonable band of responses approach to dismissal. A dismissal is unfair if it lies outside the band of reasonable responses. A justification for the rule that the tribunal does not substitute its view is as you might expect that the power to dismiss belongs solely to the employer, who is the business owner. The decision in public life to exclude a person with a dubious past from the UK may be said to belong solely to the Secretary of State, rather than to the court because statute, the Immigration Act, says it is.

15. A third technique is illustrated by the difficulties that would confront the court in seeking to determine a claim by a member of the public, for example, that he or she should be entitled to particular medical treatment on the NHS. The court has doubtful qualifications because it lacks the medical expertise to judge a particular treatment.

16. Well you say, expert evidence could be made available, but then the question is how should the court to decide questions of priority when perhaps many people with the same condition each have a pressing claim.

17. Questions of evaluative judgment requiring particular expertise are again properly matters for decision makers entrusted by statute, for example, NICE, the National Institute for Health and Clinical Excellence.

18. To summarise (i) the review court may be at a disadvantage to the primary decision maker who sees and hears the applicant, (ii) the decision which the review court is asked to re-take belongs properly to a minister or official entrusted with the decision by statute, and (iii) the review body lacks the necessary expertise to form a view or carry out an evaluative exercise.

**Parliamentary sovereignty and reasonableness review**

19. I must add the further justification (favourite of students of the British Constitution) that under our system of Democracy, Parliament is sovereign. This latter point is best illustrated by the Human Rights Act itself and the principle of legality, which
holds that courts must read Acts of Parliament, unless they clearly state otherwise, as if they meant to comply with human rights norms.

20. Where this cannot be done, the court must dutifully apply the statutory wording, even where it is contrary to established human rights norms, and declare the statute incompatible with human rights. In this way Parliament, not the court, ultimately decides what the law is or should be.

21. So completely are these justifications accepted that there is rarely a need for a Judge to refer to them in refusing to consider the merits of the decision of a public body challenged by way of judicial review.

22. With this in mind I turn to what is referred to as ‘reasonableness review’ or the principle by which the court is prevented from substituting its decision on the merits for the view of the primary decision maker.

23. We might as well call this the standard of impossibility. To succeed under this head, the merits decision of the public body must be one that no person could sensibly reach. It must be either impossible or absurd. If this test stood alone, the number of successful judicial reviews would be tiny.

Why do claims for judicial review succeed despite of the odds?

24. But the number of claims that succeed at trial is still significant. And practitioners know a great many settle before then. Success in JR occurs, as with success on appeals against Judges when they take primary decisions, because routinely important elements of claim are ignored or facts misunderstood. Often the relevant law is incorrectly identified. Sometimes a decision may be set aside because it’s not fair. In other words, judicial reviews succeed when decisions are careless and sloppily put together under difficult pressure of time.

25. Well crafted decisions, properly marshalled, by experienced decision makers, on the other hand, are practically immune from challenge, no matter how powerfully one may disagree with their conclusions. Or are they?

European law is nothing sacred?

26. The case law of Court of Justice of the European Union (“CJEU”) based in Luxembourg, is cementing into English law human rights which will override the clear words of British statute, notwithstanding the Human Rights Act. Ironically these are the same human rights derived by the European Court of Human Rights (“ECtHR”) in Strasbourg under the Convention, from which the Minister of Justice threatens to withdraw after the next general election.
27. European law does this through the Charter, which applies whenever the decision of a public authority in the UK is made within the scope of EU law. Strictly speaking, human rights under the Charter override statute only in the limited fields of EU law application, for example, environmental law, EU migration, asylum, discrimination, pensions law, package travel, competition law, consumer law, procurement law, welfare benefits, company law, VAT, the EU bank bonus cap, EU arrest warrants, the list goes on.

28. The Charter is intended to make more visible those principles that already exist under the Convention on Human Rights. But the Convention applies more widely still, for example, to housing and education, indeed to the whole of English law under the Human Rights Act, irrespective of EU law. So once EU law has made visible a point of human rights, that was otherwise obscure, it may emerge under the Human Rights Act in fields outside the scope of EU law.

DEB

29. In Case C-279/09 DEB (22.12.2010), the CJEU was asked to rule if legal aid must be available to a company that failed at the outset because, its promoters claimed, of serious breach of EU law. Under the ECHR legal aid fell to be decided as a matter under article 6 and the right to a fair trial. The Court held that matters falling within articles 6 or 13 ECHR should be considered in future under Article 47 Charter, which is equivalent of both articles 6 and 13 of the Convention. The Court stated:

“[29] The question referred thus concerns the right of a legal person to effective access to justice and, accordingly, in the context of EU law, it concerns the principle of effective judicial protection. That principle is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (‘the ECHR’) …

[30] As regards fundamental rights, it is important, since the entry into force of the Lisbon Treaty, to take account of the Charter, which has ‘the same legal value as the Treaties’ pursuant to the first subparagraph of Article 6(1) TEU. Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States when they are implementing EU law.

[31] In that connection, the first paragraph of Article 47 of the Charter provides that everyone whose rights and freedoms guaranteed by EU law are violated has the
right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. Under the second paragraph of Article 47, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone is to have the possibility of being advised, defended and represented. The third paragraph of Article 47 of the Charter provides specifically that legal aid is to be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

[32] According to the explanations relating to that article, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter, have to be taken into consideration for the interpretation of the Charter, the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.

Vilvarajah

30. The amalgam of articles 6 and 13 into a single article 47 is important for English public lawyers because since the case of Vilvarajah v UK [1991] ECHR 47 (30 October 1991), (1991) 14 EHRR 248, an English asylum case, it was understood that because judicial review was found by the ECtHR to be an effective remedy under article 13 ECHR for asylum, judicial review must be an effective remedy for everything else as well. In fact so well understood was it that Judicial Review was adequate for all public law claims, it is the reason why article 13 was not incorporated by the Human Rights Act. The upshot was that it was not considered necessary to apply the extra protections supplied by article 6 and give the right of a trial in public law claims. The position may now be different if the public law claim concerns an EU law right.

R (Evans)

31. Let’s take the obscure case\(^1\) of HRH Wales’s communications with Government Departments between September 2004 and April 2005. A journalist, Mr Evans, sought disclosure under the Freedom of Information Act. It was refused by the departments and their decisions were upheld by the Information Commissioner. The system set up in the UK under the Freedom of Information Act gives a right of appeal.

---

\(^1\) R (Evans) v Her Majesty’s Attorney General and the Information Commissioner [2014] EWCA Civ 254, (12 March 2014).
32. Mr Evans appealed to the First-tier Tribunal and by consent the case was transferred to a panel of the Upper Tribunal comprising a High Court Judge, an Upper Tribunal Judge and a lay person. After considering the royal letters in closed session they ruled that they should be disclosed. The departments did not seek to appeal the decision. Instead the Attorney General issued a certificate under the Act purporting to override the decision of the UT. Mr Evans sought judicial review of the AG’s decision.

33. A powerful court at first instance known as the Divisional Court, comprising the Lord Chief Justice, a Lord Justice of Appeal and a High Court Judge dismissed the claim, holding that statute conferred a power on the AG to override the UT decision where he had reasonable grounds to do so. The AG’s decision was said to be well crafted. It marshalled all the facts and so it was beyond challenge at common law.

34. Evans appealed to the Court of Appeal, comprising once more a powerful court, including the Master of the Rolls, who was a Supreme Court Justice, as well as two Lords Justices of Appeal. Mr Evans drew a distinction between the correspondence on environmental issues, on the one hand, which fell under EU law and other correspondence, which did not and fell to be considered at common law.


“The EU Charter of Fundamental Rights

Article 47:
Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law....”

Article 52(3):
“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

36. The Master of the Rolls then set out the argument under EU law.
43. Anyone whose EU law rights are violated has the right to an effective remedy before a tribunal which complies with the requirements of article 47 of the Charter. By article 52, that right is equivalent to the right of access to a court under article 6 of the European Convention on Human Rights ("the Convention"). That right includes (i) the right of access to a court or tribunal which can give decisions binding on all parties, including the Government; (ii) the right to legal certainty and the finality of judgments; and (iii) the right to a fair hearing (including the right to equality of arms). A provision which permits one party (and particularly a public authority) to override a decision of a court merely because he disagrees with it is incompatible with the rule of law and the principle of equality before the law. Such a provision transforms the binding decision of a court into no more than an opinion, with which the State may disagree if it so chooses.

44. The [Attorney General] under section 53(2) is neither independent nor impartial, but is part of the executive arm of Government to which the requests for information were made. His intervention subverts the final binding character of the tribunal decision to which his intervention relates (or prevents an appeal to the tribunal in the first place).

45. The availability of judicial review to challenge the section 53(2) decision is not sufficient to save the legislative scheme from incompatibility with the Directive and the Charter. First, a judicial review challenge cannot address the substance of the refusal of the public authorities holding the documents to disclose them. It can only address the reasonableness of the opinion expressed by the Attorney General that the refusal decision was in accordance with the EIR. The decision to which the judicial review is addressed is not the relevant decision for the purposes of the Directive and the scope of the power of review does not satisfy the requirements of the Directive …

46. Secondly, the section 53 process violates the rights guaranteed by article 47 of the Charter. Such an intervention by the State in the judicial process (by-passing any obligation to appeal) is contrary to basic principles of the rule of law, access to court, finality and fairness. Moreover, the availability of the section 53(2) power to one party to the proceedings (the Government) but not to the other party, breaches the principles of equality of arms and equality before the law. The court’s ability to supervise the exercise of this power by judicial review does not meet these fundamental objections.
47. In summary, … any exercise of the section 53(2) power in relation to a decision by a tribunal to require the disclosure of environmental information is a breach of EU law. In consequence, section 53(2) must be read and given effect as being without prejudice to the directly enforceable Community rights of persons having the benefit of those rights … It must, therefore, be read as not permitting the power to be exercised where, as here, a tribunal has ruled that environmental information must be disclosed and the public authority against which the ruling was made has chosen not to appeal.

37. The Master of the Rolls concluded:

52. In my view, section 53(2), unless read in the way contended for [Evans] (see para 47 above) is incompatible with … the Directive in so far as the information which is the subject of a decision notice is environmental information … It requires that an applicant has access to a review by a court of law or another independent and impartial body established by law in which (i) the acts or omissions of the “public authority concerned” can be reviewed and (ii) the decisions of the court or other body may become “final” and “binding”. The “public authority concerned” is the authority which is considered not to have dealt with the request for information…. On the facts of the present case, the public authorities concerned are the Departments which refused disclosure to Mr Evans. The right of appeal to a tribunal … is a paradigm example of the proper implementation of [the Directive]. That is not in dispute.

…

56. … anyone whose EU law rights are violated has the right to an effective remedy before a tribunal which complies with the requirements of article 47 of the Charter. By article 52, the scope of that right is equivalent to the right of access to a court under article 6 of the European Convention on Human Rights. I have referred above to [the] submission that section 53(2) violates (i) the right of access to a court or tribunal which can give decisions binding on all parties; (ii) the right to legal certainty and the finality of judgments; and (iii) the right to a fair hearing including the right to equality of arms.

…

67. For these reasons, I would hold that the certificate is incompatible with EU law in so far as the information to which it relates is environmental information.”

38. The Court of Appeal held too that in respect of the non-environmental letters, the decision to override the UT’s decision was irrational at common law, judged by the
test of impossibility. It was impossible for the Attorney General to have reasonable grounds for going behind the final decision of the UT without troubling to appeal it.

39. The facts of R (Evans) are perhaps remarkable. Nevertheless, I draw from it the recognition in the Court of Appeal that when a EU right is said to be be violated, there must be an effective remedy in accordance with article 47, the Charter the equivalent of Article 6 ECHR.

40. A right of appeal to an independent court or tribunal with the power to substitute its decision for that of the public body is the paradigm example of how to meet that obligation. If a different remedy is adopted it must be established that to do so is not unfair. A power of statutory override exercised by the losing party to litigation, representing a government department and the Prince of Wales no less, was deeply unfair because it offended the right to equality of arms and judicial review did not sufficiently remedy that unfairness.

41. The Attorney General appealed and the Supreme Court heard the case on 24/25 November 2014. We await its judgment with interest to see what is decided about effective remedy and judicial review.

Tsfayo

42. The next case to consider was on English housing benefit. In Tsfayo v UK [2006] ECHR 1158, (2009) 48 EHRR 18, the Strasbourg Court (“ECtHR”) held that the remedy of judicial review was an inadequate form of redress in a case where the key aspect in dispute was the housing applicant’s credibility. The applicant from Ethiopia had won asylum in the UK. She found a place to live with a housing association and with their help she was able to complete the forms and win an entitlement to housing benefit. Her English was poor and she failed to renew her application for housing and council tax benefit on an annual basis. When the housing association pressed her for rent arrears she obtained advice and applied to back date her claim. She could get half of the benefit backdated if she could show good cause why she had not claimed earlier. So she explained that her English was poor and she was to familiar with the benefit system. The council rejected her excuse and sued her for council tax arrears. There was a right of appeal which she exercised to a Council body comprising of 3 council members advised by a barrister from the Council’s legal department. They rejected her evidence that she did not know she had complete an application on an annual basis. There was no further remedy except judicial review,
but the High Court dismissed the application for leave on the basis it was hopeless to claim the decision of the public body was impossible or absurd.

43. The ECtHR, noting the UK’s acceptance that article 6 applied, held it was self-evidently unfair to leave the factual determination of the applicant credibility to members of the Council against whom the claim for benefit was made. This defect was not cured by the availability of judicial review. As the decision of the High Court showed there was no prospect of the court substituting its decision on the merits where the court had not seen or heard the applicant give evidence and the test was whether the adverse credibility finding made by the members of the council was impossible or absurd.

44. So this is another case in which the combination of appeal and judicial review was condemned as unfair.

TN (Afghanistan)

45. There is a further case which I’m bringing in the Supreme Court, which will decide now with the advent of article 47, how far if at all judicial review may substitute for a merits based appeal by an independent court or tribunal.

46. As doubtless some of you will know, the whole of asylum law is subsumed by EU law. Rejected claimants are entitled by directive 2 to an effective remedy against the refusal for their asylum applications, be they first applications, fresh claims or third country decisions 3. You will recall that the Strasbourg court held in Vilvarajah that judicial review was an effective remedy against the refusal of asylum and that decision caused us to believe that is was unnecessary to incorporate article 13 by the Human Rights Act.

47. Nevertheless it was decided to make our asylum system more generous than the ECHR required. We instituted as system of tribunal appeal, now to the First-tier and Upper Tier Tribunals. You will recall that the Master of the Rolls in R (Evans) described tribunal appeal as a paradigm example of the guarantee of effective remedy under article 47.

48. There is a surprising exception to the guarantee of a tribunal appeal on the merits of an asylum claim. Unaccompanied children who are over the age of 16.5 when they are refused asylum are granted limited leave until they reach 17.5.

---

3 Dublin III Regulation 604/2013/EC, article 27.
49. By express provision of statute\(^4\), clearly and without ambiguity, these children are
denied a right of appeal, in most cases until after they turn 18 and they have
completed a further application. Obviously the reason they are refused asylum when
they are young is because they aren’t believed.

50. We know from Tsfayo v UK that if article 6 applied to them, a decision by the
Secretary of State on credibility against a person applying to her for asylum would
not an independent decision. And we know that judicial review is not an effective
remedy because a court cannot, except impossibly, substitute its decision on the
facts or the merits as found by the primary decision maker.

51. You might wonder how we would lose. But in TN (Afghanistan) v SSHD [2013]
EWCA Civ 1609, [2014] 1 WLR 2095, (12 December 2013) the Court of Appeal
relied on the decision of the Strasbourg Court in Vilvarajah as the highest European
authority for the proposition that judicial review is an effective remedy for the
purposes of article 13 ECHR and that a more favourable right of appeal to the
tribunal is unnecessary. We say simply that the decision is wrong because it
overlooks the fact that article 47 of the Charter combines both article 6 and article 13
for the protection of EU rights.

52. The appeal is currently listed for hearing in the Supreme Court on 4th and 5th March
2015. If it succeeds, it is likely to have important ramifications for every field within
the scope of EU law and especially those in which credibility is an issue.

---

\(^4\) section 83 of the Nationality Immigration and Asylum Act 2002.