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THE ROLE OF THE ENGLISH JUDICIARY IN DEVELOPING PUBLIC LAW

THE RIGHT HONOURABLE LORD JUSTICE WOOLF*

I. INTRODUCTION

In comparison with the United States and many Commonwealth countries, public or administrative law was slow to develop in England. In 1964, Lord Reid said: "We do not have a developed system of administrative law—perhaps because until fairly recently we did not need it."[1] Lord Reid's conclusion is partly explained by two factors: first, the absence of a written constitution meant that the English judiciary did not have to pronounce upon constitutional principles of great public importance; and second, England's lack of a federal system meant that the courts only rarely had to arbitrate between public bodies.

Since 1964, this situation has changed dramatically, and judicial activism has played a very substantial part in bringing about the change. Lord Denning may have been somewhat premature in 1971 when he stated, "It may truly now be said that we have a developed system of administrative law,"[2] but certainly by the beginning of the 1980's this could be said with confidence. In *Gouriet v. Union of Post Office Workers*,[3] in which the House of Lords closely examined the role of the Attorney General in public law, Lord Diplock said: "[A]t the heart of the issues in these appeals lies the difference between private law and public law. It is the failure to recognise this distinction that has in my view led to some confusion and an unaccustomed degree of rhetoric in this case."[4]

Some of England's most distinguished judges, however, have remained sceptical about the desirability of too clearly defining the parameters that divide our system of public law from that of

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* Judge of the Court of Appeals.

1. Ridge v. Baldwin, [1964] A.C. 40, 72 (1963).
2. Breen v. Amalgamated Eng'g Union, [1971] 2 Q.B. 175, 189 (C.A.).
3. [1978] A.C. 435 (1977).
4. *Id.* at 496.

private law. In 1983, in *Davy v. Spelthorne Borough Council*,[5] Lord Wilberforce warned:

> The expressions "private law" and "public law" have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. . . . In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies. The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression "public law" can be used to deny a subject a right of action in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules. We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove.[6]

Lord Wilberforce, however, was in the minority in *Davy*. In the speech that the majority of the House approved, Lord Fraser implicitly acknowledged a distinction between the systems of public and private law when he asserted that the plaintiff was setting up his ordinary private rights and thus was entitled to pursue an ordinary cause of action against a public body.[7] Nevertheless, Lord Wilberforce's reference to the influence of remedies on the development of English law undoubtedly is accurate and perceptive. Indeed, the acceleration in judicial activity in the development of public law is in no small part due to the introduction of the new remedy of judicial review, which Professor Williams describes in

5. [1984] A.C. 262 (1983).

6. *Id.* at 276.

7. *Id.* at 269-75.

his Article elsewhere in this issue,[8] and which is one of the "reforms" to which Lord Wilberforce referred.[9]

Judicial review also has been spurred on by the increasing need for intervention by the courts into the activities of public bodies. Over the last twenty years, public bodies increasingly have impinged upon the interests of individuals. Naturally, these individuals have turned to the courts for protection from arbitrary use of the greater powers of public bodies. Increased judicial intervention also can be attributed to the spread of the party system, which long had determined who controlled central government, to local government. As a result of this development, the political party controlling local government in a locality often was totally different from the party controlling central government. When this occurred, disputes would arise, which the courts had to resolve, concerning whether a department of state or a local authority was exceeding its powers or otherwise acting unlawfully. Litigation in this area has been particularly prolific during the last two or three years, as the central government has attempted to impose financial restraints upon local governments and as local governments have attempted to establish that the central government has no power to force its will upon local authorities.

II. The Nature of Judicial Intervention

The courts have responded to the demands made upon them very much on a case-by-case basis, developing old principles to cover new situations. In *Chief Constable v. Evans*,[10] Lord Brightman clearly expressed this approach when he observed: "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."[11] Lord Brightman, however, may have underestimated the role of the court. Lord Hailsham provided a more general, and

8. Williams, *Administrative Law in England: The Emergence of a New Remedy*, 27 Wm. & Mary L. Rev. 715 (1986).

9. *See Davy*, [1984] A.C. at 276.

10. [1982] 1 W.L.R. 1155 (H.L.).

11. *Id.* at 1173.

perhaps better, description of the court's role earlier in the same case when he stated:

> [I]t is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question.[12]

Both Lord Brightman and Lord Hailsham, however, made clear that the court's task is to ensure that public bodies perform their duties properly and to quash decisions of these bodies if they are not taken properly, but that the court's normal role does not include making the decision itself.

A. Ascertaining the Proper Judicial Role

Lord Diplock admirably encapsulated the proper role of the court in *Council of Civil Service Unions v. Minister for the Civil Service*,[13] which is commonly known as the *GCHQ* case. According to Lord Diplock: "[O]ne can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality,' the second 'irrationality' and the third 'procedural impropriety.' "[14] Lord Diplock went on to define "illegality" as involving decisions stemming from a misunderstanding of the law that regulates the decisionmaker's power and a failure to give proper effect to that law,[15] "irrationality" as involving "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it,"[16] and "procedural impropriety" as involving a decision in which the administrative body failed to observe not only the basic rules of natural justice but also the procedural rules expressly laid down in the administrative instrument

12. *Id.* at 1160.
13. [1985] A.C. 374 (1984).
14. *Id.* at 410.
15. *Id.*
16. *Id.*

conferring jurisdiction upon a decisionmaking body.[17] Having identified those three heads, Lord Diplock was careful to observe:

> That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community.[18]

Lord Diplock's three heads fall within what Lord Brightman described as "the decision-making process."[19] Each principle has a long and respectable history, although the way in which the courts apply them has changed. The landmark decision in *Anisminic Ltd. v. Foreign Compensation Commission*,[20] which involved Lord Diplock's first category, "illegality," illustrates well the judges' new confidence in this area. That case concerned a decision of the Foreign Compensation Commission, a statutory body set up to administer compensation received from foreign countries for property of British nationals that had been sequestrated by a foreign government. A statute expressly excluded the Commission from any obligation to give reasons for its decisions, and section 4(4) of the Foreign Compensation Act, 1950, which set up the Commission, provided: "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law."[21] Despite this provision, the House of Lords declared void a determination of the Commission as being ultra vires.[22] In doing so, as Lord Diplock noted in a later case, the House of Lords and particularly Lord Reid

> liberated English public law from the fetters that the courts had theretofore imposed upon themselves so far as determinations of inferior courts and statutory tribunals were concerned, by drawing esoteric distinctions between errors of law committed by such tribunals that went to their jurisdiction, and errors of law

17. *Id.* at 411.
18. *Id.* at 410.
19. Chief Constable v. Evans, [1982] 1 W.L.R. 1155, 1173 (H.L.).
20. [1969] 2 A.C. 147 (1968).
21. *Id.* at 148 (quoting the Foreign Compensation Act, 1950, 14 Geo. 6, ch. 12, § 4(4)).
22. *Id.* at 173-75.

> committed by them within their jurisdiction. The breakthrough that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e., one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported "determination," not being a "determination" within the meaning of the empowering legislation, was accordingly a nullity.[23]

As explained by Lord Diplock, the courts might have been expected only in a few cases to have gone so far as to find that a public body had acted "irrationally." That, however, has not been the case. The courts have overturned a great many decisions of local government and even central government bodies on this ground. One might even say that if the merits have demanded judicial intervention, the courts have paid lip service to the "irrationality" principle Lord Diplock so accurately described. For example, the high-water mark of the courts' interventionist role may have occurred in *Regina v. Secretary of State, ex parte Khan*,[24] in which Dunn L.J. said: "The categories of unreasonableness are not closed, and in my judgment an unfair action can seldom be a reasonable one."[25] With this approach, which has not yet been generally adopted, the court would decide that a tribunal's action was "irrational" merely by concluding that what was done was "unfair."

A further illustration of the way that the courts have extended their role is provided by the landmark decision in *Secretary of State v. Tameside Metropolitan Borough Council*.[26] In that case, the Secretary of State was seeking the assistance of the court in enforcing an order requiring a local authority to adopt a comprehensive system of education. The Secretary of State only had the right to intervene if "satisfied . . . that any local education authority . . . [has] acted or [is] proposing to act unreasonably."[27] Lord Wilberforce, describing this provision, said:

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23. O'Reilly v. Mackman, [1983] 2 A.C. 237, 278 (1982).
24. [1984] 1 W.L.R. 1337 (C.A.).
25. *Id.* at 1352.
26. [1977] A.C. 1014 (1976).
27. *Id.* at 1024 (quoting the Education Act, 1944, 7 & 8 Geo. 6, ch. 31, § 68).

> The section is framed in a "subjective" form—if the Secretary of State "is satisfied." This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge.[28]

Having said very much the same thing, Lord Diplock added a most important gloss. He said, in summarising his views: "[P]ut more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"[29] This is most important because it indicates that, in assessing whether or not the Secretary of State's decision can be challenged, a court may take into account not only the information on which the Secretary of State based his decision, but also the information that the Secretary should have had available when taking the decision. In other words, the Secretary of State may not demonstrate that a decision was reasonable by showing, at the relevant time, a lack of knowledge of those important facts.

Lord Diplock's third category, "procedural impropriety," provides the principle that has given the judiciary its most useful weapon for controlling abuse of power by public bodies. Until relatively recently, this principle was confined to ensuring that judicial or quasi-judicial functions conformed with "natural justice," a British counterpart of due process of law. The requirements of natural justice, however, have developed beyond their initial role, so

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28. *Id.* at 1047 (citation omitted).
29. *Id.* at 1065.

that the courts now require all administrative functions, whether judicial or not, to be carried out fairly. The extension of the principle goes back to the decision of Lord Parker C.J. in *In re H.K. (An Infant)*,[30] an immigration case. Lord Parker said:

> Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nor merely bringing one's mind to bear on the problem, but acting fairly; and to the limited extent that circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly.[31]

Two recent cases decided by the House of Lords illustrate the development of the "procedural propriety" principle. The first, *In re Preston*,[32] concerned a taxpayer's attempt to challenge a decision of the Inland Revenue Commissioners invoking a statutory procedure to avoid a scheme designed by the taxpayer to achieve a tax advantage. The taxpayer contended that he previously had reached a settlement with the Revenue, and that the action proposed by the Commission would go back on assurances it had given to the taxpayer in that settlement.[33] The taxpayer failed on the issue as to fact in the House of Lords, but all members of the House agreed that if the necessary facts had been established, the courts would have been able to intervene. Lord Scarman, for example, said: "[U]nfairness in the purported exercise of a power can be such that it is an abuse or excess of power."[34] Lord Templeman, in a speech with which the other members agreed, added that the court could grant judicial review on the grounds of unfairness when some element of improper motive had been proved—for example, if a public body had exercised or declined to exercise its powers to achieve objectives that were not the objectives for which those powers had been conferred.[35] The public body also could act

30. [1967] 2 Q.B. 617 (1966).
31. *Id.* at 630.
32. [1985] A.C. 835.
33. *Id.* at 847.
34. *Id.* at 851.
35. *See id.* at 864-65.

unfairly, according to Lord Templeman, if it had established a code of conduct and then had misconstrued the code, or if it had been guilty of conduct that, in the case of a private body, would have given a right to an injunction or damages based on breach of contract or estoppel by a representation.[36]

The second case, *GCHQ*,[37] was significant because it established clearly for the first time that the courts' power to intervene, and the duty of tribunals to act fairly, were not confined to statutory powers, but also applied to the exercise of powers derived from the Royal Prerogative. The case came before the House of Lords in consequence of a decision by the Prime Minister that, for reasons of national security, employees at the Government Communication Headquarters (GCHQ) no longer could be members of trade unions. The House of Lords made clear that, in public law, the duty of fairness extended to situations that involved an express promise given by a public authority or that involved a regular practice of a public body that had created a legitimate expectation that the particular course of conduct would be continued.[38] Normally in such situations the courts would prevent the public body from departing from the established course of conduct unless the body previously had consulted with those who would be affected by the change of course and had taken into account any representations received from those consultations.[39] In *GCHQ*, however, the normal principle had to give way to the requirements of national security, which the House of Lords regarded as outweighing the requirements of fairness.[40] But for these requirements, the GCHQ staff would have retained the relief they in fact had been granted at first instance, even though as servants of the Crown the staff may not have had any contractual rights enforceable at private law.

B. Historical Development of Judicial Intervention

In many spheres of administrative law, one can see a developing process when comparing earlier decisions with more recent ones.

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36. *See id.* at 865-66.
37. *See supra* notes 13-18 and accompanying text.
38. [1985] A.C. at 401.
39. *Id.*
40. *Id.* at 403.

For example, the law regarding prisoners' rights shows the change in attitude clearly. Although the Bill of Rights, 1689 outlawed cruel and unusual punishments,[41] the courts until the last decade had manifested considerable reluctance to become involved with happenings inside prisons. Even Lord Denning, who perhaps played a greater role than any other judge in extending the powers of the court to protect individuals against public bodies, as late as 1972 said: "If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action."[42]

By 1979, the courts' attitude had changed, perhaps influenced by the European Convention of Human Rights, which is not part of English domestic law, but which can be taken into account when courts come to their decisions. This change first was marked in a Court of Appeal case, *Regina v. Board of Visitors, ex parte St. Germain.*[43] That case had arisen after a prison's board of visitors, a lay body exercising a partly supervisory and partly disciplinary role, had disciplined a number of prisoners for taking part in a prison riot by depriving them of the remissions they would have received for good behaviour. Although this remission hitherto had been regarded as a privilege, and certainly not a right that a court would protect, the Court of Appeal came to the conclusion that the rules of natural justice or fairness had a part to play in prison disciplinary proceedings. As a result, the court quashed the decision of the board. In his judgment, Shaw L.J. stated: "Prisoners are subject to a special regime and have a special status. Nonetheless they are not entirely denuded of all the fundamental rights and liberties which are inherent in our constitution. . . . [A] prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration."[44]

The House of Lords adopted this position four years later in *Raymond v. Honey.*[45] In that case, a prisoner had applied to the

41. 1 W. & M., ch. 36, § 11.
42. Becker v. Home Office, [1972] 2 Q.B. 407, 418 (C.A.).
43. [1979] Q.B. 425 (C.A. 1978).
44. *Id.* at 454-55.
45. [1983] 1 A.C. 1 (1982).

High Court for leave to commit the prison governor for contempt of court, and had entrusted the application to the prison authorities to be forwarded to the Royal Courts of Justice.[46] When the prison governor stopped that application, the prisoner applied directly to the House of Lords, which held the governor in contempt. In the principal speech, Lord Wilberforce, citing *St. Germain*, stated: "[A] convicted prisoner, in spite of his imprisonment, retains all civil rights which are not taken away expressly or by necessary implication."[47] The House of Lords thus made clear that the courts will ensure that prisoners are under no legal disability with regard to taking legal proceedings.

The case law regarding other prisoners' rights also shows changing judicial attitudes. In 1975, the Court of Appeal was not prepared to depart from previous authority holding that prisoners were not entitled as of right to legal representation before the board of visitors, notwithstanding the board's substantial powers of punishment.[48] Less than ten years later, however, the Divisional Court made, if not a 180 degree turn, at least a 160 degree turn, even though it was bound by the decision of the Court of Appeal. In *Regina v. Secretary of State, ex parte Tarrant*,[49] the court concluded that the board of visitors had the discretion to allow a prisoner legal representation, and that the only proper way to exercise this discretion in serious cases was to allow representation. The courts also have been prepared recently to review how the Secretary of State exercises his discretion under section 12(2) of the Prison Act, 1952, which provides: "Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct."[50] In *Regina v. Secretary of State, ex parte McAvoy*,[51] an unconvicted prisoner claimed that his transfer to a prison outside London had prevented his parents from visiting him and had prevented his legal advisor from properly preparing his case. On the

46. *Id.* at 9.

47. *Id.* at 10. "Civil rights" in this context include all general rights possessed at law by citizens against each other and any rights that arise at law between the citizen and public authorities.

48. Fraser v. Mudge, [1975] 1 W.L.R. 1132 (C.A.).

49. [1985] 1 Q.B. 251 (1984).

50. 15 & 16 Geo. 6 & 1 Eliz. 2, ch. 52, § 12(2).

51. [1984] 1 W.L.R. 1408 (Q.B.).

facts, Webster J. refused relief, but only because the Secretary of State had taken into account all the relevant factors, including the full effect of the transfer, the need for the applicant to consult his lawyers, and "the prisoner's right to be visited by his family or friends."[52] If the Secretary had not exercised his discretion properly, the court would have had the power to rule accordingly.

At first sight, the Court of Appeal seems to have adopted a more restrictive approach to the courts' powers recently in *Regina v. Deputy Governor, ex parte King*.[53] In that case, the court decided that it had no power to review a prison governor's exercise of disciplinary powers, even though the governor has less disciplinary power than a board of visitors, whose actions the courts can review. When examined closely, however, the decision clearly shows that prisoners are not entirely without a remedy regarding decisions of prison governors, because prisoners can petition the Home Secretary seeking review of these decisions and the courts can review the Home Secretary's action in relation to those petitions. The courts, therefore, would intervene at one step removed.

III. The Need To Maintain Proper Restraint in Judicial Review

Although the courts have shown considerable enthusiasm for extending the boundaries of judicial review of administrative action, they have not lost sight of the importance of the balance between the need to control abuses of power and the need to allow public bodies to perform their duties without undue interference. Indeed, the court in *King* frankly conceded that interference with the governor's more limited disciplinary powers purely for policy reasons would not be appropriate. Griffiths L.J. explained the decision by saying: "[T]he common law of England has not always developed on strictly logical lines, and where logic leads down a path that is beset with practical difficulties the courts have not been frightened to turn aside and seek the pragmatic solution that will best serve the needs of society."[54]

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52. *Id.* at 1417.
53. [1985] 1 Q.B. 735 (C.A. 1984).
54. *Id.* at 751.

Similar warnings have been given in other areas as well. Recently, a number of courts have been asked to adjudicate upon the legality of ministerial guidance or other conduct not involving an administrative decision. Courts have reviewed decisions concerning matters such as the role that nurses have been required to play in abortions,[55] the lawfulness of distributing a pamphlet giving guidance on how to take one's own life,[56] and the lawfulness of doctors prescribing contraceptives to girls under the age of sixteen without informing their parents.[57] In the last of these cases, Lord Bridge felt the need to give a salutary warning to the plaintiff concerning the court's ability to review the decision:

> Throughout the hearing of the argument in the appeal and in subsequent reflection on the questions to which it gives rise I have felt doubt and difficulty as to the basis of the jurisdiction which Mrs. Gillick invokes. . . . If the claim is well founded it must surely lie in the field of public rather than private law. Mrs. Gillick has no private right which she is in a position to assert. . . . But the point which troubles me has nothing to do with the purely procedural technicality. . . . My difficulty is more fundamental. I ask myself what is the nature of the action or decision taken by the D.H.S.S. in the exercise of a power conferred on it which entitles a court of law to intervene and declare that it has stepped beyond the proper limits of its power. I frame the question in that way because I believe that hitherto, certainly in general terms, the courts' supervisory jurisdiction over the conduct of administrative authorities has been confined to ensuring that their actions or decisions were taken within the scope of the power which they purported to exercise or conversely to providing a remedy for an authority's failure to act or to decide in circumstances where some appropriate statutory action or decision was called for.[58]

Lord Bridge then went on to explain that what was under attack in that case was no more than advice from the appropriate department of health.[59] He added:

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55. Royal College of Nursing v. Department of Health & Social Security, [1981] A.C. 800.
56. Attorney-General v. Able, [1984] Q.B. 795 (1983).
57. Gillick v. West Norfolk & Wisbech Area Health Auth., [1986] 1 A.C. 112 (1985).
58. *Id.* at 192.
59. *Id.*

> I think it must be recognised that the decision (whether or not it was so intended) does effect a significant extension of the court's power of judicial review. We must now say that if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the Court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration. . . . In cases where any proposition of law implicit in a departmental advisory document is interwoven with questions of social and ethical controversy, the court should, in my opinion, exercise its jurisdiction with the utmost restraint, confine itself to deciding whether the proposition of law is erroneous and avoid either expressing ex cathedra opinions in areas of social and ethical controversy in which it has no claim to speak with authority or proferring answers to hypothetical questions of law which do not strictly arise for decision.[60]

In another decision involving a wholly different field, given on February 6 this year,[61] Lord Brightman made a similar call for restraint in response to the courts' tendency to exercise conventional jurisdiction to review decisions of local authorities who denied benefits to certain applicants under the Housing (Homeless Persons) Act, 1977. In a speech with which the other members of the House agreed, Lord Brightman stated:

> I am troubled at the prolific use of judicial review for the purpose of challenging the performance by local authorities of their functions under the Act of 1977. Parliament intended the local authority to be the judge of fact. . . . Although the action or inaction of a local authority is clearly susceptible to judicial review where they have misconstrued the Act, or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. . . . Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to

60. *Id.* at 193-94.
61. Puhlhofer v. Hillingdon London Borough Council, [1986] 2 W.L.R. 259 (H.L.).

> leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely.[62]

IV. Conclusion

Of the many valuable lessons learned during the Seventh Anglo-American Exchange, one of the most important was derived from the concern, expressed by members of the American team, that the United States courts during their much longer experience with review of administrative action have not always managed to achieve the right balance between intervention in administrative action and judicial restraint in the interests of good administration. Clearly, the English courts now are showing a similar concern as to whether, in some fields at any rate, the expansion of judicial activity has been too fast and too extensive. The warnings now being given by the House of Lords may be timely, and it is possible that England now will experience a period of entrenchment.

Whether or not this entrenchment occurs, the English judiciary without a doubt now can be said to have developed a flourishing system of public law, following the trail that has been laid across the Atlantic and in many Commonwealth countries. Although it may need pruning from time to time, the system is well capable of fulfilling the purpose for which it has been established.

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62. *Id.* at 283-84.