Judicial Review and Guidance

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I. Introduction

Modern government operates through the coordination and projection of bureaucratic power. This is achieved through the creation of rules, which appear in high concentrations within administrative structures. Administrative rule-making in some respects "rivals even the legislative process in its significance as a form of governmental output".[1] Reflecting this, administrative rules have "moved increasingly to centre stage in public law".[2] Even so, administrative rule-making has not been given serious attention by legal scholars in the United Kingdom. This may be due in part to a tendency to gravitate towards what Maitland called "the surface and the showy parts of the constitution",[3] away from the administrative substructure that underpins executive power, but it also relates to the complexity and diversity of the environments in which these rules emerge and operate. Administrative rules often have no clear legal status and appear in a wide variety of forms, including guidance, guidelines, policies, codes of practice, codes of ethics, workplace policies, practice statements, memoranda of understanding, circulars, concordats, directions, advice, and handbooks.

The complexity of administrative rule-making and the lack of consistency surrounding form, status, promulgation and publicity generates uncertainty within such scholarly literature as

[1] W. West, "Administrative Rulemaking: An Old and Emerging Literature" (2005) 65 Public Adm.Rev. 655 at 655.

[2] *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2021] 1 W.L.R. 3931 at [3] (Lord Sales and Lord Burnett).

[3] F.W. Maitland, "The Shallows and Silences of Real Life" in H.A.L. Fisher (ed.), *The Collected Papers of Frederick William Maitland* (Cambridge: Cambridge University Press, 1911) Vol. 1, at 478.

exists. Various terms have been used to describe the category over the years, such as "administrative quasi-legislation",[4] "tertiary rules",[5] "unsanctioned administrative rules"[6] and "soft law".[7] Advocates and judges often favour the term "policy". John Griffith and Harry Street noted that the word policy, when used in this context, "has an emotive force which conjures up a vision of some matter which should be settled at Cabinet level", where in fact a "consideration of typical cases of regulatory action reveals that they do not involve policy in this sense at all."[8] What is distinctive is the existence of rules and rule-like statements that convey instructions intended to direct and coordinate action and behaviour. The term "administrative rules"[9] better captures what is relevant about the category from the juridical perspective but is too cumbersome a term to serve as a label for the phenomenon. This paper adopts instead the term "guidance" to encapsulate the spectrum of administrative rules that are not legal instruments.

This paper identifies a principled framework for elucidating the phenomenon and, drawing on that framework, considers recent cases that suggest the courts are seeking to qualify and potentially to reduce the juridical significance of such documents in public law.

II. Uses of guidance

[4] R. Megarry, "Administrative Quasi-Legislation" (1944) 60 L.Q.R. 125; Gabrielle Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (London: Sweet & Maxwell, 1987), at p.36; C.K. Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in England*, 3rd edn (London: Stevens & Sons, 1965), at pp.192–193.

[5] R. Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995), at pp.80–121.

[6] R. Baldwin and J. Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" [1986] P.L. 239 at 240.

[7] R. Rawlings, "Soft Law Never Dies" in M. Elliott and D. Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge: Cambridge University Press, 2015), at p.215.

[8] J.A.G. Griffith and H. Street, *Principles of Administrative Law*, 2nd edn (London: Sir Isaac Pitman & Sons, 1957), at p.150.

[9] See e.g. A. McHarg, "Administrative Discretion, Administrative Rule-Making and Judicial Review" (2017) 70 C.L.P. 267; R. Thomas, *Administrative Law in Action: Immigration Administration* (Oxford: Hart Publishing, 2022), Ch.4.

The use of guidance is a central fact of modern governance, closely associated with the rise of the regulatory state and the departure from "command and control" modes of governance. Three particular reasons can be identified.

First, the generally non-binding nature of guidance is seen as less intrusive and heavy-handed than regulating conduct through legal rules.[10] Guidance can swiftly, and without creating the hazard of civil or criminal liability and the perception of coercion, routinise the exercise of discretions. It can enable the harmonisation and predictability of action across different levels of the administration or across different institutions, persons or entities, allowing collective experience and expertise to be distilled and applied in an efficient manner.[11]

Second, guidance has the benefit of flexibility. Unlike primary and secondary legislation, the formation of guidance is often free of formal and procedural requirements and where such requirements exist, they are generally less onerous than those required for law-making. Administrative rules are routinely produced by government and administrative agencies internally without consulting with external stakeholders or satisfaction of other conditions of validity, such as laying before Parliament or promulgation in a specified form. For these reasons, guidance is also generally easy to change, amend or retire. There are long-standing concerns that this flexibility can be used to circumvent statutory requirements, or legislative processes, for policy convenience. Ganz's study noted occasions of statute being "pre-empted" by "quasi-legislation", where controversial changes that went beyond existing law were introduced as guidance.[12] Both the House of Lords Delegation Powers and Regulatory Reform Committee ("DPRRC") and the Secondary Legislation Scrutiny Committee ("SLSC") have recently expressed serious concerns about the use of guidance as "disguised legislation" not subject to Parliamentary scrutiny.[13]

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[10] Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (1987), Chs 4 and 5.

[11] See R. Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995), at p.85.

[12] Ganz, *Quasi-Legislation* (1987), at pp.13–14. See the discussion of the analogous idea of statutory protections being undermined by a "side-wind" or through the "back door" in *Laker Airways v Department of Trade* [1977] Q.B. 643 at 707 and 719; [1977] 2 All E.R. 182 (Lord Denning M.R.).

[13] House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (12th Report of Session 2021-22, HL 106, 24 November 2021),

It is increasingly the case, however, that forms of guidance are required under specific statutory regimes that impose requirements as to form, content and process, including consultation with stakeholders. Developments of this nature have contributed to blurring the distinction between guidance and law. A further feature of the flexibility of guidance, related to the fact that it does not as such generally create legal obligations or rights, is the freedom to adopt non-technical forms of language and presentation that are more accessible and effective in communicating to the subjects or audience without the need for the mediating assistance of a legal adviser.[14] By contrast, statutory instruments use highly rarefied language appropriate to legal instruments that can impose civil or criminal liability, which reflects the need for greater precision as to the scope of legal requirements but produces complexity, subtlety and qualification, often making them inaccessible to the non-specialist.

A third advantage of guidance as a form of governance, at least from the standpoint of the administration, is that judicial review of guidance has historically been limited. Judicial review of administrative rules has often been more light-touch and under-developed than judicial review of decisions or more formal legal instruments.[15] This reflects the fact that guidance does not assume a specific legal form and does not impose legal obligations directly on individuals or bodies, though it may produce indirect legal effects. Guidance presents as a dimension of the realm of policy, or administrative process, into which courts can be wary to tread.[16] Another facet of the limited nature of legal regulation is that, whereas secondary legislation is made under specific statutory provisions relating to defined purposes and often

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at [89]–[106]; House of Lords Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (20th Report of Session 2021-22, HL 105, 24 November 2021), at [47]–[59].

[14] Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (1987), at p.96; in *Patchett v Leathem* (1949) 65 T.LR. 69, at 70; 47 L.G.R. 240, Streatfeild J said of the Home Office Circular at the heart of the case, "it is not expressed in the precise language of an Act of Parliament or an Order in Council but in the more colloquial language of correspondence, which is not always susceptible of the ordinary canons of construction." See also cases in note 22 below.

[15] Megarry, writing in 1944, stated that "no court would enforce" quasi-legislation (Megarry, "Administrative Quasi-Legislation" (1944) 60 L.Q.R. 125, at 126); Baldwin and Houghton, writing in 1986, stated that such instruments were, "largely immune from judicial review" (Baldwin and Houghton, "Circular Arguments: The Status and Legitimacy of Administrative Rules" [1986] P.L. 239 at 240).

[16] For a striking and famous example of judicial abstentionism in this context see *R v Secretary of State for Environment, ex p. Nottinghamshire County Council* [1986] A.C. 240; [1986] 1 All E.R. 199.

subject to limitations and restrictions, guidance is often issued without any particular or clearly defined legal basis and thus lacks a normative reference point for principles of judicial review.[17] Nonetheless, since modern judicial review is no longer tethered to the High Court's supervisory jurisdiction over inferior statutory bodies and official decisions that determine legal rights, the scope of judicial review has widened and courts have therefore naturally given greater scrutiny to guidance and the manner that it is taken into account by public officials.[18] Nonetheless, abstentionist arguments have re-emerged in recent cases that have sought to limit the courts' role in this context. The cogency of these arguments in the context of modern judicial review is considered later.

III. Guidance and Legal Principle

Despite the relative lack of attention from scholars, a considerable amount of case law has accumulated on this topic. At least until recent cases began the process of introducing qualifications, indeed suggesting more radical revision, a number of general principles could be identified: (1) guidance cannot fetter a statutory discretion: an official must always be prepared to consider departing from guidance however mandatory its language;[19] (2) nonetheless, subject to its own terms, guidance must be followed unless the decision-maker identifies good reason to depart from it;[20] (3) guidance must comply with general principles

[17] *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 at 192; [1985] 3 All E.R. 402 (Lord Bridge): "The memorandum itself has no statutory force whatever. It is not and does not purport to be issued in the exercise of any statutory power or in the performance of any statutory function. It is purely advisory in character"; *R (New London College) v Secretary of State for the Home Department* [2013] UKSC 51; [2013] 1 W.L.R. 2358 (guidance issued incidental to powers under the Immigration Act 1971).

[18] For an example of this tendency, see *R v General Medical Council, ex p. Colman* [1989] 1 Med. L.R. 23; [1989] C.O.D. 313, transcript at pp.5–6 (General Medical Council guidance to doctors).

[19] *British Oxygen Co Ltd v Minister of Technology* [1971] A.C. 610; [1970] 3 All E.R. 165; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 A.C. 295 at [143] (Lord Clyde)*; R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2018] EWHC 969 (Admin); [2019] Q.B. 251; in the context of a policy under the prerogative, *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] UKSC 44; [2014] 1 W.L.R. 2697.

[20] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59; [2015] 1 W.L.R. 4546; *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 A.C. 245 at [26] (Lord Dyson), [202] (Lady Hale) and [313] (Lord Phillips); *R (Lee-Hirons) v Secretary of State for Justice* [2016] UKSC 46; [2017] A.C. 52 at [17] (Lord Wilson) and [50] (Lord Reed).

of public law, including that it does not disclose an error of law;[21] (4) although guidance will not be interpreted in the same way as a statute, guidance has an objective meaning which is a question of law;[22] (5) under some conditions, a public authority might be required to formulate guidance to regulate and ensure consistency in the exercise of its functions;[23] (6) applicable guidance must be published at least where this is necessary to allow persons to make informed representations to a decision-maker about whether the policy should be applied and to know whether a decision is susceptible to challenge;[24] (7) it is unlawful to follow undisclosed guidance that differs from published guidance.[25]

These general principles were always in need of articulated limits and three cases, *R (Good Law Project) v Prime Minister & Or* ("*Good Law Project*"),[26] *R (A) v Secretary of State for the Home Department* ("*R (A)*") and *R (BF (Eritrea)) v Secretary of State for the Home*

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[21] *R v General Medical Council, ex p. Colman* [1989] C.O.D. 313; *R v Secretary of State for the Environment, ex p. Greenwich LBC* [1989] C.O.D. 530; In *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 at 193G (Lord Bridge): "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 … has jurisdiction to correct the error of law by an appropriate declaration". For an example of guidance being contrary to a legitimate expectation, see *R (BAPIO Action Ltd and Anor) v Secretary of State for the Home Department* [2008] UKHL 27; [2008] 1 A.C. 1003.

[22] *Mandalia v Secretary of State for the Home Department* [2015] 1 W.L.R. 4546 at [31] (Lord Wilson); *R (Kambadzi) v Secretary of State for the Home Department* [2011] UKSC 23; [2011] 1 W.L.R. 1299 at [36] (Lord Hope); *R (Bloomsbury Institute Limited) v Office for Students* [2020] EWCA Civ 1074; [2020] E.L.R. 653 at [56] (Bean L.J., Males L.J. and Simler L.J. agreeing); *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment* [2017] UKPC 37; [2018] 1 L.R.C. 696. at [41] (Lord Carnwath for the Board); *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; [2012] P.T.S.R. 983 at [17]–[19] (Lord Reed); *R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72; [2008] Q.B. 836 at [118]–[123] (Hooper L.J.); *R (FDA) v Prime Minister* [2021] EWHC 3279 (Admin); [2022] 4 W.L.R. 5; *R v Director of Rail Passenger Franchising, ex p. Save Our Railways* [1996] C.L.C. 589 at 601 (Sir Thomas Bingham M.R. for the Court of Appeal).

[23] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [3] and [39] (Lord Sales and Lord Burnett); *R (Teleos PLC) v Customs and Excise Commissioners* [2005] EWCA Civ 200; [2005] 1 W.L.R. 3007 at [24] (Dyson L.J.); *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929; [2005] 1 W.L.R. 3799 at [43] (Sedley L.J.); *CTMH Holdings Ltd v The Government of the Cayman Islands*, Causes 55 and 150 of 2021, 18.08.22, at [94]–[108] (Williams J.). This principle currently exists at the level of dicta only: no case has required the formulation of a policy outside the Human Rights Act 1998 context.

[24] *R (Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245 at [34] (Lord Dyson); *B* [2005] 1 W.L.R. 3799 at [43] (Sedley L.J.).

[25] *R (Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245.

[26] *R (Good Law Project) v Prime Minister & Or* [2022] EWCA Civ 1580; [2023] 1 W.L.R. 785. Judgment of Sir Geoffrey Vos M.R., Dingemans L.J. and Laing L.J..

Department ("*BF (Eritrea)*"),[27] have begun the process of identifying such limits. The courts expressed concern about judicial micro-management and noted a potential perverse incentive of the legal principles in this field: that officials might refrain from formulating guidance to lessen the scope for judicial review. While the attempt to articulate limits is overdue, we question the result in *BF (Eritrea)* and suggest that some of the broader comments and reasoning in each of the cases goes further than is necessary, threatening to destabilise what has become a generally workable and principled approach to guidance by the courts.

IV. Classification

The highly varied types of document that we have termed guidance resist categorisation by reference to their form, content or self-description. Superficially promising distinctions between "policy", "advice" and "guidance", for example, drawn by reference to degree of authority or subject matter of documents, quickly disintegrate into an infinite number of variations. The interchangeability of the terminology used by guidance documents themselves and the fact that the same document might embody different forms of instruction contribute to the difficulty.[28] Although such distinctions might have some descriptive purchase in the context of elucidating individual guidance documents, they do not provide a conceptual framework for analysis. Attempts to distinguish between substantive policy, on the one hand, and process or internal administration, on the other, are equally unstable. A salient warning is provided by the unsuccessful attempts by the courts to identify a distinction between "policy decisions" and "operational activities" in the application of principles of negligence liability to public authorities. [29]

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[27] *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38; [2021] 1 W.L.R. 3967.

[28] In a case decided as early as 1948, Streatfeild J noted that departmental circulars to local authorities contained a "jumble of provisions, legislative, administrative or directive in character" that were "difficult to disentangle one from the other": *Patchett v Leathem* (1949) 65 T.LR. 69 at 70; see also *R v Director of Rail Passenger Franchising, ex p. Save Our Railways* [1996] C.L.C. 589 at 599.

[29] See *Anns v Merton London Borough Council* [1978] A.C. 728 at 754; [1977] 2 All E.R. 492 (Lord Wilberforce); *Stovin v Wise* [1996] A.C. 923 at 955–926; [1996] 3 All E.R. 801 (Lord Hoffmann); D. Fairgrieve and D. Squires, *The Negligence Liability of Public Authorities*, 2nd edn (Oxford: Oxford University Press, 2019), at [2.29]–[2.30] and [2.40]–[2.41].

A distinction drawn by reference to the bindingness of the guidance document can be more useful, but only for limited purposes. The DPRRC has identified three types of guidance: guidance which "must be complied with"; guidance which the law requires persons to "have regard" to; and guidance which "simply assists but does not direct".[30] The first form of guidance is unusual but increasingly identifiable: the Mental Health (Use of Force) Act 2018, for instance, provides that the question of whether the use of force against a person is "negligible" for the purpose of the Act "is to be determined in accordance with guidance published by the Secretary of State" (s.6(3)).[31] This type of guidance is not restricted to such forms of legislative provision.[32] The second and third types of guidance are much more commonly reflected in statute. The DPRRC, alongside the SLSC in its parallel report, considered that the first two forms of guidance should be regarded as forms of legislation and should be laid before Parliament.[33]

The distinctions advanced by the DPRRC may be useful in highlighting areas where administrative rule-making deserves more considered legislative involvement. But things become much less clear when other forms of guidance document are considered. Understandably, the DPRRC's focus is on guidance issued under specific statutory powers, which are more easily categorised within this framework, whereas guidance issued under general statutory powers or non-statutory authority resists such categorisation. A categorisation by reference to degree of bindingness is also self-evidently of no assistance in

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[30] House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (2021), at [91].

[31] For examples of mandatory guidance in delegated legislation: see e.g. The Food (Promotion and Placement) (England) Regulations 2021, r.3, giving force to technical guidance, considered in *R (Kellogg Marketing and Sales Co (UK) Ltd & Anor v Secretary of State for Health and Social Care* [2022] EWHC 1710 (Admin); [2022] P.T.S.R. 1819; and regulation 7 of the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (an investment strategy "must be in accordance with guidance issued…"), considered in *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] UKSC 16; [2020] 1 W.L.R. 1774.

[32] A different type of mandatory guidance was considered in *R (New London College) v Secretary of State for the Home Department* [2013] 1 W.L.R. 2358. At [17], Lord Sumption said that guidance that related to the sponsor status of educational institutions, which was not issued under any specific statutory authority, "lays down mandatory requirements" to be complied with.

[33] House of Lords Delegated Powers and Regulatory Reform Committee, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (2021), at [89]–[106]; House of Lords Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (2021), at [47]–[59].

ascertaining what the degree of bindingness and status of a particular guidance document is, thus limiting its analytical value.

A different type of distinction might be made between guidance that affects individuals and that which does not. But even here great care must be taken and the distinction is potentially treacherous. Guidance touches the interests of individuals across a hugely diverse range of circumstances and this may not always be apparent or direct. Examples of guidance that has been held to be reviewable include a coroner's policy on the timing of burials,[34] guidance on the transfer of captured Afghan combatants (which was reviewable by an British national with sufficient interest),[35] guidance on intelligence liaison[36] and an ombudsman's policy on the standard applied in assessing clinical assessments which could lead to criticism of third party medical professional.[37] Guidance may have indirect but nonetheless extremely important impacts on private rights and interests even where this is not their purpose. Thus, guidance on the designation of flood defences in determining flood zones indirectly affected the value of land and was subject to review.[38] Another example is the way that official guidance can impact on insurance and other contracts. As many discovered during the COVID-19 pandemic, travelling to a country against Foreign Office travel advice is likely to invalidate travel insurance policies. Thirdly, even technical, internal guidance can affect individuals. In *Mandalia*, the Supreme Court held it to be unlawful not to follow an internal "process instruction" that advised immigration caseworkers to ask for additional evidence where bank statements submitted in support of a visa application were missing from a series, a failure that resulted in the appellant's removal from the country.[39] While the effect of guidance on individuals can inform the interpretation of guidance as well as the issue of standing, it is not

[34] *R (Adath Yisroel Burial Society) v Inner North London Senior Coroner* [2018] EWHC 969 (Admin); [2019] Q.B. 251.

[35] *R (Evans) v Secretary of State for Defence* [2010] EWHC 1445 (Admin); [2011] A.C.D. 11.

[36] *R (Equality and Human Rights Commission) v Prime Minister* [2011] EWHC 2401 (Admin); [2012] 1 W.L.R. 1389.

[37] *R (Atwood) v Health Service Commissioner* [2008] EWHC 2315 (Admin); [2009] 1 All E.R. 415.

[38] *R (Manchester Ship Canal Co Ltd) v Environment Agency* [2012] EWHC 1643 (QB); [2013] J.P.L. 515.

[39] *Mandalia v Secretary of State for the Home Department* [2015] 1 W.L.R. 4546.

a secure or principled way to distinguish its juridical significance or the legal consequences flowing from its adoption.

V. Typology of guidance

We suggest that a more helpful typology is provided by a more straightforward distinction between the following three categories.

1. Self-directing guidance

Self-directing guidance is guidance by which an officeholder or public body regulates and prescribes how its own powers or functions are to be exercised. Guidance in this category guides, structures or limits the exercise of power possessed by its issuer or provides operational instructions for more mundane functions or processes. Often the guidance projects downward through an organisation, such as where a Secretary of State issues guidance about how powers exercised in their name are to be exercised. However, it will also constrain the actions of the person who has issued the guidance, such as where a Secretary of State later applies their own guidance to a decision taken personally.[40] Guidance can also be generated by one part of a public body with particular responsibility for an issue to govern the position more broadly across the organisation, thus having a sideways application.

Guidance of this nature can have two audiences. Though usually addressed in the first instance to public officials, it often also performs the important function of informing persons outside the organisation about how powers and functions are to be exercised. It therefore guides not only the actions of public officials but also the way those subject to public power are to interact with those officials.

[40] e.g. *R (FDA) v The Prime Minister and Minister for the Civil Service* [2022] 4 W.L.R. 5 (Ministerial Code); *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7; [2021] A.C. 765 (guidance on deprivation of citizenship). See also *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 at [143] (Lord Clyde); and *R v Director of Rail Passenger Franchising, ex p. Save Our Railways* [1996] C.L.C. 589 at 604.

Guidance of this type might affect individuals or it might not; it might regulate matters of high policy or it might be mundane (e.g. guidance concerning turning on radiators[41]). Self-directing guidance has frequently been considered by the courts. Examples include: Government policy on providing consular assistance but not funding for legal representation in a case brought by a British national in prison in Bali awaiting execution by firing squad;[42] guidance about how the power of immigration detention is to be exercised;[43] guidance on when human rights considerations should restrain the power to deprive a person of citizenship;[44] and guidance on the grant of sponsor status.[45]

2. Coordinating guidance

Coordinating guidance is guidance that is addressed from one public body or official to a different public body or official with independent decision-making responsibility, concerning how the latter should exercise their powers. Here, the main purpose of the guidance is to coordinate the conduct of other public officials or bodies. Recipients of such guidance are subject to their own obligations, however, and cannot unlawfully delegate or allow their decisions to be dictated by other persons.[46]

An example of coordinating guidance is the duty on the Gambling Commission to issue guidance to local authorities as to "the manner in which local authorities are to exercise their functions under this Act".[47] Importantly, the guidance relates to the exercise of powers by local authorities, who are required to "have regard" to the guidance, not those of the

[41] *R (Good Law Project) v Prime Minister & Or* [2023] 1 W.L.R. 785 at [56].

[42] *R (Sandiford) v Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 W.L.R. 2697.

[43] *R (Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245.

[44] *R (Begum) v Special Immigration Appeals Commission* [2021] A.C. 765.

[45] *R (New London College) v Secretary of State for the Home Department* [2013] 1 W.L.R. 2358.

[46] *Lavender & Son Ltd v Minister of Housing and Local Government* [1970] 1 W.L.R. 1231; [1970] 3 All E.R. 871.

[47] Gambling Act 2005 s.25(1)(a).

Commission.[48] Another example is provided by the case of *Munjaz,* in which the Appellate Committee of the House of Lords considered guidance issued by the Secretary of State for doctors and hospitals on the use of seclusion for detained psychiatric patients.[49] Similarly, *Palestine Solidarity Campaign* concerned guidance issued by central Government to authorities responsible for the local government pension scheme, the purpose of which was to ensure consistency with British foreign policy.[50] And in *Gillick*, the Appellate Committee considered guidance addressed to NHS Trusts and doctors concerning the provision of contraception treatment and advice to those under 16 years of age.

3. Public guidance

This type of guidance is provided by a public body to private persons or private entities to guide their conduct. Here, the guidance seeks to regulate or influence the conduct of private persons but, unlike self-directing guidance, the public authority that issues the guidance is not informing the person how it, the public body, will itself exercise its functions. Such guidance is common where central government publishes guidance to accompany regulations it has made but where it itself has no enforcement powers to which the guidance applies. Also falling into this category are leaflets and circulars distributed by government giving advice on individual legal rights and duties; an example that arose in case law related to the community charge (or poll tax).[51] More common today is advice published on governmental websites, such as the advice issued by the Foreign Office on overseas travel.

The most prominent recent example of this type of guidance is the guidance issued during the COVID-19 pandemic by central government to the public, which often contained a mixture

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[48] Gambling Act 2005 s.25(2).

[49] *R (Munjaz) v Mersey Care NHT Trust* [2005] UKHL 58; [2006] 2 A.C. 148.

[50] *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] 1 W.L.R. 1774.

[51] *R v Secretary of State for the Environment, ex p. Greenwich LBC* [1989] C.O.D. 530 (circular on community charge held reviewable).

of public health advice and guidance on the contents of government regulations.[52] Indeed, the COVD-19 pandemic provides a salient example of the three different types of guidance operating side-by-side. During the currency of the numerous coronavirus regulations, enforcement powers resided with police authorities. Each police authority had its own guidance on how to exercise such powers – an example of self-directing guidance.[53] Guidance was also jointly issued by the National Police Chief's Council and College of Policing to harmonise the approach of individual police authorities – an example of coordinating guidance.[54] The Government also published guidance setting out its view as to the meaning and effect of the coronavirus regulations together with its non-binding public health advice – an example, as we have noted, of public guidance.

It is important to recognize that this conceptual scheme does not represent three hermetically sealed categories of guidance. Situations where guidance is difficult to categorise or straddles the categories certainly arise,[55] although we suggest that that such instances do not render these categories unhelpful as a framework for analysis.

VI. Considerations of principle

Broadly speaking, different considerations of principle arise in respect of each category that we have identified. Good reasons for guidance within one category to be given a degree of bindingness do not necessarily apply with equal force in respect of another; similarly, good

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[52] T. Hickman, "The Use and Misuse of Guidance during the UK's Coronavirus Lockdown" (2020): https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686857; T. Hickman, "The Continuing Misuse of Guidance in Response to the Pandemic" (LSE Covid-19 Blog, 25 January 2021): https://blogs.lse.ac.uk/covid19/2021/01/25/the-continuing-misuse-of-guidance-in-response-to-the-pandemic/.

[53] See *R (Leigh & Ors) v Commissioner for Metropolitan Police* [2022] EWHC 527 (Admin); [2022] 1 W.L.R. 3141 on the Metropolitan Police's internal COVID-19 guidance.

[54] The College of Policing website published various guidance documents during the Covid-19 pandemic in particular under its "understanding the law" section: https://www.college.police.uk/What-we-do/COVID-19/understanding-the-law/Pages/default.aspx.

[55] e.g. the functions of pension scheme administrators in *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] 1 W.L.R. 1774 were found not to be governmental functions, although they operated under statutory powers and were distinct from those of ordinary pension trustees. Given the emphasis placed on the separate clinical and legal responsibilities of doctors, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 is also best considered as a case about coordinating guidance, although it concerned a public service for which the Secretary of State was at that time responsible.

reasons for impugning one type of guidance on grounds of error of law do not necessarily apply to other types of guidance, and so on.

1. Self-directing guidance

Let us consider first self-directing guidance. An authority is entitled and indeed required to decide how its own functions are to be exercised.[56] Where it has done so by the formulation of guidance, there are powerful reasons for requiring it to be followed in future cases to which it applies. It is important to register the caveat that this principle is at all times subject to the terms of the guidance itself. If the guidance is expressed in terms that its contents are only relevant considerations for officials, to be weighed and balanced by officials, it will be given no more effect than this.[57] But very often guidance is more prescriptive, laying down rules as to how decisions should be taken or how a process is to be followed. Unless a decision-maker is invited by an affected person not to apply the guidance, it will usually simply be applied where a case falls within it. Reflecting this, the principle that such guidance should be followed absent good reason to depart from it is now well-established.[58]

A foundational case in the development of this principle is *R v Home Secretary, ex p. Asif Khan*.[59] The Home Office did not apply an overseas child adoption policy set out and made available in a circular letter. Parker L.J. held that the existence of discretion on the part of the decision maker did not absolve him of a duty to exercise that discretion fairly: "the Secretary of State, if he undertakes to allow in persons if certain conditions are satisfied, should not in my view be entitled to resile from that undertaking without affording interested persons a hearing and then only if the overriding public interest demands it."[60] In response to an argument that in the absence of statutory rules the Secretary of State had an unfettered

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[56] *British Oxygen Co Ltd v Minister of Technology* [1971] A.C. 610 at 624 (Lord Reid): "if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him".

[57] e.g. *Professional Standards Authority v The Health and Care Professions Council & Anor* [2017] EWCA Civ 319; [2017] Med.L.R. 301.

[58] e.g. *Mandalia v Secretary of State for the Home Department* [2015] 1 W.L.R. 4546; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245.

[59] *R v Home Secretary, ex p. Asif Khan* [1984] 1 W.L.R. 1337; [1985] 1 All E.R. 40.

[60] *ex p. Asif Khan* [1984] 1 W.L.R. 1337 at 1344

discretion to decide as he saw fit, Dunn L.J. explained that the articulation of rules by the Secretary of State deprived him of the ability to fall back on the amplitude of his discretion. If, Dunn L.J. stated, "the Home Secretary had done no more than state that it was a matter for his discretion whether or not the child could be brought here for adoption, I should find great force in that submission". However, the Secretary of State had "caused the circular letter in common form to be sent to all applicants setting out the four criteria to be satisfied before leave could be given" with the consequence that he had, "*in effect made his own rules*".[61]

It is a mistake to read e*x p. Asif Khan* narrowly as a legitimate expectations case. In *Mandalia*, Lord Wilson, with whom Baroness Hale, Lord Clarke, Lord Reed and Lord Hughes agreed, said that the *ex p. Asif Khan* principle should be seen as free-standing from the doctrine of legitimate expectations and rooted in broader principles of fairness and good administration.[62] The animating concern in such cases is present whether the person is aware of the guidance or not, or whether it is promulgated or not. The point is that fairness requires consistent decision-making by officials when taking decisions affecting individuals. Since individuals falling within the terms of an administrative rule are materially identically situated, it follows that a decision not to apply the rule to such a person requires a reason for different treatment. Importantly, what is required is a good reason for not applying the rule, i.e. *for the different treatment*, not reasons establishing that, absent the guidance, the decision would have been a reasonable or rational one to take. This requirement reflects an underlying recognition that public officials must treat individuals on an equal basis and helps to exclude the intrusion of improper or undisclosed considerations into the decision-making process.[63] These factors justify the principle that self-directing guidance affecting individuals - subject to its own terms being to the contrary - should be followed absent good reason to depart from it.

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[61] *ex p. Asif Khan* [1984] 1 W.L.R. 1337 at 1352 (emphasis added).

[62] *Mandalia v Secretary of State for the Home Department* [2015] 1 W.L.R. 4546 at [29], approving Laws L.J. in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; [2005] All ER (D) 283 (Nov) at [68]. See also *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 A.C. 629 at 638; [1983] 2 All E.R. 346 (Lord Fraser): "when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

[63] See also K. Chng, "Reconsidering the Legal Regulation of the Usage of Administrative Policies" [2022] P.L. 76 at 88–89.

Other considerations supporting this principle relate to wider democratic values. Courts have sometimes required guidance to be followed even where it does not regulate the exercise of power over individuals, such as the designation of flood defences or the description of medical care in an ombudsman's report. Here, considerations of fairness and equality of treatment are not irrelevant, given the potential for such guidance documents to affect individual interests, but carry less weight. Such considerations may indeed be absent altogether in cases involving guidance that affects the population as a whole, such as environmental policies that do not specifically impact any identifiable individual or group.

Other rationales must be in play in such situations, one of which relates to authority. The origins of guidance often lie at a high level within a public body or government department or with those with particular expertise. Guidance may also be the product of a deliberative process within a body or external consultation. Often the product of many minds collectively tasked with taking a considered view on the authority's position when future cases arise, guidance has a degree of authority as the public body's considered position which decision-makers downstream ought to respect.

A further rationale relates to accountability. Guidance reflects the policy or practice of public bodies for which they are held accountable through non-legal processes, such as oversight by parliamentary committees or public scrutiny such as through freedom of information requests. If one wishes to know how a public body performs a function, its guidance, whether published or disclosed in the process of oversight or scrutiny, should provide a reliable answer to the inquiry. Thus, as well as serving the needs of authority, the law also reinforces transparency and accountability by ensuring that guidance is not merely paid lip-service on the front line but in fact reflects the way that decisions are taken.

There are therefore important values associated with open, well-functioning, democratic institutions, beyond considerations of fairness to individuals, which also underpin the principle that self-directing guidance should be followed, as they require correspondence between what public authorities say they do and what they in fact do.

Moreover, since self-directing guidance represents a decision taken by a public authority about how it will respond in future situations – in effect a decision taken in advance – the guidance should, like all decisions, be rational and based on a correct understanding of the law. The point can be developed further: self-directing guidance that sets out a rule reflects the reasons for decisions to which it is applicable. It should therefore be subject to the same principles as would apply if such guidance had not been in place but the decision-maker had expressed the reasons for decision in essentially the same terms as are embodied in the guidance. If the guidance is irrational or erroneous in law it should be recognised as unlawful in the same way as a decision expressed in such terms would be unlawful. Legal errors must nonetheless be material. So, for example, if guidance mistakenly identifies the wrong section of a statute as the source of the power but describes the power accurately, this is unlikely to be material such as to render the guidance unlawful.

2. Coordinating guidance

The distinctive characteristic of coordinating guidance is that it is directed to a separate public authority that has its own legal responsibilities in taking relevant decisions. In this context, the considerations which support the principle that guidance should be followed unless there is good reason to depart from it have less force. Unless statute otherwise provides, one public body cannot dictate to another how its functions should be exercised. The recipient public body must not therefore treat the guidance of another body as if it were its own; it is not a context in which it has "made its own rules". There may be operational value in seeking to coordinate decision-making, especially where a number of public bodies have equivalent or overlapping powers. But, legally, individuals have no entitlement that consistent decisions will be taken by jurisdictionally separate bodies. This version of the so-called "post-code lottery" is an inescapable feature of our administrative law, notwithstanding that it can sometimes be at variance with the self-understanding of participants within administrative structures. For instance, recipients of Treasury guidance on managing public money, though their decisions are legally their own to take, are unlikely to receive such instructions as anything other than mandatory.[64]

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[64] See e.g. T. Daintith and A. Page, *The Executive in the Constitution: Structure, Autonomy, and Internal Control* (Oxford: Oxford University Press, 1999), Ch.6.

This does not mean that no legal principles are in play where coordinating guidance is concerned, merely that different principles come into focus. The central principle here is that of relevant considerations. Guidance issued by a public body, which it within its powers to make, intended to assist other public bodies in reaching decisions is likely to be something the latter ought to take into account. The weight to be given to such guidance by the authority is - subject to rationality review - a matter for that authority. It does not have presumptive force: the public authority need not show that there are good or overriding reasons for not following it. It is enough that it has rational reasons for its decision.

There are contexts in which coordinating guidance assumes greater importance. In *Munjaz*, the Appellate Committee considered a code of practice issued by the Secretary of State under s.118 of the Mental Health Act 1983 which authorised the Secretary of State to issue a code for the guidance of hospitals. Although no obligation to "have regard" to the code of practice was expressly imposed upon hospitals, the Committee held that the code, which had to be subject to consultation and laid before Parliament, was to be followed unless a hospital had "cogent reasons" for not doing so.[65] While particular features of the statutory regime in this case justified treating coordinating guidance in a similar way to self-directing guidance, we suggest that this is not the appropriate default position in respect of coordinating guidance.

Our analysis also has implications for the review of coordinating guidance on grounds of rationality and error of law. Since in this context guidance does not represent the decision of the recipient authority but forms part of the factual matrix in which its decision is taken, it cannot be regarded as the authority's reason for its decision: the authority must take its own decision and articulate its own reasons. Inadequacies or errors in the guidance may as such be immaterial since and cannot be treated as if they were the errors of the authority making the decision. They will not result in an unlawful decision unless the authority adopts the guidance or is misled by it into committing an error of law.

3. Public guidance

[65] *R (Munjaz) v Mersey Care NHT Trust* [2006] 2 A.C. 148 at [19], [66], [101] and [104].

Public guidance is issued to private persons and entities with the aim of influencing their conduct. Though recipients often operate within civil or criminal law regimes to which the guidance may be relevant, this is far from always being the case and such persons are not subject to enforceable public law duties to reach independent, properly informed decisions. Private parties will inevitably place considerable reliance on such guidance and will act by reference to the guidance rather than seeking to question it, even where guidance includes caveats and disclaimers as to its comprehensiveness or on placing reliance upon it. An example is provided by the facts of *Bradley*, concerning a government leaflet that misled thousands of people about the security of occupational pension schemes, notwithstanding a disclaimer that the information it contained should not be treated as a complete or authoritative statement of the law.[66] Such considerations suggest a need for public guidance to be more readily subject to judicial review than other forms of guidance and calls for greater strictures on its accuracy and clarity.

VII. Application to recent cases

The framework developed in the previous sections enables us to make a close examination of a trio of recent cases which embody judicial attempts to articulate clearer limits to the application of the principles that orient judicial review of guidance.

1. Good Law Project

In *Good Law Project*, the Court of Appeal considered a number of overlapping guidance documents, several promulgated under specific statutory power contained in s.3 of the Public Records Act 1958, concerning the generation and retention of official documents. The claimant argued that Ministers acted unlawfully in failing to follow guidance on the use of private mobile devices to communicate on official government business. The case thus concerned the principle that guidance must be followed unless the decision-maker identifies good reason to depart from it. The Court held that Ministers were not bound to follow the guidance and need not demonstrate good reasons to depart from it. It provided a number of

[66] *R (Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36; [2009] Q.B. 114 especially at [89]–[95] (Chadwick L.J.).

reasons why this principle was not applicable, including that the guidance did not directly affect the public and was not concerned with "individual cases or the rights of an individual";[67] it did not regulate the exercise of public power, was internal, was directed at officials and Ministers,[68] was not a coherent whole and could not be easily followed;[69] although in part made under legislation, Parliament had not stipulated it be observed and it would be "incongruous" to find a duty in those circumstances;[70] and, finally, that complaints could be addressed in other forums such as the Information Commissioner, Parliamentary Ombudsman or in Parliament.[71]

On our classification, *Good Law Project* concerned self-directing guidance. The Court persuasively explained that the guidance in question imposed no clear administrative rule to which the case law recognising the need to observe such rules could sensibly be applied. The Court's reliance on the fact that the guidance did not affect the public also has some force as principles of equal treatment and consistency of decision-making carried little weight. That however is far from being determinative in the context of self-directing guidance, as we have explained, and in emphasizing that the guidance did not "directly" affect individuals, did not regulate pubic power or "rights of an individual", and that the guidance was "internal" or directed to officials, we suggest that the Court's reasoning went too far.[72] In other cases, courts have required self-directing guidance indirectly affecting individuals or not determining individual rights to be correctly interpreted and followed.[73] That guidance is internal and is

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[67] *R (Good Law Project) v Prime Minister & Or* [2023] 1 W.L.R. 785 at [59].

[68] *R (Good Law Project)* [2023] 1 W.L.R. 785 at [59].

[69] *R (Good Law Project)* [2023] 1 W.L.R. 785 at [60].

[70] *R (Good Law Project)* [2023] 1 W.L.R. 785 at [61].

[71] *R (Good Law Project)* [2023] 1 W.L.R. 785 at [62].

[72] Although the Court in *R (Good Law Project)* [2023] 1 W.L.R. 785 referred to the apparent significance that the policy did not determine rights at [59], it also noted at [57]–[58] that Lord Diplock's statement in *Council for Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 408; [1984] 3 All E.R. 935 that reviewable decisions must alter legal rights has been overtaken by later case law.

[73] Eg. *R (Manchester Ship Canal Co Ltd) v Environment Agency* [2013] J.P.L. 515; *R (Equality and Human Rights Commission) v Prime Minister* [2012] 1 W.L.R. 1389; *R (Atwood) v Health Service Commissioner* [2009] 1 All E.R. 415; *R v Director of Rail Passenger Franchising, ex p. Save Our Railways* [1996] C.L.C. 589 (contrast the first instance judgment of Macpherson J. who held that the policy was essentially an internal matter with that of the Court of Appeal).

primarily directed to officials has also not previously affected the application of this principle,[74] which as we explained reflects the need for consistency in decision-making and the equal treatment of individuals.

The Court's reliance on the absence from the statutory scheme of a stipulation that the guidance should be followed is also unpersuasive given the accumulated case law in which both statutory and non-statutory self-directing has been required to be applied without this being mandated by statute or even absent any specific statutory power for the promulgation of guidance. Even more questionable is the Court's comment that guidance which is "likely to attract the duty to comply" is that which represents "the epitome of Government policy". The phrase "epitome of Government policy" was drawn from a recent Supreme Court judgment concerning s.5(8) of the Planning Act 2008, which requires national policy statements to take account of "Government policy" relating to climate change.[75] The Supreme Court held that "epitome" of "Government policy" within that subsection represented a formal written statement of established policy that is clear and devoid of qualification, drawing a parallel with the requirement for an enforceable legitimate expectation. The idea of "epitome of government policy", were it adopted as a touchstone for the application of the principle that guidance must be followed absent good reason, would complicate and qualify the present law and not reflect the justifications for the principle we have identified. Indeed, the principle has been applied to a huge variety of guidance documents promulgated by a range of different public authorities. The law relating to judicial review of guidance is distorted by the importation of concepts from planning law or assimilation with the doctrine of legitimate expectations (in *Mandalia*, as we have noted, the Supreme Court drew a clear distinction between the two doctrines).

The stronger answer to the *Good Law Project* case, we suggest, is that the issue was academic, as it related to past non-compliance with guidance not intended to protect individuals and which did not affect the claimant. Moreover, the Court's reference to other methods of

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[74] *Mandalia v Secretary of State for the Home Department* [2015] 1 W.L.R. 4546; *R v Director of Rail Passenger Franchising, ex p. Save Our Railways* [1996] C.L.C. 589.

[75] *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52; [2021] 2 All E.R. 967 at [106] (Lord Hodge and Lord Sales).

objecting to the breach of the guidance is best understood as recognising that, in the particular context, a failure to comply with the guidance was more suitably subject to alternative remedies: a legitimate reason for refusing to entrain the claim, but not, we suggest, a reason for officials to be free not to follow the guidance.

2. R (A) *and* BF (Eritrea)

R (A) considered the Child Sex Offender Disclosure Scheme Guidance, promulgated by the Home Secretary at common law to coordinate the approach of police authorities to disclosing people on the child sex offenders register. It was argued that the guidance, if followed, gave rise to a risk that police authorities would not consult such offenders before publication and would lead them to breach an offenders' right to be consulted arising under Article 8 ECHR. The question was thus whether the guidance was erroneous in law. Lord Sales and Lord Burnett, with whom the other members agreed, held that unless the terms of a guidance document would "sanction", "authorise" or "positively approve" unlawful conduct—encapsulated by the term "induce"—it was not unlawful.[76] They held that the guidance was not unlawful as it could be applied consistently with Article 8 and common law duties and indeed it reminded officials of the need to consider such legal duties.[77] Where guidance can be complied with in a lawful or unlawful way, the guidance, their Lordships reasoned, is not unlawful because it is incomplete,[78] or because it contains an incorrect or misleading statement, unless this error *induces* the decision-maker to breach their legal duty.[79] Thus, guidance would not be unlawful on the basis that it created a risk of an unlawful decision being taken where it was applied, even if the risk was substantial. It was thus insufficient that the Home Secretary's guidance might have created a risk—even a significant risk—of a police authority breaching Article 8.

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[76] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [34], [38]–[39] and [46].

[77] *R (A)* [2021] 1 W.L.R. 3931 at [42].

[78] *R (A)* [2021] 1 W.L.R. 3931 at [39].

[79] *R (A)* [2021] 1 W.L.R. 3931 at [46]

This reasoning was premised on a narrow reading of *Gillick*. Lord Sales and Lord Burnett identified the *ratio decidendi* of that case as being that the guidance was not unlawful as it did not "authorise or approve unlawful conduct" by doctors.[80] In so holding, they rejected possible wider *ratios*: that the guidance was lawful as it did not disclose an error of law, or that it did not "encourage" a doctor into error. Their Lordships also relied on *R (Bayer) v Clinical Commissioning Groups*,[81] in which guidance was issued by Clinical Commissioning Groups ("CCGs") for NHS Trusts directing them to use a particular treatment for an eye complaint. This was held by the Court of Appeal to be lawful although the treatment was unlicensed and the guidance did not provide instruction on how it could lawfully be used. Based on these authorities, and wider considerations of principle, Lord Sales and Lord Burnett found that guidance must both positively misstate the law and induce a public official to breach their duty, in order for the guidance itself to be unlawful. This was identified as one of three scenarios where guidance might be unlawful on grounds of an error of law (i.e. category (i)).[82]

Neither of the other two categories identified arose on the facts of the case. Both appear markedly narrow. Category (ii) covers guidance issued pursuant to a statutory duty to issue accurate advice about the law. In that situation, the advice must be legally sound whether it induces a breach of duty or not. This has limited application if it is confined to situations where a statutory body is required to provide legal advice to its officials or other people. Category (iii) is where a public body decides to issue a policy and "purports … to provide a full account of the legal position" but does not do so either "because of a specific misstatement of the law" or because of an omission which has the effect that the guidance presents a "misleading picture of the true legal position."[83] The restricting feature of category (iii) is that, on a proper interpretation of a guidance document, the authority must have purported to provide a full account of the law. Given that it is very often in the nature of guidance documents to provide simple, digestible instructions concerning the most salient issues rather

[80] *R (A)* [2021] 1 W.L.R. 3931 at [38].

[81] *R (Bayer) v Clinical Commissioning Groups* [2020] EWCA Civ 449; [2020] P.T.S.R. 1153.

[82] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [46].

[83] *R (A)* [2021] 1 W.L.R. 3931 at [46].

than a comprehensive statement of the law, this criterion will often not be met. Public bodies are now likely to resist challenges to guidance on the ground that it does not purport to be comprehensive in its legal coverage and advice and *R (A)* is likely to encourage the inclusion of statements disclaiming that guidance is comprehensive to reinforce such arguments.

These three categories would significantly qualify the circumstances in which guidance can be found unlawful on the grounds of an error of law. That the categorisation was intended to restrict the role of the courts is clear from comments expressing concern about officials being required to produce detailed and comprehensive statements of the law equivalent to law textbooks or court judgments, with the associated risk that courts would be "drawn into reviewing and criticising the drafting of policies to an excessive degree".[84] Similar comments were made in *Good Law Project*, where the Court stated that it was not the role of the courts to "micro-manage" by seeking to impose consistency on the confusing and conflicting guidance documents at issue in that case.[85]

Though these are reasonable objectives, there are reasons for thinking that the *R (A)* framework will require refinement. Critical to understanding the case is to recognise that it concerned coordinating guidance. Police authorities must take their own decisions and possess independent public law duties relating to the disclosure of information about child sex offenders. Seen in this light, it is understandable why the Court found that the guidance was not unlawful if it did not induce the police to breach the law. While the guidance was something the police had to take into account, it remained their own decision to take. If that decision was unlawful, then it could be challenged by judicial review and quashed.

There is much to be said for an approach whereby coordinating guidance is not unlawful unless it steers an independent authority, itself subject to public law principles, to an unlawful decision in the sense of seeming to require that decision. That is consistent with our analysis of coordinating guidance. It is not any error or inadequacy in such guidance that will result in

[84] *R (A)* [2021] 1 W.L.R. 3931 at [40].

[85] *R (Good Law Project) v Prime Minister & Or* [2023] 1 W.L.R. 785 at [37], [52] and [60] considering advice under Public Records Act 1958 s.3(2) concerning the duty on the Keeper of Public Records to give advice to policy officers.

an unlawful decision because if the recipient of the guidance complies with its own duties it will compensate for the inadequate guidance. But the same logic cannot simply be transposed to self-directing guidance and public guidance.

As we have explained, self-directing guidance in effect expresses the reasons for an authority to take a decision in a particular way. It represents a position taken *in advance* about how situations falling under the guidance will be treated. There is no interposing substantive decision or consideration: the official simply identifies the guidance as setting out a rule, registers that the circumstances fall within the rule, and applies the rule.[86] Therefore, if the guidance discloses an error of law, this vitiates the decision in just the same way as would be the case if the reasons given for a decision disclose an error of law (as long as it is material to the decision). But this is not the same as saying that the guidance must induce – in the sense of positively sanction or approve[87] - unlawful action. A test of inducement introduces an additional element into the inquiry that complicates the otherwise straightforward legal analysis and directs attention to a question more appropriate to coordinating guidance. Moreover, to ask whether guidance induces unlawful conduct may in some cases effectively reverse the common law position that a decision is vitiated by an error of law unless it is inevitable that the error of law made no difference to the decision[88] by requiring instead that it is only where an error of law drives the decision-maker ineluctably to an erroneous conclusion that the decision will be vitiated.[89]

It is significant that both decisions from which the Supreme Court derived the test of inducement – *Gillick* and *Bayer* – concerned coordinating guidance. In *Gillick*, doctors were recognised as being independent decision-makers subject to separate legal obligations and thus bound to navigate the guidance they received when reaching a decision based on their

[86] Subject of course to the principle that a decision-maker must be prepared to consider not applying the guidance if invited to do so.

[87] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [38] and [46].

[88] See *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] P.T.S.R. 1446 at [267]. The common law position has been modified by Senior Courts Act 1981 s.31(2A).

[89] See e.g. *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [35] and [36] in which the reasoning of Lord Scarman and Lord Bridge in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] A.C. 112 is explained as requiring that guidance must inevitably produce unlawful conduct for it to be unlawful.

own professional duties. In *Bayer*, Underhill L.J. emphasised in the critical part of his reasoning that NHS Trusts "are independent entities, with access to their own legal advice" and which were "capable of making their own decision" about the use of medicine in question.[90] The guidance formed only part rather than the whole of the decision-making matrix.

Furthermore, in *Bayer*, Rose L.J. recognised that most of the cases to which the Court had been referred concerned guidance issued by a Minister to their own staff – i.e. within our category of self-directing guidance – and thought that such a situation warranted a different approach as there could be no question of officials "making up their own minds" and taking independent legal advice.[91] She stated that the passages in Underhill L.J.'s judgment that emphasised the separate and distinct nature of NHS Trusts from CCGs were the "key" to his judgment. The distinction identified by Rose L.J. is close to the distinction between self-directing guidance and coordinating guidance that we have drawn and identifies the difficulty with treating the two types of guidance in the same way.

Nonetheless, the approach articulated by Lord Sales and Lord Burnett was clearly intended to apply to all categories of guidance. This is clear not only from the reasoning in the case but also that it was applied to self-directing guidance in *BF (Eritrea)*, in a judgment delivered on the same day by the same panel.

Lord Sales and Lord Burnett adverted to the point raised by Rose L.J. and sought to reconcile her observation with their threefold schema by stating that, where a body issues guidance to its own staff, "the context is likely to … bring it within category (iii),"[92] i.e. where a public authority purports to provide a complete statement of the law. It is more likely to come within

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[90] *R (Bayer) v Clinical Commissioning Groups* [2020] P.T.S.R. 1153 at [200] and [202]. Similarly, at [207] Underhill L.J. distinguished cases where the policy-maker had, or had assumed, responsibility for prescribing the procedure to be followed as CCGs did not have responsibility for sourcing medicines.

[91] *R (Bayer)* [2020] P.T.S.R. 1153 at [214], including *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin); [2015] 1 W.L.R. 4497.

[92] *R (A)* [2021] 1 W.L.R. 3931 at [46].

this category because officials will not be expected to take their own legal advice but to follow the advice of their superior.[93] Logically, this means that self-directing guidance could be treated as comprehensive where coordinating guidance *in the same terms* would not be because of its difference audience.

We suggest that this is not a satisfactory way to determine the reviewability of guidance on grounds of error of law. Whether guidance purports to be comprehensive can be relevant to deciding whether it is erroneous in law or misleading – if it does not purport to be comprehensive it is less likely to be – but it should not be a *condition* for finding that self-directing guidance is vitiated by an error of law where categories (i) and (ii) are not applicable. It should not matter whether self-directing guidance that sets out a rule to be applied can be said to represent a comprehensive statement of the law or not because it is an authority's *ex ante* reasons for deciding cases in a particular way. To the extent that it embodies a material error of law, that itself should be sufficient to render it unlawful since the rule represents the reasons for the decisions to which it is applicable, in just the same way as if bespoke reasons containing that error were produced for the decision. Moreover, making the reviewability and legality of guidance dependent upon whether it purports to be a full statement of the law and then modulating that requirement, so that it is more readily satisfied, in the context of self-directing guidance, introduces an unnecessary and potentially difficult-to-apply criterion: an unsatisfactory proxy for a distinction between two quite different types of guidance.

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Lord Sales and Lord Burnett also gave the leading judgment in *BF (Eritrea)*, an appeal concerning the statutory rule that unaccompanied minors are not to be subject to immigration detention.

Home Office guidance to immigration officers stated that a person without reliable documentation showing their age must be treated as an adult if their physical appearance and demeanour "very strongly suggests that they are significantly over 18 years of age". The Court of Appeal accepted the evidence that assessing whether a person is an adult by reference to

[93] *R (A)* [2021] 1 W.L.R. 3931 at [46].

appearance has a margin of error of up to five years and therefore held the guidance unlawful as it gave rise to too great a risk of illegality, unless the reference to 18 years was changed to 23 years of age. Underhill L.J., giving the leading judgment, also accepted that there had been numerous false positive assessments that a person was an adult.[94]

The Supreme Court allowed the Home Secretary's appeal. Lord Sales and Lord Burnett rejected the argument that the case fell within category (i) in *R (A),* i.e. that the guidance induced officials to act unlawfully. They held that question was whether the instruction in the guidance "contradicts" the statutory rule, and held that it did not.[95] They explained the *R (A)* test by stating that it did not require a factual prediction about the chance or risk of a person who followed the guidance breaching the statute, but rather required a straight comparison of the terms of the guidance and the terms of the law.

However, as we have noted, the case involved self-directing guidance: the guidance set out a rule which determined the outcome of decisions in situations to which it applied. The guidance, *correctly* understood and applied, *required* officials to detain some unaccompanied minors, namely, those undocumented and unaccompanied persons whose appearance and demeanour very strongly suggested they were over the age of 18, which on the facts is a category that includes a significant number of persons under the age of 18. This is not a question of predicting how decisions might be taken: it follows from the terms of the guidance itself, read in the accepted factual context, and taking into account that the guidance was self-directing guidance and officials were not exercising independent decision-making discretion the outcome of which needed to be predicted.[96]

What appears to have influenced the Supreme Court in *BF (Eritrea)* is that, in its view, there was no duty on the Home Office to promulgate any guidance at all. In those circumstances, the Court considered it inappropriate to hold that a policy must remove "the risk of possible

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[94] *R (BF (Eritrea)) v Secretary of State for the Home Department* [2019] EWCA Civ 872; [2020] 4 W.L.R. 38 at [69]. Underhill L.J. referred to evidence that false positives occurred in 23% of cases but did not consider it necessary to make findings on how many errors had occurred or been caused by the guidance.

[95] *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3967 at [51]; referring to *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [41].

[96] There was no appeal on the facts to the Supreme Court.

misapplication of the law".[97] But the guidance did not simply leave open a *risk* of misapplication of the law. It *required* wrong decisions to be taken in a category of situation, by instructing immigration officers to treat persons as adults where their appearance and demeanour very strongly suggested that they are over the age of 18. On the facts, that rule was not equivalent to the statutory rule that unaccompanied minors must not be detained.

But what about the objection that, although the guidance was imperfect, it was better than no guidance at all?[98] It may seem illogical to find guidance to be unlawful where it is better than nothing, but it is a feature of the law that if a public body publishes guidance it will attract certain legal duties, such as correctly to interpret the guidance and to ensure it is not erroneous in law. This is not unusual in public law. For example, a public body may have no duty to consult, but if it chooses to consult so it must do so fairly. In the present context, if the Home Officer issues guidance on detaining unaccompanied minors it must reflect the underlying law. The obligation not to detain unaccompanied minors is not one based on the reasonable belief of an official but is strict or absolute. That hard-edged legal obligation feeds through to guidance that overlays it, which, like the underlying law, must be strict and cannot embody exceptions or lower thresholds. The guidance did establish a lower threshold. The authority had "made its own rules" and its rules did not conform to the statutory duty.

It is also striking that, while their Lordships stated that they were applying the test embodied in category (i) in *R (A)*, the substance of their analysis was directed to identifying a legal misstatement or other "contradiction" between the terms of the guidance and the law, an exercise that is much closer to a straightforward inquiry into whether guidance embodies a material error. Notably, the terms "induce", "sanction", "authorise" and "positively approve" are entirely absent from the judgment. The terminological shift is, we suggest, indicative of the fact that the conceptual framework devised in *R (A)* was not apposite for *BF (Eritrea)* where coordinating guidance was not in issue.

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[97] *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3967 at [51].

[98] There were in no findings of fact to the effect that the guidance produced fewer errors than would have existed absent the guidance, so this argument was not available to the Home Office and it would have involved a predictive assessment of the type that the Supreme Court disproved.

The *R (A)* framework also does not satisfactorily map on to the third type of guidance we have considered: public guidance. In such cases, it should normally be sufficient to ask whether guidance promulgated to assist the general public or private bodies misstates or mischaracterises legal rules. The question whether a person is induced to act unlawfully is unsuited to this context, for three reasons.[99]

First, guidance may misstate legal requirements in a manner that induces a person to act too far *within* their legal duties. That scenario, though it does not cause a person to act unlawfully, is materially erroneous and prejudicial.

Second, individuals should be entitled to rely on the accuracy of statements published by public bodies. To ask whether such statements induce a person to act unlawfully imposes an unnecessarily stringent threshold. If guidance is published that could cause those relying on it to incur civil or criminal liability, or other prejudice, such a material error ought to be capable of correction by judicial review. It is less plausible to expect that private individuals will engage in their own assessment of the relevant legal framework than a public body charged with taking an independent decision under statutory powers.

Third, private parties are not subject to judicial review. As such, if a private body relies on guidance promulgated by a public authority in taking a decision that affects another individual, that individual cannot challenge the body's decision by way of judicial review, appeal or similar public law action. Individuals in such a predicament should be entitled to challenge the guidance itself in order to remove the risk that it will prejudice their interests once applied. This situation is materially different from the application of self-directing and coordinating guidance since in those other contexts a decision affecting individuals in which guidance has been considered is generally subject to judicial review.

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[99] See also A. Young, "Judicial Review of Polices – Clarification or Retreat?" (UK Constitutional Law Association Blog, 5 August 2021): https://ukconstitutionallaw.org/2021/08/05/alison-l-young-judicial-review-of-policies-clarification-or-judicial-retreat/.

An example may elucidate these points. Guidance presented the first COVID-19 lockdown regulations as permitting people to leave their homes only in four narrowly defined situations: for food, health reasons, one form of exercise, and work. Misleading and incorrect, the guidance was surely susceptible to judicial review had it persisted.[100] But where does this fit within the classification scheme articulated in *R (A)*? It was not within category (i) as it did not induce unlawful conduct: on the contrary it deterred lawful conduct. This is no mere technicality. Where guidance over-states legal restrictions, it deters people and private entities from exercising their legal rights and freedoms. The guidance was not within category (ii), as it was not promulgated pursuant to any statutory duty to set out the law. Initially perhaps it may have fallen within category (iii) as purported to be comprehensive, though it would not have been difficult to argue that the short statement in the guidance did not purport to fully reflect the detailed regulations underlying it. It would have been the answer to this question which would have determined whether the guidance fell inside or outside the *R (A)* categories and thus its amenability to judicial review for error of law. Later, the COVID-19 guidance included a statement in the Q&A of the increasingly sprawling section of the Government's website that a fuller statement of the law was to be found in the Coronavirus regulations. Unquestionably at that point it could no longer be said that the guidance purported to be a comprehensive statement of the law. Even so, most people would have relied upon the guidance in regulating their actions with only the most intrepid venturing into the UK statutory instrument database to seek to track down the Coronavirus regulations in their original form and seek to decipher them.[101]

Considerations of this nature illustrate why it ought not to be a condition for public guidance to be subject to review on grounds of error of law that it purports to be a comprehensive statement of the law. To be clear, the issue is not that individuals cannot be expected to take legal advice. It is more straightforwardly that they are entitled to rely on public bodies issuing guidance within their field of responsibility getting the law right, not merely right when it purports to be a full statement of the law. The very objective of public bodies publishing

[100] Hickman, "Use and Misuse of Guidance during the UK's Coronavirus Lockdown" (2020), at 20–21

[101] See N. Finch et al., "Undermining Loyalty to Legality? An Empirical Analysis of Perceptions of 'Lockdown' Law and Guidance during COVID-19" (2022) 85 M.L.R. 1301.

guidance is so that people can rely on it to guide their conduct. If the law is misstated or misleading, that should be capable of correction by judicial review, without it having to be shown that the authority was purporting to be comprehensive or that the guidance sanctions or approves unlawful conduct.

The case of *R (A)* was therefore in our view correctly decided but the scope of application of the principles articulated in that case requires refinement.

VIII. Arguments for judicial abstention

We now assess the broader arguments that animate the reasoning *Good Law Project*, *R (A)*, and *BF (Eritrea)*, as to why greater deference should apply when reviewing guidance or its application.

1. Formal distinctions as reasons for abstention

The first line of argument is essentially formal. In an understandable effort to reduce complexity, courts sometimes invoke variations of the distinction between "policy" and "law" as a way of justifying judicial abstentionism in scrutinising guidance.[102] The suggestion in this context is that judicial review should in most instances be confined to questions that concern "law" and that guidance does not affect legal rights. Thus, in *Good Law Project*, the Court of Appeal placed emphasis on the "separation of powers" by which it said, it is "for the legislature, and for neither the executive nor the judiciary to make the law."[103] In *R (A)*, Lord Sales and Burnett drew an associated distinction between statements of law, which are found in statutes, judgments or textbooks and which can be expected to be accurate and comprehensive, and statements of guidance, which have a different practical purpose and take a different, more practical form. [104]

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[102] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [3].

[103] *R (Good Law Project) v Prime Minister & Or* [2023] 1 W.L.R. 785 at [56].

[104] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [39].

The Court of Appeal's attempt to associate "law" with the legislature is, however, overly simplistic. Most laws in this country are not made by legislatures but by central or devolved governments. The fact that statutory instruments are often (but not always) subject to approval or annulment by one or both House of Parliament does not mean they are made by the legislature, they are executive instruments.[105]

The more subtle distinction drawn by Lord Sales and Lord Burnett is also in need of qualification. Many guidance documents are lengthy, highly prescriptive and comprehensive, quite often referring to relevant statute, case law and international law.[106] Other forms of guidance operate in a similar way to statutory instruments or accumulated case law. The Highway Code, for instance, has its origins in the idea of codifying customs adopted by road users and represents an extremely detailed guidance document, compliance with which is taken into account by courts when determining civil and criminal liability.[107]

A further difficulty is that the very dividing line between what counts as a law and what does not is blurred.[108] There is nothing in our constitution which designates what forms of executive rules are law and which are not. No statute says that statutory instruments are "law" or that guidance is not.[109] That designation is externally determined by courts for reasons which are rarely articulated. Similarly, no statute states that other forms of delegated rule-making are not forms of law. Some – like the immigration rules, which create enforceable legal rights – are forms of law.[110] And many forms of statutory guidance must also be laid before a legislative body - whether the UK Parliament, or as the case may be, the Senedd,

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[105] *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] A.C. 700 at [43] (Lord Sumption) and [54] (Lord Reed).

[106] For example, Home Office guidance to staff on applications for leave to remain on the basis of statelessness: Home Office, "Stateless leave v.3.0" (30 October 2019): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/843704/stateless-leave-guidance-v3.0ext.pdf.

[107] Road Traffic Act 1988; see Ganz, *Quasi-Legislation* (1987), at p.51.

[108] E.E.L. Rubin, "Law and Legislation in the Administrative State" (1989) 89 Colum.L.R. 369;

[109] The Statutory Instruments Act 1946 s.1 identifies which rules are to be treated as "statutory instruments".

[110] And in any event occupy a highly ambiguous position between law and non-law: see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 W.L.R. 1230.

Scottish Parliament or Northern Ireland Assembly - and more still have prescribed legal consequences.[111]

Insofar as a distinction can be drawn, it is sometimes said that to be in breach of statutory instruments is a form of civil or criminal wrong, whereas breach of guidance is not, although it may have consequences in law. But the distinction is often hard to detect. Guidance can make lawful that which would be unlawful,[112] and unlawful that which would be lawful.[113] Breach of guidance can be decisive in establishing criminal or civil liability.[114] Some forms of guidance are "mandatory" and others must as a matter of legal obligation be followed absent good reason.

The DPRRC has drawn attention to the "blurring of the distinction" between delegated legislation (i.e. "law") and guidance and called for all "disguised legislation" to be laid before Parliament. Important as these observations are, the Committee underestimates the degree to which public administration is saturated with forms of guidance to which legal consequences attach.

But even accepting that most guidance is not law and ranks lower than law in the constitutional hierarchy, this is not a good reason for limited judicial review. Ordinarily, the higher a legal instrument in the constitutional hierarchy the greater the deference that it should be afforded. The suggestion that constitutionally inferior documents attract more deference stands this principle on its head.

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[111] *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 W.L.R. 2208.

[112] e.g. *R v Criminal Injuries Compensation Board, ex p. Lain* [1967] Q.B. 864 at 888D–888E; [1967] 2 All E.R. 770 (Diplock L.J.) a compensation scheme with no statutory foundation, is not "without any legal effect" it "makes lawful a payment to an applicant which would otherwise be unlawful..

[113] e.g. where a decision that would have been lawful had there been no guidance, is unlawful for failure to follow it without good reason for not doing so.

[114] For examples of codes being made admissible in legal proceedings for the purposes of establishing legal liability: Road Traffic Act 1988 s.38 (Highway Code); Protection of Freedoms Act 2012 s. 33 (Surveillance Camera Code).

Some cases make use of a further formal abstentionist argument based on the distinction between rules derived from statute and those that are not.[115] However, it has long been settled that whether a decision is subject to judicial review is "not its source but its subject matter".[116] Whether guidance is issued under statute or at common law or under the prerogative does not speak to its reviewability: that is determined by its subject matter. The fact that there is no underlying statute by which to measure the legality of the policy is not as such a basis for judicial restraint. It simply makes it more difficult to establish that the guidance is unlawful, since that question cannot be addressed by reference to the terms and purpose of the legislation pursuant to which it was made.

Formal distinctions therefore do not provide a firm basis for judicial abstentionism in this context.

2. *Functional reasons for abstention*

Another site of argument supporting greater deference to guidance starts from the proposition that public officials in general have a discretion about how they exercise their powers under statute, prerogative or common law. Since they are normally entitled to decide whether or not to exercise their discretionary power by means of guidance documents and similar statements, the courts ought not to require them to make detailed or comprehensive statements. If the courts do so, "there would be a practical disincentive for public authorities to issue policy statements for fear that they might be drawn into litigation on the basis that they were not sufficiently detailed or comprehensive."[117] The concern was given a different twist in *Good Law Project*, where the Court stated that if guidance documents of the sort in issue in that case were required to be followed, the government would be disincentivised from making them.[118]

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[115] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [3], [39].

[116] *Council for Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374 at 408 at 407 (Lord Scarman).

[117] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [40].

[118] *R (Good Law Project) v Prime Minister & Or* [2023] 1 W.L.R. 785 at [64].

The concern must be taken seriously. If the production of guidance makes administration more difficult it may be less used.

The first response to this concern is to register the point that by ensuring that guidance is legally accurate and is followed, and that other applicable legal principles are observed, the courts are in an important respect advancing effective and efficient administration. And where guidance is issued under statutory powers, the courts are enforcing the intention of Parliament. Judicial review is often an obstacle for officials, but that does not mean it is also an inappropriate or inefficient one.

The argument must also be tested against the counterfactual position that would exist if guidance were not produced. It is unlikely that there would be less judicial review in that situation. On the contrary, the absence of coordinated decision-making would likely generate less rational and defensible decisions, which would be accompanied by heightened legal risk. The possibility of judicial review of a guidance document, or the failure to apply the guidance, surely represents a net reduction in the risk of judicial review compared with the scenario in which guidance is not in place. Guidance works, in other words, to reduce rather than increase the risk of judicial review. The regular, but by no means proliferate, incidence of judicial reviews relating to guidance should not distract us from what would be the case if guidance ceased to be produced.

A more prosaic answer to the concern is that rule-making by means of guidance is now an indispensable feature of modern governance and a scenario whereby public bodies operate without issuing guidance is implausible.[119] Moreover, governance by guidance has burgeoned at precisely the same time that the courts have developed the principles relating to judicial review of guidance. That these phenomena occurred in tandem suggests that the case law has not disincentivised the production of guidance. On the contrary, it suggests that the case law has developed more or less harmoniously with administrative practice.

[119] See Rawlings, "Soft Law Never Dies" in Elliott and Feldman (eds), *The Cambridge Companion to Public Law* (2015), at p.215.

While the courts must be vigilant to ensure a properly balanced approach to judicial review there is no reason to think that the law as it has developed in relation to administrative guidance is counterproductive or needs significant revision.

3. *Judicial over-reach as a reason for abstention*

There is sometimes a concern that judicial review of guidance can amount to a curb on policy-making in the true sense of that term. Judicial review, as Lords Sales and Burnett argued in *R (A)*, might draw courts "into reviewing and criticising the drafting of policies to an excessive degree". Judicial review "in relation to functions (the operation of administrative systems and the statement of applicable policy) which are properly the province of the executive government would represent an unwarranted intrusion by the courts into that province."[120]

It would be wrong to discount the possibility of judicial overreach in the exercise of the court's supervisory jurisdiction over administrative action. However, the first response to these concerns is essentially the same as the response that has just been articulated: the case law has developed in a principled fashion and there is no reason to think it has disincentivised the production of guidance.

A more substantial point is that it is unclear why administrative rule-making should be thought less suitable to detailed judicial scrutiny than delegated legislation. Guidance is generally speaking further away from the most central policy-making arenas and is subject to less political oversight. Where the matter is settled by Ministers, the courts by enforcing observance of the guidance by officials are ensuring obedience to high-level policy, not undermining it. In fact, the empirical evidence suggests[121] that rule making via subordinate legislation usually operates with little direct involvement from senior government figures.

Insofar as the concern about judicial overreach is that the courts are at risk of being drawn too far into the "nitty gritty" of government removed from decisions affecting individuals it has

[120] *R (A) v Secretary of State for the Home Department* [2021] 1 W.L.R. 3931 at [40] and [65].

[121] E.C. Page, *Governing by Numbers: Delegated Legislation and Everyday Policy Making* (Oxford: Hart Publishing, 2001).

more purchase. But this concern is not unique to review of guidance but arises in any judicial review case that involves administrative decisions with no direct impact on individuals. Established control mechanisms such as standing and the need for a dispute which is not hypothetical or academic should be sufficient to prevent meddlesome or pointless litigation.

IX. Conclusion

Guidance issued by government eludes straightforward classification. We have nonetheless suggested a framework of analysis based on a threefold distinction between self-directing, coordinating and pubic guidance. The distinction enabled us to propose different rationales for applicable legal principles in respect of each category and it provided a platform from which to consider a trio of recent cases that have taken a restrictive approach to judicial review of guidance and its application. Our suggested threefold typology was not recognised in those cases – although Rose L.J. identified a similar distinction to that between self-directing and coordinating guidance in *Bayer* – but it allowed us to highlight parts of the reasoning in the cases as problematic. That led us to examine the wider arguments for judicial abstentionism, which we found wanting. We conclude that while there is a need to articulate principled limits to general principles applicable in this area and afford greater attention to whether guidance is self-directing, coordinating or public guidance, there are no good reasons for the courts to adopt a policy-driven change of direction.