LAW AND POLICY: Notes

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The difference between policy and law

1. A legal rule *dictates* a result. A policy *indicates* a result; it may be departed from for good reason.

2. Lord Hope in *Kambadzi* [2011] 1 WLR 1299 at §36

> "Policy is not law, so it may be departed from if a good reason is shown."

3. Sedley LJ in *Begbie* [2000] 1 WLR 1115 at §94:

> "So regarded, and so supervised by law, a policy has virtues of flexibility which rules lack, and virtues of consistency which discretion lacks."

4. These are conflicting imperatives. Sedley J in *Hamble Fisheries* [1995] 2 All ER 714, 722a-c, noting the:

> "two conflicting imperatives of public law: the first is that while a policy may be adopted for the exercise of a discretion, it must not be applied with a rigidity which excludes consideration of possible departure in individual cases ... the second is that a discretionary public law power must not be exercised arbitrarily or with partiality as between individuals or classes potentially affected by it ... The line between individual consideration and inconsistency, slender enough in theory, can be imperceptible in practice."

But when is policy law?

5. A policy forms part of the law for the purposes of the ECHR. The ECHR views the concept of "law" in a *substantive,* rather than a *formal* sense.

6. Lord Hope in *Purdy* [2010] 1 AC 345 at §41:

> "The word "law" in this context [Article 8(2)] is to be understood in its substantive sense, not its formal one ... This qualification of the concept is important, as it makes it clear that law for this purpose goes beyond the mere words of the statute ... it has been held to include both enactments of lower rank than statutes and unwritten law."

7. The heresy in *SK (Zimbabwe)* [2009] 1 WLR 1527 at §33 (*Kambadzi* in the Supreme Court):

> "Here the 'rules' are the *Hardial Singh* principles. Their fulfilment In any given case saves a detention from the vice of arbitrariness. A system of regular monitoring [required by policy] is, no doubt, a highly desirable means of seeing that the principles are indeed fulfilled. But it is not itself one of those principles…."

8. The heresy repeated in *WL (Congo)* [2010] 1 WLR 2168 at §74 (*Lumba* in the Supreme Court):

> "In the present context, the requirement for an accessible and precise statement of the relevant law is satisfied by paragraph 2 of the Schedule, taken with the *Hardial Singh* guidelines."

9. The criticism in *WL (Congo)* at §77-78 of *Nadarajah* [2004] INLR 139:

> "The court [in *Nadarajah*] held that a decision to detain, made in reliance on the unpublished guidance, was unlawful. In a passage headed "Is the policy accessible?" Lord Phillips MR ... quoted [a] passage from the *Sunday Times* case, as indicating that "the law" must be "accessible" (para 64-5). He then moved, without further discussion of the principle, but after considering the evidence, to the conclusion that the Secretary of State's "policy" was not accessible (paragraph 67). The explanation for this apparent *non-sequitur* may possibly be found in an earlier passage, in which he stated ... : "Our domestic law comprehends both the provisions of Sch 2 to the Immigration Act 1971 and the Secretary of State's published policy, which *under principles of public law, he is obliged to follow*." (para 54, emphasis added). The court (quite possibly reflecting the argument as it had been developed before it), thus appears to have accepted as a starting-point, without further analysis, that at least in the context of Article 5 published policy was equivalent to law, and that unpublished policy, at least so far as inconsistent with published policy, was unlawful.
>
> Given the lack of discussion of this point, we do not with respect regard ourselves as bound by this judgment to accept that, whether for the purposes of the *Sunday Times* principles or otherwise, policy is to be equated with law."

10. The criticism was misplaced: Lord Dyson in *Lumba* at §30.

<u>The power (and duty) to establish a policy</u>

11. The need for structured discretion (at common law, quite apart from human rights imperatives). Lord Bingham in *The Rule of Law* [2007] CLJ 67, 72:

> ""The broader and more loosely-textured a discretion is, whether conferred on an official or a judge, the greater the scope for subjectivity and hence for arbitrariness, which is the antithesis of the rule of law. This sub-rule requires

that a discretion should ordinarily be narrowly defined and its exercise capable of reasoned justification."

(Cited by Lord Hope in *Kambadzi* [2011] 1 WLR 1299 at §41.)

12. Sedley LJ in *Walmsley v Transport for London* [2005] EWCA Civ 1540, at §§ 57-8:

> "... it is inimical to good public administration for a public authority to have and operate such a policy without making it public: see *R v Home Secretary, ex parte Urmaza* [1996] COD 479.[1]
>
> ... it is unfair that those who, despite the absence of any indication that they can do so, write to [Transport for London] in the hope of clemency, at present obtain an advantage over those who assume [from the published documents]….that there is no way of doing such things… "

13. Viscount Dilhorne in *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 631:

> "It was both *reasonable and right* that the Board should make known to those interested the policy it was going to follow*."* (emphasis supplied)

<u>The duty to publish policy</u>

14. Again, at common law, quite apart from human rights imperatives: the Beloff concession: Lord Dyson in *Lumba* at §38:

> "What must, however, be published is that which a person who is affected by the operation of the policy needs to know in order to make informed and meaningful representations to the decision-maker before a decision is made."

15. The reason: Lord Dyson in *Lumba* at §35:

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it."

16. Compare *WL (Congo)* Court of Appeal at §§54-55*:*

[1] "nobody who values openness of government can regard as satisfactory a process whereby a departmental policy of real importance to many people's lives, although not covered by any form of public interest immunity, is not published by government but leaks out and, becomes the subject of litigation in the courts." *R v Secretary of State for the Environment, ex parte Urmaza* CO/4080/95, 11 July 1996, p.11 per Sedley J.

> "First, for the purposes of legal analysis, it is desirable to distinguish between different categories of policy or practice. In the context of the present case we would distinguish (a) formal published policies, (b) formal *internal* policies, and (c) informal internal "practices". The most obvious example of (a) is a White Paper, which can be regarded as Government policy in the fullest sense, representing as it does a public statement of the settled view of government (normally following full consultation) on a particular subject ... Under (b) we would include internal statements of policy or practice, which have been subject to some form of process leading to what may be regarded as formal Departmental approval, but are not intended for general publication."

Legal supervision and enforcement

17. A public body will be held to its policy, unless good reason is shown for departing from it, as a matter of consistency, equality and good administration.

18. Compare Sedley J in *Urmaza* [1996] COD 479: a decision maker will be held to his policy, absent demonstrated good reason given (a) principle of consistency and avoidance of arbitrariness; (b) duty to have regard to relevancies; (c) avoidance of over-rigidity; (d) legitimate expectation.

19. Note emphasis in Lord Dyson in *Lumba* [2012] 1 AC 245 at §26

    a. approving *De Smith* 6th ed (2007), §12-39:

       > "there is an independent duty of consistent application of policies, which is based on the principle of equal implementation of laws, non-discrimination and the lack of arbitrariness."

    b. approving *Wade and Forsyth, Administrative Law* 10th ed, (2009), pp 315-316, referring to the principle that a policy must be consistently applied.

20. The duty is independent: not analysed as part of the duty to take account of relevancies or through the doctrine of legitimate expectation (criticised by *Wade and Forsyth :* can the individual be said to have the expectation? What about reliance: Sedley LJ in *Begbie* at §101 "in cases where government has made known how it intends to exercise powers which affect the public at large it may be held to its word irrespective of whether the applicant had been relying specifically upon it.")

21. Query whether a different analysis is needed where the policy is that of a different body (planning policy guidance issued by the Secretary of State): this has sometimes been seen a situation which does not give rise to any expectation created by the decision maker (the planning authority), but may be categorised as a failure to have regard to a relevancy. See *Gransden* (1985) 54 P & CR 86. But sometimes not: eg.

Bancoult [2008] QB 365 (predecessor in office); *BAPIO* [2008] 1 AC 1003 (Health Secretary infringing expectation created by Home Secretary's practice).

22. Query change of policy cases: is legitimate expectation analysis helpful? Certainly not abandoned by Supreme Court:

    a. Lord Dyson in *Lumba* at §26 refers to *Nadarajah* (which advanced a legitimate expectation basis for adherence to policy);

    b. Lord Hope in *Kambadzi* at §36

> "there is a substantial body of authority to the effect that under domestic public law the Secretary of State is generally obliged to follow his published detention policy. In *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512, [2002] 1 WLR 356, para 7, Lord Phillips of Worth Matravers MR, delivering the judgment of the court, said that lawful exercise of statutory powers can be restricted, according to established principles of public law, by government policy and the legitimate expectation to which such policy gives rise. In *Nadarajah v Secretary of State for the Home Department* [2003] EWCA Civ 1768, [2004] INLR 139, para 54 the Master of the Rolls, again delivering the judgment of the court, said: "Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow."

23. Query *ABCIFER* [2003] QB 1397 at §§85-86, which left open "whether there is a free-standing principle of equality in English domestic law".

Review for compliance

24. The question is what is the correct meaning, not what is a reasonable one: *Raissi* [2008] QB 836 at §§118-123.

25. Sir Thomas Bingham MR classically in *R. v Director of Rail Passenger Rail Franchising, ex parte Save Our Railways* [1996] CLC 589, at 601D:

> "… the Court cannot … in case of dispute, abdicate its responsibility to give the document its proper meaning. It means what it means. Not what anyone would like it to mean."

26. Richards LJ in *LE Jamaica* [2012] EWCA Civ 597: *application* of detention policy is subject to *Wednesbury* review. Query: duty of consistent application? Query legitimate expectation analogue and fairness? Query role of court in supervision of executive detention?