Appeal *vs* Judicial Review: Myths and Surprises

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Abstract. An appeal from a judicial decision is different than a judicial review of an administrative decision. But how are they different, exactly? One common view is that the grounds of appeal are more extensive than the common law grounds of judicial review. Specifically, appeal concerns the merits of a decision whereas review concerns only its legality. I argue that this common view turns the truth on its head. All the grounds of appeal are, in fact, also grounds of review. Not all the grounds of review are grounds of appeal. As a result, the grounds of review are more, not less, extensive, than the grounds of appeal. The implication is that review concerns the merits of a decision at least as much as appeal does.

I. INTRODUCTION

One of the orthodoxies of administrative law is that appeal is different from judicial review. Appeal and review are 'quite different'[1], said Lord Hoffmann. They are 'entirely different'[2], insisted Lord Fraser. Christopher Forsyth and Julian Ghosh

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[1] *Kemper Reinsurance Company v Minister of Finance* [2000] 1 AC 1 (HL), 14H-15A (Lord Hoffman)

[2] *R v Entry Clearance Officer, ex p Amin* [1983] 2 AC 818 (HL), 829 (Lord Fraser).

describe them as 'radically different'[3]. But *how* are appeal and review different, exactly? The most common answer is that the grounds of appeal are more extensive or generous than the grounds of review. The usual way to spell out this answer is to say that review is limited to an inspection of the legality of a public body's decision, or the procedure by which it was made. By contrast, appeal also concerns the "merits" of a lower court's decision.[4]

In this article, I argue against this common view. I show that every ground of appeal has a counterpart among the common law grounds of judicial review. However, there are grounds of judicial review without a counterpart among the grounds of appeal. Thus, the common answer in the last paragraph turns the truth on its head: the grounds of review are *more*, not less, extensive than the grounds of appeal. One implication of my argument is that review concerns the merits of decisions to at least the same extent that appeal does.

Here is how I will proceed. I will assume a familiarity with judicial review grounds and procedure. Appeals, however, are not often studied or taught. So, in section II, I describe the main types of appeal and explain which is my focus here. In section III, I show that every ground of appeal has a corresponding ground of review. In section IV, I show that, by contrast, some grounds of review have no counterpart among the grounds of appeal. Section V rejects the dogma that judicial review concerns the legality of decisions rather than their merits. Section VI states the actual differences between appeal and review. Section VII concludes.

II. TYPES OF APPEALS

[3] CF Forsyth and IJ Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2023) 16.

[4] e.g., *R (Haralambous) v Crown Court at St Albans* [208] UKSC 1, [56] (Lord Mance); *General Medical Council v Michalak* [2017] UKSC 71, [20]-[21] (Lord Kerr).

My focus is civil rather than criminal appeals.[5] Some civil appeals are *from* a court, whereas others are from bodies such as ministers, arbitrators, or professional regulatory organisations. My interest is appeals from a court. Appeals from a court are always made to another court. In general, a civil appeal from one court is heard by the next court in the hierarchy (e.g., an appeal against the order of a circuit judge in the county court is heard by a High Court judge). In what follows, I use "the lower court" to refer to the court from which an appeal is brought and "the appeal court" to refer to the court to which it is made.[6]

I focus on appeals from courts, rather than from other types of public bodies, for two reasons. First, when courts and commentators claim that judicial review is different than 'appeal', they almost always mean an appeal from a court. Second, rights of appeal against decisions of other public bodies are conferred by many different statutes. The possible grounds of appeal depend on the terms of the statute and the nature of the body.[7] As a result, there is no single set of grounds of non-judicial appeal to compare with the grounds of judicial review.

Appeals in the UK Supreme Court are regulated mainly by the Supreme Court Rules (authorised under the Constitutional Reform Act 2005, §45). Appeals in the county court, High Court, or Court of Appeal are governed mainly under Part 52 of the Civil Procedure Rules (created under the Civil Procedure Act 1997, §1). My focus in what follows is civil appeals regulated by the CPR. That is partly for simplicity, but also because the vast majority of appeals are covered by the CPR. I will not discuss appeals to the Privy Council.

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[5] This section draws on AAS Zuckerman, *Zuckerman on Civil Procedure* (4th edn, Sweet & Maxwell 2021); J Leabeater, J Purchas, L McCafferty, and S O'Sullivan, *Civil Appeals* (2nd edn, Sweet & Maxwell 2015); M Burton (ed), *Civil Appeals* (2nd edn, Sweet & Maxwell 2013); and H Brooke, D Di Mambro, L Di Mambro (eds), *Manual of Civil Appeals* (2nd edn, LexisNexis 2004).

[6] H Brooke, D Di Mambro, L Di Mambro (eds), *Manual of Civil Appeals* (2nd edn, LexisNexis 2004) 2.

[7] *R (Begum) v Special Immigration Appeals Commission* [2021] UKSC 7, [69].

III. APPEAL AS A SUBSET OF REVIEW

Under CPR 52.21(3), an appeal will be allowed if and only if either the lower court's decision is 'wrong' or 'unjust because of a serious procedural or other irregularity'. These broad grounds – wrongness, injustice due to a serious irregularity – have been interpreted to include several more specific grounds of appeal. In this section, I discuss these specific grounds, showing that in each case there is a corresponding ground of judicial review. In other words, the grounds of appeal are a subset of the grounds of review. By 'grounds b of judicial review', I mean common law grounds and not, for example, review for compliance with the European Convention on Human Rights. And I mean common law grounds that apply by default, even if in a particular context those grounds are displaced or overridden (e.g., by an ouster clause).

A. 'Wrong'

CPR 52.21(3)(a) says that an appeal will be allowed if a lower court's decision is 'wrong'. The term 'wrong' is not defined in the CPR. However, it is interpreted in the *White Book* and elsewhere to include three types of errors: errors of law, errors of fact, and errors as to the exercise of discretion.[8]

1. Error of law

An appeal will be allowed if the lower court made a material misdirection of law.[9] When a lower court interpreted a section of a statute in a way that simply duplicated an earlier section, for example, it committed a reversible error of law.[10] A material

[8] Lord Justice Coulson, *The White Book* (vol 1, Sweet & Maxwell 2025) 1905. See also M Burton (ed), *Civil Appeals* (2nd edn, Sweet & Maxwell 2013) 120; *Ali v Solicitors Regulation Authority* [2021] EWHC 2709 (Admin), [94].
[9] *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982, [9].
[10] *Trennery v West (Her Majesty's Inspector of Taxes)* [2005] UKHL 5.

misunderstanding of a common law rule is also grounds for appeal. For instance, when a judge misunderstood who had the burden of proof to show that a testator had capacity to make a will, he committed an error of law, and the appeal against his decision was allowed.[11]

Error of law is, of course, also a ground of judicial review. If a public authority commits an error of law, and that error is 'relevant'[12] to its ultimate decision, the court will normally quash the decision. The point has been well-established since at least the House of Lords' decision in *R v Lord President of the Privy Council, ex p Page*[13]. As Lord Griffiths said in that case:

> In the case of bodies other than courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly and judicial review is available to correct their error of law ....[14]

A reviewing court does not, subject to limited exceptions, defer to a public authority's determination of the law.[15] It does not matter if the authority's interpretation was 'reasonable'[16]; what matters is whether it is correct, in the eyes of the court. In the same way, an appeal court does not defer to a lower court's determination of the law (though it does not 'strain'[17] to disagree with its determination either).

2. Error of discretion

[11] *Lonsdale v Teasdale* [2021] EWHC 2342 (Ch).
[12] *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 (HL), interpreting *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL).
[13] *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 (HL), 693 (Lord Griffiths); see also 702 (Lord Browne-Wilkinson) (describing the 'general rule ... that decisions affected by errors of law made by tribunals or inferior courts can be quashed').
[14] *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 (HL),
[15] For example, there is an exception for the interpretations of certain areas of 'domestic law' by visitors: *R v Lord President of the Privy Council, ex p Page* [1993] AC 682 (HL), 702-3 (Lord Browne-Wilkinson); *R v Visitors to the Inns of Court, ex p Calder & Persaud* [1994] QB 1, 40F.
[16] *R (Akester) v Department for Environment, Food, and Rural Affairs* [2010] EWHC 232 (Admin), [82].
[17] *Rugby Joinery UK Ltd v Whitfield* [2005] EWCA Civ 561, [43].

Lower courts are often granted discretion to make decisions. Examples include decisions with respect to case management, striking out, and costs. Appeal courts have 'always been very slow to interfere with such decisions'[18], but they are prepared to interfere with discretionary decisions in at least three circumstances, each of which has a parallel in judicial review.

First, a lower court must not fetter or deny a discretionary power. As Lord Greene MR said in *Egerton v Jones*[19], 'the discretion of the Court is not to be fettered by rules. The discretion is given by statute and must be exercised according to the circumstances of each particular case'[20]. In *R v Home Secretary, ex p Venables and Thompson*[21], Lord Browne-Wilkinson described the rule against fettering of administrative discretion in very similar terms. A 'statutory power', he explained, 'must be exercised on each occasion in light of the circumstances of that time.'[22]

Second, that a lower court takes into account an irrelevant consideration or fails to take into a relevant consideration is ground for appeal.[23] In *Ward v James*, Denning LJ asked: 'in what circumstances will the Court of Appeal interfere with the discretion of the judge?'[24] His answer, in part, was that:

> [The court] will interfere if it can see that the judge has given no weight ... to those considerations which ought to have weighed with him. ... Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him ....[25]

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[18] H Brooke, D Di Mambro, L Di Mambro (eds), *Manual of Civil Appeals* (2nd edn, LexisNexis 2004) 44.
[19] *Egerton v Jones* [1939] 2 KB 702 (CA).
[20] *Egerton v Jones* [1939] 2 KB 702 (CA), 705; see also *Crowther v Elgood* (1887) 34 Ch 691, 697.
[21] *R v Home Secretary, ex p Venables and Thompson* [1988] AC 401, 496 (Lord Browne-Wilkinson).
[22] *R v Home Secretary, ex p Venables and Thompson* [1988] AC 401, 496 (Lord Browne-Wilkinson). The leading case is *British Oxygen Co v Minister of Technology*, [1971] AC 610 (HL).
[23] *Phonographic Performance Ltd v AEI Rediffusion Music Ltd* [1999] 1 WLR 1507 (CA), 1523C-D; *Clin v Walter Lilly & Co Ltd* [2021] EWCA Civ 136, [86].
[24] *Ward v James* [1965] 1 QB 273 (CA), 293.
[25] *Ward v James* [1965] 1 QB 273 (CA), 293; see also *In re F (Wardship: Appeal)* [1976] Fam 238, 251-252.

To illustrate, in *Wolley v Ministry for Justice*[26], the county court judge set the budget for the plaintiff's costs without giving any weight to the agreed budget for the defendant's costs. Plainly, though, the defendant's costs were a 'relevant consideration'[27] because the parties would be in court the same amount of time. Failing to take this consideration into account was an error of discretion. The appeal was therefore allowed. The same types of error – failing to have regard to a relevant consideration or having regard to an irrelevant consideration – are well-known grounds of judicial review. Indeed, these grounds 'form the bread and butter of administrative law'[28].

The third type of error of discretion takes more explaining. In *Bellenden v Satterthwaite*[29], Asquith LJ said that an appellate court could not interfere simply whenever it disagreed with a lower court's exercise of discretion. Rather:

> It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible and is, in fact, plainly wrong, that an appellate body is entitled to interfere.[30]

This statement has been endorsed and applied many times since, including by the House of Lords in *G v G*[31].

In judicial review, exercises of discretion are, of course, reviewable for unreasonableness. In *Associated Picture Houses Ltd v Wednesbury Corporation*, it was said to be unlawful for an authority to make a decision 'so unreasonable that no reasonable authority could ever have come to it'[32]. The House of Lords later expressed the *Wednesbury* standard more simply as whether a decision is outside the 'range of reasonable decisions open to the decision-maker'[33].

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[26] *Woolley v Ministry for Justice* [2024] EWHC 304 (KB).
[27] *Woolley v Ministry for Justice* [2024] EWHC 304 (KB), [64].
[28] M Elliott and J Varuhas, *Administrative Law* (5th edn, OUP 2017) 237.
[29] *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA).
[30] *Bellenden v Satterthwaite* [1948] 1 All ER 343 (CA), 345 (Asquith LJ).
[31] *G v G* [1985] 1 WLR 647 (HL).
[32] *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1947] 1 KB 223 (CA), 230 (Lord Greene MR).
[33] *Boddington v British Transport Police* [1999] 2 AC 143, 175 (HL); see also *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [98].

Is the *Wednesbury* standard the same as the standard articulated in *Bellenden v Satterthwaite* and *G v G*? First appearances suggest the answer is 'yes'. Both standards regulate the exercise of discretion. Both strike a balance between the need for deference to an initial decision-maker and the need to prevent errors. Both are framed in terms of what is 'reasonable'. It is natural, as a result, to think that the two questions – 'is a decision *Wednesbury* unreasonable?' and 'is a decision beyond the scope of reasonable disagreement?' – are two ways of asking the same thing.

This is the conclusion that commentators have reached. According to John Eekelar, to say that the *G v G* standard is met 'is surely to say no more, nor less, than that [the judge's] decision was one which no reasonable judge could make'[34], which is the 'the same [test] as that usually associated with the *Wednesbury* principles'[35]. Caroline Forder and Robert Ward say that the difference between the two tests is 'merely semantic'[36]. The two tests are 'comparable'[37], says Katrina Yates.

The difficulty is that the House of Lords in *G v G* insisted that the tests are different.[38] Lord Fraser quoted from a Court of Appeal decision in which a dissenting judge had said that the question on appeal was whether the judge at first instance had followed a course 'no reasonable judge having taken into account all the relevant circumstances could have adopted'[39]. Lord Fraser then said:

> That is the test which the court applies in deciding whether it is entitled to exercise judicial control over the decision of an administrative body: see the well-known case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. It is not the appropriate test for deciding whether the

[34] J Eekelaar, 'Custody Appeals' (1985) 48 MLR 704, 705.
[35] J Eekelaar, 'Custody Appeals' (1985) 48 MLR 704, 704-5.
[36] C Forder and R Ward, 'Child Custody Appeals: The Search for Principle' (1987) 46 CLJ 489, 497.
[37] K Yates, 'Appealing the Discretionary Grant or Refusal of Relief in Judicial Review Proceedings' [2009] JR 129, 130.
[38] To similar effect, see *Tsai v Woodworth* (1984) 81 LSG 44, (1983) 127 SJ 858 (CA).
[39] *In re F (A Minor) (Wardship: Appeal)* [1976] Fam 238, 254 (Stamp LJ), cited in *G v G* [1985] 1 WLR 647 (HL), 653.

> Court of Appeal is entitled to interfere with the decision made by a judge in the exercise of his discretion.[40]

It is clear from this passage that Lord Fraser thought that there was a difference between the test applied in judicial review cases and the one applied on appeal. What is the difference, exactly? Lord Fraser did not say. A possible answer was suggested, however, by Lord Bridge in a concurring judgment. His lordship said that the distinction between the standards in *G v G* and *Wednesbury* was admittedly a 'fine one'[41]. It was still important to distinguish them, he said, because the grounds for interference with discretion in judicial review proceedings were 'more restricted'[42] than on appeal. The implication is that the *G v G* standard allows for intervention in more circumstances than *Wednesbury*.

So, we have standards that seem to be very similar, but which the House of Lords said were different. Is there any way to reconcile these points? One possibility was suggested by Brennan J of the High Court of Australia in *Norbis v Norbis*[43]. After quoting the passage above from Lord Bridge, Brennan J said that there is 'no distinction in principle'[44] between appellate review of judicial discretion and judicial review of administrative discretion. There is a difference, but it lies in the standards' application. Since an appellate court is familiar with exercises of judicial discretion, it will be 'more confident'[45] second-guessing a lower court's exercise of discretion. It will be slower to question an administrative body's discretionary use of a power, 'of which the court has no experience'[46]. This is an attractive proposal. It explains both why the test in *G v G* strikes so many commentators as indistinguishable from the test in *Wednesbury*, and why one might think that an appellate court is less 'restricted' than a reviewing court when assessing the exercise of discretion.

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[40] *G v G* [1985] 1 WLR 647 (HL), 653.
[41] *G v G* [1985] 1 WLR 647 (HL), 656.
[42] *G v G* [1985] 1 WLR 647 (HL), 656.
[43] *Norbis v Norbis* (1986) 161 CLR 513 (HCA).
[44] *Norbis v Norbis* (1986) 161 CLR 513 (HCA), 540 (Brennan J).
[45] *Norbis v Norbis* (1986) 161 CLR 513 (HCA), 541 (Brennan J).
[46] *Norbis v Norbis* (1986) 161 CLR 513 (HCA), 541 (Brennan J).

Here is another way to reconcile the apparent similarity of the two tests with the House of Lords' insistence in *G v G* that the two are different. Remember that *G v G* was decided in 1985. Let us grant for the sake of argument that, at that time, *Wednesbury* represented a more restricted standard than the one Lord Fraser and Lord Bridge had in mind. It does not follow that now, 40 years later, the two standards are still different. In the meantime, *Wednesbury* unreasonableness has developed. Three points are especially important. First, *Wednesbury* unreasonableness is now seen as a variable standard, which is more or less intrusive depending on contextual factors.[47] Second, those contextual factors include the relative experience and expertise of the initial decision-maker.[48] Thus, *Wednesbury* will be a fairly undemanding standard when an initial decision-maker is relatively expert and experienced, but a fairly demanding standard when the initial decision-maker does not enjoy the same advantages. Third, in general, *Wednesbury* is a more intrusive standard than it once was. Indeed, the test is now 'often applied in a way that made it closer to asking whether the court believed that the exercise of discretion was reasonable'[49]. Putting these points together, even if the *Wednesbury* standard circa-1985 was more restricted than the *G v G* standard, the *Wednesbury* standard of today need not be. Moreover, we would expect the *Wednesbury* standard to apply more rigorously in the judicial context than in the administrative context. That is because lower courts are not more expert or practised at exercising judicial discretion than are appellate courts.

If Brennan J was right, then *Wednesbury* was always the standard for appellate review of discretionary decisions by judges. If my second suggestion is correct, then *Wednesbury* is today the standard for review of such decisions, even if it was not initially.

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[47] e.g., *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (HL), 531 (Lord Bridge); *Nottinghamshire County Council v Secretary of State for the Environment* [1986] 1 AC 240 (HL).

[48] *R (British Union for the Abolition of Vivisection) v Secretary of State for the Home Department* [2008] EWCA Civ 417. See also *R v Ministry of Defence, ex p Smith* [1996] QB 517 (CA), 556; *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158.

[49] P Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016) 639.

Either way, *Wednesbury* is the standard now. I draw support for this conclusion from the fact that English courts have often assumed that something like it is true. For example, in *Eagil Trust Co Ltd v Pigott-Brown*[50] Griffiths LJ said that discretionary decisions can only be 'attacked on what are colloquially known as "*Wednesbury*" grounds'[51]. In *Noorani v Merseyside TEC Ltd*[52], Henry LJ said of an appeal against a discretionary decision that '[s]uch decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds ... [including] where the conclusion reached was "outside the generous ambit within which reasonable disagreement is possible", see *G v G*'[53]. After reviewing the recent authorities, Mostyn J reached a similar conclusion: 'there is a high degree of equivalence between an appeal against an exercise of discretion and a *Wednesbury* challenge to a regulatory decision'[54].

3. Error of fact

I turn now to errors of fact. There are five recognised types of errors of fact that will ground a successful appeal. All have an equivalent in judicial review.

First, an appeal will be allowed if *a material finding of fact is based on no evidence*.[55] A good example is *AA (Uganda) v Secretary of State for the Home Department*[56]. The Home Secretary sought to return AA to Kampala in Uganda. AA challenged that decision. She had no support network in the city, she said. Opportunities were so limited that she would be consigned to work as a 'bar

[50] *Eagil Trust Co Ltd v Pigott-Brown*, [1985] 3 All ER 119 (CA).
[51] *Eagil Trust Co Ltd v Pigott-Brown*, [1985] 3 All ER 119 (CA), 121.
[52] *Noorani v Merseyside TEC Ltd* (unreported, 19 October 1998).
[53] *Noorani v Merseyside TEC Ltd* (unreported, 19 October 1998).
[54] *R (Wales & West Utilities Ltd) v Competition and Markets Authority* [2022] EWHC 2940 (Admin), [43].
[55] *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 WLR 410, 36 (Lord Radcliffe); *Begum v Tower Hamlets LBC* [2003] UKHL 5, [7] (Lord Bingham), [99] (Lord Millett).
[56] *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579.

girl/sex worker'[57]. The trial judge rejected that argument. AA had been involved in church in the UK. She could get support from the church in Kampala as well, the judge claimed. The Court of Appeal disagreed. 'There was', Buxton LJ said, 'no evidence from which [the lower court judge] could properly conclude that the church would make a difference to AA's life in Kampala'[58]. There was an 'absence of any real evidence to justify the finding'[59], said Carnwath LJ, as he then was. There 'was no evidence' for the judge's conclusion, according to Lloyd LJ; it was 'pure speculation'[60]. The appeal was allowed.[61]

The same error – basing a material finding of fact on no evidence – is an established ground of judicial review.[62] In *R (Beresford) v Sunderland City Council*[63], for instance, an area of land had been used as a town green for 25 years. When the applicant tried to register the land as a green, the council refused. It said that the land was not used as a green 'as of right', but pursuant to an 'implied licence' granted by the council. On an application for judicial review, the refusal was quashed. In allowing the appeal, Lord Bingham explained that there was '*nothing* in the material before the council to support the conclusion that ... [use of the land] had been otherwise than of right'[64]. Similarly, in *R (Lancashire County Council) v Secretary of State for Energy, Food, and Rural Affairs*[65], the Supreme Court upheld a challenge to an inspector's

[57] *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [10].
[58] *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [13].
[59] *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [40].
[60] *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [54].
[61] *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579, [14]; also [36].
[62] *R (Iran) v Secretary of State for the Home Department* [2005] EWCA 982, [11]; *R v Hillingdon Council, ex p Islam* [1981] 3 WLR 942 (HL), 954 (Lord Lowry).
[63] *R (Beresford) v Sunderland City Council* [2003] UKHL 60.
[64] *R (Beresford) v Sunderland City Council* [2003] UKHL 60, [8] (Lord Bingham) (emphasis added). To similar effect, see [51] (Lord Scott), [60] (Lord Rodger), [83] (Lord Walker).
[65] *R (Lancashire County Council) v Secretary of State for Energy, Food, and Rural Affairs* [2019] UKSC 58.

conclusion that areas of land had not been held for educational purposes. There was 'no evidence to support any [such] inference'[66], said Lord Carnwath and Lord Sales (Lady Black agreeing). 'An assessment made without supporting evidence cannot stand'[67].

Second, *a lower court failing to consider relevant evidence* is a ground for appeal.[68] Likewise, a public authority's failure to consider relevant evidence is a ground of review.[69] Consider *R (W) v Secretary of State for the Home Department*[70]. The claimant wanted indefinite leave to remain. The Home Office refused because of concerns about the claimant's involvement in a terrorist plot. The claimant said that the Home Secretary had failed to consider his poor intellectual functioning (which would have tended to mitigate any involvement in the plot). The court agreed that this was an error. The Home Secretary 'was not entitled to leave out of account the ... evidence about intellectual functioning'[71]. Because he had 'failed to consider relevant material'[72], the decision was quashed.

Third, *a failure to make a finding of fact on a crucial issue* is a ground of both appeal and judicial review.[73] In *Lloyds TSB v Hayward*[74], for example, the trial judge had failed to make a finding as to when a crucial document was written. This meant the

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[66] *R (Lancashire County Council) v Secretary of State for Energy, Food, and Rural Affairs* [2019] UKSC 58, [32].
[67] *R (Lancashire County Council) v Secretary of State for Energy, Food, and Rural Affairs* [2019] UKSC 58, [32].
[68] *Simplex GE (Holdings) Ltd v Secretary of State for the Environment and the City of St Albans District Council* [1988] COD 160 (EWCA); *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [67] (Lord Reed).
[69] *R (Bukartyk) v Welwyn Hatfield Borough Council* [2019] EWHC 3480 (Admin), [48]; *R v Housing Benefit Review Board of the London Borough of Sutton, ex p Keegan* (1995) 27 HLR 92 (QB), 100.
[70] *R (W) v Secretary of State for the Home Department* [2019] EWHC 254 (Admin).
[71] *R (W) v Secretary of State for the Home Department* [2019] EWHC 254 (Admin), [43].
[72] *R (W) v Secretary of State for the Home Department* [2019] EWHC 254 (Admin), [45].
[73] *Coleman v Dunlop Ltd* [1998] PIQR P398 (appeal) and *(Delaney) v Parole Board for England and Wales* [2019] EWHC 779 (Admin) (judicial review).
[74] *Lloyds TSB v Hayward* [2002] EWCA Civ 1813.

decision was 'fundamentally flawed'[75]. The same type of error was committed in *R (A) v Independent Appeal Panel for Sutton BC*[76]. A student was permanently excluded from school for selling what the buyers and Head Teacher believed to be cannabis. The student appealed to an Independent Appeal Panel. Part of his defence was that he had not sold cannabis but an herbal mixture that looked like cannabis. The Panel upheld the exclusion without making any finding as to whether, in fact, what the student had sold was cannabis. That was an error, Hickinbottom J held. The nature of the substance sold was relevant to whether permanent exclusion was a reasonable sanction, and the Panel was bound to reach a conclusion as to whether it was cannabis. Its decision was accordingly quashed.

Fourth, *E v Secretary of State for the Home Department* established *mistake of fact leading to unfairness* as a ground of appeal.[77] Such a mistake occurs, Carnwath LJ said, if there has been a mistake as to an existing and material fact, which is uncontentious and objectively verifiable, where the person alleging the mistake was not responsible for it, and there was a shared interest in cooperating to achieve a correct result.[78] In *E*, it was clear that Carnwath LJ understood mistake of fact leading to unfairness as a ground of judicial review, too.[79] And it is 'now well established ... that an error of fact resulting in unfairness can be asserted as a separate ground of challenge on judicial review'[80].

Fifth, a court will allow an appeal if *a finding of fact is unreasonable or perverse* (the two terms are used interchangeably).[81] The

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[75] *Lloyds TSB v Hayward* [2002] EWCA Civ 1813, [66].
[76] *R (A) v Independent Appeal Panel for Sutton BC* [2009] EWHC 1223.
[77] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49.
[78] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [66] (Carnwath LJ).
[79] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [42] (Carnwath LJ).
[80] A Gask, 'Other Grounds of Judicial Review' in (M Supperstone, J Goudie, P Walker, and H Fenwick (eds), *Judicial Review* (6th edn, LexisNexis 2017) 517.
[81] *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 WLR 410, 36 (Lord Radcliffe); *Miftari v Secretary of State for the Home Department* [2005] EWCA Civ 481, [10] (Buxton LJ), [36] (Keene LJ) (both equating perversity and unreasonableness);

same test is applied in judicial review cases. Thus, in *Puhlofer v Hillingdon LBC*, a judicial review case, Lord Brightman said that:

> Where the existence or non-existence of a fact is left to the judgment and discretion of a public body ... it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power *save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely*.[82]

Later cases have applied the standard described in *Puhlofer*. For example, in *R (Javed) v Secretary of State for the Home Department*[83], the Home Secretary purported to designate Pakistan a country where there was no 'serious risk of persecution'. But the Home Secretary could not have 'reasonably reached that conclusion'[84] based on the evidence before him. The decision was quashed.

Sometimes, courts say that a 'plainly wrong' determination of fact is a ground for appeal.[85] That is admittedly not language commonly found in judicial review. However, when pressed, courts have explained that 'plainly wrong' means a finding of fact that 'no reasonable judge could have reached'[86] or one that is 'outside the bounds within which reasonable disagreement is possible'[87]. On that interpretation, a 'plainly wrong' finding is an unreasonable decision. That makes it part of the previous ground (i.e., an unreasonable or perverse factual finding).

B. 'Serious procedural or other irregularity'

CA v Secretary of State for the Home Department [2004] EWCA Civ 1165, [27] ('perversity under the *Wednesbury* principle').

[82] *Puhlofer v Hillingdon LBC* [1986] AC 484 (HL), 518 (emphasis added).

[83] *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789.

[84] *R (Javed) v Secretary of State for the Home Department* [2001] EWCA Civ 789, [73].

[85] *McGraddie v McGraddie* [2013] UKSC 58, [2]; *Henderson v Foxworth Investments* [2014] UKSC 41, [61]. For discussion see A Perry, 'Plainly Wrong' (2023) 86 MLR 122.

[86] *Henderson v Foxworth Investments* [2014] UKSC 41, [62].

[87] *Kwok Kin Kwok v Yao Juan* [2022] UKPC 52, [40].

So far, I have discussed the ways in which a decision can be 'wrong' for the purposes of 52.21(3)(a). In addition, under CPR 52.21(3)(b), an appeal will be allowed if a lower court's decision is 'unjust because of a serious procedural or other irregularity'. Three types of errors fall under this category: bias, lack of fair hearing, and failure to give reasons.

1. Bias

Starting with bias, an appeal will be allowed if the lower court judge was actually biased, automatically disqualified, or would appear biased to a fair-minded and informed observer. Precisely the same grounds are also grounds of judicial review. Indeed, most of the leading cases in judicial review proceedings are cases involving bias in judicial or quasi-judicial contexts.[88] The suggestion that there was a significant difference in the approach to bias in judicial and administrative contexts was 'crisply rejected'[89] by Sedley J in *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd*[90].

2. Lack of a fair hearing

A lower court's decision may also be unjust due to the lack of a fair hearing. A fair hearing requires notice of relevant claims and the opportunity to make representations. For example, in *Jenkinson v Robertson*[91], a personal injury case, the lower court found that the plaintiff had been 'fundamentally dishonest' about the nature of his injuries and accordingly dismissed his claim. Since the plaintiff had not been given adequate notice of the defendant's claim of fundamental dishonesty, the appeal was allowed. A fair hearing also requires the opportunity to make representations. In *Labrouche v Frey*[92], for instance, it was a serious

[88] e.g., *R v Gough* [1993] AC 646 (HL); *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451 (CA).
[89] CF Forsyth and IJ Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2023) 376
[90] *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304, [1996] JPL 1042 (QB), 1052.
[91] *Jenkinson v Robertson* [2022] EWHC 791.
[92] *Labrouche v Frey* [2012] EWCA Civ 881.

procedural irregularity for the judge to reject an application to strike out a claim without giving the applicants the chance to be heard on the matter. While an oral hearing is not always necessary, justice requires an oral hearing on important matters and when an applicant has been led to expect an oral hearing.[93] Of course, lack of a fair hearing is also a ground of judicial review. Notice, the opportunity to make representations, right of cross-examination, and so on are all familiar requirements on judicial review. Moreover, in both the appeal and judicial review cases, courts have repeatedly emphasised that the content of a fair hearing is context sensitive.[94]

3. Failure to give reasons

Failure to give reasons may also make a decision 'unjust' for the purposes of CPR 52.21(3)(b).[95] The leading case is *English v Emery Reimbold & Strick Ltd*, where the Court of Appeal said that the crucial thing is that it be 'apparent to the parties why one has won and the other has lost'[96]. This need not require the judge to discuss every issue and argument raised. But 'the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained'[97]. The lower court's judgment in *English* was 'a lamentable document'[98], 'in places unintelligible'[99], giving 'little indication of the process of reasoning that led to the result'[100]. The appeal was allowed. Failing to give reasons can also ground a successful application for judicial review. There is typically a duty to give reasons for administrative decisions which affect important interests, which are aberrant, or which depart from an authority's previous positions.[101]

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[93] *Deeds v Various Respondents* [2013] EWCA Civ 1678, [23].
[94] e.g. *Lloyd v McMahon* [1987] 1 All ER 1118 (HL), 1161.
[95] *Hicks Developments Ltd v Chaplin* [2007] EWHC 141 (Ch), [24].
[96] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [16]
[97] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [19].
[98] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [33].
[99] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [33].
[100] *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [53].
[101] *R v Secretary for the Home Department Ex p. Doody* [1994] 1 A.C. 531 (HL) (important interest); *R v Higher Education Funding Council, ex p Institute for*

In judicial review, courts have denied that there is a 'general' common law duty on administrative officials to give reasons.[102] That may seem like an important difference with appellate review of judicial decisions. But caution is called for because 'general' is ambiguous. If a 'general' duty is a *universal* duty, then of course there is no general duty to give reasons for administrative decisions. But there is also no such general – that is, universal – duty to give reasons for judicial decisions.[103] Indeed, the lack of a general duty to give reasons in the judicial review context has sometimes been justified by the lack of a comparable duty in the judicial context.[104] Another possibility is that a 'general' duty is one that applies in *a majority of cases*. In that event, whether there is a general duty to give reasons is an empirical, not a doctrinal, question.[105]

A third possibility is that a 'general' duty applies by *default*: there is a duty to give reasons except if there is a justification for not giving reasons. There may be such a 'general' duty to give reasons for judicial decisions. But the same may be true for administrative decisions. In 2002, Tuckey LJ said that 'trend of the law [in judicial review] has been towards an increased recognition of the duty to give reasons'[106]. More recently, Elias LJ said that it appeared that 'in general they [i.e., reasons] should be given unless there is proper justification for not doing so'[107].

Dental Surgery [1994] 1 WLR 242 (DC), 261 (aberrant); *R (Oakley) v South Cambridgeshire DC* [2017] EWCA Civ 71, [56] (departure).

[102] e.g. *R v Secretary for the Home Department Ex p. Doody* [1994] 1 A.C. 531 (HL), 564 (Lord Mustill); *Dover District Council v CPRE Kent* [2017] UKSC 79, [51] (Lord Carnwath).

[103] *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119, 122; *Flannery v Halifax Estate Agents* [2000] 1 WLR 377 (CA), 381; *English v Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, [8]-[14].

[104] *De Smith's Judicial Review* (9th edn, Westlaw 2025) §9-122.

[105] For a discussion of the many circumstances in which administrators are required to give reasons, especially under statute, see J Bell, 'Reason-Giving in Administrative Law: Where are We and Why have the Courts not Embraced a General Duty to Give Reasons?' (2019) 82 MLR 983, especially 998-999.

[106] *North Range Shipping Ltd v Seatrans Shipping Corp* [2002] EWCA Civ 405, [15] (Tuckey LJ).

[107] *R (Oakley) v South Cambridgeshire DC* [2017] EWCA Civ 71, [30] (Elias LJ).

C. Conclusion

I conclude that all the grounds of appeal are also grounds of review. I grant that these grounds may apply differently in appeal and review. For example, unreasonableness may apply with less intensity in review contexts. Oral hearings will more often be required in appellate contexts, as will reasons. Such differences do not threaten my conclusion. That is because a ground remains the same even if the context makes a difference to how it applies and what it demands. Consider an analogy. Within judicial review, context makes a difference to how courts apply the *Wednesbury* unreasonableness standard. The standard is applied more or less rigorously depending on factors like the nature of the interest affected and the qualifications of the decision-maker. Despite the variability in its application, *Wednesbury* unreasonableness is a single ground of judicial review. We could say the same thing about the requirement of a fair hearing. What form of hearing is required will depend on all the circumstances: the nature of the affected interest, the costs to the public body, the potential for a more accurate decision, and so on. Nonetheless, fair hearing is a single ground of judicial review. In the same way, the grounds of appeal are also grounds of review, even though those grounds may apply differently in the appeal and review contexts.

Although my conclusion – that the grounds of appeal are also grounds of review – is unorthodox, I think that, on reflection, it should not be so surprising. After all, the two procedures share many underlying features. In both cases, there is an initial use of public and usually coercive power. That cries out for oversight. In both cases, oversight is provided by a judicial body. In both cases, the initial decision is typically made by a body better placed to make findings of fact than judges. In both contexts, efficiency favours not making the initial decision a mere 'dress rehearsal'[108] for the oversight stage. Finally, the grounds of appeal and review are both largely judicial creations and reflect

[108] *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [114] (Lewison LJ).

what judges think are legitimate bases for intervention.[109] Given these similarities, it might be more notable if the grounds of appeal and review were very different.

IV. APPEAL AS A *PROPER* SUBSET OF REVIEW

In the last section, I argued that every ground of appeal has a counterpart among the grounds of review. What about the converse case? Does every ground of review have a corresponding ground of appeal? Carnwath LJ thought so. He said in *E* that '[i]t would certainly be surprising if the grounds for judicial review were *more* generous than those for an appeal.'[110] However, this surprising possibility turns out to be true: there really are grounds of review that are not grounds of appeal.

I offer four examples of grounds of review without a parallel in the appellate context. The first is the doctrine of legitimate expectations. If a public authority promises to act in some way, or otherwise represents that it will do so, then there is a legitimate expectation that the authority will fulfil its commitment.[111] The authority must respect that expectation, absent a compelling reason to the contrary. References to judicial conduct giving rise to legitimate expectations, by contrast, are very rare.[112] It is not plausible that frustration of a legitimate expectation is a ground of appeal.

My second example is the requirement that a public authority acts consistently with its policies.[113] The requirement is related

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[109] The point is common ground between common law and modified *ultra vires* theories of judicial review. See the contributions to C Forsyth (ed), *Judicial Review and the Constitution* (Hart 2000).

[110] *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [40] (Carnwath LJ) (emphasis added).

[111] For a recent statement, see *Re Finucane's Application for Judicial Review* [2019] UKSC 67, [55]-[62].

[112] e.g. *Deeds v Various Respondents* [2013] EWCA Civ 1678, [23].

[113] *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [26] (Lord Dyson); Lee-*Hirons v Secretary of State for Justice* [2016] UKSC 46, [17] (Lord Wilson), [50] (Lord Reed).

to the doctrine of legitimate expectations but is 'free-standing'[114]. The third example is the delegation of a statutory power without authorisation. Lastly, authorities sometimes have a common-law duty to consult the public before taking a decision.[115] This duty is owed to the public (unlike the duty to provide a fair hearing, which is owed to individuals).[116] None of these three grounds of review has an equivalent in the appellate context. I know of no cases in which the ground of appeal was a court's failure to consult the public, breach of its non-legal policy, or delegation of its powers.

I conclude that, while all grounds of appeal are grounds of review, not all grounds of review are grounds of appeal. In other words, the grounds of appeal are a *proper* subset of the grounds of review.

Why would the grounds of review be more extensive than the grounds of appeal? I suspect the answer is that judicial review is available in diverse contexts. Judicial review is available with respect to tribunals and other bodies analogous to courts. Here the range of relevant grounds will generally be the same as in an appeal from one court to another. But judicial review is also available against very different bodies, like health authorities, local councils, and departments. These bodies have complex internal structures. They may make decisions in huge numbers of cases and for classes of case. They engage with individuals and the public in distinctive ways. They have very extensive discretionary powers. Such bodies can err in ways that tribunals and courts cannot or, at least typically, will not. Perhaps, then, the breadth of the grounds of review is best understood as a response to the great many ways that the public bodies can go wrong.

V. LEGALITY AND MERITS

[114] *Mandalia v Home Secretary* [2015] UKSC 59, [29] (Lord Wilson).
[115] See, e.g., *R (Moseley) v Haringey LBC* [2014] UKSC 56, [24] (Lord Wilson).
[116] *R (Kebbell Developments Ltd) v Leeds City Council* [2018] EWCA Civ 450, [66].

I said in section I that it is common to claim that the grounds of judicial review are narrower than the grounds of appeal. There is one very popular way to spell that claim out. It is to say that judicial review concerns only the legality of a decision and appeal concerns its merits. For example, Lord Kerr said that 'appeal is different from a review of the legal entitlement to make a decision' because 'it involves an examination of what decision *should* be taken in the dispute between the parties'[117]. Lord Hoffmann said that judicial review 'is concerned with the legality rather than merits of the decision'[118]. Adam Tomkins says that 'in a claim for judicial review, the claimant is not appealing against the merits of what the administrative has done, but is rather seeking a review of the legality of what has been done'[119]. Forsyth and Ghosh write: 'On an appeal the question is "right or wrong?" On review the question is "lawful or unlawful?"'[120] There are a great many other statements to the same effect.[121]

This claim – that judicial review concerns a decision's legality and appeal its merits – is repeated so often it has become a dogma. Given the discussion in the last two sections, we can see that the dogma is incorrect. The reason is simple: judicial review also concerns the merits of decisions. This is obvious when it comes to the review of discretionary decisions. The reviewing court will ask whether the use of discretion was *Wednesbury* unreasonable. That inquiry forces the court to consider the 'weight and balance'[122] of the reasons for and against the decision – that is, the merits and demerits of the decision. As Philip Joseph says, '[c]hallenges mounted on the ground of unreasonableness are

[117] *General Medical Council v Michalak* [2017] UKSC 71, [30] (Lord Kerr).
[118] *Kemper Reinsurance Company v Minister of Finance* [2000] 1 AC 1 (HL), 14H-15A (Lord Hoffman)
[119] A Tomkins, *Public Law* (OUP 2003) 170.
[120] CF Forsyth and IJ Ghosh, *Wade & Forsyth's Administrative Law* (12th edn, OUP 2023) 16.
[121] See, e.g., *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, [273]; *R (Shoesmith) v Ofsted* [2011] EWCA Civ 642, [74]; R Gordon, *Judicial Review: Law and Procedure* (Sweet & Maxwell 1996) 124; A Young, *Turpin and Tomkins' British Government and the Constitution* (CUP 2021) 787..
[122] *Kennedy v Charity Commission* [2014] UKSC 20, [54] (Lord Mance).

wholly antithetical to ... [an] appeal/review distinction' in terms of merits versus legality or procedure.[123]

One might grant that judicial review is concerned with the merits of discretionary decisions but point out that a reviewing judge will not ask whether a discretionary decision is *correct*. That is, the reviewing judge will not ask what he or she thinks the relevant reasons favour and then impose that result on the public body. However, this does not distinguish review from appeal. The reason is that an appeal court does not ask whether a discretionary decision is correct either. It asks whether the decision is beyond the scope of reasonable disagreement. This, as I have said, is the same as asking whether it is unreasonable.

Moreover, in the ways that an appeal court *is* concerned with the correctness of an initial decision, so is a reviewing court. An appeal court will ask whether the initial decision-maker understood the law correctly. So will a reviewing court. An appeal court will ask if the initial proceedings were procedurally fair, in its own estimation. That is what a reviewing court will ask, too.

Here is a possible defence of the dogma.[124] True, the defender will say, reviewing courts consider the merits of discretionary administrative decisions. But note *why* reviewing courts consider the merits of such decisions. They do so because errors of discretion can qualify as errors of *law*. Reviewing courts are always concerned with the legality of decisions. It is just that, sometimes, they need to attend to the merits of decisions to determine their legality. By contrast, an appeal court is *not* concerned with the merits of a lower court's decision simply for what it says about the decision's legality. An appeal court is interested in the merits of the decision as an independent basis for intervention.

That is how the defence might go. The problem is its artificiality. At one time, courts treated an unreasonable exercise of discretion as proof that a public authority misdirected itself in law. But, as Lord Diplock said in *Council of Civil Services Union v Minister for Civil Service*, resort to such 'ingenious' explanations 'is

[123] P Joseph, *Constitutional and Administrative Law in New Zealand* (4th edn, Thomson Reuters 2014) 864.

[124] My thanks to [reference omitted for peer review] for suggesting this line of argument to me.

today no longer needed'[125]. '"Irrationality" by now can stand upon its own two feet as an accepted ground ... [of] judicial review'[126]. In other words, reviewing courts are concerned with the merits of discretionary decisions not simply as a means of identifying misdirections in law.

VI. WHAT IS THE DIFFERENCE BETWEEN APPEAL AND REVIEW?

I have rejected several claimed differences between appeal and review. I have also identified a new difference, namely, that some grounds of review are not grounds of appeal. But this is not the only difference. There are at least five other differences between the two procedures. (I restrict myself to differences of contemporary doctrinal relevance. Of course, appeal and review have different origins and histories.)

First, there are different procedural requirements. Appeal and review have different time limits, permission requirements, costs rules, and so on. Second, the processes have different constitutional bases: appeal is a statutory creation, whereas review is the exercise of inherent jurisdiction. Third, the scope of appeal and review is different. Appeals governed by the CPRR are from the decisions of lower courts. Judicial review lies against the decisions of public bodies. These three differences are straightforward, and I will not labour them. Two other differences require more explanation.

The fourth difference concerns remedies. A successful claim in judicial review normally leads to a quashing order. It is then open to the initial decision-maker to make a new decision (or, sometimes, to do nothing). By contrast, an appeal court is not limited to referring matters back to a lower court. It can affirm, set aside, or vary any order made or given by the lower court.[127]

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[125] *Council of Civil Services Union v Minister for Civil Service* [1985] 1 AC 374 (HL), 410 (Lord Diplock).
[126] *Council of Civil Services Union v Minister for Civil Service* [1985] 1 AC 374 (HL), 411 (Lord Diplock).
[127] CPR 52.20

The usual way to express this point is that appeal allows for a 'substitution of judgment'[128].

While remission versus substitution does mark a difference between review and appeal, we should not exaggerate the point. For one thing, reviewing courts *do* have formal powers of substitution. Under §31 of the Senior Courts Act 1981, if the High Court quashes a decision by a tribunal or other court for an error of law, and there is only one lawful decision open to the lower body, then the High Court may 'substitute its own decision for the decision in question'.[129]

In addition, reviewing courts may effectively substitute their view for a public authority's by issuing a mandatory order. Some mandatory orders leave a public authority with a degree of discretion about how to comply with the order. But others do not. In the latter case, the court's order leaves the authority with no choice what to do.[130]

Fifth, judicial review is, as it sounds like, a *review* of the initial decision. The reviewing court does not decide the issues itself. It merely looks to see whether the public authority erred. What about on appeal? Under CPR 52.21(1), an appeal can take the form of either a review or a rehearing. In an appeal by way of review the court will scrutinise the lower court's judgment and interfere only if it identifies an error.[131] But on a rehearing the appeal court 'will hear the case again'[132]. It will decide 'afresh'[133] what to do.

Although the possibility of a rehearing marks a genuine difference between appeal and review, we need to keep the point

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[128] *General Medical Council v Michalak* [2017] UKSC 71, [20]-[21] (Lord Kerr); *R v Entry Clearance Officer, ex p Amin* [1983] 2 AC 818, 829 (Lord Fraser).

[129] A good example of substitution under §31 is *R (Chief Constable of Northumbria Police) v The Police Appeals Tribunal* [2019] EWHC 3352 (Admin), *[57]*-[58]. The High Court also has a power of substitution in relation to sentences by certain courts under Senior Courts Act 1981, §43.

[130] *R v London Borough of Ealing, ex p Parkinson* (1995) 29 HLR 179 (QB), 18; *R (ClientEarth) v Secretary of State for Environment, Food, and Rural Affairs* [2015] UKSC 28, [31].

[131] AAS Zuckerman, *Zuckerman on Civil Procedure* (4th edn, Sweet & Maxwell 2021) 1275.

[132] *EI Du Pont de Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [96].

[133] *Audergon v La Baguette Ltd* [2002] EWCA Civ 10, [85].

in perspective. The 'general rule' is that an appeal is 'limited to a review'[134]. Exceptions to the general rule arise only when a Practice Direction or the interests of justice demand a rehearing. These conditions are usually met only if an appeal is from a body that did not hold a hearing or consider evidence.[135] Since lower courts hold hearings and consider evidence, it is 'rare'[136] for an appeal from within the court system to be way of rehearing. Also, even in a rehearing, CPR 52.21(3) – the rule that an appeal will be allowed if the lower court's decision is 'wrong' or unjust due to a 'serious procedural or other irregularity' – continues to apply. So, a rehearing is not an invitation to an appeal court to impose its own preferred decision, nor does it mark any difference in the grounds of appeal.

VII. CONCLUSION AND IMPLICATIONS

In this article I have argued for three main claims: (1) Every ground of appeal is also a ground of review. (2) Not every ground of review is also a ground of appeal. (3) It is false that appeal concerns the merits of decisions while review concerns only their legality.

Why are (1)-(3) so often overlooked? It is hard to know for sure, but a possible explanation is that there used to be more to be said for the view that appeal is more extensive than judicial review. Observe two converging trends. One trend is towards greater intrusiveness in judicial review. Review for error of law used to be limited to jurisdictional errors and errors on the face of the record. Today, review is available for essentially all errors of law. Review for error of fact has expanded to include review for unreasonable factual findings and mistakes of fact giving rise

[134] *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 (CA), [30] (Brooke LJ).
[135] AAS Zuckerman, *Zuckerman on Civil Procedure* (4th edn, Sweet & Maxwell 2021) 1289.
[136] *EI Du Pont de Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [96] (May LJ).

to unfairness. There is also greater willingness to interfere with discretionary decisions, partly through a more intense *Wednesbury* standard. New grounds to supervise legitimate expectations, policies, and consultation have been invented.

The other trend is for appeal to become somewhat less intrusive. Appeal courts have been 'repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so'[137]. Something similar is true of appellate interference with exercises of discretion, particularly regarding case management, where the role of an appeal court is now merely to act a 'longstop'[138]. Taking these two trends together, perhaps review and appeal have converged. That would suggest that the common view is best explained as a holdover from an earlier time.

Let me end by mentioning two possible implications of my analysis. Appeals are, as I said, a statutory creation. Now, courts have *said* that they are aware of the danger of creating an appeal mechanism when Parliament has not chosen to create one. For example, Lord Templeman said in *R v Independent Television Commission, ex p TSW Broadcasting Ltd* that '[w]here Parliament has not provided for an appeal from a decision maker the courts must not invent that appeal machinery'[139]. However, if my analysis is correct, and judicial review is in substance an 'appeal machinery', then the courts have not heeded their own warning. They have invented what Parliament refrained from providing. For those who think that judicial review is meant to give effect to legislative intent, the implication is that courts have exceeded their constitutional role.

The other implication is conceptual and explanatory. Lower courts are very different than the type of administrative bodies that are normally subject to judicial review (boards, departments, councils, etc). Lower courts have different expertise than most

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[137] *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [114] (Lewison LJ).
[138] e.g. *Bansal v Cheema* [2001] CP Rep 6 (CA), [27]. See also AAS Zuckerman, *Zuckerman on Civil Procedure* (4th edn, Sweet & Maxwell 2021) 1290-93.
[139] *R v Independent Television Commission, ex p TSW Broadcasting* [1994] 2 LRC 414 (HL), 424 (Lord Templeman); see also *R v Broadcasting Complaints Commission, ex p Granada Television* [1995] 3 EMLR 163 (CA).

administrative bodies. They often exercise non-statutory powers, unlike most administrative bodies. They do not enjoy democratic legitimacy. And yet, if my analysis is correct, the decisions of lower courts and administrative bodies are supervised on almost all the same grounds. That tells us that at least most grounds of review are not best explained by any of the distinctive features of administrative bodies (e.g., democratic legitimacy). Instead, the grounds of review must be explained by reference to features that administrative bodies share with lower courts. I gave some possible examples of these features in section IV (e.g., better access to evidence).