TURNING THE PAGE: AN ANALYTICAL SOLUTION TO THE LAW OF JURISDICTIONAL ERROR

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Abstract

The article discusses problems with the law on error of law and error of fact, particularly the law-fact distinction. It suggests a novel two-stage analytical structure, by which to review jurisdictional error. At the first stage, law and fact are distinguished as analytical categories. At the second stage, frameworks for review of these independent categories are set out.

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1. Introduction

Since the decision in *Anisminic Ltd v Foreign Compensation Commission*[1] (as interpreted by *R v Hull University Visitor, ex p*

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Page[2]), in which the "arbitrary and uncertain"[3] distinction between jurisdictional and non-jurisdictional errors of law was abolished, the courts have struggled to conceptualise jurisdictional error as a ground of review. There has been a disfigurement of the distinction between law and fact, with these heads functioning as instrumentally manipulated, ex-post facto labels indicating little more than the desirability of court intervention[4]. This area of judicial review is burdened by inconsistent and unclear decisions. Review on grounds of jurisdictional error has been avoided both through exploitation of a porous law-fact division[5] and through reliance on the uniqueness of certain facts[6]. However, it is unclear when and why these escape routes from the position under *Page* are available. Similarly, in respect of error of fact, the decision in *E v Secretary of State for the Home Department*[7] may have set the groundwork for a sensible and consistent analysis, but the scope of application of this decision is unclear[8].

Despite jurisdictional error being a ground of review, which derives from the central tenants of our constitution, the position arrived at under *Page* lacks constitutional justification. *Page* conceives of the courts as the only bodies able to supply the clarity and consistency demanded by the rule of law; however, in an expanded administrative and judicial system, other decision-makers are necessary to share the task of promoting these rule of law values. This has been acknowledged by the Supreme Court in respect of the Upper Tribunal[9], and other decision-makers[10], and was one motivating factor in establishing a unified tribunal system

[1] [1969] 2 AC 147 (HL).
[2] [1993] AC 682 (HL).
[3] P. Craig, *Administrative Law*, 8th ed. (2016).
[4] See P. Daly, *Deference on Questions of Law*, 74 Mod. L. Rev. 694 (2011); R. Williams, *When is an Error not an Error? Reform of Jurisdictional Review of Error of Law and Fact*, P.L. 793 (2007).
[5] *Jones v First-tier Tribunal*, [2013] UKSC 19, [2013] 2 AC 48.
[6] *R v Monopolies and Mergers Commission, ex p South Yorkshire Transport*, [1993] 1 WLR 23; *Page*, cit. at 2.
[7] [2004] EWCA Civ. 49, [2004] QB 1044.
[8] See Williams, *When is an Error not an Error?*, cit. at 4.
[9] *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 41.
[10] *Jones*, cit. at 5, at [47].

under the Tribunals, Courts and Enforcement Act 2007[11]. Tribunals should be considered as a judicial, rather than administrative, mechanism: they are administered and funded by the Ministry of Justice, in a system combined with the courts. The apex body in this system (the Upper Tribunal) is almost entirely composed of High Court judges[12] and exercises a jurisdiction equivalent to that of the High Court in judicial review. The separation of powers' focus on preventing tyranny is harmed if tribunals are denied a role in answering questions of law, and a monopoly power is reserved for the courts. Other decision-makers – for example, immigration officers and local authorities – are not judicial bodies, and as such, should not be able to conclusively determine questions of law, which may expand their powers beyond the scope delegated by Parliament. In drawing a distinction between different excesses of jurisdiction, as was done by Laws LJ in *Cart*[13], the separation of powers demands review in certain situations but not in others, contrary to the position under *Page*. Where a decision-maker ventures into territory that they are not entitled to – for example, if a local authority with jurisdiction over cases in Edinburgh tries to determine cases in Cambridge – the courts will always intervene to correct the ultra vires action. By contrast, where a decision-maker acts within their authorised field, but misunderstands the meaning of the statute – for example, if the Mergers Commission, in reaching the *South Yorkshire* decision, had interpreted 'substantial' in section 64 of the Fair Trading Act 1973 to mean only 'more than de minimis' – review is not always appropriate. It may be a disproportionate use of court resources, or the tribunal may be more expert than the courts in interpreting the law in this area. Parliamentary sovereignty is the constitutional principle most apparently harmed by the position under *Page*, reflecting an unrealistic understanding of Parliament's sovereign will where the courts are uniformly best-placed to understand the considerations and implications of the statute's interpretation. Practical justifications in support of tribunal interpretation – the endowed expertise and

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[11] Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals* (2004).

[12] *R (on the application of Cart)*, cit. at 9, at [22], [25].

[13] *R (on the application of Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), [2010] 2 WLR 1012 78.

efficiency, which allows tribunals to better understand and serve common law principles and Parliament's intended policies – are an implicit consideration in parliamentary intention[14]. Where Parliament has granted greater capabilities and accountabilities to a tribunal, Parliament intends for this tribunal to have a greater role in conclusively determining the law. Under *Page*, the law-fact distinction is a tool manipulated by judges to undercut parliamentary intent and seize powers destined for decision-makers.

The law under *Page* can be seen as a reaction to the perceived need for increased judicial review over an expanded administrative State[15]. However, the courts' desperate attempts to escape the resulting absolute position through exceptions and manipulation of the law-fact distinction demonstrate the need to develop an approach reflective of the judicialization and increased expertise and efficiency of decision-makers. A rigorous analytical framework, which explains what questions of law and fact are – independent of considerations of competence, efficiency etc. – and sets out analyses to determine the appropriateness of judicial intervention under these different heads can be a powerful defence against judges masking substantive reasoning and baldly carving their way around a law-fact distinction in order to reach their desired conclusions. A formalistic approach supplies clarity, certainty, and a buttress to the rule of law[16] – values harmed by unstructured and disguised judgments which appeal to undefined concepts such as "expediency"[17]. Therefore, I propose a two-stage analytical solution to replace the existing, unsatisfactory approach to the law of jurisdictional error. At the first stage, the law-fact distinction is given independent value. Standing analytical distinctions in the area of jurisdictional error – whether this be Australia's distinction between jurisdictional and non-

[14] P. Daly, *Deference on Questions of Law*, cit. at 4.

[15] P. Murray, *Escaping the Wilderness:* R. v Bolton *and Judicial Review for Error of Law*, 75 Cambridge L.J. 333 (2016).

[16] C. Forsyth, *Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law*, 66 Cambridge L.J. 325 (2007); T. Endicott, *Questions of Law*, 114 Law Q. Rev. 292 (1998).

[17] *Jones*, cit. at 5, at [47].

jurisdictional errors of law[18], the English law-fact divide, or the EU's law/fact/discretion triad[19] – are formally decisive, but in practice they have no stand-alone impact on the courts' determinations, which are instead propelled by subterranean pragmatic reasoning. The encompassing nature of 'law' (understood as statutory interpretation) is recognised: the elucidation of the words of the statute, driven by common law principles of interpretation and policies underpinning the statute, arriving at an understanding which is of direct applicability to the facts in question. Separate from law, a decidedly narrow category of 'fact' can be distinguished: issues of primary fact-finding, misunderstandings of evidence, and failures to consider evidence. These three situations of 'fact' are unique in their objectively and independently verifiable nature.

Adopting these distinct meanings for 'law' and 'fact' (albeit one being particularly broad; the other particularly narrow), the law-fact distinction becomes analytically valuable and allows these normatively distinct categories to be properly and independently addressed. At the second stage, analyses for the appropriateness of judicial intervention in errors of law and fact are set out, reasoned on the basis of substantive considerations, which have thus far been hidden behind labels of 'jurisdictional'/'non-jurisdictional' and 'law'/'fact'. I propose two routes of challenge to address errors of law. Route One is a correctness challenge to the decision-maker's interpretation at a level of abstraction, where the courts are more expert than the decision-maker in interpreting the statute. Route Two is reasonableness review of the decision-maker's interpretation at a level of detail, where the decision-maker is more expert than the courts. Errors of fact are addressed separately, and with a correctness standard.

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[18] J. Boughey, L.B. Crawford, *Reconsidering* R (on the application of Cart) v Upper Tribunal *and the Rationale for Jurisdictional Error*, P.L. 592 (2017).
[19] P. Craig, *Judicial review of questions of law: a comparative perspective*, in S. Rose-Ackerman, P.L. Lindseth & B. Emerson (eds.), *Comparative Administrative Law*, 2nd ed. (2017), 389.

2. Stage One: A Meaningful Law-Fact Distinction

In order to give independent utility to labels of 'law' and 'fact' – such that they can move beyond representing a conclusion reached as to the appropriateness of review – 'law' should take on a clear and distinct, albeit broad, meaning. 'Law' is the exercise of making sense of statutory wording, through application of common law principles of interpretation and consideration of the statute's policy. This process concludes with an understanding of statute that is of direct application to the present factual scenario. It cannot be separated out, for example, into 'law' and 'application of the law'. What can be distinguished is a narrow category of 'fact', which should be limited to matters of primary fact-finding, misunderstandings of evidence, and failures to account for evidence.

2.1. Law

Interpretation of statute is the search for the proper understanding of Parliament's words allowed by common law principles of interpretation. The raw materials for this process are the words of statute, which can only rarely be applied without interpretation (for example, an absolute ban on people leaving or entering the country during a health pandemic), and the finished product is custom-built for the facts at hand. For the purposes of my analysis, the interpretation process is divided into two. At the first stage, interpretation is conducted at a level of abstraction, where the courts are more expert than the tribunal; at the second stage, interpretation reaches a level of detail, where the tribunal becomes best-placed to develop the understanding of statute. The crossover between first and second stages happens at a point particular to the statute in question, and the comparative expertise of the tribunal. This divide is a key to promoting the proper understanding of statute: when the body most expert in interpretation gives their understanding, this should be taken to be the statute's inevitable meaning as determined by common law principles of interpretation.

Lord Mustill in *South Yorkshire* seems to suggest a separation between statutory interpretation, and application of this interpretation to the factual scenario: 'substantial' was interpreted to mean "of such size, character and importance as to make it worth consideration for the purposes of the Act";

however, this criterion "may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case"[20]. This should be seen not as a variation in kind, but one of degree. To suggest that the legal meaning of a term can be isolated from its application overlooks the pragmatic nature of statutory draftsmanship[21]. A generalist law cannot set out the consequences to follow in every possible factual scenario; the meaning of statute must be elucidated in greater detail until it can be applied to the present factual situation. A general understanding of 'substantial' is informed by common law principles of interpretation – statutory wording of "part of the UK"[22] conveyed Parliament's intention for the area's size, rather than its market share, to be central to the understanding of 'substantial'. Any further engagement with the statutory term is a continuation of this understanding, still driven by common law principles and the policy of the statute, but engaging with the statute at a greater depth. Contrary to the court's suggestion in *South Yorkshire* (Lord Mustill talks of a "range of possible criteria from which it was difficult to choose and on which opinions might legitimately differ" and a "meaning broad enough to call for the exercise of judgment")[23] it is not helpful to understand statutory interpretation as involving a choice. Interpretation is permissive of only one answer: it is the carving of the statutory veined block of marble with the tools provided by common law principle, the statute's policy, and background considerations, in order to reach the appropriate meaning.

In administering a statutory scheme, a statute's understanding must be developed to such a depth as to straightforwardly fit the primary facts; an interpretation tailored to the facts entails further refinement of the general statutory definition[24]. A decision that the region of South Yorkshire is a 'substantial part' of the UK within the meaning of section 64(3) of the Fair Trading Act 1973, is a demonstration of the meaning of

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[20] *South Yorkshire*, cit. at 6, at [32].
[21] Williams, *When is an Error not an Error?*, cit. at 4.
[22] Section 64, Fair Trading Act 1973 (as enacted).
[23] *South Yorkshire*, cit. at 6, at [32].
[24] T.R.S. Allan, *Doctrine and Theory in Administrative Law: an Elusive Quest for the Limits of Jurisdiction*, P.L. 429 (2003).

the statute. Engaging with the statute – by developing higher-level guidance (for example, that the area must be of worthy size, character and importance), applying common law principles, and reaching a conclusion on the facts – clarifies its meaning. If interpretation at greater levels of detail is instead viewed as isolated fact-specific determinations, law disintegrates into a wilderness of single instances. The Housing Act 1996 cases of *Poshteh v Kensington and Chelsea Royal London Borough Council*[25] (in which accommodation that reminded the applicant of her imprisonment in Iran, from which she suffered post-traumatic stress disorder, was 'suitable' for purposes of the act) and *El-Dinnaoui v Westminster City Council*[26] (in which accommodation on the 16th floor was not 'suitable' for an applicant with a fear of heights) appear to be incompatible decisions. This is not so: the cases uphold and inform the same understanding of the Housing Act, in the context of their particular facts, such as the significant shortage of housing in Poshteh's area, Poshteh's inaccurate recollection of the accommodation's features, and El-Dennaoui fainting during her visit. Interpretation of the statute at the fact-centric level should be viewed not as isolated understandings, but as individual brush strokes on a canvas, which colour the interpretation of statute.

2.2. Fact

I use 'fact' to describe only primary facts, misunderstandings of evidence, and failings to take account of evidence. An exercise of primary fact-finding can be seen in *South Yorkshire*, where the Secretary of State delineated the reference area in question: "the county of South Yorkshire, the districts of Bolsover, Chesterfield, Derbyshire Dales…"[27]. Craig has identified examples of the other varieties I seek to classify as 'fact'[28]. *R (on the application of Haile) v Immigration Appeal Tribunal*[29] involved a misunderstanding of evidence: the special adjudicator had confused the relevance of evidence to one body with another

[25] [2017] UKSC 36, [2017] AC 624.
[26] [2013] EWCA Civ 231, [2013] HLR 23.
[27] *South Yorkshire*, cit. at 6, at [26].
[28] P. Craig, *Judicial review, appeal and factual error*, P.L. 788 (2004).
[29] [2001] EWCA Civ 663, [2002] INLR 283.

body. *R v Criminal Injuries Compensation Board, ex p A*[30] addressed a failure to take account of evidence: a doctor's report on the victim, which supported allegations of sexual assault, was ignored by the Board.

More evaluative fact-finding such as assumptions, deductions, inferences and assessments of risk, are excluded from this category. These 'secondary facts'[31] are not factual determinations in the same sense; instead, they are a necessary and inseparable part of the interpretation process. In *Khawaja v Secretary of State for the Home Department*[32], at issue was whether the applicant was an 'illegal entrant' within the meaning of section 33(1) of the Immigration Act 1971. The court interpreted this to cover persons who had obtained leave to enter by practising fraud or deception. It was for the tribunal to develop this interpretation and determine whether the primary facts – Khawaja's non-disclosure of his previous unsuccessful application attempts, and his marriage to a UK national in Brussels – meant that the applicant was an 'illegal entrant'. The distance between the court's interpretation and the primary facts was bridged through development of the statutory interpretation in view of the facts: did Khawaja's acts amount to 'deception'?

The court in *R(A) v Croydon London Borough Council*[33] demonstrated an ability to distinguish objectively ascertainable facts from secondary facts (which I posit make up part of the interpretation process). Baroness Hale said section 20 of the Children Act 1989 "draws a clear and sensible distinction between different kinds of question". On the one hand, "the question whether a child is 'in need' requires a number of different value judgements"; on the other hand, "the question whether a person is a 'child' is a different kind of question. There is a right or wrong answer"[34]. Crucial to the objective nature of the second question was Parliament's deliberate step away from an evaluative definition: 'child' was defined by section 105(1) as 'a person under the age of 18'. Whilst there may be evidential difficulties in

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[30] [1999] 2 AC 330 (HL).
[31] J. Beatson, *The Scope of Judicial Review for Error of Law*, 4 Oxf. J. Leg. Stud. 22 (1984).
[32] [1984] AC 74 (HL).
[33] [2009] UKSC 8, [2009] 1 WLR 2557.
[34] *R(A)*, cit. at 33, at [26], [27].

answering this question, the primary facts will objectively meet or fall short of this statutory requirement[35]. By contrast, determining whether the child is "in need" entails confronting difficult questions that inform the proper interpretation of the statute:

> "What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it?"[36]

This evaluative element settles the question firmly within the category of 'law'. 'Fact' is therefore distinguished on the basis of its objective verifiability: either the primary fact existed, or it did not; either the decision-maker erred in his treatment of evidence, or he did not. To maintain a distinction with 'law', 'objective verifiability' must be understood narrowly, because there is no way to properly distinguish assessments involving "a minute degree of discretion in the definition of a particular condition from situations in which the degree of discretion is much greater"[37].

3. Stage Two: Standards of Review

'Law' covers the vast plane of statutory interpretation, which journeys from abstract to fact-centric understanding. Since different implications and considerations arise at different points of this process, I propose two routes, by which the courts can review the decision-maker's statutory interpretation on grounds of jurisdictional error. Route One is available for interpretation at a level, where the tribunal is less expert than the courts. The courts' expertise allows them to identify errors in interpretation, and provide a proper understanding of statute. However, judicial intervention must be tempered, because where disproportionate court resources are allocated to addressing errors of law at this level of interpretation, injustices can result. Route Two is available for the tribunal's interpretation at a point, where they have

[35] *R(A)*, cit. at 33, at [51].
[36] *R(A)*, cit. at 33, at [26].
[37] R. Williams, *When is an Error not an Error?*, cit. at 4, 802.

expertise superior to the courts. The tribunal should generally be trusted to have used their expertise to deliver the proper interpretation of statute; however, the courts can assess whether the understanding reached by the tribunal is an unreasonable one, in order to ensure that the tribunal has properly utilized their greater expertise in interpretation. Separate to this analysis of law are errors of facts, the objective verifiability of which justifies judicial intervention to a correctness standard, irrespective of the courts' expertise.

3.1. Law

The route pursued in review of an error of law depends on which part of the interpretation process is challenged. In most cases, a threshold exists – the location of which is specific to the tribunal and statute in question – where the tribunal's expertise comes to outweigh the courts'. When first engaging with the words of the statute, the courts are likely to be the expert body. Interpretation at this stage typically manifests as a generally applicable test, with factors and scope set out. As a more detailed and intricate understanding is demanded, the tribunal will become the most expert interpreter. Decision-makers are able to utilise their familiarity with the area and available lay expertise, to develop the interpretation to give a nuanced understanding of the law on the particular facts.

The courts recognise the limits of their expertise and the strength of tribunal expertise. In *South Yorkshire*, the House of Lords interpreted 'substantial' to mean "of such size, character and importance as to make it worth consideration for the purposes of the Act"[38]. however, further interpretation of the term was left to the Monopolies and Mergers Commission. In the absence of a detailed knowledge of the technical and complex area of regulation, the court were reluctant to fetter the Commission's ability to develop a proper understanding of the statute and "substitute non-statutory words for the words of the Act which the commission is obliged to apply"[39]. The tribunal may be of superior expertise throughout the process of interpretation, as in

[38] *South Yorkshire*, cit. at 6, at [32].
[39] *South Yorkshire*, cit. at 6, at [31].

Puhlhofer v Hillingdon London Borough Council[40], where the meaning of 'accommodation' in section 1(1) of the Housing (Homeless Persons) Act 1977 was at issue – an unqualified, non-legal term in an Act that "[abounded] with the formula when, or if the housing authority are satisfied as to this, or that, or have reason to believe this, or that"[41]. By giving considerable scope for the housing authority to act, there is a parliamentary intent for interpretation of this statute to be a matter for tribunal expertise. Carrying out the policy of the statute – to assist, but not necessarily house, the homeless[42] – required allocation of limited resources between competing needs of the homeless and others on the waiting list, with "due regard for all their other housing problems"[43] – a political judgement that should be deferred to administrative managerial expertise. Therefore, interpretation of the term was left to the local authority. At the other end, the interpretation of provisions such as ouster clauses – implicating judicial creations such as the common law presumption against ouster as well as expertise in constitutional principles, and where specialist technical knowledge is of less value – are best left to the courts.

The crossover of expertise in interpretation can be used to divide 'law' into two stages. The exact point of crossover is largely irrelevant because interpretation is only vocalised in discrete forms – such as a base understanding, higher-level guidance, the identification of specific elements, an understanding particular to the facts –which apparently fall either side of the divide. Route One is available to challenge the tribunal's interpretation on grounds of jurisdictional error where the courts' familiarity with the common law and higher-level interpretation places them in a position of greater expertise in interpretation than decision-makers. Route One is a correctness review, and its availability is determined by what Elliott and Thomas[44] have called 'proportionate dispute resolution' (PDR). PDR calls for proportionality between the cost of resolving an issue, and the benefit of doing so; however, I make sense of the concept through

[40] [1986] AC 484 (HL).
[41] *Puhlhofer*, cit. at 40, at [518].
[42] *Puhlhofer*, cit. at 40, at [517].
[43] *Puhlhofer*, cit. at 40, at [518].
[44] M. Elliott, R. Thomas, *Tribunal Justice and Proportionate Dispute Resolution*, 71 Cambridge L.J. 297 (2012).

interplay of considerations of expertise, efficiency, and parliamentary intent. Route Two is a reasonable review available to challenge the tribunal's more detailed, fact-centric interpretation. At this level of interpretation, the courts' expertise in guiding the common law pales in significance when compared to the tribunal's expertise – derived from exposure, and the input of lay expertise – in the vast and technical area of law at issue, which allows the tribunal to address nuances and deliver the statute's policy on the particular facts. The appropriateness of review via either of these routes will be analysed on the basis of three considerations: expertise, efficiency and parliamentary intent. In Route One these considerations must be counterbalanced to produce a proportionate result. In Route Two, expertise, efficiency and parliamentary intent all point in favour of the tribunal's determination, such that the more deferential standard in reasonableness review operates. The courts should only intervene through Route Two when something has clearly gone wrong in the interpretation process – i.e. when the tribunal has reached an unreasonable understanding – with the intensity of reasonableness review reflecting the importance of the interests at stake.

3.1.1 Route One: Proportionate Dispute Resolution

PDR is encapsulated by Lord Dyson's statement in *Cart*: "the scope of judicial review should be no more…than is proportionate and necessary for the maintaining of the rule of law"[45]. Although intervention is needed to ensure that decisions are taken in accordance with the law,

> "the rule of law is weakened…if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on threshing floor full of chaff"[46].

In addressing a challenge to the Upper Tribunal's refusal of application to appeal, the Supreme Court had to balance the need to minimise errors and provide independent scrutiny, against the strength of the enhanced TCEA system and the limitations of

[45] *South Yorkshire*, cit. at 6, at [100].
[46] *South Yorkshire*, cit. at 6, at [122].

strained judicial resources. The "particular statutory context and the inferred intention of the legislature" was also central[47].

It is this trade-off between competing considerations which lies central to PDR. The interplay between three factors – expertise, efficiency and parliamentary intent – will be used to determine the appropriateness of correctness review of questions of law at a level, where the court are more expert interpreters than the tribunal. Expertise favours court intervention, but this must be balanced against the efficiency offered by tribunals and countervailing parliamentary intent.

3.1.1.1. Expertise

The courts' long history in developing and applying common law principles of interpretation puts them in a position of superior expertise with respect to higher-level interpretation of statute. In some areas, for example human rights, the courts have taken a special interest and should be considered to have a particular expertise. The statutory appeal criteria adopted in *Cart* – which allowed judicial review when (a) an important point of principle or practice was raised, or (b) there was some other compelling reason – speaks on these hotspots of judicial prowess. Branch (a) appeals to the courts' expertise in overseeing and maintaining a functioning and coherent general law[48]. Branch (b) concerns situations, where extreme consequences result for the individual[49], which speaks on the courts' expertise in protecting fundamental rights and interests of individuals as reflected, for example, in their powers under the Human Rights Act 1998. Nonetheless, the disparity in expertise between courts and increasingly impressive tribunals should not be overstated. As such, tribunal expertise should be used to shape the law in these specialist areas to a greater extent than is permitted under *Page*; judicial review of errors of law at this level of interpretation is not always justified.

Decision-makers can access legal and non-legal expertise to facilitate an interpretation, which best serves the statute's policy objectives. Tribunal panels are composed of specialised judges,

[47] *South Yorkshire*, cit. at 6, at [130].
[48] *South Yorkshire*, cit. at 6, at [43], [57], [128].
[49] *South Yorkshire*, cit. at 6, at [57].

supported by non-legal experts; local authorities are composed of specialist teams, informed by expert guidance; government ministers are supported by special advisers and civil service departments. By contrast, generalist courts lack an all-star cast and are limited to witness reports for the input of non-legal expertise. Decision-makers also develop expertise from familiarity with the breadth of complex and technical law that tribunals regulate – "to fully comprehend such great volumes of law and the regulatory creatures who inhabit these silos requires concentration of almost Herculean qualities"[50]. Tribunals administer a huge diversity of heavily regulated and technical areas such as tax, charity, and immigration. Their familiarity with these specialised fields, the nuances of factual scenarios and the practical implications of statutory interpretation means that intervention by the administrative courts in these corpuses of coherent jurisprudence may harm the law's development and flexibility[51].

In *Page*, the distinction drawn between generally-applicable law and "a peculiar or domestic law of which the visitor is the sole judge"[52] was used by the court to justify their refusal to correct the visitor's interpretation. Despite the differences in regulating public and private spheres, this can be viewed as an acknowledgment of the strength of tribunal specialism. Where the courts fail to value expertise by exposure, there is a risk that the law is left in poor repair. In *Kostal UK Ltd v Dunkley*, the Employment Appeal Tribunal (EAT), interpreting section 145B of the Trade Union and Labour Relations (Consolidation) Act 1992 – which gives workers the right not to have an offer made to them by their employers for the purposes of forgoing collective bargaining – decided that the provision applied to an increased pay and bonus offer, and therefore the offer should not have been made by the employer[53]. The Court of Appeal rejected this conclusion, interpreting section 145B to be of no application, where a worker is merely forgoing a collectively bargained term, rather than forgoing the right to have these terms determined by collective bargaining in the future[54]. This means that fundamental terms are not protected, and

[50] P. Daly, *Deference on Questions of Law*, cit. at 4, 707.
[51] P. Daly, *Deference on Questions of Law*, cit. at 4, 707.
[52] *Page*, cit. at 2, 700.
[53] [2018] ICR 768 (EAT).
[54] [2019] EWCA Civ. 1009, [2020] ICR 217.

employers can bypass statutory protections by addressing terms individually. The decision turned on a policy assessment of Parliament's intention[55], but the court failed to account for the realities of industrial practice – this is explained by the court's comparatively inferior expertise. At EAT level, the case was decided by Simler J: specialist employment counsel during her time at the bar. In comparison Bean, King and Singh LJJ – the Court of Appeal judges – had less extensive expertise in this area, with only Singh LJ having practiced in employment law (alongside human rights work).

It appears "anomalous"[56] for High Court judges to be less well-equipped to answer legal questions than tribunal judges, as Lord Carnwath acknowledged to be the case with the Investigatory Powers Tribunal (IPT) and Upper Tribunal. However, in assessing the comparative expertise of court and tribunal, the potential for onward transmission once claims are "channelled into the legal system"[57] must be accounted for. A tribunal judge is of no match for a five-person Supreme Court panel in answering questions of law, but at higher appellate levels the courts can only play an increasingly limited role and efficiency becomes a more prominent consideration in determining the appropriateness of review.

3.1.1.2. Efficiency

An ineffective court-tribunal relationship, whereby all errors of law are subject to correctness review, has resulted in the time-consuming, procedurally-laborious, formal and expensive court route becoming a systematic fetter on administrative decision-making. The great majority of immigration and asylum claims – which make up two-thirds of total applications for permission for judicial review – are unsuccessful[58], but applicants acting to avoid or delay drastic consequences of detention and deportation, even when faced with only dim prospects of success,

[55] IDS, *Employer's one-off direct pay offer to employees not unlawful inducement*, IDS Emp. L. Br. 11.

[56] *R (on the application of Privacy international) v Investigatory Powers Tribunal* [2019] UKSC 22, [2019] 2 WLR 1219 [140].

[57] *R (on the application of Cart) v Upper Tribunal* [2010] EWCA Civ 859, [2011] QB 120 [30].

[58] *South Yorkshire*, cit. at 6, at [117].

have "overwhelmed" the administrative courts with a repetitive, burdensome caseload[59]. A proportionate approach is needed to ensure that scarce judicial resources are used most effectively to deliver justice; unmeritorious claims should not be able to clog the system, even where important interests are at stake[60].

Decision-makers derive efficiency from their generally informal, accessible and inquisitorial approach, which reduces the impact of practical barriers, such as legal representation and financial and temporal burdens. Tribunal expertise also facilitates their ability to quickly deliver substantial justice. Whilst efficiency is a trade off with rigour (for example, cross-examination helps to address evidence but is largely unique to the court process), appellate bodies in tribunal ecosystems can provide authoritative guidance and some self-sufficiency in correcting legal errors[61]. Ultimately, Baroness Hale's appeal to practical limitations must inform our approach: "there must be a limit to the resources which the legal system can devote to the task of trying to get the decision right in an individual case"[62].

3.1.1.3. Parliamentary intention

Parliamentary intention is inextricably linked to the practical justifications of efficiency and expertise[63], but it can take on a more central role in a PDR analysis. For example, in *Cart* the Supreme Court adopted second-tier appeal criteria for judicial review of the Upper Tribunal, as found in section 13(6) of the TCEA, because as well as reflecting the Upper Tribunal's expertise and efficiency, this indicated "the circumstances in which Parliament considered that questions of law should be…channelled into the legal system"[64]. Open-textured, non-legal statutory language – such as 'substantial' in section 64 Fair Trading Act 1973 – reflects a parliamentary intention to delegate the responsibility of creative development of the law[65], best achieved by expert decision-makers. Similarly, the absence of

[59] *South Yorkshire*, cit. at 6, at [47].
[60] *South Yorkshire*, cit. at 6, at [51].
[61] *South Yorkshire*, cit. at 6, at [42].
[62] *South Yorkshire*, cit. at 6, at [41].
[63] Daly, *Deference on Questions of Law*, cit. at 4.
[64] *R (on the application of Cart)*, cit. at 9, at [52].
[65] P.S. Atiyah, *Common Law and Statute Law*, 48 Mod. L. Rev. 1 (1985).

parliamentary intervention in the long-standing common law relating to the treatment of university visitors demonstrated an intent for decisions of visitors to be respected by the courts.

In a PDR analysis, these considerations of expertise, efficiency and parliamentary intent are traded off against one another to determine the appropriateness of judicial review via Route One. At this stage of interpretation, the courts have superior expertise; but the lesser the disparity in expertise, the greater the efficiency and corresponding burden on the courts, and the clearer the parliamentary intent favouring the tribunal, the less interventionist the courts should be. We should be more willing to allow questions of law to find finality through the quick, efficient procedure of an expert tribunal than *Page* currently allows; how willing depends on the particular balance struck on the facts. *Cart* saw a powerful demonstration of a PDR analysis, but its reasoning has been criticised by Wade and Forsyth as pragmatic but not principled, due to the courts' "abandonment of jurisdiction as the organising principle of administrative law"[66]. In a similar vein, Boughey and Crawford have argued that *Cart* looks to balance the rule of law and efficiency, rather than focusing on what Parliament has authorised the tribunal to do. Such criticism is misplaced, because error of law and jurisdiction have been vehicles for judicial manipulation, rather than organising principles in our system[67]. The rule of law, our constrained court system, parliamentary intent and the growing expertise and efficiency of tribunal demand a proportionate approach. In a PDR analysis, the composite factors of expertise, efficiency and parliamentary intent are articulated in a balancing exercise; however, these same factors have long been present in the case law as the courts have tussled with the absolutism of *Page*. In *Page* itself, expertise, parliamentary intent, and considerations of efficiency (speed, cost and finality) were used to justify the conclusion reached[68]. By refusing to pin a "spurious degree of precision" on an "inherently imprecise word"[69], the court in *South Yorkshire* appealed to parliamentary intent and implicitly recognised the expertise of the tribunal. In *Moyna and Lawson v*

[66] H.W.R. Wade, C. Forsyth, *Administrative Law*, 11th ed. (2014), 222-223.
[67] J. Beatson, *The Scope of Judicial Review for Error of Law*, cit. at 31.
[68] *Page*, cit. at 2, 704.
[69] *South Yorkshire*, cit. at 6, at [29].

Serco Ltd[70] the courts spoke of "desirability" and "expediency"– umbrella terms composed of considerations such as the utility of an appeal, relative competence of tribunal and court, and utilisation of expertise to shape law and practice in a specialist field[71].

The Supreme Court in *Eba v Advocate General for Scotland*[72], suggested that all tribunals should be subject to the criteria used to determine the appropriateness of review of the Upper Tribunals' decisions on grounds of jurisdictional error. There was a "harmony"[73] between the appeal criteria – adopted from Rule 41.59 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 – and the common law position of judicial restraint against reviewing tribunal decisions. Uniformity of standards was also preferred in *Cart* across the Upper Tribunal chambers, reflecting a strong parliamentary intent embodied in the section 13(6) TCEA appeal criteria (which also aligns with the practice of judicial restraint in considering tribunal decisions)[74]. However, to roll-out the specific criteria reached in *Cart* to all tribunals would defeat the utility of PDR to reach tailored, proportionate resolutions. Beyond the TCEA, there is a strong diversity of decision-makers, differing in subject matter, composition, expertise, appellate tier structure, procedure and available remedies.

The Supreme Court engaged with considerations of expertise, efficiency and parliamentary intent in respect of the IPT in their analysis of an ouster clause in *Privacy International*. The IPT's efficient procedural capabilities failed to impress Lord Carnwath, because the High Court could also protect sensitive information[75], as did the tribunal's specialist expertise because the tribunal's determinations touched upon the general law of the land, in areas where the courts are expert (such as human rights and tort law)[76]. However, the IPT's special status, deriving from parliamentary intent reflected in, for example, the body's

[70] [2006] UKHL 3, [2006] 1 All ER 823.
[71] R. Carnwath, *Tribunal Justice – A New Start*, P.L. 48 (2009), cited in *Jones*, cit. at 5, at [46].
[72] [2011] UKSC 29, [2012] 1 AC 710.
[73] *Eba*, cit. at 72, at [51].
[74] *R (on the application of Cart)*, cit. at 9, at [49].
[75] *R (on the application of Privacy international)*, cit. at 56, at [112].
[76] *R (on the application of Privacy international)*, cit. at 56, at [14].

exclusion from obligations under the Freedom of Information Act, warranted the restriction of judicial review[77]. A PDR analysis to determine the appropriateness of review via Route One of the IPT would require this strong parliamentary intent to be balanced against the weaker arguments of expertise and efficiency. To take another example, the Employment Appeal Tribunal has an efficient procedure, and is marked out by Parliament as a superior court of record (section 20 of the Employment Tribunals Act 1996); but its expertise may be seriously weakened by the possibility of hearings being conducted by a lone judge (Courts and Tribunals Judiciary, 2018), without the support of non-legal experts.

In summary, PDR is the methodology behind a Route One claim, available for review of interpretation of statute formulated at a level, where the courts are more expert than the tribunal. It addresses the absoluteness of *Page* by balancing considerations of expertise, efficiency, and parliamentary intent to reach a proportionate conclusion as to the availability of correctness review of errors of law on grounds of jurisdictional error. The growing expertise, efficiency and parliamentary intent behind tribunal action should be balanced on their merits: the interaction of these considerations will be markedly different in relation to a tribunal headed by a High Court judge compared to a government minister; but PDR is an adaptable framework, able to address both of these decision-makers.

3.1.2. Route Two: Reasonableness Review

I propose a second route to review on grounds of error of law in the form of reasonableness review, available in respect of interpretation operating at a level, where the tribunal is more expert than the courts. The courts' comparatively inferior expertise in interpretation at this stage means that they should take a merely supervisory role in ensuring that the tribunal has utilised their specialist expertise to reach a proper understanding of statute. This reasonableness review would operate as a check on tribunal procedure, not as a means to supplant tribunal interpretation in favour of the courts' formulation. It is a standard justified by the same trident of considerations determinative in Route One's PDR analysis – expertise, efficiency, and

[77] *R (on the application of Privacy international)*, cit. at 56, at [126].

parliamentary intent. Route Two addresses interpretation at its latter stages, where these factors are not counterbalanced or traded-off against one another; they align in unilateral support of tribunal determinations.

3.1.2.1. Expertise

More so than at the earlier stages of interpretation, a practical understanding of the specialised area at hand, in all its nuance and complexity, is required to interpret statute in greater depth and deliver its policies on the particular facts. Although the courts are able to address the difficult questions raised by interpretation of statute at this level of detail (as highlighted by Hale in *R(A)*[78]), lay participation in the decision-making process – something largely absent in the courts – is crucial to delivering a proper application of statute. Non-legal expertise is of manifold value. Lay experts – such as trade union officials on employment panels, and permanent local authority staff, who process hundreds of housing applications each year – represent the community values of the people affected. They supply wider expertise and socio-political perspectives, facilitative of more effective decision-making and responsiveness to the context of the case[79]. Who should be trusted to interpret, at such depth, immigration legislation designed to:

> "produce a logical and just system for admitting those numbers and categories of long-term and short-term applicants for entry who can be absorbed without disastrous economic, administrative or social consequences"?[80]

Even where external expertise is unavailable (as is the reality of publicly-funded bodies), familiarity achievable only through specialisation means that there is a clear disparity between the ability of tribunals and courts to answer questions of law at this level.

[78] *R(A)*, cit. at 33, at [26].
[79] S. Turenne, *Fair Reflection of Society in Judicial Systems - A Comparative Study* (2015).
[80] *Khawaja*, cit. at 32, at [126].

3.1.2.2 Efficiency

Tribunals are informal, quick and accessible bodies born of the volume and diversity of cases, which pass through the judicial system and which cannot be adequately addressed with the scarce resources and cumbersome processes of the courts. The courts have not the time, resources, nor expertise to manage the full breadth of individual circumstances and unforeseen situations, which arise in the administration of a statutory scheme. Their ability to give binding guidance that speaks directly to all subsequent cases under the legislation is constrained to means of abstract interpretation (which would fall under Route One). Interpretation at a more detailed level, which engages with the facts, will elucidate the general understanding of the statute, but may be of limited direct value to other factual scenarios. Therefore, efficiency requires that decision-makers carry out the legwork in interpreting statute at this stage, in order to properly address the particular facts.

3.1.2.3. Parliamentary intention

The third prong in the trident, which strikes in support of reasonableness review in Route Two is parliamentary intent. Parliamentary intent is facilitative of the substantive expertise and efficient operation of tribunals; but as noted in relation to Route One, it can also have independent value. For example, the courts' relinquishment of their ability to answer questions implicit in the process of reaching a detailed interpretation in *R(A)* can be explained on the basis of parliamentary intent. The court was not comfortable in determining which service the local authority should provide because it was "entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority"[81].

These three considerations – expertise, efficiency and parliamentary intent – support the conclusion that questions of law at this more detailed, fact-centric level should be left to the determination of decision-makers. Tribunals reach more effective decisions more efficiently; judicial review is therefore only useful as a backstop, where interpretation has clearly gone wrong. Reasonableness review reflects the courts' proper place, as

[81] *R(A)*, cit. at 33, at [26].

dictated by considerations of expertise, efficiency and parliamentary intent. In light of these factors, the House of Lords in *Puhlhofer* subjected the interpretation of statute to review only where this body had acted perversely. The court was receptive to Parliament's legislative intention and the tribunal's expertise in managing finite resources. Efficiency also pointed strongly against invasive judicial review, due to the prolific litigation, which accompanied the introduction of the Housing (Homeless Persons) Act 1977[82], and the inability of the courts to address the strong diversity of factual situations "ranging from the obvious to the debatable to the just conceivable"[83]. Whilst the courts' comparatively inferior expertise points against correctness review, it does not deny them the ability to recognise an unreasonable interpretation.

Reasonableness review is a flexible, structured[84], and potentially intrusive[85] standard. Therefore, Route Two is a viable solution even in areas where the courts take a special interest in protecting individuals, for example asylum and immigration cases. In the asylum case of *R v Secretary of State for the Home Department, ex p Turgut*[86], the Secretary of State's assessment of 'risk' – a secondary fact, part of the tribunal's interpretation of statute particular to the facts – was subjected to anxious scrutiny. This sub-Wednesbury standard reflects the important rights implicated and the courts' supervisory (and not decision-making) role in reviewing interpretation at this level. However, the courts are not always this unambiguous in their review. In *Kibiti v Secretary of State for the Home Department*[87], the court's discussion centred around whether the tribunal's determination was adequately justified by the evidence. This was framed in terms of assessing whether the tribunal's decision was beyond "the range of responses open to a reasonable decision-maker", which should be considered an exercise of anxious scrutiny[88]. It is not, nor should it be, correctness review – a standard which pays no

[82] *Puhlhofer*, cit. at 40, at [511], [518].
[83] *Puhlhofer*, cit. at 40, at [518].
[84] P. Daly, *Wednesbury's Reason and Structure*, P.L. 237 (2011).
[85] *R v Ministry of Defence, ex p Smith*, [1996] QB 517 (CA).
[86] [2001] 1 All ER 719 (CA).
[87] [2000] Imm AR 594 (CA).
[88] *Smith*, cit. at 85, at [554].

attention to the tribunal's decision, no matter how reasonable or well-intended. The intensive reasonableness review of errors of law in these cases is proportionate: the "more substantial the interference with human rights, the more the courts will require by way of justification before it is satisfied that the decision is reasonable"[89]. In the immigration case of *Khawaja*, the court required the immigration officer's decision to detain and remove the applicant to be justified on the balance of probabilities, with the degree of probability being "proportionate to the nature and gravity of the issue"[90]. This determination, arrived at by developing statutory interpretation to fit the facts, was treated with "extreme jealousy"[91] because of the potential consequences of deportation and imprisonment without trial. Again, this should be understood as reasonableness review: the silent premise being that if the tribunal's conclusion is not adequately justified, then the decision is unreasonable[92]. The distinction drawn by Lord Bridge in *Khawaja*, between situations where a resident is deported because of their illegal entry (immigration), and situations where the applicant's leave to enter is refused (asylum) is false[93]. He suggested that the immigration applicant warrants greater protection than the asylum-seeker, which may open the door for an argument in support of a correctness standard to operate in the immigration context at all stages of interpretation. However, it is the same adverse consequences and rights, which are at stake in immigration and asylum cases: the applicant is detained and removed from the UK, after living there for a period of time. Khawaja had been living in the UK for a year as an illegal entrant before being detained; the applicants in *Turgut* and *Kibiti* had actually been present in the UK for longer, as asylum-seekers. Therefore, it is a reasonableness standard, which should apply across the board in review of interpretation at this stage, where the tribunal is more expert than the courts. The standard's flexibility ensures that the particular demands of the case can be met, without allowing the courts to intrude too far into something that they do not – nor have the time nor resources to – understand.

[89] *Smith*, cit. at 85, at [554].
[90] *Khawaja*, cit. at 32, at [97].
[91] *Khawaja*, cit. at 32, at [122].
[92] T. Endicott, *Questions of Law*, cit. at 16.
[93] *Khawaja*, cit. at 32, at [122].

3.2. Fact

The law on error of fact lies in uncertainty. *E* established "mistake of fact giving rise to unfairness" as "a separate head of challenge", requiring the error to be "uncontentious and objectively verifiable"[94] alongside four other conditions. However, it is unclear whether this decision opens the gates to review error of fact generally[95], or only in the case of misunderstanding of established and relevant facts, as one of three purported pre-existing categories in error of fact[96]. Craig's understanding of 'fact' has required him to limit the intrusiveness of the decision by arguing for restrictions on the admissibility of fresh evidence and the introduction of a threshold of failure[97]. But if 'fact' is understood as being limited to objectively and independently verifiable assessments, correctness review is justified by reason of the decision-maker's determination alone[98]. I propose that the criteria in *E* should serve as the sole basis to review error of fact, when the criteria are read in faithfulness to its wording.

Unique to this decidedly narrow category of 'fact' that I propose – which includes only primary fact-finding, failures to take evidence into account, and misunderstandings of evidence – is the ability to say objectively, and without the need for any specialist expertise, whether or not there has been an error in determining the issue of fact. Contrast questions of law: although driven by policy and common law considerations to an inevitable conclusion, only the most expert body is able to say whether these considerations have been properly understood and the correct interpretation reached. The judgment of the most expert interpreter must be followed, except where it is evidently wrong. Therefore, the appropriateness of correctness review of errors of fact derives from the objectively ascertainable incorrectness of the error: the tribunal failed to establish the proper primary facts, they misunderstood the evidence, or failed to take the evidence into account.

The propriety of a correctness standard of review for errors of fact does not derive from the factors prominent in my analysis

[94] *E*, cit. at 7, at [66].
[95] P. Craig, *Judicial review, appeal and factual error*, cit. at 28.
[96] R. Williams, *When is an Error not an Error?*, cit. at 4.
[97] R. Williams, *When is an Error not an Error?*, cit. at 4, 796.
[98] R. Williams, *When is an Error not an Error?*, cit. at 4, 796.

of errors of law (expertise, efficiency and parliamentary intent). These factors point to leaving questions of fact to tribunals, subject to a concession to justice where correctness review is appropriate. First, expertise: the non-legal expertise of decision-makers facilitates an understanding of evidence in all its intricacy and difficulty. Second, efficiency: it would be inefficient to place the significant and time-consuming burden of determining fact in the courts' *legally* expert hands. The courts' examination and cross-examination processes would bring further complications and delay. By contrast, non-legal proficiency in understanding the situation and its characters allows decision-makers to adopt an inquisitorial approach. This allows them to go beyond the evidence presented to them, and make the necessary determinations of credibility to resolve factual disputes with oral and written evidence alone[99]. Third, parliamentary intent: this lies implicit in the strong arguments of expertise and efficiency. However, justice demands that tribunal dominance in the domain of fact not be absolute. When an objective error of fact falls through the expert and efficient decision-making system, the courts should be able to intervene without difficulty. Where there is an error of primary fact, the courts should substitute the objectively correct answer. Where evidence is misunderstood or overlooked, there is no substitutionary answer, because the courts' check is effectively one of procedural fairness, which highlights a mistake in the tribunal's method. Therefore, the decision should instead be quashed and remitted for reconsideration by the tribunal, as was done in *CICB* and *Haile*.

Judicial review on grounds of error of fact must be a proportionate treatment for the particular situation, and the criteria in E offers a sensible basis to limit the scope of judicial intervention. It requires an uncontentious and objectively verifiable error, which is material, and for which the claimant is not responsible. The decision has been criticised for not applying its own criteria stringently[100]; however, I propose to reinterpret the reasoning of the court and have it serve as the foundation for review of the narrow category of 'fact'. At issue in *E* was whether

[99] H. Genn, *Assessing credibility*, (Jan. 20, 2016) available at https://www.judiciary.uk/publications/assessing-credibility-genn/.
[100] R. Williams, *When is an Error not an Error?*, cit. at 4.

the applicant's membership of the Muslim Brotherhood meant that he was liable to persecution if he were to return home. This inference or prediction is a secondary fact, and would be 'law' under the above analysis; it cannot properly be said to be 'uncontentious and objectively verifiable', in the way that primary facts and dealings with evidence are. The tribunal's determination can be understood to have been struck down not on the basis of making an improper inference or prediction, but on the basis of their failure to consider evidence, which had become available after the applicant's hearing but before promulgation: namely, a doctor's medical report in support of the claimant's allegations. The Court of Appeal made a particular point of including failures to take evidence into account within the scope of their criteria[101], and if the wording of "uncontentious and objectively verifiable"[102] is applied faithfully, it is difficult to see how any matters beyond misuses of evidence and determination of primary facts can be said to be 'uncontentious'. Thus, the existing law under *E* can be reconceptualised in order to realise my proposed approach to reviewing errors of fact – as I have narrowly defined them – on grounds of jurisdictional error.

4. Conclusion

I have proposed an analytical approach to replace the faux-analytical position under *Page*, and reflect the expansion of the state and the growing competence of decision-makers, building on promising aspects of what is otherwise directionless caselaw.

Law and fact should be properly defined labels of analytical utility which distinguish different parts of the process of administering a statute which deserve independent treatment. I propose a narrow category of fact separated by its objective verifiability. Correctness review of errors of fact is demanded by justice, and does not require any particular expertise from the court. However, sensible limits must regulate the courts' intervention in this area. *E* offers suitable criteria: as well as being uncontentious and objectively verifiable (something that should be construed narrowly), the error should be material, and not the

[101] *E*, cit. at 7, at [66].
[102] *E*, cit. at 7, at [66].

responsibility of the claimant. Questions of law cover the expansive process of statutory interpretation. It would be problematic to review this with one tool (and would likely fail to avoid many of the dissatisfactions with the current law); two routes should be used to address review of statutory interpretation on grounds of jurisdictional error. Route One is a claim against higher-level interpretation, at the stage where the courts are more expert in interpretation than the tribunal. This is a correctness standard, the appropriateness of which is dictated by PDR – a concept which I explain on the basis of expertise, efficiency and parliamentary intent. Route Two targets interpretation operating at greater levels of depth, where the tribunal is more expert than the courts. This takes the form of reasonableness review, and ensures that expert decision-makers have made use of their expertise to reach an appropriate understanding of the statute. In practice, interpretation is a staggered process, particular to the statute in question and articulated at distinct stages. In challenging a decision-maker's interpretation of statute on grounds of jurisdictional error, it must be determined which body has superior expertise at this level of interpretation, because this will determine whether the claim progresses via Route One or Route Two. It may be the case that there is only higher-level interpretation (such that Route Two is unavailable), only fact-centric interpretation (such that Route One is unavailable), or no interpretation required at all in order for the statute to fit the present facts.

Whilst this approach draws inspiration from the case law, it is far from a rationalisation of the existing law. The law-fact distinction has been mistreated ever since it became decisive to review on grounds of jurisdictional error: this position was established in *Page*, but the court avoided the consequences of the decision through reasoning on the basis of the case's facts. Drawing on demonstrations by the courts, for example in *R(A)* and *South Yorkshire*, it is clear that there is a practical ability to discern between normatively distinct categories, which make up the process of administering statute. A rigid law-fact divide is possible, and 'law' can be further partitioned on the basis of comparative expertise. *Cart* is demonstrative of a PDR approach, which offers a necessary compromise between justice and the realities of the courts and tribunals system. This should be

expanded to supply one route to review of errors of law. Route Two builds upon the courts' responsiveness to decision-making expertise with reasonableness review, as seen, for example, in *Puhlhofer*. Both routes appeal to considerations of expertise, efficiency and parliamentary intent – factors which have influenced the courts' decisions for some time. The law on error of fact can find structured and proportionate guidance from the *E* criteria; however, the proper meaning of the criteria should be respected, and applied to the decidedly narrow category of fact isolated above.

Jurisdictional error is an area central to judicial review and is of great significance to constitutional principles generally. It is essential that the law escapes from the captivity of *Page*, and its uncoordinated, pragmatic struggles to escape the consequences of the decision. An analytical approach is the solution.