restatement in *A* and *BF* will depend on how important quantitative considerations turn out to be in practice.

Lastly, although Lord Sales's test is designed to be more restrictive, it may facilitate judicial review in some instances, especially the typical challenges to the lawfulness of a policy, which allege conflict with statutory or regulatory rules or decry the creation of extra-statutory regulatory regimes. The objection that a challenge to a policy is premature because a decision has not yet been taken loses all its force when assessed in accordance with Lord Sales' new test. An applicant in such a case will typically be asking a court to compare the normative statement in the policy with the normative statement in the statute or regulation, as the new test requires.

Both judgments are of high quality, as one would expect of public law decisions penned by Lord Sales (who was a distinguished practitioner of constitutional and administrative law). They are likely to firm up judicial review of policies and other soft law instruments. But how much they will do so remains to be seen.

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KEEP OFF THE GRASS! NULLITY REVISITED IN THE SUPREME COURT

THE uneven wicket of administrative law is accustomed to the periodic application of the light judicial roller. But the Supreme Court in *R. (Majera) v Secretary of State for the Home Department* [2021] UKSC 46 has prepared the ground for some more substantial returfing.

The claimant was released on immigration bail by order of the First Tier Tribunal ("FTT") under paragraph 22(1A) of Schedule 2 to the Immigration Act 1971. Displeased with the bail conditions set by the judge, the Home Secretary sought to use executive powers under Schedule 3 to impose more onerous restrictions. In defence to judicial review proceedings, the Home Secretary claimed that the bail order had been a nullity as it had not required the claimant to appear before an immigration officer as stipulated by paragraph 22(1A).

Lord Reed, giving the only judgment, applied the rule that orders of courts of competent jurisdiction must be obeyed unless and until set aside. The Home Secretary was bound by the bail order and could not contradict it. Lord Reed held that the rule applied because the FTT was a "court of competent jurisdiction" to determine applications for immigration bail (at [49]).

The interest in this part of the case lies in the fact that the FTT is not a tribunal with unlimited jurisdiction. Therefore, any error of law represents

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an excess of its statutory authority. There was some, albeit limited, precedent for the application of the rule to such bodies (e.g. *R. v Central London County Court, ex parte London* [1999] Q.B. 1260 (County Court); *R. (H) v Ashworth Hospital Authority* [2002] EWCA Civ 923, [2003] 1 W.L.R. 127 (mental health tribunal)). Moreover, Hale L.J. had stated in *R. v Secretary of State for the Home Department ex parte Saleem* [2001] 1 W.L.R. 443, 457 (a case not cited in *Majera*) that the determinations of statutory tribunals "are no less binding than those of the ordinary courts" even though they lack powers to enforce them by contempt.

The application of the rule to the FTT is welcome. But the legal basis and scope of application of the rule remains uncertain. In this context, it is best understood as a common law presumption of statutory interpretation as to the effect of orders of statutory tribunals. Its application depends upon whether the tribunal is properly characterised as a court of competent jurisdiction with respect to the issue addressed by its order.

The case is of most interest, however, for the extensive *obiter* comments of Lord Reed on the status of administrative acts and decisions where the rule does not apply – a topic that Lord Steyn described in *Boddington v DPP* [1999] 2 A.C. 143, 164 as "a matter of great contention and difficulty". Haddon-Cave L.J. in the Court of Appeal had stated that where an administrative decision has been found to be unlawful it is then recognised as having "no legal effect at all". The remark was, as Lord Reed said, an over-simplification: as the Supreme Court confirmed in *DN (Rwanda) v Home Secretary* [2020] UKSC 7, [2020] A.C. 698 (noted Hickman [2020] C.L.J. 384) a specific rule of law –whether statute or common law –may afford legal consequences to even unlawful administrative decisions.

But Lord Reed did not stop there. He reasoned that: (1) a court order is required to determine an administrative decision to be unlawful (at [28]); (2) absent such an order the decision "will remain in effect" (at [29]); and (3) even if a court decides a decision is unlawful it may decide to treat the decision as having had some legal effects not only where some other rule of law affords it such effects, but also where the court judges that this is required by "legal certainty or with the public interest in orderly administration" (at [31]). He placed emphasis on the well-known comments of Lord Radcliffe in *Smith v East Elloe Rural District Council* [1956] A.C. 736, 769–70 to the effect that an administrative order bears "no brand of invalidity upon its forehead" and that unless quashed it, "will remain as effective for its ostensible purpose the most impeccable of orders".

On such an approach, the distinction between administrative decisions and orders of courts of competent jurisdiction is diminished. Both have legal effect until set aside by an order of a court (but the quashing of an administrative decision may operate retrospectively). Moreover, it is asserted that the courts have power to afford legal effect to *ultra vires*

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decisions, even if this is not required by statute or a rule of common law, where this is in the public interest (at [32]). Despite Lord Reed deprecating such language, this analysis reconceptualises unlawful administrative decisions as "voidable".

Lord Reed's explanation is that the "complexity and variability of the practical consequences" of unlawful administrative decisions necessitates a "more flexible approach than is afforded by a binary distinction between what is valid and what is void" (at [32]). This may be so, but the comments cannot, without significant qualification, be reconciled with three principles established by authority.

First, it is established that where a person has a private law claim, such as in trespass, false imprisonment or for restitution, an order to invalidate an impugned administrative decision is not required and the remedy is available as of right, such as *R. (Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245 (unlawful detention); *Wamala v Tascor Services Ltd.* [2017] 4 W.L.R. 155 (invalid movement notification).

Second, individuals are entitled to treat unlawful administrative decisions as invalid and raise the illegality as a defence if the decisions are applied against them (assuming this can be raised in a tribunal competent to determine the issue); for example, *Wandsworth LBC v Winder* [1985] [1985] A.C. 461 (council rent increase); *Boddington*, *supra* (prosecution under byelaw); *Mossell (Jamaica) Ltd. v Office of Utilities Regulations* [2010] UKPC 1 (ministerial direction to regulator).

Third, that quashing orders are not necessary to achieve the nullity of an administrative act found to be unlawful as this follows from the logic of the *ultra vires* principle (*A v HM Treasury* [2010] 2 A.C. 534). Moreover, in *R. v Wicks* [1998] A.C. 92, 115, Lord Hoffmann had explained that Lord Radcliffe's comments in *Smith* were limited to the context of compulsory purchase orders, should not be the basis for generalisation and indicated only that it is conceptually possible – although not the norm – for administrative instruments to have validity until quashed, a question that will depend on the construction of the legislative scheme.

The *obiter* comments of Lord Reed therefore appear destined to require the courts to reconsider and grapple afresh with a number of old problems. It is surely not a coincidence that in July 2021 the Government introduced the Judicial Review and Courts Bill containing a clause that would enable courts to limit the retrospective effect of orders made in judicial review proceedings. In a context in which a judicial solution to the challenge of reconciling the logic of *ultra vires* with needed remedial flexibility has proved elusive, a legislative solution is surely appropriate. However, in *Majera* the Supreme Court – perhaps with one eye to the wider jurisdiction of the Judicial Committee of the Privy Council – has signalled that the

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reform may be unnecessary and that judges are capable of ensuring that the hallowed turf of judicial review is fit for modern playing conditions.

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DAMAGE IN THE SUPREME COURT

WHAT constitutes "damage" for data protection purposes? This question came before the Supreme Court in *Lloyd v Google LLC* [2021] UKSC 50.

The claimant, Mr. Lloyd, sought permission to serve proceedings on Google outside the jurisdiction, alleging breach of Google's duties as a data controller under section 4(4) of the Data Protection Act 1998 ("DPA 1998"). The claim alleged that for several months between late 2011 and early 2012, Google used Apple's "Safari" Internet browser to track secretly the Internet activity of millions of Apple iPhone users (in what is known as "the Safari workaround") before collating and selling the data. The Safari workaround has already been the subject of litigation (see *Vidal-Hall and ors v Google Inc* [2015] EWCA Civ 311), but a novel feature of *Lloyd* was that the claimant did not seek damages just for his own loss but instead claimed to represent – and recover damages for – everyone resident in England and Wales who owned an iPhone at the relevant time and whose data were obtained by Google without their consent. The size of class was estimated to be 4.4 million people.

This is where the claimant fell into difficulties. Had Mr. Lloyd simply claimed damages on his own behalf it is likely he would have been successful so long as material damage (pecuniary loss, as well as physical and psychiatric harm) or distress caused by the breach of duty could be shown (as decided in *Vidal-Hall v Google*). However, Mr. Lloyd's claim was financially backed by a commercial litigation funder, and there would have been little commercial value to the funder in Mr. Lloyd pursuing this more modest line. Instead, then, a representative action. A long-standing rule of civil procedure, now CPR rule 19.6, allows a claim to be brought by someone as a representative of other persons who have the "same interest" in the claim. Section 13 of the DPA 1998 requires "damage" to be suffered by an individual seeking compensation for a data controller's breach of duty. "Damage" under section 13 clearly encompasses material damage, and following *Vidal-Hall v Google*, also includes distress. Due the representative nature of the claim, proof of material damage or distress caused to each individual member of the class could not be evidenced. However, the claimant argued that such an individualised approach to "damage" was unnecessary and instead a "uniform per capita" sum could

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