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IN *R. (on the Application of LXR) v First-tier Tribunal (Social Entitlement Chamber)* [2025] EWCA Civ 1608 ("*LXR*"), the Court of Appeal was again confronted by the difficulties in distinguishing questions of fact from questions of law in judicial review cases. Classifying a question before a decision maker as one of fact or law allows courts to calibrate the intensity of review: questions of fact are generally best answered by administrative decision makers and questions of law are generally best answered by courts. This makes sense. Why should judges determine facts, where that task has been allocated by Parliament to an expert public official? The problem, however, is that facts raise legal questions and legal rules are fact-sensitive. Explaining why a question is one of fact or law is not straightforward. Attempting to separate questions of law and fact into neat, abstract categories amounts to a Sisyphean task. This explains courts' reference to "policy" or "pragmatism" when justifying their conclusions in such cases, which can obscure, rather than illuminate, their reasoning.

In *LXR*, the Court, unsurprisingly, held that a first-instance tribunal was better placed to evaluate a fact-sensitive claim than a reviewing tribunal. The judgment reveals how so-called "pragmatic" judgments do not dispense with analytical discipline in two ways. First, the factors which the Court uses to determine whether the question was one of law or fact illustrates the kind of pragmatism courts are interested in. Second, the judgment cements the original decision-making body's particular fact-finding function as an essential reference.

The applicant, LXR, survived childhood sexual abuse ("CSA") and non-physical sexual harassment as an adult. He suffered from chronic mental health issues. In 2019, LXR applied to the Criminal Injuries Compensation Authority ("CICA"), which denied compensation for the adult harassment but awarded the maximum £11,000 for the CSA. No additional award was provided on the basis that LXR's ongoing mental health issues were not primarily caused by the CSA. LXR initially accepted this award.

After changing healthcare providers, LXR believed that the CICA had misattributed his condition to causes other than the CSA. LXR applied to re-open the award pursuant to paragraphs 114–116 of the Criminal Injuries Compensation Scheme 2012 ("the Scheme"). The relevant criterion, paragraph 115(b), requires "a material change in the medical condition of the applicant that allowing the original determination to stand would give rise to an injustice to the applicant". LXR produced expert evidence to illustrate that a change in a person's *understanding* of their traumas can *of itself* be a change in their condition. The CICA refused

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the application, citing that this did not constitute a material change in LXR's condition. LXR unsuccessfully requested a review submitting further medical evidence to CICA. The CICA was not convinced that there was "a substantial deterioration in [LXR's] condition" since the award.

The procedural history is as follows. LXR brought a statutory appeal to the First-tier Tribunal ("FTT"), arguing that the Scheme had been misapplied. The FTT rejected his claim, holding that there was no material change and even if the deterioration in his mental health *was* a material change, it was not caused by the CSA. LXR sought judicial review of the FTT's decision in the Upper Tribunal ("UT"), an appeal being unavailable under section 11(5)(a) of the Tribunals, Courts and Enforcement Act 2007. The UT quashed the FTT's decision, holding that an award could be reopened where there was a material change in the "aetiology" of the claimant's condition (*R. (on the Application of LXR) v the First-tier Tribunal* [2024] UKUT 208 (A.A.C.), at [29]). The CICA appealed to the Court of Appeal on three grounds: first, that the UT had erred by quashing the FTT's decision on grounds not argued by LXR; second, that the FTT's decision was a conclusion of fact and therefore the UT had erred in law by interfering; and third, that the meaning the UT attributed to the Scheme was wrong in principle. LXR also filed a respondent's notice arguing that the FTT's decision violated Article 14 of the European Convention on Human Rights ("ECHR").

Singh L.J. gave the judgment of the Court. The first ground failed as there was no significant injustice caused to the CICA and production of further evidence was unnecessary. The Court accepted the second and third grounds, the crux of the appeal. The Court rejected the respondent's ECHR, Article 14 claim; its reasons for according the FTT a wide margin of appreciation under the ECHR test reinforced its conclusions on the law–fact distinction.

The Court first considered LXR's argument that the UT was a specialist tribunal charged with providing guidance to the FTT and therefore its judgments warrant deference (at [68]). This argument relied on Lord Carnwath's analysis of the UT's role as a source of specialised guidance for the FTT in *R. (on the Application of Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19, [2013] 2 A.C. 48, at [41]–[42] ("*Jones*"). The Court noted that this did not negate the FTT's fact-finding function and that the claim was not an appeal but a judicial review, which "serves to reinforce" that the UT could only interfere on errors of law (at [69]). This brought the Court to engage with the law–fact distinction.

The issue, then, was whether the question of LXR's changed understanding constituting a "material change" was one of fact or of law. Classification as a question of fact meant that the FTT should decide on the evidence before it. Classification as a question of law would mean the UT should provide

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interpretative guidance on the Scheme. The Court considered cases such as *Jones*, which emphasised "a pragmatic approach" (at [16] (Lord Hope)) and *Criminal Injuries Compensation Authority v Hutton* [2016] EWCA Civ 1305, [2017] A.C.D. 20 ("*Hutton*"), in which Gross L.J. held "[w]hen determining whether a question was one of 'fact' or 'law', this Court should have regard to context" (at [57]). *Jones* and *Hutton* had relied on Lord Hoffmann's analysis in *Lawson v Serco Ltd*. [2006] UKHL 3, [2006] 1 All E.R. 823 where the law–fact distinction turned on "whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review" (at [34]). Singh L.J. concluded that, in this case, it was definitively for the FTT, not the UT, to decide whether there had been a material change. He accepted CICA's submission that the conclusion was "essentially one of fact" and that the FTT only gave itself a direction of law to the extent required given how the case was argued (*LXR*, at [88]). As judicial review requires a public law error, "what is important is what was before the FTT" (at [85]).

Singh L.J.'s approach to reaching this conclusion is revealing in two ways. The first is that the questions and factors considered relevant to the law–fact distinction provides some structure to the kind of pragmatism courts are interested in. Both first-instance decision makers and reviewing bodies evaluate facts in light of relevant rules and direct themselves on the meaning of those rules to do so. Whether a claimant's changed understanding of his condition constitutes a "material change" is such an evaluative exercise. Notably, the Court considered the second ground (was "material change" a question of fact?) and third ground (was the UT's definition of "material change" incorrect?) *together*. It criticised the UT invoking its guidance-issuing role to modify the meaning of the Scheme, where its attention should have been on the facts and not an "abstract exercise" (at [43], [88]). The Court supported its conclusion by reference to policy-driven factors for respecting the FTT's decision: finite public resources (at [114]), parliamentary intent (at [70], [114]) and the need for finality (at [115]). What weighed against this being a question of law were ideas about what good administration requires in light of the question of whether *revising the Scheme's meaning was unnecessary.* This is a more structured analysis than simply asserting that a conclusion is "pragmatic".

The second way in which *LXR* is an illuminating case is that it cements the nature of the original decision maker and their *particular fact-finding function* as an essential reference-point in the exercise. The present case, much like *Jones* and *Hutton*, concerns judicial review of a *tribunal's* decision. Lord Carnwath's extrajudicial writing is revealing, arguing that the law–fact distinction is not "purely objective" and that even on questions of law "the view of the tribunal of fact must still be given

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weight" to efficiently make use of the expertise Parliament entrusts such tribunals with (R. Carnwath, "Tribunal Justice: A New Start" [2009] P.L. 48, 63–64). Tribunals *are* better fact-finders than reviewing courts. They have dedicated evidentiary procedures, are created by Parliament to evaluate evidence in specialised areas and often include expert panel members. Indeed, Singh L.J. emphasised the FTT panel including a "medical member" (at [88]). The nature of tribunals – as distinct from other public decision-making bodies – accords them greater latitude when the law–fact distinction is engaged. The Court's analysis here may therefore be less forceful the further away a decision maker is from an archetypal tribunal.

Behind a judge's pragmatic decision to classify a question as one of law or fact lies the analytical task of identifying whom the question is actually for. *LXR* does not offer a comprehensive guide. Rather, it sketches an analytical outline and offers some useful reference-points. It is a modest, but welcome, illustration of what matters to judges when the law–fact distinction is at play.

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