Northern Ireland
Legal Quarterly
Vol. 74 No. 2 (2024) 298–330
Articles DOI: 10.53386/nilq.v75i2.1085

Fettering scrutiny on executive discretionary powers? Developments in the judicial reviewability of ministerial non-statutory guidance

Sarah Atkins*

University of Portsmouth†

Correspondence email: sarah.atkins@port.ac.uk.

ABSTRACT

This article examines the Supreme Court's clarification of the law relating to the judicial review of soft law. In doing so, it offers a fresh perspective on how soft law sits within the legal framework. While much literature to date has attempted to theorise the nature of soft law, or focus on judicial review strategy, this article examines the role that soft law plays in the modern regulatory state. It then examines the treatment of these instruments by the courts, with particular attention paid to the 2021 joined decisions of *R(A)* and *BF*. The Supreme Court reversed a more expansive trend evident in preceding Court of Appeal case law and reinforced the primacy of the narrower approach to review seen in the *Gillick* judgment. Unlike other research on these judgments, this article problematises these decisions by showing how this limits the ability of particularly vulnerable applicants like children to challenge decisions due more to systemically flawed policies than to *ad hoc* misapplications of soft law by end users. How the Supreme Court could in future occupy a role as a mechanism for legal accountability of discretionary executive powers is also discussed; should the judicial branch of the state avail of the opportunity to make declaratory orders or endorse practice directions that might better regularise the making of soft laws in the future. The article then discusses the wider constitutional problems raised by use of a *Gillick*-inspired approach, including issues relating to lack of judicial scrutiny of soft law.

Keywords: soft law; policies; *Gillick*; ministerial powers; non-statutory guidance; accountability; scrutiny.

* I would like to thank Dr Kieran Walsh and the anonymous reviewer for their constructive comments on previous drafts. Any errors remain my own.

† The laws, guidelines, policies, etc referenced in this article refer to the versions which were in place as of November 2023 unless otherwise stated.

INTRODUCTION

The nature of non-statutory ministerial guidance, and the reach of soft law instruments generally, have undergone profound change in the United Kingdom (UK) since the Second World War. The term 'soft law' for our purposes is used as a convenient shorthand for a variety of instruments issued by ministers, without a statutory empowerment or obligation. These include instruments variously labelled as 'guidance', 'guidelines', 'circulars' and 'policies', among others.[1] They are typically used by ministers to implement government policies via binding rules without using the more traditional methods of primary or secondary legislation. From humble beginnings, and in many guises, this discretionary form of rule-making now pervades every level of central and local government. Though often a quick, flexible and effective method of administration, it can also lack many features that we have come to expect of a parliamentary democracy such as certainty, accountability and transparency. It also lacks standardised regulation and adequate oversight centrally. This article seeks to investigate this modern phenomenon through the prism of a pivotal Supreme Court pronouncement on the subject, in the joined cases of *R(A)* and *BF*.[2] Though very different in terms of the facts that led them there, *R(A)* and *BF* provided the Supreme Court with a long-awaited opportunity to focus on the extent of review of such soft law instruments. Though the *R(A)* outcome was not particularly surprising, the *BF* judgment was not without its controversy, as the Supreme Court significantly shifted from the expansive rights-based claims embraced by the Court of Appeal, to a far narrower focus limited to the unlawfulness of the policy. The Supreme Court also significantly departed from many prominent post-*Gillick* developments by the Court of Appeal in this area, and reinstated the *Gillick* test as the standard by which to assess the lawfulness of soft law in future challenges. Though there were other avenues open to it, the Supreme Court plainly conceived its role here as being to reorient judicial review rather than to engage in a review of soft law *per se*. An alternative and more purposive approach, as employed by a different panel of Supreme Court judges in *G v G*,[3] was open to the Supreme Court, but ultimately not taken. Through mechanisms such as declaratory orders or endorsing practice directions, the court

1 Other terms for soft law encountered by the author in literature cited in this article also include quasi-legislation, third-source powers, sub-delegation, hidden law-making, tacit legislation, etc.

2 *R (A) v SSHD* [2021] UKSC 37 (*R(A)*, SCt); *BF (Eritrea) & Equality & Human Rights Commissioner v SSHD* [2021] UKSC 38 (*BF*, SCt).

3 *G v G* [2021] UKSC 9; see also Kieran Walsh and Sarah Atkins, 'When our paths cross again: the Supreme Court's management of related asylum and child abduction claims in *G v G*' (2022) 85(5) Modern Law Review 1245.

could have encouraged and promoted good governance by ministers and prevented future difficulties in similar soft law proceedings, and as such play an important role in 'opening channels of deliberation and participation' with government.[4]

The cases of *R(A)* and *BF* were not joined until they reached Supreme Court level. As the ministers had issued the policies at their own discretion in both matters, they were considered suitable vehicles by which to jointly examine (and clarify) 'the correct approach to judicial review of policies'.[5] The facts of *R(A)* involved a convicted child sex offender challenging the Child Sex Offender Disclosure (CSOD) Scheme on the basis that he felt it did not go far enough in its wording and was unlawful because, *inter alia*, it created an unacceptable risk of unfairness.[6] It was a successful challenge to guidance by the same applicant in 2012 that led to amended wording which was the subject matter of the present proceedings.[7] However, for the applicant, the new wording did not go far enough, giving rise to 'an unacceptable risk of unfairness and breach of A's "right to respect for private life" under Article 8' of the European Convention on Human Rights (ECHR).[8]

The facts of *BF* involved a 16-year-old Eritrean who arrived in the UK and claimed asylum as an unaccompanied minor. Statute requires the Home Office to carry out its functions in a way that takes account of the need to safeguard and promote the welfare of children in the UK, including asylum-seeking children.[9] In *BF*'s case the immigration officers did not believe the adolescent's assertions that he was under 18 years of age and, based on the criteria in the policy guidance at the time,[10] duly detained him in an adult facility. The UK

4 Margit Cohn, *A Theory of the Executive Branch: Tension and Legality* (Oxford University Press 2021) 16–17.

5 *R(A)*, SCt (n 2 above) [6].

6 Para 5.5.4 of CSOD Scheme Guidance provides that: 'If the application raises "concerns", the police must consider if representations should be sought from the subject to ensure that the police have all necessary information to make a decision in relation to disclosure.'

7 *R (X) v Secretary of State for the Home Department* [2012] EWHC 2954 (Admin).

8 *R (A) v SSHD* [2016] EWCA Civ 597 [23], (*R(A)*, CoA); art 8 ECHR guarantees a person the 'right to respect for his private and family life, his home and his correspondence'. The applicant's argument before the Supreme Court was that the Disclosure Guidance in question was not sufficiently certain or predictable in application and accessibility under art 8(2) and therefore not 'in accordance with the law'.

9 Borders, Citizenship and Immigration Act 2009, s 55.

10 Criterion C under para 55.9.3.1 of the general operational guidance issued by the Home Office to immigration officers entitled the Enforcement Instructions and Guidance (EIG), both as it appears and as it is reproduced in other Home Office guidance called Assessing Age.

method of assessing age, in the absence of evidence of age, is based on an assessment of the 'physical appearance and demeanour' of the individual. Criteria for assessment by immigration officers are provided by Home Office guidance.[11] This guidance stated that immigration officers should apply the benefit of doubt in favour of determining that an individual is a child,[12] pending a Local Authority age assessment. Two age assessments conducted by the Local Authority determining BF to be an adult were later discredited by an independent age assessment that concluded he was under 18 when he entered the UK.[13] The third assessment was ultimately accepted by the Home Office during proceedings,[14] though by then it was too late for BF to avail of his rights as a child. The claim before the court was the lawfulness of the policy.[15]

The combined judgments of *R(A)* and *BF* are important because they represented a rare opportunity for the Supreme Court to evaluate judicial interpretations by the lower courts of the lawfulness of soft law instruments. The Supreme Court chose to recalibrate judicial interpretation of soft law instruments to be more in line with *Gillick* going forward and thus limit the scope of unfair government policies being subject to judicial review in the future. However, by finding unanimously in favour of the Secretary of State for the Home Department (SSHD) and focusing their judgments so narrowly, the Supreme Court judgment is open to some criticism. First, it did not sufficiently distinguish whether the courts might approach statutory and non-statutory guidance differently, and if so how. Secondly, and regardless of finding in favour of the SSHD here, they could have nonetheless encouraged the minister to systematically review the appropriate means of producing, using, interpreting and remedying these non-statutory executive policies and guidance. Given that use of soft law has become a burgeoning practice by ministers in the years since *Gillick*, it is now in urgent need of scrutiny and regulation. In not doing so, the Supreme Court overlooked an opportunity which had been 35 years in the making.

---

11 Both the EIG and *Assessing Age*, ibid, underwent many changes since first published in 2011, including four times during the *BF* matter alone; ch 55.9.3.1 of EIG covers 'individuals claiming to be under 18'. For comparison of different versions of EIG and *Assessing Age* see *BF*, SCt (n 2 above) [24]–[31].

12 Version 2.0 of *Assessing Age* (n 10 above) para 2.2.

13 *BF (Eritrea) & Equality & Human Rights Commissioner v SSHD* [2019] EWCA Civ 872 [3] and [85], (*BF*, CoA).

14 *BF (Eritrea) v SSHD*, JR/8610/2014 [12]–[13], (*BF*, UT). However, by then the Home Office had unlawfully detained BF in adult facilities for a cumulative total of nearly nine months, contrary to the Immigration Act 1971, sch 2, 18B (as amended by the Immigration Act 2014).

15 See *BF*, CoA (n 13 above) [11].

Though this may seem controversial to some, what such judicial deference towards non-statutory guidelines indicates is that some of the UK judiciary do not see the courts as a legitimate scrutiniser of this form of soft law. The *BF* judgment also serves as a conspicuous reminder of how too many vulnerable minors in the UK asylum process can fall foul of flawed drafting of soft law instruments. News coverage has highlighted that '867 out of 1,386 [individuals] deemed to be adults by the Home Office were later confirmed to be children',[16] but only after those children had been put at risk over protracted periods when placed in inappropriate adult settings. The current non-statutory guidance on age assessment arguably goes to the heart of this problem.

More recent developments, since these Supreme Court judgments, do not detract from arguments raised here about soft law. In fact, even the nascent National Age Assessment Board (NAAB),[17] a new government body established by the Home Office on foot of the Nationality and Borders Act 2022, sets out the policy and procedures for the operation of the NAAB and on the wider processes by way of non-statutory ministerial guidance. Therefore, the discussion on soft law below is more relevant than ever. In light of the above, it remains fair to say that 'judicial regulation of administrative rule-making is still patchy and incomplete, and its conceptual basis is often unclear'[18] and requires continued academic attention.[19]

Literature on soft law has a long and varied history.[20] While scholars like McHarg or Williams take a more doctrinal, judicial review emphasis,[21] others like Hewart or Daly have engaged in analysis of

16 See Refugee Council, *Identity Crisis: How the Age Dispute Process Puts Refugee Children at Risk* (Refugee Council Report October 2022); David Neal, *An Inspection of the Initial Processing of Migrants Arriving Via Small Boats at Tug Haven and Western Jet Foil, Dec 2021 – Jan 2022* (Independent Chief Inspector of Borders and Immigration July 2022); see also Samir Jeraj and Michael Goodier, 'Child asylum seekers are caught between the Home Office and cash-strapped councils' (*The New Statesman* 31 October 2022); Diane Taylor, 'Hundreds of UK asylum seeker children wrongly treated as adults, report shows' *The Guardian* (London 24 April 2023).

17 See Home Office, *National Age Assessment Board: The Operation of the National Age Assessment Board and Sections 50 and 51 of the Nationality and Borders Act 2022*, version 1.0 (Home Office March 2023); see also Association of Directors of Children's Services Ltd and the Home Office, *Age Assessment Joint Working Guidance* (Home Office March 2023).

18 See Aileen McHarg, 'Administrative discretion, administrative rule-making, and judicial review' (2017) 70(1) Current Legal Problems 267.

19 Recent commentary includes Kenny Chng, 'Reconsidering the legal regulation of the usage of administrative policies' [2022] Public Law 76.

20 Including comparable terms (see n 1 above).

21 See also Greg Weeks, *Soft Law and Public Authorities: Remedies and Reform* (Bloomsbury 2016) writing largely from an Australian perspective.

constitutional questions. These include questions of what such practices, if abused by the executive, say about democratic legitimacy, the rule of law,[22] potential tensions with other constitutional principles and the necessary role of the judiciary in holding the executive accountable.[23] This article adds to the normative scholarship by critically analysing these Supreme Court judgments as symptomatic of how this prevalent form of rule-making undermines established separation-of-power paradigms in a number of concerning ways. Another cause of concern arises when one considers the formal effects of soft law on the people to whom official decision-makers apply these informal rules. As Weeks rightly states, 'people [are] subjected to real and legally effective consequences as a result of the operation of soft law'.[24] As such, potential ramifications for more vulnerable rights holders that fall foul of this form of rule-making can have life-altering effects. In light of this concern, and in the absence of a regulatory or legislative framework for soft law, the author joins the call for a more enhanced role to be taken by the judiciary to review soft law.[25]

The first part of this article will introduce soft law instruments, with particular focus on non-statutory rule-making. After acknowledging some of the potential benefits of soft law in principle, the section then progresses to interrogate the courts' position on such guidance to date. There the landmark case of *Gillick* will be examined,[26] as well as how subsequent case law interpreted and applied those principles to soft law instruments. The second part addresses the joined judgments of *R(A)* and *BF*, giving brief attention to their earlier proceedings before presenting the Supreme Court judgments. Finally, part three provides analysis of the linked judgments and raises some criticism that may be levelled against aspects of the joined cases. Discussion of wider constitutional problems with the court's approach also occurs here. Perhaps controversially, this article argues that in the absence of Parliament reforming the regulation of soft law instruments, it is left to the courts to scrutinise discretionary ministerial power whenever the opportunity arises. Unfortunately, we may infer from these judgments that the Supreme Court does not readily accept this role.

22 See Stephen Daly, 'The rule of (soft) law' (2021) 32(1) Kings Law Journal 3.

23 See Lord Hewart in *The New Despotism* (Ernest Benn 1929) arguing that quasi-legislation, at its worst, should be feared.

24 Weeks (n 21 above) 2.

25 See also Cohn (n 4 above) ch 10 generally.

26 Harlow at the time felt *Gillick* was not a helpful judgment following on from *O'Reilly v Mackman* [1983] UKHL 1, [1983] 2 AC 237. See Carol Harlow, 'Gillick: a comedy of errors?' (1986) 49(6) Modern Law Review 768.

SOFT LAW INSTRUMENTS: OVERVIEW

It is worth noting that, although there is a plethora of terminology used in academic circles to discuss this form of rule-making,[27] I will predominantly use the term 'soft law' below. Though emergence of the term 'soft law' had its origins in the international/transnational law context,[28] with the passage of time the term has also been adapted for use in domestic law, and in the specific context of domestic UK law that the term 'soft law' is used here.

Though some discard the term 'soft law',[29] in my view it readily indicates both the power and nature of such instruments in this jurisdiction, whilst at the same time distinguishing them from 'hard law' rule-making like primary and secondary legislation. The term 'soft' also depicts the malleable and fluctuating character of these instruments from the drafter's perspective, whilst also being considered as binding the affected end-user or public. In the words of Rawlings, soft law is 'not directly legally enforceable but … may be treated as binding in particular legal or institutional contexts'.[30] As such informal devices are considered legally binding by creating powers or duties, the exercise of these powers should in turn be judicially reviewable in the same way as any other exercise of executive functions.

Soft laws are used by ministers to roll out government policies as an alternative to primary or secondary legislation.[31] They may set out policies, principles, practices and procedures assigned by the minister to end-users, such as public bodies/officials, agencies and, in some instances, the public.[32] Though government ministers may produce statutory guidance because they are obligated to do so on foot of primary

---

27 For examples, see further Robert E Megarry, 'Administrative quasi-legislation' (1944) 60 Law Quarterly Review 125; Robert Baldwin and John K Houghton, *Circular Arguments: The Status and Legitimacy of Administrative Rules* (Sweet & Maxwell 1986); Alexander Williams, 'Judicial review and monopoly power: some sceptical thoughts' (2017) 133 Law Quarterly Review 656.

28 Referring to rules that are not formally binding but still considered to be the accepted 'rules of the game'; for the international law origins and development of this term see further Dinah Shelton, 'Soft law' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009); Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016).

29 See Cohn (n 4 above).

30 Richard Rawlings, 'Soft law never dies' in Mark Elliot and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press 2015) 215.

31 Mark Elliott and Jason N E Varuhas, *Administrative Law: Text and Materials* 5th edn (Oxford University Press 2017) 128.

32 Some academics differ on how best to classify 'soft law': eg Weeks (n 21 above); cf Cohn (n 4 above).

legislation,[33] they can produce non-statutory guidance – a form of soft law – at their own discretion without statutory empowerment; it is the latter on which we shall focus. The practice of issuing executive circulars/guidance, and the courts' interpretation of them, became established in the aftermath of the Second World War.[34] The secretive and club-like attitudes that prevailed in government on matters of policy are evidenced by the unearthing of the 'Ram Doctrine'. This was a 1945 legal memorandum that permits ministerial action as long as it is not restricted by statute,[35] but was not a matter of public knowledge until 2003.[36] The exposure of the 'Ram Doctrine' illustrates longstanding government attitudes symptomatic of 'club government',[37] with lack of transparency or accountability being tell-tale characteristics of this mindset.[38]

Subsequent decades saw a gradual increase in transparency; executive practice evolved to 'publish circulars which were of any importance to the public'.[39] However, a public perception of partial opacity remained.[40] Though soft law is now findable on any given departmental website, these remain quite difficult to navigate and to trace previous iterations of a document, particularly for lay people. Because there is still no centralised record of non-statutory ministerial rules, unlike statute, the government webpages in this regard are hardly a model of accessibility or transparency.

With the proliferation of scandals and the shift towards a 'risk society' it has become necessary to move away from oligarchic forms of power and rule-making towards a more transparent and accountable modern regulatory state. Building on Moran's understanding of this,[41]

---

33 If a statute requires a minister to publish guidance then the status of that guidance should be likened to other statutory instruments; this obligation should be formalistically distinguished from circumstances where the courts impose a 'duty' on ministers to produce guidance, as an outcome of a specific review of ministerial discretion.

34 *Blackpool Corporation v Locker* [1948] 1 KB 349 and *Patchett v Leathem* [1949] 65 TLR 69.

35 See further Margit Cohn, 'Medieval chains, invisible inks: on the non-statutory powers of the executive' (2005) 25(1) Oxford Journal of Legal Studies 97.

36 Anthony Lester and Matthew Weait, 'The use of ministerial powers without parliamentary authority: the ram doctrine' [2005] Public Law 415.

37 See Michael Moran, 'The rise of the regulatory state in Britain' (2001) 54(1) Parliamentary Affairs 19 and Michael Moran, *The British Regulatory State: High Modernism and Hyper-Innovation* (Oxford University Press 2003).

38 Rawlings (n 30 above) 234 includes these characteristics, along with participation, as amongst the 'trio of good governance'.

39 See William R Wade and Christopher F Forsyth, *Administrative Law* 11th edn (Oxford University Press 2014) 736.

40 See Cohn (n 35 above).

41 Moran (n 37 above).

I argue that an essential component of the regulatory state is regulation of government itself. Channelling the work of both Giddens and Beck who argue that risk can no longer be thought of as an objective artefact capable of being eliminated, but as an intrinsic part of late modern society which is constantly constructed and remodelled in light of ever-changing knowledge and attitudes,[42] Moran highlights how objective risks no longer drive regulation, and that the aim of eliminating risk has been replaced by a desire to manage perceptions of risk.[43] While political science was attuned to this more sophisticated understanding of risk and regulation for some time,[44] it will become apparent that some in the current Supreme Court have yet to appreciate these changing modes of governance, or the role they can play.

Until the high-profile *Gillick* judgment there was 'a paucity of literature' on the subject,[45] though some early literature concerned itself with the various typologies of soft law, while other work focused on its true source, nature or function.[46] The sources of soft law, and the grounding of their legitimacy, has been thoroughly debated in scholarship. Whilst some argue that it derives from common law (in the form of the Crown's legal personality) or prerogative, few endorse the view that the power derives from legal personality of the executive. To interpret broad and far-reaching ministerial discretion within the limited range of ministerial prerogative powers would in effect amount to broadening the prerogative, an exploit which would be '350 years and one civil war too late'.[47] The drafting and interpretation of discretionary ministerial rules could equally be considered as 'unsanctioned' executive action, as distinct from prerogative powers and statutory authority.[48]

The term 'third source' powers was coined by Harris to refer to that residuary freedom of executive powers, different in kind from positive authorisation found in statute and common law, but which

42 See generally Anthony Giddens, *The Consequences of Modernity* (Polity Press 1991) and Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage 1992).

43 See Moran (n 37 above).

44 For a more global and interdisciplinary perspective on forms of regulatory state, see David Levi-Faur, 'The odyssey of the regulatory state: from a "thin" monomorphic concept to a "thick" and polymorphic concept' (2013) 35(1–2) Law and Policy 29.

45 Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell 1987).

46 See Megarry (n 27 above); Baldwin and Houghton (n 27 above).

47 *BBC v Johns* [1965] Ch 32 [79].

48 See Elliott and Varuhas (n 31 above) 128, quoting *R (New London College Ltd) v SSHD* [2013] UKSC 51 [28] (Lord Sumption); see also Cohn (n 35 above).

are not prohibited under positive law.[49] This residuary 'third source' theory is more persuasive because, like Cohn, I find the argument that it is a form of ministerial prerogative derived from royal prerogative unconvincing. Neither is the legal personality argument entirely convincing.[50] However, though the 'third source' model persuades in terms of satisfactorily situating the powers and identifying the functional role by which it was initially designed to operate, it fails to adequately portray the true scope of this increasingly utilised and unencumbered ministerial power. Therefore, regardless of which source one finds convincing,[51] none seem to be without their potential flaws.

There are admittedly some attractive features of soft law as a regulatory instrument for the executive branch.[52] One strength of soft law is that it can be brought into force rapidly without the necessity of passage through the Houses of Parliament. As Rawlings acknowledges, 'flexibility and responsiveness, institutional efficiency, and accommodation of difference' may be attributed to soft law.[53] The attractiveness of informal rules to the executive also lies in the ability of these devices to 'inexpensively and swiftly routinise the exercise of discretion'.[54] However, motivation for their creation aside, the realities of their creation and regulation by ministers as well as their extent of scrutiny and review by the courts are more questionable.

It is small wonder, therefore, that these devices were once deemed by the UK courts to be 'an example of the very worst kind of bureaucracy' because 'whereas ordinary legislation, by passing through both Houses of Parliament … are twice blessed, this type of so-called legislation is at least four times cursed'.[55] The above comment is no less valid today as it was then, because soft law still lacks political and public scrutiny and accessibility, is often both difficult to disentangle and lacks sufficient certainty in language, which can inevitably lead to legal challenges.

---

49 See Bruce V Harris, 'The "third source" of authority for government action' (1992) 108 Law Quarterly Review 626; Bruce V Harris, 'The "third source" of authority for government action revisited' (2007) 123 Law Quarterly Review 225; Bruce V Harris, 'Government "third source" action and common law constitutionalism' (2010) 126 Law Quarterly Review 373.

50 See Cohn (n 35 above).

51 See eg Adam Perry, 'The Crown's administrative powers' (2015) 131 Law Quarterly Review 652.

52 See further Weeks (n 21 above).

53 Rawlings (n 30 above) 234; see also Paul Daly, *Understanding Administrative Law in the Common Law World* (Oxford University Press 2021); see also *BF*, SCt (n 2 above) [2].

54 See Baldwin and Houghton (n 27 above) 239.

55 *Blackpool* (n 34 above) [375] (Scott LJ); *Patchett* (n 34 above) [70] (Streatfield J).

Though 'for a long time there [was] no judicial criticism of the use made of them',[56] the publication of circulars and similar 'state-subject' instruments impacted on their justiciability as it led to occasional judicial reviews brought by the public of problematic issues with such quasi-legislation.[57] Since the 1940s it was established that circulars could be judicially reviewed because they were legal restrictions which limited delegated power;[58] were they not to be judicially reviewed they would not only avoid parliamentary scrutiny but judicial scrutiny as well. This is especially the case for non-statutory guidelines – a form of soft law. In that sense the courts have proven to be a useful, though often reluctant,[59] mechanism to scrutinise executive rule-making.[60] Nonetheless, the increased use by government ministers of soft law has necessitated that the courts have increasingly addressed questions of the extent to which it can be judicially reviewed.

The court's ability to review administrative rules has potentially four aspects: first, deciding on its amenability to judicial review; secondly, interpreting meaning from its evidentiary or substantive force within proceedings; thirdly, ensuring consistency of its application by agencies unless good reasons dictate not doing so; and, lastly, by testing if it is being exercised within the scope of any empowering legislation (if applicable) or if any preference between circulars is being shown.[61] Even though not all official executive action is, or needs to be, underpinned by legal powers,[62] it has proved to be a somewhat complicated endeavour to successfully judicially review soft law instruments.[63]

The difference between statutory and non-statutory ministerial guidance was previously a more crucial distinction in terms of being allowed to bring a judicial review than it is today. For statutory guidance, the courts often interpreted the legislation on foot of which the guidance was issued to determine whether the rules were

56 See Wade and Forsyth (n 39 above) 736.

57 As opposed to 'subject-subject' quasi-legislation, see further Megarry (n 27 above).

58 See the judgments of *Blackpool* (n 34 above) and *Patchett* (n 34 above).

59 Even by 2010 it was common for 'the domestic courts [to] routinely decline … to intervene in active administration': see Carol Harlow and Richard Rawlings, *Law and Administration* 3rd edn (Cambridge University Press 2009) 723; though see also Carol Harlow and Richard Rawlings, *Law and Administration* 4th edn (Cambridge University Press 2021) ch 17.5 for analysis of judicial developing of approaches to soft law prior to the *BF*, SCt judgment (n 2 above).

60 Alternative forms of legal accountability include consultation, legislative supervision and publication.

61 See Paul P Craig, *Administrative Law* 8th edn (Sweet & Maxwell 2016) 469.

62 See Harris (1992) and (2007) (n 49 above).

63 Case in point: *R(A)*, SCt (n 2 above) and *BF*, SCt (n 2 above).

reviewable. However, for non-statutory guidance no such legislative authorisation existed, with the result that it was more difficult to argue that these instruments were amenable to review. This hurdle was even more difficult to overcome where the guidance was deemed not to have legal effect. More recently, as the instant Supreme Court judgments illustrate, the distinction between statutory and non-statutory ministerial guidelines is now less about denial of review *per se* but rather more about judicial narrowing of scope in determining the legality of non-statutory instruments.

A further factor which historically persuaded the courts to deny judicial review of non-statutory instruments was because, traditionally, non-statutory executive rules did not tend to have legal effect in the sense of creating justiciable rights or obligations; rather they would be addressed to semi-state, devolved, or professional bodies.[64] I argue that this is now more often the exception rather than the rule; these same instruments are used much more extensively and in a way which gives rise to a variety of justiciable issues. An illustration of this is found in the immigration rules relevant to *BF*; those circulars do have legal effect regardless of their nomenclature or whether or not they are legislatively empowered. More recently it was recognised that the rapid and disorderly evolution of soft law (in all its shapes and labels) has led to more and more types of rules in fact having legal effect.[65] Yet the decisions examined in this article have failed, I argue, to take account of this change. They approach forms of soft law as they were used, not necessarily as they are used.

It is sometimes argued that courts and Parliament should not restrain the discretion of ministers out of respect for the non-fettering principle.[66] McHarg, writing in 2017, observed that the courts, since *British Oxygen*,[67] had moved from a permissive approach towards discretionary executive power to increased judicial scrutiny of administrative law-making. Touching on the interaction between ministerial discretion and the courts, she rightly argued that '[w]hile an essentially permissive approach may be appropriate in relation to the decision whether to adopt administrative rules, judicial restraint seems much less justified in relation to the regulation of administrative rules, if an agency has chosen to adopt them'.[68] It must also be borne

64 See Baldwin and Haughton (n 27 above) and McHarg (n 18 above).

65 See McHarg (n 18 above).

66 See S Daly (n 22 above); Timothy Endicott, *Vagueness in Law* (Oxford University Press 2000); cf McHarg (n 18 above); Kenneth C Davis, *Discretionary Justice: A Preliminary Inquiry* (University of Illinois Press 1971).

67 *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610.

68 McHarg (n 18 above) 297.

in mind that non-fettering of discretion arguments are often bound up with matters concerning procedural propriety in decision-making.[69]

The absence of a regulatory or legislative framework for soft law to date has arguably necessitated that courts by default take on a role of scrutinising this power.[70] The ever-changing nature and utilisation of soft law makes arguments that the court should approach these powers differently from policy derived from positive law all the more compelling. Rather than taking a 'one size fits' all approach of judicially reviewing policies using a positive law paradigm, Simpson convincingly argues that the judiciary should adjust to the context of non-statutory forms of policy by developing a 'third source reasoning' tailored to third source powers.[71] Unfortunately, such a third source reasoning has yet to be embraced by the courts. It is with that in mind that we now turn to how the courts have approached soft law, both in the *Gillick* judgment and since.

How has soft law been interpreted in judicial review? *Gillick* to *R(A)* and *BF*

Gillick was a key judgment in the context of both amenability of ministerial guidance to judicial review and 'the legality of action recommended in circulars issued by government departments'.[72] What follows will initially set out the *Gillick* principle as it applied to soft law and then examine post-*Gillick* case law that applied, interpreted and proceeded to take a more generous approach in subsequent years.

The matter before the court in *Gillick* was whether,[73] on foot of ministerial guidance, doctors were 'entitled to give contraceptive advice to girls aged under 16 without the consent of their parents'.[74] The ministerial guidance was provided on foot of statutory duty and was directed to general practitioners.[75] Whilst some of the Law Lords felt that the guidance was issued under specific statutory authority; others did not. Nonetheless, the Lords held the guidance to be judicially

69 Eg legitimate expectation: ibid.

70 A framework of the sort suggested by Lester and Weait (n 36 above).

71 See Jeff Simpson, 'The third source of authority for government action misconceived' (2012) 18 Auckland University Law Review 86.

72 See Wade and Forsyth (n 39 above) 485.

73 *Gillick v West Norfolk and Wisbech Area Health Authority* [1986) 1 AC 112 (HL) (*Gillick*).

74 See Wade and Forsyth (n 39 above) 386.

75 National Health Service Act 1977, s 5(1), which superseded the National Health Service (Family Planning) Act 1967.

reviewable and proceeded on that basis.[76] On the facts, the official advice in *Gillick* was upheld.

The test on this point, provided by Scarman LJ, was '[i]t is only if the guidance *permits or encourages unlawful conduct* ... that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way'.[77] Put another way, a policy which – if followed – would lead to unlawful acts or decisions or which permitted or encouraged such acts would itself be unlawful, and the court could correct the guidance by way of declaratory order.[78]

The court's power to correct erroneous legal advice in soft law, according to Lord Bridge, was an exception to the general rule that 'the reasonableness of advice contained in non-statutory guidance could not be subject to judicial review'.[79] Therefore, *Gillick* served to demonstrate that declaratory orders are a useful and flexible remedy in such challenges because they clarify the position of the court without necessarily creating the impression of judicial overreach,[80] regardless of whether or not the circular purported to be pursuant to any legal authority.

The lower courts would later rely on *Gillick* and as precedent for expanding the scope of soft law devices of which the court could take notice.[81] By the mid-2000s executive guidance was widely accepted by the courts as a form of 'third source power' at the disposal of government ministers, along with statutory and prerogative powers.[82] As soft law was increasingly being used to undertake the ordinary business of government, despite concerns over its extent and juridical basis,[83] it was in turn deemed more amenable to judicial review by the

76 Fraser LJ and Scarman LJ held that they had legal effect; Bridge LJ and Templeman LJ held that they had no legal effect but were judicially reviewable; Brandon LJ held no opinion; see further Wade and Forsyth (n 39 above) 736.

77 *Gillick* (n 73 above) para 181F in *R(A)*, SCt (n 2 above) [33] (emphasis added).

78 See Craig (n 61 above) 468.

79 See ibid, referencing *Gillick* (n 73 above) (Bridge LJ).

80 See further Elliot and Varuhas (n 31 above) 456.

81 See Wade and Forsyth (n 39 above) 486 and 735.

82 See Elliott and Varuhas (n 31 above) 128; this was in line with Dicey's view that all of the Crown's non-statutory powers are prerogative powers: Albert V Dicey, *Introduction to the Study of the Law of the Constitution* 8th edn (Macmillan 1915) 282; cf Blackstone's approach; see further J Howell, 'What the Crown may do' (2010) Judicial Review 36.

83 See Elliott and Varuhas (n 31 above), quoting Lord Sumption in *New London College Ltd* [2013] UKSC 51, [28].

courts.[84] The extent of review of soft law was considered by the Court of Appeal in several post-*Gillick* decisions including *RLC*,[85] *Tabbakh* and *Bayer*.[86]

The Court of Appeal in *RLC* took a more expansive approach than *Gillick*. Sedley LJ in *RLC* confirmed that the relevant question was whether there was something so 'wrong with a system which places asylum-seekers ... at *unacceptable risk of being processed unfairly*'.[87] *RLC* was later treated by subsequent judgments, such as *Tabbakh*, as authority for interpreting a wider principle of review than was initially set out in *Gillick*.

In considering that the issue of procedural unfairness that arose in *Tabbakh* was materially different from the extent of review of guidance as erroneous in law (*Gillick*), Richards LJ said the question to be asked was therefore 'whether the system established by the guidance in the policy documentation is *inherently unfair*'.[88] In preferring to draw on *RLC* than on *Gillick*, Richards LJ stated that this wider interpretation 'does not *reject* the test of "unacceptable risk" of unfairness but effectively equates an unacceptable risk of unfairness with a risk of *unfairness inherent within the system itself*'.[89] Therefore, if the flawed wording or gaps in the guidance – or the resulting flaws in the system – amounted to an unacceptable risk of individuals being processed unfairly then the policy would be deemed unlawful.[90] *Tabbakh* joined *RLC* in being treated by a subsequent line of cases as authority for interpreting a wider principle of reviewing policies than had been set out in *Gillick*.

By way of contrast, in *Bayer*, the Court of Appeal interpreted the scope of Scarman LJ's use of the term 'permits' in *Gillick*. While previous case law had read the term 'permits' as meaning 'does not forbid' a certain course of unlawful action, the court did not deem this

84 'Third source powers', as a form of residual non-statutory government power, were generally deemed amenable to judicial review in *R (Shrewsbury and Atcham BC) v SSCLG* [2008] EWCA Civ 148 [48]. However, challenges where policies were empowered by statute 'against which its *vires* and reasonableness can be judged' arguably found the courts more willing to consider procedural propriety and consistency issues: see Craig (n 61 above) 469.

85 *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481 (*RLC*).

86 *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] EWCA Civ 287 (*Tabbakh*); *R (Bayer plc) & Another v NHS Darlington CCG & Others* [2020] EWCA Civ 449 (*Bayer*).

87 *RLC* (n 85 above) [6] (emphasis added).

88 *Tabbakh* (n 86 above) [35], [38] and [48] (emphasis in original). Other members of the court agreed.

89 Ibid [48] (Richards LJ) (emphasis in original).

90 The *Tabbakh* judgment came to this conclusion based on the *RLC* judgment.

policy as unlawful when the Clinical Commissioning Group (CCG) neither prescribed lawful action nor proscribed unlawful action.[91] The reasoning of Underhill LJ here was that NHS Trusts are independent entities, with access to their own legal advice, so the CCG was not under a duty to advise NHS Trusts as to what routes were lawful. Clearly, *Bayer*'s interpretation of 'permits and encourages' is readily contrastable to those earlier interpretations in *RLC* and *Tabbakh*.

Ultimately, *Gillick* was a significant declaratory judgment and in some ways caused controversy at the time.[92] Subsequent Court of Appeal judgments took expansive approaches to the extent of review of circulars and other forms of official departmental guidance.[93] The Court of Appeal gradually extended the approach in *Gillick* by examining the question of inherent unfairness. However, the Supreme Court evidently became concerned at the gloss which some cases had put on the test post-*Gillick* and took the opportunity to express its concern in these joined judgments.

THE CASES OF *R(A)* AND *BF*

Though these two cases contain different facts and proceeded through the lower courts quite separately, they were nonetheless linked at Supreme Court level. In both matters the minister had issued the policies at their own discretion rather than being under a legal obligation to do so. Therefore, both cases were considered by the Supreme Court to be suitable vehicles by which to jointly examine (and clarify) 'the correct approach to judicial review of policies'.[94]

Earlier proceedings

In *R(A)* the applicant argued that there should be a presumption that the CSOD scheme subject be consulted and have the opportunity to make representations prior to the police making the disclosure to the enquiring member of the public. The Court of Appeal held that the scheme was not unfair, as there was no need for a presumption in favour of seeking representations in every case.

The Court of Appeal in *BF* had overturned the Upper Tribunal decision because, in its view, the 'policy as expressed … left open an unacceptable risk' that child asylum seekers would be detained as adults,[95] and so it found that the relevant sections of the guidance were

91 *Bayer* (n 86 above) [200].
92 See Harlow (n 26 above); Simpson (n 71 above); Williams (n 27 above).
93 See Wade and Forsyth (n 39 above) 486.
94 *R (A)*, CoA (n 8 above) [6].
95 *BF*, CoA (n 13 above) [78] (Underhill LJ).

unlawful.[96] The Court of Appeal, in the course of granting *BF*'s appeal, acknowledged that the 'appearance and demeanour' method in the guidance was 'based on a subjective and therefore fallible … means of assessing age'.[97] Whilst acknowledging that a finding of unlawfulness would not apply if the application of a proper policy brought the possibility of mere individual misapplication in the carrying out of the policy, the unlawfulness here arose where the 'terms of the policy themselves create[d] a risk which could be avoided if better formulated'.[98] Even Simon LJ, though dissenting, acknowledged when summarising the criticisms of the policy, that '[it] fail[ed] to convey the inherent doubtfulness of any assessment which is based solely on appearance and demeanour, and that the width of the potential margin for error is drawn too narrowly'.[99] The SSHD appealed this decision to the Supreme Court, but not before changing the wording of the relevant guidance in advance of the appeal being heard.[100] At this point the two cases were joined in the court lists and heard sequentially.

The Supreme Court's findings

From the very outset of the joined judgments, the views of the Supreme Court did not auger well for either individual. Sales LJ stated at paragraph 2 that:

> [i]t is a familiar feature of public law that Ministers and other public authorities often have wide discretionary powers to exercise. … Where public authorities have wide discretionary powers, they may find it helpful to promulgate policy documents to give guidance about how they may use those powers in practice. Policies may promote a number of objectives. In particular, where a number of officials all have to exercise the same discretionary powers in a stream of individual cases which come before them, a policy may provide them with guidance so that they apply the powers in similar ways and the risk of arbitrary or capricious differences of outcomes is reduced. If placed in the public domain, policies can help individuals to understand how discretionary powers are likely to be exercised in their situations and can provide standards against which public authorities can be held to account. In

96 Ibid [82] (Underhill LJ), referring to Criterion C under para 55.9.3.1 of EIG both as it appeared then and as it was reproduced in *Assessing Age* (nn 10–11 above).

97 *BF*, CoA (n 13 above) [85] (Simon LJ) (dissenting).

98 Ibid [63] (Underhill LJ).

99 Ibid [86] (Simon LJ) (dissenting).

100 For a summary of these changes, see ibid [16]–[28]. For further changes up to the Supreme Court hearing see ibid [43]; however, on foot of the Supreme Court judgment the minister promptly reverted to wording from older versions: see the latest version of *Assessing Age* (version 6.0 at the time of writing) published in March 2023 on foot of the Nationality and Borders Act 2022; see further nn 10–11 above.

> all these ways, policies can be an important tool in promoting good administration.[101]

Therefore, if one takes this statement, made so early in these judgments, as the point of departure then it is apparent that the court feels that soft law is a good thing on the whole and that there is no need to over-regulate its use by the state. The Supreme Court, therefore, unanimously found in favour of the SSHD in both judgments.[102]

For the avoidance of doubt, the Supreme Court made it clear in *BF* that many of the principles relied on in that case had been set out and could be found in *R(A)*,[103] rather than repeating itself in the *BF* judgment. This section will take a similar approach and examine the two judgments in concert. What follows is a precis of the court's views on the extent of review of soft law; *Gillick*'s role in the instant cases; and whether the policy in each of the respective cases was lawful.

The extent of review of soft law

Declining to be drawn on the source of discretionary powers,[104] the Supreme Court nonetheless considered that policies made using these powers were reviewable. Although others have argued for alternative grounds by which discretionary ministerial powers could be successfully challenged, such as legitimate expectation,[105] the Supreme Court here did not entertain the possibility of alternative potential grounds in the *ratio* and focused solely on illegality.[106] Recalling the reasoning of Rose LJ in *Bayer*,[107] the Supreme Court in *R(A)* reiterated that there were a limited number of ways a policy was capable of being deemed unlawful based on the statement of the law it includes or omits when giving guidance.[108] However, the Supreme Court ultimately held that none of these applied to *R(A)*,[109] and in *BF* remained silent on whether

101 *R(A)*, SCt (n 2 above) [2] per Sales LJ.

102 For contemporaneous case notes, see further Alison L Young, 'Judicial review of policies: or judicial retreat?' (*UK Constitutional Law Association* 5 August 2021) or Paul Daly, 'Firming up judicial review of soft law?' (2022) 81(1) Cambridge Law Journal 8–11.

103 *BF*, SCt (n 2 above) [1].

104 *R(A)*, SCt (n 2 above) [2].

105 See McHarg (n 18 above) and Chng (n 19 above); however, arguably, 'the courts are more willing to consider this where the rule is made in the context of a relatively clear statutory framework, against which its *vires* and reasonableness can be judged': Craig (n 61 above) 469.

106 Lord Sales did raise, *obiter* at [54], considerations of certainty and 'in accordance with the law' though only as it pertained to art 8 ECHR arguments and *Gillick* (n 73 above).

107 *Bayer* (n 86 above) [214].

108 *R(A)*, SCt (n 2 above) [45]–[46].

109 Ibid [46].

they were applicable to that case. To broaden this would require, they said, 'the courts to intervene to an unprecedented degree in the area of legislative choice and … executive decision-making in terms of control of the administrative apparatus'.[110]

The Supreme Court also took a firm position on the level of ministerial obligation depending on whether guidance was statutory or not:

> Since there is no [statutory] obligation [to produce a statement of the law here], there is no basis on which a court can strike down a policy which fails to meet that standard. The principled basis for intervention by a court is much narrower … .[111]

This statement by the Supreme Court may well have a significant impact on the future of non-statutory guidance cases in terms of their amenability (or lack thereof) to scrutiny by the courts. In *BF* it was held that the SSHD was under no obligation, at statute or common law,[112] to produce further guidance on foot of safeguarding duties towards children set out in section 55 of the Borders, Citizenship and Immigration Act 2009, but had nonetheless issued guidance using her discretion. The Supreme Court in *BF* also confirmed that there was no general duty at common law 'to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty',[113] though reducing risk was not addressed by the court. The court felt that to oblige the Secretary of State to provide guidance that satisfied such speculation would place too onerous a burden on the Secretary of State. The court emphasised the point by adding '[a]ny such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers.'[114] The Supreme Court thus took a narrower view on the extent of review of policy both in terms of the extent of review of this category of informal rules and also on the appropriate amount of judicial scrutiny as to mitigation against risk of misapplication or unfairness in policies' content.

Gillick*'s role in* R(A) *and* BF

The Supreme Court took the opportunity in *R(A)* to set aside more expansive approaches since *Gillick* by revisiting the Court of Appeal cases of *RLC* and *Tabbakh*.[115] Despite the fact that *RLC* had made

110 *BF*, SCt (n 2 above) [52]; see also *R(A)*, SCt (n 2 above) [40].
111 *R(A)*, SCt (n 2 above) [39].
112 See *BF*, SCt (n 2 above) [62]–[63].
113 Ibid [51].
114 Ibid [52].
115 *R(A)*, SCt (n 2 above) [55]–[65].

no mention of *Gillick* in its determinations, the Supreme Court in *R(A)* took the view that *RLC* could be 'readily assimilated with the approach derived from *Gillick*'.[116] The Supreme Court felt such a misunderstanding had also occurred in *Tabbakh*, observing that the comments made equating an 'unacceptable risk of unfairness with a risk of *unfairness inherent within the system* itself' were *obiter dicta* because the challenge in *Tabbakh* was ultimately dismissed.[117]

Whilst endorsing the restrictive *Gillick* approach taken by some subsequent judgments,[118] the Supreme Court in *R(A)* noted that certain other Court of Appeal judgments had 'treated [*RLC* and *Tabbakh*] as authority for … wider principles of review ([by asking] is there a real risk or unjustified risk of unfairness or illegality?) without examination of its consistency with the principles articulated in *Gillick*'.[119] The Supreme Court's position was that this tendency by the lower courts needed to be corrected, and so it 'put to one side a series of other principles which … have been relied upon [by the lower courts] to challenge the lawfulness of policies'.[120] The court then proceeded to itemise several cases that had fallen foul of this tendency,[121] including *BF*.[122] In particular, the Supreme Court highlighted that these cases had failed to place sufficient, or indeed any, emphasis on *Gillick* in their reasoning.[123] In doing so, the Supreme Court reiterated that the decisions in *RLC* and *Tabbakh* were merely applications of the *Gillick* principle rather than decisions establishing new free-standing principles.[124] Therefore, the Supreme Court held that the relevant test was to be found in *Gillick*, without the gloss which it had been given in some subsequent cases.

---

116 Ibid [62]; at [65] the court proceeded to provide five reasons why *RLC* should be subsequently viewed 'in line with *Gillick*'.

117 *R(A)*, SCt (n 2 above) [56] (emphasis added).

118 *R (Letts) v Lord Chancellor* [2015] EWHC 402 (Admin) and *Bayer* (n 86 above) – see *R(A)*, SCt (n 2 above) [44]–[48].

119 *R(A)*, SCt (n 2 above) [66].

120 Ibid [54].

121 *R (Detention Action) v First Tribunal (Immigration Chamber)* [2015] EWCA Civ 840; *R (S) v Director of Legal Aid Casework* [2016] EWCA Civ 464; *BF*, CoA (n 13 above); *R (Woolcock) v Secretary of State for Communities and Local Government* [2018] EWHC 17 (Admin); *R (W) v Secretary of State for the Home Department* [2020] EWHC 1299 (Admin); see *R(A)*, SCt (n 2 above) [67]–[74].

122 *R(A)*, SCt (n 2 above) [73].

123 Of these itemised cases, those that made no express mention of *Gillick* (n 73 above) included *Detention Action*, *R(S)*, *R(Woolcock)* and *R(W)* (see n 121 above); see also *R(A)*, SCt (n 2 above) [67]–[74].

124 *R(A)*, SCt (n 2 above) [48].

Whether the policy in question was unlawful?

On the subject of *Gillick* 'unlawfulness', the Supreme Court in *BF* rejected submissions that the relevant policy document[125] 'permits' or 'encourages' unlawful conduct 'because it does not sufficiently remove the risk that the immigration officers might make a mistake when they assess the age'.[126] Likewise in *R(A)*, the Supreme Court reinforced that the test for judicial review of a policy at common law was to be found in *Gillick*. When assessed thus, the guidance in both *R(A)* and *BF* was deemed lawful. In its view it was in accordance with, and did not contradict, the SSHD's legal obligations; nor did it give a misleading direction to the end-user. The court held that the guidance was not defective or unlawful just because it did not spell out 'in fine detail how decision-makers should assess ... in a particular case'.[127] It further held that 'it was not incumbent on the Secretary ... to eliminate every legal uncertainty which might arise in relation to decisions falling within its scope'.[128] This position was echoed in *BF* where the court felt that to oblige the SSHD to provide guidance that satisfied such speculation would place too onerous a burden on them as policy drafter.[129] This, the court felt, would create too far-reaching an obligation and could potentially conflict with the doctrine of separation of powers.[130] Therefore, the Supreme Court's view was that the guidance did enough because it specifically reminded decision-makers that they should satisfy themselves that a decision should conform to the common law requirements of fairness,[131] and in doing so the Secretary of State had discharged their duty accordingly. According to the Supreme Court in *R(A)*, if the test were any more demanding, then (a) there would be a practical disincentive for public authorities to issue policy statements, which would be contrary to the public interest, and (b) the courts would be drawn into reviewing and criticising the drafting of policies to an excessive degree.[132]

In *BF* the court considered that there were sufficient safeguards for the asylum-seeking child in the age assessment process because of both the 'benefit of the doubt' wording of the guidance and the

125 Criterion C under para 55.9.3.1 of EIG both as it appeared and as it was reproduced in *Assessing Age* (n 11 above).

126 *BF*, SCt (n 2 above) [51].

127 *R(A)*, SCt (n 2 above) [42].

128 Ibid.

129 See *BF*, SCt (n 2 above) [51].

130 Ibid [52].

131 Expressly so in the guidance at issue in *R(A)*, SCt (n 2 above) [42]; however, in *BF*, SCt (n 2 above), the Supreme Court was silent on this point.

132 *R(A)*, SCt (n 2 above) [40].

process used by immigration officers.[133] The 'benefit of doubt' was, in its view, sufficiently provided for in the policy guidance because those seeking asylum should be assessed to be an adult only if their physical appearance and demeanour 'very strongly suggests that they are *significantly* over the age of 18'.[134] The court also found that the fact that two immigration officers should reach the same conclusion that the 'borderline' child was an adult was an important safeguard.[135] Thus the Supreme Court observed that the minister had 'properly complied with her duty under section 55 of the 2009 Act'.[136] Though acknowledging that aberrant application by immigration officers was always a possibility,[137] and that uncertainty could never be eliminated,[138] the court failed to acknowledge that the risk to a child could be reduced through more precise wording in the policy. The court did not elaborate on how many individuals should have the policy misapplied towards them before a threshold was met which might draw attention to potential problems in the instructions.

133 In *BF*, SCt (n 2 above) [35]. The Supreme Court quoted the Upper Tribunal judge, that '[g]iven the evidential and methodological difficulties identified in both [sides'] data sets, I do not consider I have a sufficient evidential basis on which to draw any definite conclusions as regards whether there is a significant risk of error, let alone a risk that is systematic': *BF*, UT (n 14 above) [77]; see also [41]; however, cf [80] where (in the context of UNISON and the real risk of prevention of access to justice) the Supreme Court seemed to appreciate the part that statistics might play in an evaluative assessment of evidence regarding its likely impact and thereby test the lawfulness of a measure.

134 *BF*, SCt (n 2 above) [30] (original emphasis) referring to 'version 2' of Criterion C; note that by the time of the Supreme Court hearing this the wording had changed to 'their physical appearance and demeanour very strongly suggests that they are 25 years of age or over' (ibid [43]) but was since changed back as of January 2022.

135 *BF*, CoA (n 13 above) [58]; no evidence as to how often these two immigration officers disagreed with each other's assessment (if ever) was sought nor submitted.

136 Ibid [59]; the relevant provision that the Supreme Court was referring to was s 55(1)(a), namely 'having regard to the need to safeguard and promote the welfare of the children who are in the United Kingdom'.

137 In the event of the policy guidance being misunderstood or breached by an official, the Supreme Court viewed that the appropriate remedy is to have access to the courts. However, a logical consequence of unnecessarily vague guidance that the Supreme Court failed to recognise is that there would be an avoidable increased demand on the courts as a result.

138 *BF*, SCt (n 2 above) [58].

ANALYSIS

The political landscape that served as a backdrop to these proceedings may be worth acknowledging at this point. At the time when these matters were going through the courts the passage of new legislation affecting judicial review was being debated. The Independent Review of Administrative Law had just published its concluding report.[139] It would be speculative to ask whether this report, the Government's response to this report and, the introduction of the Judicial Review and Courts Act 2022 were in the minds of the Supreme Court during *R(A)* and *BF*.[140] Nonetheless, *R(A)* and *BF* do represent a retreat from the more expansive approach to review seen in the Court of Appeal up to that point.

The Supreme Court's judgments in *R(A)* and *BF* have certainly recalibrated the legal framework in this area, but in doing so they failed to appreciate some of the wider constitutional and human rights implications of their judgment. One might be forgiven for assuming that the Supreme Court's and my own views on soft law are diametrically opposed; that is not necessarily so. As was alluded to in *R(A)*,[141] there is much to commend soft law in terms of its expediency and capacity to provide detailed practical guidance of a policy to end-users. Therefore, in principle I agree that – if drafted clearly and if account is taken of the typical end-user's expertise – soft law can indeed 'be an important tool in promoting good administration'.[142] However, in practice those conditions are often not met, as was seen in the case of *BF*.[143]

By thinking about all soft law's scope of review, through the lens of *Gillick*, the Supreme Court created a number of problems which arise from that decision, as well as wider problems related to the use of illegality as the main basis for review. Other considerations only add to the shortcomings in the way soft law is currently made in the UK, namely the lack of any regulatory framework on the drafting, registration or monitoring of soft law instruments by the UK Government. Without such a framework it becomes all the more vital that the courts see it as their role to hold the executive accountable, in the absence of more rigorous standards from either the Government itself or Parliament. Before examining those wider considerations, however, it is necessary

139 See The Independent Review of Administrative Law (Crown Copyright March 2021).

140 Now the Judicial Review and Courts Act 2022, c 35; see further Paul Craig, 'IRAL: the Panel Report and the Government's response' (*UK Constitutional Law Association* 22 March 2021).

141 See Sales LJ's quote (text attached to n 101 above).

142 *R(A)*, SCt (n 2 above) [2].

143 See further the text under the heading 'Problems with foregrounding *Gillick*' below.

to first consider the ramifications for judgments' approach to the extent to which non-statutory policies may be judicially reviewed from now on.

Scope of review of soft law

What seems to have been missing from the Supreme Court's rationale for using the narrow *Gillick* test in *BF* is an acknowledgment that judicial review is often the recourse of last resort available to vulnerable applicants, such as children seeking asylum, to challenge non-statutory guidance.[144] This is made clear in cases like *BF* where an asylum-seeking child, like many others, was wrongly majoritised and had few options to challenge the process or policy other than via judicial review. As a result of this judgment, the scope of legal recourse for vulnerable rights holders has now narrowed significantly.[145] Though Weeks provided useful insights into what remedies for breach of soft law might be available at judicial review,[146] since these joint Supreme Court decisions such commentary has almost become moot in the UK in terms of 'unacceptable risk of unfairness'.

This stance by the Supreme Court also failed to acknowledge that the expanding range of non-statutory executive actions often do have practical and/or legal effect even if not statutorily empowered, and this decision could give rights holders less, or even no, opportunity to challenge a poorly worded policy which seriously risks breaching their rights. In *GCHQ*,[147] Lord Roskill made it clear that what opened a decision to review was its impact on an individual's rights rather than the source of the power used to make that decision. While *GCHQ* related to the use of prerogative powers, there is no compelling reason why a decision made on foot of a soft law instrument by a minister should be any more insulated from review than a decision made using prerogative power, if the impact on an applicant's rights is just as significant. The unsavoury alternative would be, as Elliott correctly points out, to limit judicial review to uses of legal power, which would result in under-inclusiveness by 'preclud[ing] review in circumstances in which this might be warranted by reference to the other normative factors which … animate judicial review'.[148] It is the constitutional imperative of effective legal control of government, he convincingly

144 As opposed to judicially reviewing, for example, a public authority's decision on foot of primary or secondary legislation.

145 See n 151 below for examples of other potential rights holders with vulnerabilities.

146 See Weeks (n 21 above), pt II generally.

147 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

148 See Mark Elliott, 'Judicial review's scope, foundations and purposes: joining the dots' (2012) 2012(1) New Zealand Law Review 75–111, 82, echoing the sentiments of Harris (n 49 above).

argues, that 'furnishes a justification for judicial review of the exercise by government of *de facto*, or "third source" powers'.[149] Harris has previously argued convincingly for the reviewability of government action on the grounds of breach of common law fundamental rights.[150]

The proliferation of soft law over the decades and the extent to which it impacts on the rights of people subject to it has only strengthened the need for these instruments to be judicially reviewed to their full extent. Whilst many of the UK population subject to forms of soft law may not be considered vulnerable individuals, where a particular soft law does apply to vulnerable individuals there should be an onus on the executive to mitigate against compounding their vulnerabilities in their drafting of the soft law instrument. In the case of certain categories of vulnerable applicant,[151] such as asylum-seeking children wrongly classified as adults, they are denied child-specific rights (such as rights to education and child protection rights during their minority) and procedural safeguards which are essential in order to guarantee to them all the rights deriving from their status as a minor. Therefore, if a minor is wrongly identified as an adult, serious and irreversible measures in breach of their rights might be taken by the state.

The Supreme Court commented on potential advantages of soft law in contrast to the formalities of 'hard law', and its potential for good governance.[152] One strength of soft law acknowledged by the Court was that it can be brought into force rapidly without the necessity of passage through the Houses of Parliament. Though not acknowledged by the Court here, this characteristic of soft law has the potential to serve good governance well and could have created a constructive dynamic between the executive and the judiciary in this respect. What the court praised as an advantage of soft law could arguably, in that constructive spirit, be seen as an effective tool for rectifying flawed drafting in guidance.[153] In the absence of an executive-led monitoring system to ensure that a new policy is being applied as envisaged, the courts could perform a valuable role in highlighting 'teething problems'. For example, interpretation of a guidance document could be clarified

149 See Elliott (n 148 above) 79.

150 See Harris (2010) (n 49 above).

151 Other groups whose vulnerabilities the Government should be live to when drafting their policies and instructions to end-users include those considering assisted suicide, young people (18–25) with special educational needs and disabilities at risk of exploitation, looked after children in the care system, unaccompanied minors seeking asylum placed in hotel accommodation and therefore at an increased risk of human trafficking/modern slavery.

152 See, for example, *BF* SCt (n 2 above) [2]; see also text between nn 56–58 above.

153 Something not dissimilar to this constructive dynamic (though on a more *ad hoc* basis) arguably occurred at times in the *BF*, UT (n 14 above) [95] and *BF*, CoA (n 13 above) [58].

by the court if doing so reduces both the risk of rights breaches and of further cases of a similar type coming before the courts. This need not be with a view to eliminating risk but rather managing identifiable and avoidable risks perhaps not foreseen by the drafters. Unlike Young, who sees it as fitting that fault be laid at the door of the decision maker,[154] it should be recognised that there is plenty of blame to go around, including some at the door of the drafter.

The SSHD in *BF* demonstrated the ease by which they could adapt and tighten guidance when they amended the relevant guidance on four occasions in the course of proceedings.[155] It is a shame, however, that the Supreme Court did not see that the judiciary could play a constructive role in such a reflexive process by way of issuing declaratory orders, at least until such time as a regulatory framework of soft law is designed, ideally by Parliament. This need no longer be regarded as a major innovation in the judicial role, given that the Supreme Court did something similar in 2020 when it endorsed standard directions for how the state should handle certain categories of asylum-seeking child cases.[156]

Furthermore, this cautious and hands-off position by the Supreme Court in *R(A)* and *BF* is extremely unlikely to discourage ministers from availing of this form of rule-making in the future. In fact, these judgments could actually encourage ministers to increasingly avail of this method, given that the scope of successful judicial review of soft law is slimmer than ever thanks to this now re-affirmed *Gillick* standard, and regardless of whether or not the wording of the guidance allows for an avoidable level of risk of unfairness when applied.

Lastly, it is unfortunate that the court neglected to include what the threshold might be before the court should intervene in the prolonged misapplication of policy. Surely, though the odd abhorrent decision is possible, even likely, there must be a point at which a court should have its attention drawn to the problem, be it poorly drafted instructions or systemic misapplication of policies with legal effect. Whether that threshold is 50 or 5000 such challenges is a matter that the Supreme Court should consider further.

Problems with foregrounding *Gillick*

The variability of end-users of policy documents is also important to consider. The Supreme Court in *R(A)* did not seem to appreciate the substantial range of different end-users' training or experience when it comes to interpreting and applying ministerial guidance. There is no connection made in the judgment between the 'inherent risk of

154 See Young (n 102 above).

155 See *Assessing Age* (n 10 above).

156 See *G v G* (n 3 above) Appendix 2; see also Walsh and Atkins (n 3 above).

unfairness' and the relevant end-user of the guidance. The inference here is that all end-users are created equally, in that they will all equally appreciate the subtleties of discretionary or mandatory aspects of relevant guidance, and of the ramifications. It is possible that, with appropriate training, this may be the case, but in the absence of that this is a flawed assumption. In *R(A)*,[157] the Supreme Court read Scarman LJ's oft-quoted *Gillick* test to mean that it 'was to be read objectively, having regard to the intended audience'.[158] In *Gillick*, the intended audience was general practitioners, who undergo on average 10 years of training to gain their qualifications and expertise before they apply their professional judgement; in *R(A)* the intended audience was police officers who undergo a minimum of three years' training before operating that policy. However, in *BF* the intended audience of immigration officers obtain no training on age assessment.[159] There is clearly a higher probability that policies may well be misconstrued and misapplied when operated in the absence of training. Training alone is only a partial solution, however, as the courts are still needed as recourse of last resort to hold public authorities' decisions based on soft law to account.

Unlawful on the basis of illegality

The restoration of the *Gillick* principle and the move away from its more expansive interpretations will have come as a blow to applicants and human rights advocates alike. What seems apparent from these judgments is that the Supreme Court has sent a signal to the lower courts that a more restrictive approach is expected in the future. The judgments also rely on the false assumption that what the claimants sought within the respective guidance was a 'detailed and comprehensive statement of the law'. This is not apparent nor applicable in either *R(A)* or *BF*, where the guidance primarily set out procedures to be followed. In *BF*, for instance, the applicant

157 *R(A)*, SCt (n 2 above) [33]–[34].

158 Ibid.

159 *BF* (UT) (n 13 above) [100] which states: 'The [SSHD]'s own evidence (given by Mr Gallagher) confirmed that none of the officers who implement this policy have any training on how they are to go about visual assessment or on how to apply the "very strong" and "significant" thresholds.' According to a recent immigration officer job description, 'training' means the following: 'Once you gain acceptance for a role as an immigration officer, you enrol in a training course. You learn topics like conflict management, communication and diversity awareness while also training on personal safety methods and arrest and restraint techniques.' The on-the-job skills that an immigration officer may acquire, eg through shadowing colleagues, may or may not sufficiently develop their professional judgment in respect to assessing age. See 'How to become an immigration officer: complete the training process'.

sought that the guidance acknowledge the uncertainty attached to appearance/demeanour age assessments by specifying the width of the potential margin of error, rather than remaining silent, thereby giving the end-user the impression that decision-making procedures were more certain than was actually the case.

While all three Court of Appeal judges in *BF* appreciated the uncertainty that comes with 'appearance and demeanour' age assessment,[160] the Supreme Court did not appreciate the importance of acknowledging uncertainty in the policy wording. This is a critical point for this policy, which some commentators fail to appreciate,[161] because by failing to acknowledge uncertainty and the margin of error in the age assessment procedure, the policy did in fact mislead the end-user decision-maker in terms of the latent flaws in the adopted age assessment method. The SSHD thereby omitted relevant considerations from the guidance that may, if included, have led to fewer misapplications by end-users of that guidance to date, more children to have their safeguarding rights ensured on arrival, and in turn fewer legal challenges.

Further concerns that these judgments highlighted include the government-wide lack of consistency towards policy scrutiny, implementation and end-user training. Consistency, accessibility and transparency would seem to be constructive steps towards good administration, for the executive, end-users and public alike. As with many forms of soft law currently in circulation, the Immigration Rules are a maze of guidance and policies. They are drafted inconsistently and on an *ad hoc* basis. They are not subjected to any regulation in terms of neither drafting, organisation nor registration. Young's argument highlighting 'the need to reinforce other forms of accountability over the growing use of policies' and her suggestion for 'codes and internal review procedures to facilitate effective systems of administration', while retaining recourse to the law as a last resort, has significant merit.[162] That would certainly be one means of achieving accountability through better monitoring of the roll-out of policies.

In his judgment in *BF* at the Upper Tribunal, Storey J drew on *R (European Roma Rights) v Prague Immigration Officer* to advance

160 At *BF*, CoA (n 13 above) [54], Underhill LJ referred to the immigration officers' age assessment as 'far less substantial' and 'more unreliable' than a *Merton*-compliant age assessment and Simon LJ at [85] acknowledged that the 'evidence shows that all age assessments are "an inexact science"' and that the margin of error 'can be as much as 5 years either side'; Baker LJ at [98] used the phrase 'inherently subjective'; local authorities carry out *Merton*-compliant age assessments, ibid, citing *R(B) v Merton LBC* [2003] EWHC 1689 (Admin).

161 Young (n 102 above).

162 Ibid.

the view that 'failure to monitor a policy can constitute unlawfulness',[163] which is a position this author, for one, finds persuasive. There is currently no such system of monitoring the roll-out of soft law policies in the UK, neither by individual government departments nor centrally. In terms of data-gathering in age assessment, Storey J in the Upper Tribunal also noted that reliable data was not available from the SSHD on how many immigration officer decisions as to age were ultimately overturned once challenged.[164] More consistent data-gathering for monitoring purposes across government departments is needed as well as a centralised monitoring system. This lack of standardised departmental oversight in turn hinders the possibility that 'public bodies ... bear a greater responsibility for ensuring that [agencies acting for the state] do not act unlawfully when they adhere to guidelines'.[165]

Pertaining specifically to asylum-seeking children, the SSHD would also be urged to provide training for immigration officers on the subtleties of applying the age assessment guidance as well as to acknowledge where the adopted methods lack certainty by inserting a '+/- 5 years margin of error' in the guidance.[166] In terms of training of decision-makers, the Court of Appeal in *BF* observed, with some concern, the acknowledgment by counsel for the SSHD that migration officers at first instance are provided with no specific training in age assessment beyond access to the guidance that was the subject of this case.[167] The Court of Appeal certainly felt this was a matter that the SSHD 'may wish to consider further'.[168] Despite the Court of Appeal judgment being overturned, it is clear that the SSHD should implement the above recommendations without delay, to both strive for best practice in the application of the policy and hopefully to mitigate against as many legal challenges in the future, or else risk falling foul of a *R (European Roma Rights)* type challenge in due course.

The Supreme Court judgments were also arguably lacking when they did not expressly take into account the larger human rights, constitutional and political implications of their decision. This decision

163 *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 62 [91]; Storey J acknowledged that 'whilst the [SSHD] has taken some steps to monitor this policy, she had done so belatedly and largely as a result of directions from the Court of Appeal and this Tribunal' [95].

164 As per the recommendations of Storey J, ibid.

165 See Young (n 102 above).

166 As recommended in *BF*, CoA (n 13 above) [75].

167 Ibid [58]; here Simon J (though dissenting) echoed the concerns of the Upper Tribunal judge who had found there to be a failure in regard to adequacy of training though not sufficient to render the policy unlawful as 'the challenge before [the Court was] confined to the policy rather than its application' – see *BF*, UT (n 14 above) [43].

168 *BF*, CoA (n 13 above) [58].

has clear human rights implications. Soft law, as was the case in *BF*, can lead to decisions that do affect people's rights,[169] and sometimes even determine whether a person has specific rights acknowledged or granted at all. Misidentifying an asylum-seeking child as an adult leads to their children's rights being denied them and them being placed in inappropriate adult settings for months or even years, where they are vulnerable to neglect, trauma, abuse, exploitation or trafficking. Furthermore, with ministers potentially making rules with legal effect without legislative sanction, the traditional lines separating the executive and legislative arms of the state have already begun to blur.

Constitutional considerations

The UK's fused separation of powers seeks to strike a delicate balance between roles of the respective arms of the state. Yet this decision does little to promote Parliament as the designated maker of UK law. The political implications of the Supreme Court's decision will likely be the encouragement of government ministers in a number of ways. Ministers will be encouraged to continue making rules through their discretionary power, and as such soft law created by the executive side-steps parliamentary oversight. Ministers may also be encouraged to continue drafting these instruments in non-legal and often vague terms. Furthermore, now that the Supreme Court has made its position clear, it is doubtful that ministers will now heed the constructive suggestions by the lower courts in the past urging reform of soft law, such as regulation.[170]

Whilst there are very few scholars who are full-throated supporters of soft law,[171] even those that see the merits of it nonetheless see the flaws in the existing *ad hoc* state of affairs.[172] Even if soft law was used appropriately, for example in times of emergency,[173] many scholars argue nonetheless that there is a need for caution in the increased use of these powers.[174] Contention amongst commentators often lies in how the *status quo* can be reformed for the better. Reform is urged

169 See also Weeks (n 21 above); Simpson (n 71 above).

170 Eg *BF*, UT (n 14 above) [95]; *BF*, CoA (n 13 above) [75].

171 P Daly (n 53 above) and S Daly (n 22 above) see some of their advantages; Simpson (n 71 above) does not see the third source powers as the problem *per se*, rather the lack of positive rules to control such action.

172 See Young (n 102 above); see also Rawlings (n 30 above); see also McHarg (n 18 above).

173 Eg Jonathan Montgomery, Caroline Jones and Hazel Biggs, 'Hidden law-making in the province of medical jurisprudence' (2014) 77(3) Modern Law Review 343 or S Daly (n 22 above) advocating in favour of ministers invoking soft law under certain circumstances.

174 See Ganz (n 45 above); see also Lester and Weait (n 36 above); Cohn (n 35 above); Simpson (n 71 above); McHarg (n 18 above).

both in terms of ministerial accountability and for a more consistent normatively informed system by which the courts should examine soft law in judicial review proceedings.[175] Regulation is a common plea by many supporters of reform, 'to ensure an effective system of administration and that sound policy choices are made',[176] though they often differ as to who ought to do the work of regulating.[177] Whilst some, including myself, argue for parliamentary intervention in the form of 'legislation setting out clear legal requirements of consultation in the formulation of policies, which could help ensure better policies are adopted in the first place',[178] others prefer to leave responsibility to the Government.[179]

The principle of parliamentary sovereignty is almost sacred in the UK constitution. As a result, executive rule-making, though at times useful and advantageous for the better administration of the state, when unchecked also carries with it the constitutional 'health warning' of side-stepping parliamentary scrutiny in the process. This caution should most be heeded when it comes to non-statutory executive rule-making of the kind challenged in *R(A)* and *BF*. However, these Supreme Court judgments would seem to signal to ministers that they may now have far more impunity when it comes to soft law, in stark contrast to the pre-*R(A)* and *BF* case law. One further implication of *R(A)* and *BF* is to discourage as much judicial scrutiny of soft law as had occurred to date.[180] The lower courts are now on notice that more restraint is expected of them in the future than was seen previously when it comes to adjudicating on soft law.

In the absence of a regulated system as described by Young, the only remaining port of call is the court's scrutiny, and this Supreme Court has just made the route to this port even narrower for applicants at a time when the scope of this soft law form of rule-making is more widespread than ever. Whilst I would join calls for Parliament to regularise the making of, appropriate use for, recording of and monitoring of non-statutory guidance, short of scrutiny by Parliament, it seems remiss for the judiciary to restrain itself as legitimate scrutiniser of executive power as exercised in this way.

---

175 See eg Megarry (n 27 above); Cohn (n 35 above) – note that Cohn calls for theorisation of public law in order to develop a distinct approach to third source powers.

176 See Young (n 102 above); see also Rawlings (n 30 above) 216.

177 Simpson (n 71 above) sees the courts as the default regulator; cf S Daly (n 22 above).

178 See Young (n 102 above).

179 Eg S Daly (n 22 above) who echoes Endicott (n 66 above) in taking a more 'pro-executive' view on soft law.

180 See further Elliott and Varuhas (n 31 above) 181.

Though some may argue that it is necessary to ensure that courts do not stray from their proper role,[181] I would argue that the courts should not be limited in the policies they review. After all, legal accountability dictates that decisions and actions of the executive are scrutinised though the courts. Whether the rule derives from statute or otherwise is surely immaterial. The courts are both well placed and constitutionally justified in performing this much-needed role in pro-actively scrutinising this discretionary aspect of executive rule-making.

CONCLUSION

These judgments are very telling as to how some of the judiciary at the highest level view their role in relation to scrutinising soft law. This is in some contrast to the pattern of judgments that emerged out of the Court of Appeal in the years subsequent to *Gillick*. Though the position taken by this particular panel may not be indicative of an overall Supreme Court consensus, it certainly indicates that a strong judicial deference exists amongst some Supreme Court judges towards non-statutory guidelines as a form of soft law.

These judgments have effectively reset the course of judicially reviewing soft law instruments and undone years of what it clearly views as the lower courts having 'drifted off course'. We are all now on notice that arguments of real/inherent risk of unfairness alone will get short shrift from the courts, as the *Gillick* principle was strongly endorsed by the Supreme Court as the benchmark when judicially reviewing government policies. However, this renewed high threshold may also serve to embolden the executive and deter potential legitimate challengers of unlawful policies, particularly non-statutory ones.

These judgments served to highlight serious systemic flaws in good governance of soft law instruments. Lack of self-regulation or any monitoring system, either at departmental level or centrally, has led to an *ad hoc* and unpredictable government approach to this ever-expanding body of rules. Likewise, once applied, there is no guarantee of end-user training nor that consistent data-gathering will occur, leading to failure to monitor a policy and whether it is achieving its objectives. Though it would not be possible to eradicate risk, such constructive reforms would mitigate the real and inherent risk of further unfairness in how the guidance is applied by end-users. One suspects, however, that the political will for reform on this scale is absent.

Specific to *BF*, it is regrettable that the Supreme Court did not encourage better governance of soft law by the Government, perhaps by way of declaratory judgment or by endorsing draft standard directions

181 See Young (n 102 above).

specifying best practice and procedures surrounding asylum-seeking children (or both) to better impede this appreciable and avoidable risk. Though this could be said of many policies, while the policy at the centre of *BF* remains as is, more children will have their rights breached and be put at risk. Furthermore, by mistakenly treating too many children as adults, the UK asylum system has already deprived too many of what is left of their childhoods.

Viewed more broadly, these joined judgments came before the Supreme Court ripe for acknowledgment both of (a) the ways in which non-statutory 'guidance' is utilised by the executive today, having grown exponentially in recent decades, and (b) the constructive role the judiciary may occupy until such time as a much-needed soft law regulatory framework is created. Soft law instruments no longer function as mere supplements to legal provisions or as clarifying 'guidance' for industry and qualified professional bodies, but can now contain detailed practice and procedure documents for agents of the state. However, the Supreme Court's approach on this occasion did not see such acknowledgments as worth making, even though judicial review of discretionary ministerial powers with human rights ramifications fits squarely within the court's supervisory jurisdiction.