The Government's Response to the Independent Review of Administrative Law Representations on behalf of the Bar Council of England and Wales

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Introduction

- These slides focus on the following aspects of Government's Response (CP 408) ("**the Response**") to the publication of the ***The Independent Review of Administrative Law*** (CP 407) chaired by Lord Faulks QC ("**IRAL**") which was described by the Lord Chancellor as "*a well-researched and closely argued Report which reflects the diversity of views on Judicial Review*":
  - Judicial overreach and the rule of law
  - The role of certainty in the rule of law
  - Ouster clauses
  - Nullity as a factor relevant to remedies
  - Prospective remedies especially for quashing of SIs
  - Suspension of remedies whether -
    - In the discretion of the court
    - Presumed unless rebutted by exceptional circumstances
- §12 "*Drafting to legislate on the above issues would not be simple, and the Government is open to considering whether other measures, either legislative or non-legislative, could be effective. Similarly, the risk of unintended consequences is one the Government is cognisant of and will explore.*"
- NB It is critical to understand how far Government intends to pursue all of the various proposals in the Response since the scope and detail is critical to assessing its effect on the constitutional arrangements between the Courts and Parliament and the protections afforded to individuals by JR.

Judicial overreach

- The Response sets the Government's reason for reform in the Foreword by the Lord Chancellor (which was repeated in a press release) by making the incorrect statement that
  - "The Panel's analysis identified a growing tendency for the courts in Judicial Review cases to edge away from a strictly supervisory jurisdiction, becoming more willing to review the merits of the decisions themselves, instead of the way in which those decisions were made. The reasoning of decision-makers has been replaced, in essence, with that of the court. We should strive to create anduphold a system which avoids drawing the courts into deciding on merit or moralvalues issues which lie more appropriately with the executive or Parliament."
- This is factually inaccurate as Lord Faulks himself made clear in an interview by Joshua Rozenberg (*Law in Action* and Joshua Rozenberg's blog 23 March) and as can be seen e.g. from IRAL §§3.19-3.24 and the Conclusions §§6 and 7 –
  - "The fact that 'difficult' cases attract different views is true in other areas of law and by itself is rarely justification for radical reform. We stress, as we say in the body of the report, that the great majority of cases involve the straightforward application of well-established judicial review principles.
- This is the experience of those who practice in public law. The existence of a few controversial cases does not warrant the drawing of sweeping conclusions or making major changes without proper study and it is concerning that assumptions of a systemic problem is based on such a misconceived basis.

Judicial overreach

- IRAL noted the fertile area of dispute over the extent of intervention and justiciability but noted that this was in large part the result of the introduction of EU law and the Human Rights Act by Parliament.
- Professor Paul Craig has written "The Response is grounded on a particular conception of the rule of law, espoused by Richard Ekins, (para. 26), which is in itself based on highly contestable assumptions concerning this concept, and equally contestable assumptions as to how judicial review operates."
- As Professor Mark Elliott has commented (*Public Law for Everyone, Blog,* 17.4.21)
  - "the view that the principle of legality reflects the outworking of the courts' independent constitutional function, whereby it is right and proper for them to seek to give effect to legislation in a way that is respectful of fundamental constitutional values, is replaced by a view that castigates courts for illegitimately projecting their 'own views' onto legislation enacted by Parliament. Of course, if courts really are merely 'servants of Parliament', this critique acquires considerable force. But that underlying assumption itself reflects a partial and highly contestable understanding of the respective roles of the judicial and political branches."
- See e.g. Lord Nicholls in ***In re Spectrum Plus Ltd*** [2005] 2 AC 680 on the constitutional role of the Court esp. at §§31-33 (in the context of consideration of overruling and the common law) which draws a clear line in the separation of powers between Parliament and the Courts, whose role it is to interpret what Parliament sets down in statute. The Response appears to seek to undermine this constitutional fundamental by seeking to limit the role of the Courts.

Judicial overreach

- It is also important not to confuse decisions made with regard to issues such as fairness, central to the rule of law, as moral judgments or substantive interference since they inevitably require a fact-intensive review of the circumstances and context and may inevitably involve questions of whether prejudice to individuals should take precedence over administrative convenience.
- Moreover, it is not suggested that there may not be scope for further consideration of the principle of illegality but that it is of considerable complexity and controversy and if it is to be the basis for intervention, it should not be dealt with in haste following a short consultation but given to the Law Commission for its proper consideration. Rushing to conclusions may not only be unwise without the level of careful deliberation the LC can provide but it may have unintended consequences that harm the constitutional role of the Courts. As Professor Elliott has said -
  - "None of this is to suggest that the courts should unquestioningly be treated as having carte blanche to develop the principle of legality and the approach to judicial review that goes along with it however they wish. For instance, the IRAL Report is undoubtedly right to highlight the difficulties that can arise due to the uncertain scope of the principle of legality, to call for further work in this area, and to underline the scope for extra-judicial, as well as judicial, contributions to that work."
- Professor Paul Craig writes "The fabric of judicial review has existed for over 400 hundred years. There is no reason for modification thereto to be subject to such tight time constraints."

Judicial overreach

- As a final word, in response the Lord Chancellor's suggestion that he wishes to -
  - "restore the place of justice at the heart of our society by ensuring that all the institutions of the state act together in their appropriate capacity to uphold the Rule of Law"
- However, IRAL provides no support for the need for any significant "restoration" but supports the view that JR plays an critical constitutional role. As Professor Paul Daly writes in his *Administrative Law Matters Blog* 18.3.21
  - "It would probably be an overstatement to suggest that the Faulks Report is a celebration of judicial review, but it certainly highlights the importance of the judicial review jurisdiction as a backstop against misuse or abuse of power by public bodies. The last paragraph of the Introduction captures, I think, the general mood of the report as a whole. The Panel cites Professor Richard Mulgan's scholarship on accountability:
    - Judicial hearings increasingly require the government to disclose publicly what it has done and why; they allow members of the public the right to contest such government actions, and they can force the government into remedial action. Indeed, an effective, independent judicial system is a fundamental prerequisite for effective executive accountability.
  - And states, simply: " The Panel agrees" (at para. 40)."

Certainty and the Rule of Law

- The Response attaches significant weight to achieving certainty (which is referred to some 15 times in the Response as opposed to 7 references to fairness or unfairness) through its proposed reform of remedies
  - "68. The Government considers that legal certainty, and hence the Rule of Law, may be best served by only prospectively invalidating such provisions…"
  - "70. In both proposed approaches, legal certainty is given higher regard than the Government considers that it currently is, or would be with the use of a discretionary power. Both powers provide clarity and certainty to the use of executive powers, while also providing for clear safety valves by which the courts can find the appropriate and just outcome where required…"
- However, certainty is only one among many considerations, and may indeed undue emphasis on it undermine the rule of law since it places a greater value on administrative convenience than grappling with the effect of unlawfulness, unfairness and prejudice to individuals affected by the unlawful act. Certainty says nothing about the act in that an unjust decision or law may be certain.
- As Professor Elliott writes
  - "As if these proposals, which risk eviscerating judicial review, were not objectionable enough, the Government then proceeds to argue that all of this is to be done in the service of the rule of law…"

Certainty and the Rule of Law

- Having quoted §68 of the Response, Professor Elliott continues:
  - "This conveniently overlooks the fact that another critical component of the rule of law is the requirement of government under law — and that that fundamental principle would be placed in serious jeopardy by preventing or improperly limiting retrospective invalidation of unlawful administrative acts. Doing so would, in effect, enable the Government to legislate at will, confident in the knowledge that anything done under the colour of such secondary legislation — however blatantly unlawful it might be — would be functionally lawful up to the point of the issuing of any relief, thanks to the courts' inability retrospectively to invalidate it.
  - None of this is to deny that the demands of the rule of law can sometimes pull in opposing directions in this area, and that the requirements of legal certainty and legality may be in tension with one another. Nor is it to deny that there may be circumstances in which the former may outweigh the latter. But these are not novel issues; rather, they are ones that can readily be resolved by the courts through their existing capacity to exercise remedial discretion where appropriate. In contrast, the Government's astonishing proposals amount to nothing other than an attempt to launch an assault on judicial review under the cover of promoting the rule of law. Even in a post-truth age, such constitutional gaslighting cannot be allowed to go unchallenged."
- We agree.

Ouster clauses

- **De Smith** (8th ed) §4-008 notes that the ouster cases -
  - "demonstrate how carefully the courts will scrutinise any attempt to oust their ability to protect the citizen against abuse of power by public bodies and at the same time how important it is to the rule of law that Parliament does not attempt to do so inappropriately. In this area in a jurisdiction where there is no entrenched constitution there is a very heavy responsibility for restraint on all the arms of government."
- The question of whether ouster clauses are effective is generally a matter for the courts in discharging their constitutional role of interpreting the legislation of Parliament. A general approach is inappropriate and it appears to be assumed that ousters are necessarily easily overridden. IRAL considered excluding JR should be an "exceptional course" requiring "highly cogent reasons" (§2.89).
- It also overlooks the difficulty that it assumes that Parliament has made its intention clear in the specific legislation and proposes to substitute a general approach which has the potential to create a serious limitation on JR which taken with the proposed reform of remedies will do much to emasculate JR and undermine the Rule of Law.
- Professor Elliott in the second of his blogs on the Response (*Public Law for Everyone*, *Judicial review reform II: Ouster clauses and the rule of law,*11.4.21) sets out a series of forceful criticisms of the Response, especially when taken with the remedies proposals

Ouster clauses

- See Professor Elliott *Judicial review reform II* 11.4.21
  - "it follows that the Government is proposing that the vast majority of unlawful administrative acts should either not be reviewable at all (because review would be impossible thanks to more efficacious ouster clauses) or should be reviewable subject to remedial consequences that would be significantly inferior to those that currently exist thanks to a combination of conceptual avoidance of nullity and collateral challenge and the introduction of a significantly attenuated remedial regime …. Of course, it is not necessarily the case that, following the implementation of these 'reforms', ouster clauses would be enacted left, right and centre. It is, however, crucial to note, by way of conclusion, that the proposed changes would both lay the foundation for the enactment of newly potent ouster clauses while simultaneously dismantling critical parts of the conceptual machinery that accounts for the relative effectiveness of modern administrative law — both in the face of ouster clauses and in the other senses set out above. In its Response to the IRAL Report, the Government avers that: 'The rule of law matters.' But the devil is in the detail…"

Ouster clauses

- The suggested limitations on the Courts' ability to override an ouster at §§89-91 would severely impair the scope of JR by attempting to set a very high threshold for intervention. Whilst taken with other proposals e.g. regarding nullity and remedies, this might be convenient for Govdrnment (at least while in power) it would be at the cost of a system developed to hold them to account and to observe the law. The ouster proposals only come into play when there has been an unlawful act and therefore seek to limit the ability of the citizen to hold Government accountable. The existence of other means of complaint is no guarantee of speedy or effective justice.
- Ouster is better left as a question for consideration on a sectoral basis. See e.g. s. 27 of the Social Security Act 1998 which limits the effect of test cases, or the ouster in planning and similar legislation (e.g. CPR Part 54.5 and s. 288 of the Town and Country Planning Act 1990) which limits the nature of challenges and ousts jurisdiction unless claims are brought within a fixed 6 week period. In the latter, the Courts have been firm in their rejection of attempts to avoid the ouster – see e.g. ***Barker v Hambleton DC*** [2013] PTSR 41.
- An attempt to forge a "one size fits all" restrictive approach ignores the different considerations in each sector and the need to uphold and not undermine the rule of law: see IRAL §2.89.

Nullity

- The Responses is more concerned, in the context of prospective and suspended orders (below) with the point flagged by IRAL at as to the difficulties created by the concept of "nullity" the Supreme Court decision in ***Ahmed*** (where the SC considered suspending the order would obfuscate its effect) and the role played by the enlargement of JR post-***Anisminic.***
- A significant amount of Section 5 (§§71-84) is taken with the discussion on nullity arising from the point that if subordinate legislation, policy or a decision is a nullity, then the Court can have no discretion over remedy, which is seen as undermining the proposals both for prospective remedies and suspended orders. It is regarded as running contrary to the principle of certainty (though the finding of an administrative act as void appears more certain than the application of the "valid until quashed" approach).
- The focus on this conceptually difficult issue is wholly disproportionate both as to the limited role that nullity plays in practice and to the means to resolve any issue with it. The more extensive the proposed intervention the greater the risk of unintended consequences. Legislation may only shift the problem (such as it is) rather than resolving it. The debate will continue, focussed on the language of the statute and the underlying constitutional principles which limit what such a statute might achieve.
- Although the choice of commentators in support of the Response's is selective, there is a large body of academic opinion that the distinction is of little consequence. See e.g. **De Smith** (8th ed) Chapter 4, especially "*The situation today*" at paras. 4-062 to 4-067 which supports that view.

Nullity

- The §74 reference to Professor Daly's 2014 blog fails to note that he does not analyse that claim of "*astonishing regularity*" and in any event states with regard to the quotation from Professor Feldman (Response §71) "*I am not sure that propositions (2) and (3) are pervasive amongst people who think seriously about public law …*" It is not pervasive among practitioners either. Nullity is not considered to be a significant factor in practice.
- IRAL treated the issue pragmatically at §§3.59-3.60 (see Response at §73) suggesting that if necessary Parliament should simply reverse the Supreme Court's decision in ***Ahmed*** and give the courts the power to grant remedies (including making suspended quashing orders) notwithstanding whether the act might be regarded as void. As IRAL noted
  - "The common law's adherence to the "metaphysic of nullity" has never been more than half-hearted, driven as it has been less by considerations of principle and more by policy concerns to limit the operation of legislation ousting judicial review or to preserve people's abilities to mount collateral challenges under the civil and criminal law to the lawfulness of administrative action."
- The proposal to legislate and to alter the principles of JR (§81 especially c) risk unintended consequences given that the issue could be resolved simply by legislating that remedies should remain discretionary even in cases of nullity (which reflects the general approach in practice).

Prospective remedies

- The Response itself recognised difficulties with prospective remedies –
  - "61. … this could lead to an immediate unjust outcome for many of those who have already been affected by an improperly made policy, but this would be remedied in the long-term. It is also recognised that the Report made no recommendations in relation to this measure."
- The Response does not consider the authoritative consideration of the injustice and difficulties that prospective remedies may create by Lord Nicholls in ***In re Spectrum Plus*** (above) at §§12-17, 26-38, considering whether there was power to overrule prospectively, where he considered practical and in principle objections to prospective remedies, though acknowledging that they were not incompatible per se with the judicial function (noting s. 102 of the Scotland Act 1998 and the equivalent provisions for Wales and Northern Ireland). The existence of those specific powers does not, contrary to the Response, provide a basis for assuming that prospective remedies are generally suitable as Lord Nicholls careful analysis makes clear. See also Lord Hope at §§71-74.
- Note e.g. the discussion of the unfairness caused by a prospective remedy itself, leaving the victims of the unlawful act without a remedy, the possibility of discrimination between those who bring the action and those who wait until after it concludes, and arbitrariness in the relationship between the timing of multiple cases (worsened in the "selective" use of prospective remedies).

Prospective remedies

- S. 102 not an appropriate model since it concerns the very special position of the devolved administrations, and whether they act within their devolved competence, and formed part of the devolution settlement. These are very different issues from those in JR generally. If it were a model, which it should not be, in any event it does not require or presume suspension or prospective effect but leaves it to the discretion of the Court: s. 102(2).
- In practical terms, the use of such a power may in practice require clear evidence or proposals from the respondent as to how the injustice created by the unlawful act would be remedied and within what timescales, otherwise it seems the Court would be unlikely to be attracted by its use if it leaves in place the consequences of an unlawful act for an uncertain period and possibly without any remedy for the subject of the unlawful act. This is likely to be enhanced in cases of unlawful delegated legislation where the effect on individuals is likely to be greater.
- It is likely to create a complex situation where post-judgment consideration of remedies is significantly extended to allow evidence and proposals to be put before the Court to justify the use of a prospective order and may require the granting of a form of post-judgment interim relief to protect those affected by the unlawful act. It may require new procedural rules. It will extend well beyond the limited evidence the Courts take into account in considering whether to refuse relief under s. 31(2A)-(2C) (see ***Plan B Earth*** in the Court of Appeal [2020] PTSR 1246 at [267]-[276]). The scope for satellite litigation is obvious.

Prospective remedies

- It is unclear how considerations of certainty and timing in remedial action which should follow a prospective order will be accommodated e.g. how certain is remedial legislation, how long it will take and whether it will be satisfactory with regard to the error found, or proposals to provide some assistance for those who have been prejudiced by the unlawful act in the first place.
- If, as the Reponses incorrectly complains, there were an increasing problem with judicial overreach, it is not clear why the Response considers it then acceptable (§64) for the Court, in the context of deciding whether to grant a prospective remedy only, to determine questions such as whether such an order would have exceptional economic implications, whether there would be a significant administrative burden and whether this would outweigh the harm to the individual victims of the unlawful act.
- On the other hand it would be a constitutional outrage if the Courts were to be deprived of their discretion having found an unlawful act, and JR thereby neutered
- The types of factor referred to in §64 only serve to underline the practical difficulties and additional procedural delay caused in the JR process since it is highly doubtful they can simply be "tagged on" to a JR response or relatively simply dealt with as submissions with regard to the exercise of discretion or operation of s. 31(2A)-(2C) which are based on the JR evidence.

Suspended quashing orders

- There is scope for conferring power on the Courts (which they may have in any event) to suspend the provision of remedies (see ***Ahmed No 2*** §§4-7, though there the issue of nullity came into play). However this should not be presumed either generally or specifically with regard to SIs, requiring proof of good reasons for not suspending or even the demonstration of exceptional circumstances
- S. 102 of the Scotland Act is not an appropriate model (see above) but does not require or presume suspension (s. 102(2)), merely gives a discretion subject to a procedure to be followed and consideration of "the extent to which persons who are not parties to the proceedings would otherwise be adversely affected".
- This proposal is subject to many of the difficulties which prospective orders create e.g. the party who successfully bring a challenge may have no remedy for that case, their may be other forms of unfairness in those who were prejudiced by the unlawful interpretation which the court rejects.
- It is not clear whether it is proposed to be limited to cases of secondary legislation and seems wholly inappropriate for individual administrative decisions which are found to be unlawful e.g. an unfair refusal of benefit, a planning decision granted without consideration of some relevant factor, compulsory purchase of a property without due consideration of the viability of the CPO scheme.

General and practical considerations

- How easily will it be to accommodate the impact of decisions where the claimant makes out a case for JR in e.g. the deprivation of benefits, unlawful treatment, discrimination etc if it is to be suspended or prospectively quashed?
- How to accommodate consideration of certainty and timing in remedial action which should follow a suspended or prospective order e.g. in terms of legislation in Parliament which is less certain and speedy than subordinate legislation or amending policy, or in terms of statutory processes applying to local government, or interim relief to be required to satisfy the Court
- What assurances will be able to be provided to the Court e.g. if the Government does not have a sufficient majority, or there is not enough legislative time or there is no consensus as to the manner of resolving the legal issue?
- Will any form of redress be made available to
  - The successful claimant whose interests have been harmed by the unlawful act e.g. by the deprivation of financial support, loss of status etc.
  - Others who have brought claims following the successful claim and equally harmed
  - Those who have not brought claims but are harmed and await the outcome of the claim

  Will there be discrimination between those prejudiced?

General and practical considerations

- It is difficult to understand the impact of the Response which will depend on which proposals (and which version of them) are taken up by Government for legislation. As Professor Elliott has said, the devil is in the detail.
- There is a real risk if the inappropriate model of s. 102 of the Scotland Act is used, and suspension presumed the current constitutional protections afforded by it to individuals will be significantly curtailed – "eviscerated" as Professor Elliott describes it -

  > "a combination of conceptual avoidance of nullity and collateral challenge and the introduction of a significantly attenuated remedial regime"

- Though it may depend on whether suspension is discretionary or presumed, the factors necessary to determine whether to exercise the power to suspend or to exceptionally rebut the presumed suspension will go beyond the limited evidence the Courts will taken into account in considering the exercise of its discretion as to relief or under s. 31(2A)-(2C) (see ***Plan B Earth*** in the Court of Appeal [2020] PTSR 1246 at [267]-[276]. S. 102(3)-(5) of the Scotland Act supports that view.
- While it is possible that the evidence will have to be provided as part of the main JR proceedings, this could lead to a significant extension of the time required for the hearing, require additional evidence and the costs associated – though in many respects it would not be required unless and until the Court concludes that the decision was unlawful. S. 102 has a special procedure even in devolution cases – s. 102(3)-(5) which allows the participation of those who may be affected.

General and practical considerations

- Lord Nicholls in ***Spectrum*** highlights the type of serious concerns the Courts are bound to have in approaching this issue.
- If suspension is presumed, there will inevitably be considerable scope for dispute over "exceptional public interest" and how that would fit with decisions significantly affecting individuals. Oddly, this may require the Courts to engage with the types of broader policy issues the Response is keen to prevent the Courts from taking. This issue itself would create scope for a protracted dispute over the exercise of the new powers and additional delays and costs in the system, which may further prejudice the successful claimant.
- Problems exist as to how to accommodate consideration of certainty and timing in remedial action which should follow a suspended or prospective order, especially if the Court is anxious (as it well might be) to provide some protection for those whose interests have been effected
- Further problems would be created if the power went beyond subordinate legislation and applied to individual decisions or other public body decision-making, where the prospect of appropriate corrective action may be even less certain, and it may leave local authorities saddled e.g. with ultra vires contracts or unlawful financial arrangements. How would it apply to environmental decisions where suspension may be causing harm to the environment either generally or that of the applicants?

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