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Galina Ward

Public law errors and invalidity

Presumption of validity

Smith v East Elloe Rural District Council [1956] AC 736

"…An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders…"

The principle in *Anisminic*

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147

"It has sometimes been said that it is only when a tribunal acts without jurisdiction that its decision is a nullity. But…there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity."

What did Anisminic decide?

Boddington v British Transport Police [1999] 2 AC 143

Lord Irvine:

"Subordinate legislation, or an administrative act, is sometimes said to be presumed lawful until it has been pronounced unlawful. This does not, however, entail that such legislation or act is valid until quashed prospectively…In my judgment, the true effect of the presumption is that the legislation or act which is impugned is presumed to be good until pronounced to be unlawful, but is then recognised as never having had any legal effect at all."

What did *Anisminic* decide? (2)

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Lord Browne Wilkinson:

“During that period people will have regulated their lives on the basis that the act is valid. The subsequent recognition of its invalidity cannot rewrite history as to all the other matters done in the meantime in reliance on its validity.”

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What did *Anisminic* decide? (3)

Lord Slynn:

"I consider that the result of allowing a collateral challenge in proceedings before courts of competent jurisdiction can be reached without it being necessary in this case to say that if an act or byelaw is invalid it must be held to have been invalid from the outset for all purposes…may be the logical result and will no doubt sometimes be the position but courts have had to grapple with the problem of reconciling the logical result with the reality that much may have been done on the basis that an administrative act or a byelaw was valid…The cases referred to in Wade and Forsyth…lead the authors to the view that nullity is a relative rather than an absolute concept…and that "void" is meaningless in any absolute sense. Its meaning is "relative". This may all be rather imprecise but the law in this area has developed in a pragmatic way on a case by case basis."

What did *Anisminic* decide? (4)

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Lord Steyn:

"…it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act, and it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void."

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What did *Anisminic* decide? (5)

R(Lumba) v SSHD [2011] UKSC 12:

"The importance of *Anisminic* is that it established that there was a single category of errors of law, all of which rendered a decision ultra vires: see *Boddington*…"

What does this mean for deportation orders?

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SSHD v Draga [2012] EWCA Civ 842:

"There will, however, be some cases where appeals are allowed by the Tribunal on the basis that there was a breach of a rule of public law in the process of making the decision to make the order, where the nature of the breach will be such as to render the detention unlawful…It must however be acknowledged that it is difficult to identify any principled basis for distinguishing between those public law errors which will render the decision to detain unlawful and those which will not."

Effect of successful appeal against deportation order

George v SSHD [2014] UKSC 28:

"The words of section 5 of the 1971 Act are, as words, capable either of importing revival of leave or of not doing so. Revival is not their natural meaning, because the natural meaning is that revocation takes effect when it happens and does not undo events occurring during the lifetime of the deportation order. Revival is a significant and far reaching legal concept, and it is much more likely that it would have been specifically provided for if it had been intended…

On its correct construction, section 5(2) of the 1971 Act does not mean that if the deportation order is revoked, the invalidation by section 5(1) of leave to remain is retrospectively undone…"

The limits of *George*

R (Guled) v SSHD [2019] EWCA Civ 92

" I therefore turn to the issue of whether the public law error in the making of DO2 rendered that order a nullity, void ab initio, which accordingly did not invalidate Mr Guled's existing LTR. Lord Dyson's words in *Lumba* expressed the *Anisminic* principle in broad terms, and relied upon *Boddington*. However, as I have indicated…Lord Irvine's broad statement of the *Anisminic* principle did not receive explicit support from the other Law Lords in *Boddington*…Other judges, and academic writers, have similarly proposed that nullity in this context should be treated as relative rather than absolute. That seems to me to be the correct approach, not least because I am uncomfortable with the use of the word "nullity" once it is recognised that the unlawful act may have legal consequences, at least for third parties, during the period before it is declared unlawful."

Factors relevant to whether void/nullity

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In *Guled*:

- Only affected parties, no innocent third party had acted to detriment in reliance on apparent unlawfulness of DO
- SSHD had admitted DO was unlawfully made
- SSHD had not challenged *Anisminic* principle itself, just application to facts

In *DN*:

- Lack of validity of quashed DO assumed
- "Theory of the second actor" may explain "how an unlawful and void administrative act may nonetheless have legal effect", but not relevant where detention by maker of unlawful DO (and SI)

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Questions?

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Thank you for listening

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