Landmark Chambers

Reflections on the Faulks review: should judicial review be codified?

Tim Buley QC

TERMS OF REFERENCE AND QUESTIONS IN CALL FOR EVIDENCE

Landmark Chambers

- The IRAL terms of reference include this question:

  1. Whether the amenability of public law decisions to judicial review by the courts and the grounds of public law should be codified in statute?

- This is reflected in two questions in the Call for Evidence:

  3. Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

  4. Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

WHAT ARE THE GROUNDS FOR JUDICIAL REVIEW?

Landmark Chambers

- Lord Diplock in *CCSU v Minister for the Civil Service* [1985] AC 374:

  … one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community.

- I suppose that one could envisage section 1 of the JR Act 2021 which sets out these three heads of JR, but I strongly doubt that that would provide any greater *clarity* on what are the grounds for JR.

An expanded list?

- What would an expanded list look like? Question 1 of the Call for Evidence lists:

  a. judicial review for mistake of law

  b. judicial review for mistake of fact

  c. judicial review for some kind of procedural impropriety (such as bias, a failure to consult, or failure to give someone a hearing)

  d. judicial review for disappointing someone's legitimate expectations

  e. judicial review for Wednesbury unreasonableness

  f. judicial review on the ground that irrelevant considerations have been taken into account or that relevant considerations have not been taken into account

  g. <u>any other ground of judicial review</u>

- So even the question in the call of evidence recognises that this does not capture all, or perhaps most, of the grounds for JR. Notably, it overlooks the most simple.
- In reality, impossible to think of a modest or short list which captures all of the grounds whilst also providing any notable clarification. If *clarity* is the real aim, rather than radical reform, then the answer to the question posed is surely a resounding “no”.

MORE RADICAL REFORM?

Landmark Chambers

- There is reason to think that the aim behind the establishing of IRAL, including this question, is more radical. Some evidence of this can be seen in the Terms of Reference and the Consultation Paper:

  Historically there was a distinction between the scope of a power (whether prerogative or statutory or in subordinate legislation) and the manner of the exercise of a power within the permitted scope. Traditionally, the first was subject to control (by JR) by the Court, but the second was not. Over the course of the last forty years (at least), the distinction between "scope" and "exercise" has arguably been blurred by the Courts, so that now the grounds for challenge go from lack of legality at one end ("scope") to all of the conventional [JR] grounds and proportionality at the other ("exercise"). Effectively, therefore, any unlawful exercise of power is treated the same as a decision taken out of scope of the power and is therefore considered a nullity. Is this correct and, if so, is this the right approach?

- In so far as the distinction referred to did exist it was overridden in *Anisminic Ltd v FCC* [1969] 2 AC 147 i.e. 51 years ago. So this, if means anything at all, suggests a radical retrenchment of the grounds for judicial review.

MORE RADICAL REFORM? (2)

Landmark Chambers

- Secondly, the thrust of the questions in Section 1 of the Call for Evidence is in invitation for public authorities to say why judicial review is problematic of vexing to them. The sub-text appears to be that judicial review is problematic.
  - There is no corresponding invitation to NGOs and individuals to explain why judicial review has been important or valuable or led to better decisions.
  - There is a fundamental ambiguity in what would "improve" decision making (question 2). An authority which has its decision declared unlawful may nevertheless regard it as a good decision. Improve for who? From what perspective?
  - Fundamentally unclear how this series of questions will inform IRAL's response to the other questions. Does this go to procedure only, or to substance?

- In any case, certainly some grounds for concern that IRAL is to consider, or should consider, *reform* of the grounds for judicial review rather than mere *clarification.* For reform, see limitation

THE CONSTITUTIONALITY OF MORE RADICAL REFORM

Landmark Chambers

If the government (with or without the support or IRAL) wishes to make more radical reform, so as to significantly cut down upon the grounds for judicial review or indeed the justiciability of particular kinds of decision, can it do so? On any view this is not a straightforward question (and must depend to an extent on the detail of the reform). But there are reasons to think, at least, that the issue is not straightforward:

- Judicial review comes from the *inherent* jurisdiction of the High Court to interpret and apply the law.
- In *Anisminic,* the House of Lords in effect nullified an ouster clause which purported to render a particular body immune from challenge. It interpreted the clause so as not to cover acts of the body which were unlawful (i.e. as contrary to *any* ground for judicial review).
- *Anisminic* was recently followed in *Privacy International* [2020] AC 491, and contains speculation about the ability (reflecting earlier *dicta*) about the approach to the court to a completely clear ouster. The logic can be applied to an attempt to "oust" *grounds* for judicial review which derive, ultimately, from the court's interpretation of the particular statutory scheme

CONCLUSIONS

Landmark Chambers

- If one takes seriously the focus on “clarification” of the grounds for judicial review, very difficult to see that there is any real benefit to be had.

- Does not mean that codification in itself is *necessarily* bad, but difficult to see how it achieves anything in our system.

- Any more fundamental reform or limitation of the grounds for judicial review is a law reform task of monumental proportions, and raises extremely difficult issues of effectiveness given the central constitutional role of judicial review of public law in our system.

Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

Follow us
@Landmark_LC
Landmark Chambers