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Welcome to Landmark Chambers' 'The Independent Review of Administrative Law: Much ado about nothing or rewriting the rules of public law?' webinar

The recording may be accessed here.

Your speakers today are…

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Richard Drabble QC (Chair)

Topic:
How did we get here?

David Elvin QC

Topic:
The Government's Response – additional proposals (1)

Tim Buley QC

Topic:
The Government's Response – Government Reform Proposals (2)

Jenny Wigley QC

Topic:
What did the IRAL report recommend? (and what did it not recommend?)

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The Independent Review of Administrative Law
How did we get here?

Richard Drabble QC

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IRAL “invites the submission of evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the law fulness of executive action with the role of the executive in carrying on the business of government…The panel is particularly interested in any notable trends in judicial review over the last thirty to forty years. Specifically, the panel is interested in understanding whether the balance struck is the same now as it was before, and whether it should be struck differently going forward”.

Call for evidence introduction

General themes behind both IRAL itself and the government response

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- General suggestion of judicial overreach
- The void/voidable distinction and implications for remedies and ouster clauses
- Justiciability
- Validity of the concept of the principle of legality

Stepping stones on the way

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Classic formulation by Lord Diplock in Hoffman-La Roche & Co AG 1975 AC 295

It would, however, be inconsistent with the doctrine of ultra vires as it has been developed in English law as a means of controlling abuse of power by the executive arm of government if the judgment of a court in proceedings properly constituted that a statutory instrument was ultra vires were to have any lesser consequence in law than to render the instrument incapable of ever having had any legal effect upon the rights or duties of the parties to the proceedings (cf. *Ridge v. Baldwin [1964] A.C. 40*).

Cases featuring in government thinking

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- *Miller 2* seen by many as a classic example of judicial overreach and prompted the search for a clearer definition of the limits to justiciability.

- *Unison* also cited by Lord Faulkes himself as another example. Also seen as problematic both in terms of remedy and application of the principle of legality.

Where we are now

- Proposals of the Review itself relatively modest.

- Government proposals go beyond those of Review and if implemented would be a major change in relation to remedies in particular

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The Independent Review of Administrative Law
What did the IRAL report recommend?
(and what did it not recommend?)

Jenny Wigley QC

Main areas in the terms of reference

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- Codification
- Non-justiciability
- Moderating judicial review
- Procedure

Codification (1)

Terms of reference:

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

Report includes detailed discussion of the pros and cons of codification but the short answer to the question posed by Government was: “No”

Codification (2)

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The options:

- Statement of general principles (as in Barbados legislation) brings together grounds in one place, “stamping them with the authority of Parliament and restating basic principle in simple language accessible to general public” while “retaining the flexibility of the common law”

- Listing the grounds specifically (as in South Africa legislation) – “danger is that the detailed approach goes too far and not far enough”. It is more consistent with UK statutory drafting but less accessible to the public, restrictive, and also misleadingly incomplete as cannot capture every form of JR.

Codification (3)

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Conclusions:

- JR essential ingredient of the rule of law, essential element of access to justice, constitutional right, protected by ECHR;
- Whilst might help set boundaries, ability of the courts to interpret and apply the law in individual cases should not be restricted (need for flexibility);
- Statutory formulation would anyway be interpreted as operating in the framework of the common law;
- Might make JR more accessible but on balance little significant advantage as grounds for review well established and accessibly stated in the leading text books.

Non-justiciability (1)

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Terms of reference:

“Whether the legal principle of non-justiciability requires clarification and, if so, the identity of subjects/areas where the issue of the justiciability / non-justiciability of the exercise of a public law power and/or function could be considered by Government.”

Again the answer was generally “No”

Non-justiciability (2)

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- Whilst “arguable” that there have been case of judicial overreach, no clear conclusion to that effect.

- “Entirely legitimate for Parliament to legislate in this area, if it sees fit to do so”

- But “Parliament’s approach should reflect a strong presumption in favour of leaving questions of justiciability to the judges.”

- Constitutional cases such as Miller (1) and Miller (2), very much the exception. Important to be cautious about leaping from the particular to the general.

Non-justiciability (3)

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- Legitimate to legislate in response to particular decisions – such as The draft Fixed-term Parliaments Act 2011 (Repeal) Bill (re non-justiciability of "revived" prerogative powers of dissolution of and call to Parliament)

- (a) codifying clause or (b) reforming clause? (only latter is 'ouster')

- Clause 3 of the draft Bill likely to be (a) so not considered an ouster.

- **But Panel does *not* recommend any of the broader options for legislation.**

Moderating Judicial Review (1)

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Terms of Reference:

"**Whether, where the exercise of a public law power should be justiciable: (i) on which grounds the courts should be able to find a decision to be unlawful; (ii) whether those grounds should depend on the nature and subject matter of the power; and (iii) the remedies available in respect of the various grounds on which a decision may be declared unlawful.**"

Interpreted by the Panel as:

- Should the grounds of review be tailored to exercises of a particular public power? (e.g exclude some grounds in some / all cases to deal with concerns relating to (1) judicial overreach and (2) uncertainty)

- Should the remedies that are available for successful JRs be altered?

Moderating Judicial Review (2)

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Re: Grounds, clear answer from the Panel was “No”

- Not wise for Parliament to try to tailor the grounds of judicial review applicable to a particular exercise of public power according to the “nature and subject matter” of that power.

- Rely instead on judicial restraint and “respect” to address concerns identified.

Moderating Judicial Review (3)

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- Exception to “No” – Panel recommends reversing Supreme Court decision in *R (Cart) v. Upper Tribunal*, which established the principle of being able to challenge by judicial review the Upper Tribunal’s power to refuse to grant permission to appeal against FTT.

- Way around the rule that the refusal of permission to appeal is not capable of being appealed.

- Recommendation *Cart* be reversed on basis of statistics - large number of Cart JRs and only 0.22% with a successful outcome

Moderating Judicial Review (4)

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Re: Remedies, again answer of the Panel was largely "No"

> "Our only recommendation in this area is that section 31 be amended to give the courts the option of making a suspended quashing order – that is, a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met."

- i.e an additional discretionary remedy which can avoid mass inconvenience and uncertainty caused by retrospective quashing in certain cases
- Discussion of some conceptual difficulties re: nullity
- NB the discretionary element of the recommendation is important for many reasons – but as we will see Government appears to want to consider making it mandatory or near mandatory.

Procedure (1)

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Terms of Reference:

“Whether procedural reforms to judicial review are necessary, in general, to ‘streamline the process’, and, in particular: (a) on the burden and effect of disclosure in particular in relation to ‘policy decisions’ in Government; (b) in relation to the duty of candour, particularly as it effects Government; (c) on possible amendments to the law of standing; (d) on time limits for bringing claims, (e) on the principles on which relief is granted in claims for judicial review, (f) on rights of appeal, including on the issue of permission to bring JR proceedings and (g) on costs and interveners.”

Procedure (2):

- Serious impact of costs regime in JR cases on access to justice and impact of JR on defendants' functioning need careful study and research;
- No need for changes to rights of appeal;
- Temptation to legislate on the issue of standing should be resisted;
- No change to duty of candour but guidance could be clarified re: timing and substance
- "We would certainly not favour any tightening of the current time limits for bringing claims for judicial review"

Procedure (3): Clear Recommendations

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- Abolish promptitude requirement;
- Introduce formal provision for a Reply to Acknowledgement of Service;
- Criteria for permitting interventions should be developed and published, perhaps in the Guidance for the Administrative Court.

Procedure (4): Government's Proposals

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Consultation on inviting CPRC to consider:

- Abolishing promptitude requirement;
- Introducing formal provision for a Reply to Acknowledgement of Service;
- Extension of time limits by agreement to encourage pre-action resolution
- Tracks
- Early identification of potential interveners
- Extension of time for DGR to 56 days

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The Independent Review of Administrative Law
The Government's Response – additional proposals (1)

David Elvin QC

Introduction

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- The Government's Response (CP 408) followed the publication of the ***The Independent Review of Administrative Law*** (CP 407) chaired by Lord Faulks QC, earlier this month
- Despite the IRAL terms of reference, the Government has made further suggestions of its own, it not being entirely clear why they were omitted from the terms of reference though said by the Lord Chancellor to be "the most pressing issues" in his Foreword to the Response
- Faulks noted in IRAL's Introduction that some had thought the time provided for the review had not been sufficient and the terms did not allow for a sufficiently wide consideration (Law Commission). Nonetheless, a further narrowly focussed consultation is now underway with the proposals in the Response, in part based on IRAL recommendations but also including matters appearing in the Response, Section 5.
- The Response makes a worrying and potentially misguided comment by the Lord Chancellor in the Foreword (which was repeated in a press release) 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."

Comments by Lord Faulks

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- This comment is not supported by Faulks. In an interview by Joshua Rozenberg (Law in Action and on his blog, 23 March) Lord Faulks said
  - "No, I don't think it really was our finding. I think we found that there were one or two cases, which we particularly pointed out, where there was considerable tension between what was legitimate to be considered by the courts and what was really a matter of politics. But those were particular cases. We did not think that there was an overall trend that you could extract from those particular cases."
  - "There are some cases which we thought — and some of the people who made submissions to us thought — were crossing a line. But it's one thing to say, well, there are one or two cases the result of which is questionable — to then go on and conclude that there's an overall drift in one particular direction. And I think there's a slight danger that you can go from the particular to the general."
- IRAL noted the fertile area of dispute over the extent of intervention and issues such as justiciability but noted that this was in large part the result of the introduction of EU law and the Human Rights Act by Parliament: see e.g. Chapter 2 and the comments on the ***Miller*** cases at §2.37 and their unique circumstances and "judicial overreach" at §§3.19-3.24, especially §3.24.

Comments by Lord Faulks

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- See IRAL Conclusions §§6 and 7
  - "6... 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.
  - 7. The Panel, however, is well aware that there have been occasions when… the courts may be thought to have gone "beyond a supervisory approach" and employed "standards of scrutiny that exceed what is legitimate within a supervisory jurisdiction". That the courts have been able to do this is because Parliament has, for the most part, largely left it to the judges to define the boundaries of judicial review…."
- When considering the Government's proposals, and promoting the rule of law, balancing the two sides of the debate between upholding the rule of law and maintaining efficient government, there does appear to be a tendency, perhaps unsurprising for Government, to place more emphasis on certainty than other factors in play in judicial review

Additional proposals

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- There are a number of interlinked proposals in Section 5 of the Response, summarised at §11:
  - a. legislating to clarify the effect of statutory ouster clauses
  - b. legislating to introduce remedies which are of prospective effect only, to be used by the courts on a discretionary basis
  - c. legislating that, for challenges of Statutory Instruments, there is a presumption, or a mandatory requirement for any remedy to be prospective only
  - d. legislating for suspended quashing orders to be presumed or required
  - e. legislating on the principles which lead to a decision being a nullity by operation of law
  - f. making further procedural reforms (which would need to be considered by the CPRC)
- "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."
- The Response approaches the issues from the perspective of delegated legislation and government policy and does not focus on challenges to individual decisions or local actions
- This paper focuses on b, c, d and in part e.

Prospective remedies

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- IRAL's only significant recommendation on remedies
  - "Our only recommendation in this area is that section 31 be amended to give the courts the option of making a suspended quashing order – that is, a quashing order which will automatically take effect after a certain period of time if certain specified conditions are not met."
- The are two cases IRAL gave as examples where prospective quashing might be appropriate
  - To alleviate concerns about the overstepping of constitutional boundaries by the courts in cases such as ***Miller (No. 2)***
    - "3.51 … the suspended quashing order could have indicated that the impugned exercise of public power would be automatically quashed at some point in the near future unless Parliament legislated in the meantime to ratify the exercise of that power. The order might have also have indicated in very general terms what the legislation would have to say to successfully ratify the exercise of that power."

Prospective remedies

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    - "3.52. Issuing such an order in those cases would have made it abundantly clear that the Court acknowledged the supremacy of Parliament in resolving conflicts between the courts and the executive as to how public power should be employed."
- Cases, such as ***R (Hurley and Moore) v Secretary of State for BIS*** [2012] EWHC 201 (Admin), where the Court might exercise its discretion not to quash because of the inconvenience or prejudice it might cause, only giving a remedy in the form of a declaration. In such cases, it was suggested that
    - "As a remedy, a suspended quashing order would have had more teeth. Such an order would have indicated that that the Regulations would be quashed within a couple of months of the Court's judgment unless the Secretary of State in the meantime properly performed his "public sector equality duties" and considered in the light of that exercise whether the Regulations needed to be revised. Such a remedy would have ensured that the Secretary of State was not left free to disregard his statutory duties in regard to the Regulations."
  - See also s. 102 of the Scotland Act 1998 which creates a prospective power where the Scottish Parliament/Executive have exceeded their powers to allow the defect to be corrected.

Prospective remedies

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- The Response was attracted by this suggestions because it would allow the validity of acts in past reliance on the power or policy to remain in place but would mean they could not be relied on in future and would mitigate the impact e.g. on public finances in resolving the problems that arise if e.g. a statutory scheme is quashed, allowing a more appropriate remedy than a compensation scheme created "in a reactive manner" (§60). Some of the difficulties were recognised –
  - "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 madeno recommendations in relation to this measure."
- The use of such a power may in practice require clear evidence or proposals from the respondent arm of Government 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. This is likely to be enhanced in cases of unlawful delegated legislation. It may give rise to 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 a new procedural addition to CPR Part 54 to accommodate.

Prospective remedies

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- The Response does not grapple with the practical problems arising from prospective quashing or their implications for creating extended or satellite remedies disputes, and states that it is not committed to the proposal, but notes at §64
  - "As with suspended quashing orders, the Government also considers it appropriate to provide in legislation factors against which the need for prospective-only remedy can be assessed, with a view to providing greater certainty for both parties. This could include requiring the courts to consider the following factors before imposing a remedy:
  - a. whether such an order would have exceptional economic implications
  - b. whether there would be a significant administrative burden
  - c. whether injustice would be caused by a prospective-only remedy
  - d. whether third parties have already relied considerably upon the impugned provision/decision"
- Those factors, if implemented, would underline the practical difficulties and additional procedural delay and difficulty into 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 largely arise out of the evidence for the challenge.

Prospective remedies

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- The Responses appears to be more concerned here, and in the context of suspended orders (below) with the point flagged by IRAL at as to the difficulties created by the concept of "nullity" and the role played by the enlargement of JR post-Anisminic :

  > "3.58. Making such an order would have been inconsistent with what has been called the "metaphysic of nullity" that the common law of judicial review has embraced since the House of Lords' decision in *Anisminic v Foreign Compensation Commission*: namely, that an exercise of public power that has been established to have been unlawful was always null and void. Given this, the UK Supreme Court held that they would be contradicting themselves and confusing matters if they suspended the effect of the quashing orders that they made in *Ahmed* in respect of Orders in Council that they had just found were unlawful and therefore null and void."

- 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 - though uncertainty may arise more from the difficulties in predicting the result, that is not the point made by the Response which refers to outcome)

Prospective remedies

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- IRAL treated the issue in a fairly "no-nonsense fashion" (quoted in part in the Response rt 73) –
  - "3.59. We think that Parliament should legislate to reverse the UK Supreme Court's decision in *Ahmed* on this point and give the courts the option, in appropriate cases, of making suspended quashing orders. Such legislation would not involve any fundamental breach with the principles underlying the common law of judicial review. 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.
  - 3.60. Leaving aside cases where an unlawful exercise of power is rendered seemingly valid simply because it was never subjected to judicial review – which adherents to the "metaphysic of nullity" explain on the basis that exercises of public power are always presumed to be valid until they are challenged through the courts – there are plenty of examples of cases where a finding that public power was exercised unlawfully does not lead to an ineluctable conclusion that the exercise of that power was always null and void …"
- However, it does not appear that the issue provides much of a practical problem in the Courts. See e.g. **De Smith** (8th ed) Chapter 4, especially "The situation today" at paras. 4-062 to 4-067.

Prospective remedies

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- Responding to Professor Forsyth QC and the distinction between powers and duties, IRAL added-
  - "3.63. Of course, it would be an impossible task for the courts to attempt to distinguish between (i) cases where public power has been exercised validly but unlawfully and (ii) cases where it has not been exercised validly and its purported exercise was therefore null and void. This is one of the reasons why the distinction between jurisdictional and non-jurisdictional errors of law has been excised from the law. However, the fact that it is practically impossible to distinguish between type (i) cases and type (ii) cases is no reason to treat all cases that fall into category (i) as falling into category (ii) – which is what the law has tended to do since Anisminic was decided.
  - 3.64. The better route, it seems to us, is to give the courts the freedom to decide whether or not to treat an unlawful exercise of public power as having been null and void ab initio…"
- The Response appears to treat this issue as more problematic than IRAL though at §74 it notes
  - "74.The Government agrees … that the best interpretation of the case-law is inconsistent with the view that all errors lead to a decision being a nullity and of no effect. Nonetheless, as Professor Daly points out, this interpretation surfaces "with astonishing regularity and vigour", so much so that Professor Adams calls it (before calling for it to be rejected) "the standard theory of administrative unlawfulness." Furthermore, as stated above, some of the case-law does provide some support to that theory while other cases reject it."

Suspended quashing orders

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- The nullity discussion also has implication for the proposal to introduce a power or even presumption that quashing orders be suspended. The Response states:
  - "69. For quashing orders, the Government is considering a wider use of a requirement, whereby the default use of a quashing order in relation to any impugned power is that it is suspended. There would be merit in having a requirement over a discretionary power because there is a considerable time lag in understanding how and when a discretionary power will be applied by the courts, and to what extent. The Government considers that there is currently a wide array of possible outcomes when legal acts have been impugned."
- That "wide array" is again considered at §69 largely in terms of government policy and subordinate legislation and again the principle of legal certainty is at the fore –
  - "The Government further considers that legal certainty, and hence the Rule of Law, may be best respected by a suspensive quashing of such provisions. Suspended quashing by default would focus remedial action on resolving issues related to the faulty provision"
- It proposes two alternatives for consideration:

Suspended quashing orders

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- "**a. A presumption that any quashing order should be suspended.** This proposal would see the creation of a statutory presumption of suspended quashing orders by default. The nature of the rebuttal will be left to the courts to decide. This will offer flexibility in constructively correcting issues where possible. The Government welcomes consultees' opinions on the efficacy of such a presumption.
- **b. Mandating that quashing orders will be suspended, unless there is an exceptional public interest not to do so.** This proposal takes the logic outlined in (a) above further in providing for flexibility where quashing orders are used. All quashing orders would be suspended unless there is an active assertion that there is an exceptional public interest not to. A mandatory approach provides greater clarity for rectifying administrative faults, while providing certainty of administrative action. Again, judges will be allowed to disapply this requirement the exceptional public interest test, which they are familiar with."

- And again –
  - "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."

Some issues

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- If suspension is presumed, or mandated or quashing is to be prospective only –
  - To what extent is this driven by a misguided view of interventionist judges or on legal issues which present few practical problems
  - Does this give place too much emphasis on certainty in the rule of law as opposed concerns with regard to e.g. unlawfulness and fairness. Ensuring that unlawful decisions are not allowed to stand is surely a critical aspect of the rule of law and the inconvenience aspect which the Response focuses on might be seen as a fair price to pair to ensure good government.
  - The Response recognises the important of the rule of law which is why the proposals to at least a degree strain to try to balance its desire for certainty with lawfulness and the discipline JR provides to ensure good government and the protection of the individual
  - Will it apply to subordinate legislation only or to Government policy or more generally, e.g. local authority policy formulation e,g. will it extent to statutory challenges on JR grounds to local plans, which can take many years to formulate and reach adoption
  - Is it compatible with finding individual decisions unlawful (both in JR and statutory remedies based on JR principles) e,g where there has been unfairness or unlawful decision-making in the case of planning, housing, immigration, procurement, wider regulatory decision-making etc?

Some issues

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- 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
- This goes 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], unaffected by the Supreme Court judgment)
- 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
- New procedural steps may be required to satisfy the Court to exercise such powers, and this creates scope for a protracted dispute over the exercise of the new powers and additional delays and costs in the system, which may prejudice the successful claimant. Would a further hearing be required and if so would Government be required to fund it?
- The scope for argument over what may be "exceptional public interest" and how that would fit with individual decisions, or decisions affecting the financial position of a group

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The Independent Review of Administrative Law
The Government's Response –
Government Reform Proposals (2)

Tim Buley QC

Additional proposals in Government Response

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- The Government has expressed "agreement" with the three reform proposals it says are contained in the IRAL Report, which it summarises at §9 of its "Response"

- It also sets out a number of further reforms at §11.

- This paper will focus on three of those (substantive) reforms:
  - Legislating to reverse *Cart* [2012] 1 AC 663 and prevent judicial review of permission decisions of the Upper Tribunal (recommended by IRAL at §8(g) of its Conclusions)
  - Legislating to "clarify" the effect of ouster clauses
  - Legislating on the "principles" which lead to a decision which lead to a decision being a nullity by operation of law

REVERSAL OF *CART* (1)

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- In *Cart,* the Supreme Court held that decisions of the Upper Tribunal to refuse permission to appeal to itself were amenable to judicial review, but that the High Court should only grant permission for such claims if they satisfied a "second appeal" test, either (a) arguable point of general principle or (b) other compelling reason. The following may be noted:
  - There was no "ouster clause" excluding JR of the UT
  - The government argued that the status of the UT as a "superior court of record" was sufficient to oust JR, but lost this argument in the Div Court and did not renew it. No one has ever suggested that DC was wrong on that issue.
  - Applying first principles, as a statutory tribunal decisions of the UT were therefore amenable to JR like any other tribunal
  - Long history of JR of permission decisions of predecessor to UT (Social Sec Commissioner and Immigration Appeal Tribunal), no limitation
  - Briefly interrupted by "statutory review" of AIT which was held to *generally* but not always exclude JR
  - Some recent case law (notably *Sivasubramaniam* [2003] 1 WLR 475) restricting JR of county court permission decisions essentially because disproportionate

REVERSAL OF *CART* (2)

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- *Cart* not within IRAL's terms of reference but they agreed to look at it on request of some judges (see §10). Dealt with in § §3.35 to 3.46. Thrust of reasoning is that analysis of the 5000+ *Cart* JRs decided since 2012 shows that very few succeed, and even fewer changed the final outcome. But:
  - Since not in terms of reference, consultees did not respond, leaving IRAL to do its own homework
  - Methodology used by IRAL (to look for reported cases which showed ultimate success of claimant) *highly* problematic. Will not capture vast majority of cases
  - Conclusions presented ambiguously – implication that tiny number of cases succeed not supported by figures. 12 "successes" out of 45 "transcripts" or 5,502 cases
  - No doubt they missed many cases. For example, I have pursued 3 *Cart* JRs, all of which succeeded and all of which changed final outcome for my client on issues of fundamental importance to them.
  - Some of the underlying data clearly wrong. EG *JD (Congo)* [2012] 1 WLR 3273 presented (fn 55) as a *Cart* "failure", in fact 3 of 4 claimants succeeded and it was not a *Cart* case at all.

REVERSAL OF *CART* (3)

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- Response says as follows:

  51. ... The Review analysed 5,502 Cart Judicial Reviews (all the Cart Judicial Reviews since this avenue became available) and found that in only 12 instances (ranging between 0-3 per year) had an error of law been found – a rate of only 0.22%. ... Further, the Government considers that rendering Upper Tribunal decisions justiciable by Judicial Review is contrary to the intention of Parliament. This is because the Upper Tribunal was originally intended to be broadly equal to the High Court. As stated in the explanatory notes to the Tribunals, Courts and Enforcement Act 2007, "the Upper Tribunal is a superior court of record, like the High Court."

- So (a) tiny number of cases succeed and (b) *Cart* wrongly decided by SC. (a) is not justified by IRAL report and (b) is simply wrong.

- This does not show that *Cart* should not be overturned, but it does show clearly that the basis for doing so has not been established.

- Begs question of how *how* Cart can be reversed given that would appear to have to by way of statutory ouster

Legislating to "clarify" the effect of ouster clauses: (1) The problem with ouster clauses

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- Fundamental principle that High Court's jurisdiction to test the legality of public body action by judicial review cannot be "ousted" by statute:
  - *Anisminic Ltd v FCC* [1969] 2 AC 147
  - *R (Privacy International) v IPT* [2020] AC 491

- Two possible bases:
  - That Parliament is presumed not to intend to oust judicial review, and that words purporting to do so should be interpreted as relating to errors which fall short of those which would found judicial review. Leaves open that ouster could be achieved by exceptionally clear wording (4 of the judges decide *PI* on this basis by a bare majority)
  - That Parliament does not have power to exclude JR because to do so is unconstitutional and would undermine the principle of the rule of law. Correctness of this view (3 of the judges would *likely* have decided *PI* on this basis)

Legislating to "clarify" the effect of ouster clauses: (2) *Sivasubramaniam*

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- *Sivasbramaniam* concerns whether High Court has jurisdiction to consider judicial review of County Court permission decisions (CC is a tribunal of limited jurisdiction)
  - Not an ouster case
  - Court of Appeal held that it does have jurisdiction but should only be exercised on wholly exceptional basis
- Note also *Cart,* where judicial review jurisdiction to be exercised more rarely (second appeals test) albeit not in unlimited number of cases

Legislating to "clarify" the effect of ouster clauses: (3) Government Proposals

Landmark Chambers

- Para 91 of the Response:

  The Government considers it most appropriate to legislate for a 'safety valve' provision in how ouster clauses are interpreted. This could work in a multitude of ways, but essentially would allow the courts to not give effect to an ouster clause in certain exceptional circumstances. An example of this would be, if there had been a wholly exceptional collapse of fair procedure,81 the court could ask whether Parliament intended for this to be covered by the ouster. This 'denial of procedural justice' would, we propose, be a threshold far higher than the current ground of procedural impropriety. Another possibility is the sort of exceptional circumstances contemplated in Sivasubramaniam v Wandsworth County Court & Ors.82 If a court determines that the impugned conduct of the body fell within that category then, as a general principle of interpretation, it would not interpret the ouster clause as covering that conduct. The decision would therefore be reviewable. The Government hopes that such a high threshold would defend against matters of outright injustice, while preserving the effect of ouster clauses and the certainty they can bring.

- Government also keen for suggestions of how else this ouster could be achieved

Legislating to "clarify" the effect of ouster clauses (4): Legal effectiveness of government proposals

Landmark Chambers

- Seems like a strong case that a proposal of the kind given in para 91 would be effective, precisely because it provides for a safety valve:
  - It would appear to be possible to devise clear wording which would have the effect described in para 91, and the rulings in *Sivasubramaniam* and *Cart* would appear to weaken or undermine any presumption against legal effectiveness. If the court can reach that position without an ouster, it is difficult to see why Parliament must be presumed not to intend it
  - Important safety valve in that court is left free to interpret "exceptional circumstances" in line with its own view of what the rule of law requires
  - The "constitutional" objection to ouster would therefore be greatly weakened if not removed.
- Contextual point here is ouster of review of *legal tribunal*. Completely different when considering ouster (even limited ouster) of JR of administrative body or legislation

Legislating to “clarify” the effect of ouster clauses (5): Final thoughts

Landmark Chambers

- Limited ouster of JR of appropriately qualified *legal tribunal* (which itself satisfied Article 6 ECHR as an independent etc tribunal) may well be legally effective
- Early test may be ouster which seeks to reverse *Cart.* May be a propitious context for government to test the issue
- If government goes further and seeks *absolute* ouster of JR of UT, much more problematic
- *Cart* aside, debate here begs question of *why* ouster is thought desirable. It will matter only where *appeal* is also excluded. Should surely be wholly exceptional to create a situation where all routes of challenge to tribunal decision, determining legal questions, is shut down.
- Will this be achieved by general legislation or by specific ouster?

LEGISLATING ON "PRINCIPLES" GOVERNING NULLITY (1)

Landmark Chambers

- This is not a topic on which IRAL made any recommendation for change. More than any of the other proposals for reform, this does not appear to relate in any very clear way to any practical issue. It is an abstract question.

- According to *De Smith* et al:

  Behind the simple dichotomy of void acts (void ab initio, invalid, without legal effect) and voidable acts (valid until held by a court to be invalid) lurk terminological and conceptual problems of excruciating complexity.

- The issue has considerable importance for other proposals relating to suspended quashing orders and prospective only remedies. But government also makes proposals which are free-standing from that debate, concerning distinction between:
  - Decisions which are *voidable* (valid until quashed / declared unlawful, but then *void* from the start so as to never have any legal effect)
  - Decisions which are a nullity (never valid, no court order required)

- How real is the problem? *De Smith:*

  Again, although an ultra vires decision was ineffective against the party aggrieved, he might need, for his own protection, a formal pronouncement of a courtsetting the decision aside or declaring it to be void. Meanwhile, he could be enjoined from disregarding the decision until its validity had been finally determined. If he took no judicial proceedings at all within a prescribed statutory time limit, the void decision could become as impregnable as if it had been valid in the first place.And until he obtained such a judicial pronouncement in an appropriate form of proceedings, third parties (unable to impugn the invalid decision) would be obliged to treat it as if it were valid

LEGISLATING ON "PRINCIPLES" GOVERNING NULLITY (2): PROPOSALS

Landmark Chambers

- Para 81 of the Response:
  - Only lack of competence or power leads to nullity;
  - Presumption against nullity
  - Legislating to further clarify what is outside competence as opposed to error of law within jurisdiction
    - Breach of principle of legality does not go to competence or jurisdiction
    - Standard public law grounds do not do so
    - If there is power, it cannot be taken away even by egregious error

LEGISLATING ON "PRINCIPLES" GOVERNING NULLITY (3): FINAL THOUGHTS

Landmark Chambers

- Far from clear how this is to be achieved. By a generic statute (perhaps amendment of SCA 1981) laying down general principles of judicial review

- Appears to suffer from all the dangers of any exercise of codification, that the problem (such as it is) is shifted rather than removed. The debate will continue, focussed on the language of the statute and the underlying constitutional principles which limit what such a statute might achieve

- In so far as government is seeking to reverse *R (Unison) v LC* [2020] AC 869, [2017] 3 WLR 409, it will be disappointed!

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

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