

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



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Introduction

- 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

- 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

- 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

- 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

- 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.”
- There 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

- “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

- 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

- 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

- 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

- IRAL treated the issue in a fairly “no-nonsense fashion” (quoted in part in the Response at 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

- 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

- 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

- **“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

- 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 pay to ensure good government.
 - The Response recognises the importance 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 extend 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

- 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

Thank you for listening

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