Landmark Chambers

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

Landmark Chambers

- 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)

Landmark Chambers

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)

Landmark Chambers

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)

Landmark Chambers

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)

Landmark Chambers

- 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)

Landmark Chambers

- 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)

Landmark Chambers

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)

Landmark Chambers

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)

Landmark Chambers

- 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)

Landmark Chambers

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)

Landmark Chambers

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

Landmark Chambers

- 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

Landmark Chambers

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

Landmark Chambers

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