

Judicial Review Bill: The Reversal of Cart Presumptions and Statutory Interpretation



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TOPICS TO BE COVERED

- This section will address – shortly –
- the mechanics of the provision reversing *Cart* [2011] UKSC 28 [2012] 1 AC 663
- The possible use of those mechanics as a precedent for other ouster clauses
- The common law approach to statutory interpretation
- The relevance of that approach to the provisions of the Bill dealing with retrospectivity and issues which can arise both by way of judicial review and in statutory appeals

The mechanics

- Clause 2 inserts a new s11A into the Tribunals Courts and Enforcement Act 2007.
 - (1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).
 - (2) The decision is final, and not liable to be questioned or set aside in any other court.

The mechanics continued

- (3) In particular –
- (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision
 - (b) The supervisory jurisdiction does not extend to, and no application or petition may be made or brought in relation to, the decision.

The mechanics continued

- Subsection (4) states that subsections (2) and (3) do not apply so far as the decision gives rise to
- any question as to whether the UT has or had a valid application before it;
- whether the UT was properly constituted
- Whether the UT is acting or has acted (i) in bad faith, or (ii) in fundamental breach of the principles of natural justice

The contrast with Cart [2011] UKSC 28 [2012] 1 AC 663

- The Government argument in Cart that JR did not lie relied primarily on the designation of the UT as a superior court of record. This failed at first instance and was not revived.

Nevertheless the argument was comprehensively demolished by Laws LJ..... It was a constitutional solecism to consider that merely to designate a body “a superior court of record” was sufficient to preclude judicial review. This could only be done by the most clear and explicit language and not by implication, still less by what was effectively a deeming provision. The rule of law requires that statute law be interpreted by an authoritative and independent judicial source “the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it ... The requirement of an authoritative judicial source for the interpretation of law means that Parliament’s statutes are always effective ...”

Cart continued

That source was the High Court. This was not because it was a superior court of record but because it was a court of unlimited jurisdiction. Other courts and tribunals, having a limited jurisdiction, were not that source and were susceptible to judicial review by the High Court. Unreviewable courts of limited jurisdiction were exceptional.

RETROSPECTIVITY AND STATUTORY INTERPRETATION

A large number of JR's are basically concerned with issues of statutory interpretation. One issue that will have to be grappled with is how the provisions of clause 1 should be operated where the same issue can be raised both in a JR and by a statutory appeal – say in a social security case.

The classic approach to statutory interpretation

Lord Nicholls in *Spectrum*

Cases of these types are of increasing importance. But leaving these aside, the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to do so it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this. Statutes express the intention of Parliament.

Thank you for listening

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