INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

Submission of Evidence

By

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EXECUTIVE SUMMARY

1. Parliament being sovereign is the ultimate decision-making authority in the UK; it has the final word upon the reach and nature of judicial review.

2. Recent years have seen the development of "constitutional judicial review" in which the courts have in several leading and very prominent cases abandoned traditional approaches to the interpretation of statutes (that seek to determine what was the intention of Parliament in enacting legislation) and instead imposed a meaning that in the courts' view better protects an important constitutional right or principle.

3. In these circumstances a review such as the present is appropriate and should not be perceived as hostile to the rule of law.

4. Codification of circumstances in which public law decisions are amenable to judicial review is not favoured. Instead piecemeal remedial legislation is favoured.

5. Codification of the grounds of judicial review is also not favoured. Some of the difficulties and complexities that South Africa has experienced with the "codification" of the grounds in section 33 of its Constitution are set out.

6. Further reform of the application for judicial review should not proceed prior to an empirical assessment of the operation of the reforms introduced by the Criminal Justice and Courts Act 2015.

PRELIMINARY REMARKS

I would like to make some preliminary observations before I turn to the specific matters raised in the Terms of Reference. First of all, I consider that the creation of a comprehensive system of administrative law in England over the past fifty years or so was in Lord Diplock's words 'the greatest achievement of the English courts in my judicial lifetime'.[1] The great accretion of discretionary power to the executive during WWII and thereafter as Atlee's government implemented its far-reaching social and economic reforms led many eminent jurists to suppose that the common law had lost the power to control the executive. But this was not to be as great judges and jurists of the recent past cast the mantle of the rule of law over the exercise of discretionary power and using ancient principles of the common law gave us the administrative law which we have today. This was an immense juridical and cultural achievement that should be cherished; nothing that I say later in this paper should be taken as qualifying that achievement.

But admiration for this achievement should not be allowed to obscure the fact that this took place within the context of an orthodox understanding of constitutional principle. In particular, that Parliament was supreme or Sovereign which meant at its most elemental that Parliament could make or unmake any law at all. This was the understanding of sovereignty that was approved by every judge in *Miller I* and we may take as the orthodox view. Parliament speaks with the special legitimacy of a democratically elected legislature and its intent is worthy of great respect.

[1] *R v Inland Revenue Commissioner Ex parte National Federation of Self Employed and Small Businesses* [1982] AC 617 at 641.

The sovereignty of Parliament has profound consequences for the constitutional position of the judges. "They are not the appointed guardians of constitutional rights, with power to declare statutes unconstitutional, like the Supreme Court of the United States. …, they can only obey the latest expression of the will of Parliament. Nor is their own jurisdiction sacrosanct. If they fly too high, Parliament may clip their wings. They entirely lack the impregnable constitutional status of their American counterparts."

Of course," …. judges will rightly strain to interpret legislation in a way that is consistent with the rule of law. But, when the will of Parliament is clear, even if inconsistent with the principles of the rule of law, the judges [and everyone else] must bow to that will. 'What is at stake [here] is the location of the ultimate decision-making authority—the right to the "final word" in a legal system.'[2] Generally, any conflict between judiciary and legislature can be avoided by sensible construction of the relevant statute since, on the whole, Parliament, will intend to comply with the rule of law……."[3] But in any conflict over construction, the will of Parliament must prevail.

What these constitutional orthodoxies make plain is that there is nothing untoward in the executive reviewing the operation of the system of judicial review and placing the results of its review before Parliament for Parliament to judge whether there is a need for remedial legislation. Suggestions that this review is in and of itself bad or dangerous or a threat to the rule of law a are mistaken.

[2] Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999) at 3

[3] All the quotations in the preceding two paragraphs come from Wade and Forsyth, *Administrative Law* (11 th ed, 2014),23

This review takes place in a context in which the judges, particularly of the Supreme Court, have in recent years - in reliance on perceived common law constitutional rights and principles- in several high-profile judicial reviews boldly intervened to protect fundamental rights and constitutional principle. But in doing so they have sometimes abandoned "ordinary statutory interpretation". It seems as if, in the interpretation on the relevant statutes, the Court was not searching for the meaning that Parliament intended; but instead imposing the meaning that Parliament ought to have intended.

Two examples of "constitutional" judicial review are given now but they could be multiplied. In the first instance, in *Privacy International*[4] an ouster clause provided that 'determinations, awards and other decisions' of the Investigatory Powers Tribunal *'including decisions as to whether they have jurisdiction'* 'shall not be subject to appeal or be liable to be questioned in any court'.[5] These words, a majority of the Supreme Court held, did not oust judicial review for jurisdictional error of law. Giving meaning to the statute in the particular circumstances was not an exercise in 'ordinary statutory interpretation' for that would downgrade, said the Supreme Court, 'the critical importance of the common law presumption against ouster'.[6] Applying that presumption led to the conclusion that the ouster clause only applied to a legally valid determinations and thus did not preclude judicial review for error of law.[7]

Another case (*Evans*) concerned the Freedom of Information Act 2000 which provided, as part of a carefully chosen scheme for the enforcement of the rights

[4] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 ,para 107
[5] Regulation of Investigatory Powers Act 2000, s 67(8) omitting presently irrelevant words but adding emphasis.
[6] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 ,para 107
[7] Para 105 (Lord Carnwath, with whom Lady Hale and Lord Kerr concurred; Lord Lloyd- Jones concurring in a separate judgment: Lord Sumption (with whom Lord Reed agreed) dissenting; Lord Wilson also dissenting. This was the position reached in *Anisminic*; thus, the addition of the emphasised words made no difference to the meaning of the ouster clause. It was as if Parliament had not enacted them.

granted by the Act,[8] that a decision notice or enforcement notice made by the Information Commissioner requiring certain information to be disclosed and upheld in the courts 'shall cease to have effect' if a Minister of the Crown certifies that 'he has on reasonable grounds formed the opinion that, there was no failure [to satisfy the "right to know"].'[9] The judges that made up the majority were much impressed by this constitutional novelty of an executive officer's opinion overruling that of a judicial officer. The awkward meaning given to the statute by the majority was certainly not that intended by Parliament.[10] For the dissenting majority Parliament had spoken clearly and the novelty should be loyally tolerated.

The protection of access to justice in these two decisions will be welcomed by many administrative lawyers. But what we see here is that the Court has abandoned the search for the meaning that Parliament intended; instead it imposes a meaning that seems to them good. In so doing the judges are denying Parliament's supremacy; its right to have the final word.

What ought to be noted here is the judicial recognition of its abandonment of conventional interpretation in some candid evidence given by Lord Phillips (first President of the Supreme Court) to the House of Commons Political and Constitutional Reform Committee.[11] Lord Phillips, when commenting on the court's role in interpreting legislation that seeks to oust judicial review , said:

> One would be considering a constitutional crisis before you could envisage the courts purporting to strike down primary legislation. Before you got

[8] This is well set out in Lord Wilson's dissent, para 170.
[9] Freedom of Information Act 2000, section 53 omitting currently irrelevant words
[10] Lord Neuberger in the lead judgment restricted section 53 to where there had been a material change of circumstance since issue of the decision notice or the decision notice was demonstrably wrong in law or fact (para 68).
[11] House of Commons Political and Constitutional Reform Committee, Constitutional Role of the Judiciary if there were a Written Constitution (HC 2013–14, 802) at 16–17.

> that, the courts would say, "Parliament couldn't possibly have meant that because—" and therefore would have given an interpretation to the legislation that it, faced with it, *couldn't bear it*, but would have chucked the gauntlet back to Parliament, saying, "We have pulled you back from the brink. Are you really going to persist with this?" That is what the House of Lords did as the Privy Council [sic ?] in Anisminic. They threw down the gauntlet and it was not taken up. Judges do have ways of finessing the intention of Parliament from time to time.[44]

There is clear recognition here that the courts might in "interpreting" such legislation give it a meaning that it "couldn't bear" in order to throw down a gauntlet to Parliament. But if judges give a meaning to a statute which they know is not what Parliament intended, surely, they are acting unconstitutionally; and a review is justified? Parliament can pick up the gauntlet.

CODIFICATION

1. *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.*

On my understanding of the Terms of Reference comments are being sought here on two closely related but different questions: First whether the amenability of public law decisions to judicial review should be codified in statute. And, second, whether the grounds of public law illegality should be codified in statute.

(a) The question of amenability or justiciability of decisions is presumably raised here because of decisions like *Miller II* which held subject to judicial review a class of decision – the decision by the Prime Minister to advise Her Majesty to

prorogue Parliament—long thought to be non-justiciable, i.e. not apt for determination by judges.

This raises fundamental questions about the nature of our constitution. Is the UK's constitution one in which the executive is held accountable primarily by Parliament or is it one in which the executive is held primarily accountable by the judiciary? *Miller II* undoubtably sets the balance between political accountability and legal accountability at a point weighted towards legal accountability.

If this balance is judged by Parliament not to be in the common weal – and I stress this is for Parliament not for academic commentators, the executive, or self-appointed guardians of the rule of law to judge - the remedy is in principle simple: to legislate to provide that advice to Her Majesty to prorogue Parliament shall be considered a proceeding in parliament for the purposes of Article 9 of the Bill of Rights 1688.

But the ToR seeks consideration of whether the amenability of public law decisions to judicial review by the courts should be *codified in statute* rather to proceed by way of piecemeal remedial legislation. But to codify the amenability of all public law decisions to judicial review comes close to the writing of a written Constitution for UK which is a mammoth task and I expect beyond the ambitions of the Review.

The difficulty is this: if amenability or justiciability were defined in abstract terms in the code the words used might well command wide agreement but would almost certainly be sufficiently open textured to allow plenty of judicial wriggle room. And the reform would likely be ineffective to constrain over bold decisions. While if the code were precise and focussed allowing little scope for creative interpretation it would necessarily also be very complicated and formalistic; and probably not command widespread support. Focussed piecemeal media legislation would be preferable.

(b) Presumably the question of codification of the grounds of review is under consideration for similar reasons; it is believed that the grounds of review have been extended too far and that there is a need to restrict or rein in the development of grounds of judicial review. Codification might appear to be easy. A that is required is to express with sufficient clarity the classical grounds of review.

Take for example section 33 of the South African Constitution which seems clear and simple:

1. *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
2. *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

   ……

But in attempting to set out in statutory form the grounds of review it immediately becomes clear that not every decision is subject or can be subject to judicial review; some form of limitation must be built into the statutory words. In section 33 the limitation is to be found in the concept of "administrative action". If the action in question is not "administrative action" section 33 does not apply. The result of these provisions has been that the concept of "administrative action" has moved to the centre stage in South African administrative law. As Professor Cora Hoexter, a leading expert on South African administrative law, remarks:[12] "…the concept of administrative action [has become] the focus of administrative law jurisprudence to an extent that had not been anticipated. What had previously been a non-issue in our administrative law became its most noticeable feature.

[12] In *Effective Judicial Review: A Cornerstone of Good Governance* (OUP, 2010) edited by Forsyth, Elliott, Jhaveri, Ramsden and Scully Hill at 50.

The threshold administrative action enquiry soon took up far more space in the law reports than any other issue".”

So, if the UK were to codify the grounds of review it would need to have a similar limiting concept; and the focus of administrative law would shift to the identification of the limits of that concept. And energy and effort would go into that task rather than into determining the proper content of the grounds of review.

It is worth noting that the rights contained in section 33 are given effect by national legislation in the form of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[13]) Thus, section 1 of PAJA contains a detailed definition of "administrative action"; it

> “means any decision taken, or any failure to take a decision, by-
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> a) an organ of state, when i) exercising a power in terms of the Constitution or a provincial constitution; or ii) exercising a public power or performing a public function in terms of any legislation; or
>
> b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
>
> *aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b), (c), (d), (f), (g), (h), (i) and (k), 85(2)(b), (c), (d) and (e), 91(2), (3), (4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution; bb) the executive powers or functions of the Provincial Executive, including the powers or functions referred to in sections*

[13] As required by section 33(3)

121(1) and (2), 125(2)(d), (e) and (f), 126, 127(2), 132(2), 133(3)(b), 137, 138, 139 and 145(1) of the Constitution;

cc) the executive powers or functions of a municipal council;

dd) the legislative functions of Parliament, a provincial legislature or a municipal council;

ee) the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution or of a Special Tribunal established under section 2 of the Special Investigating Units and Special Tribunals Act, 1996 (Act No. 74 of 1996), and the judicial functions of a traditional leader under customary law or any other law;

Two points may be noted, first, how complicated the definition of "administrative action" has become (and it would not be different in the UK). And, secondly, how extensive the list of excluded powers is (in italics in the block above) excluding many executive powers or functions from the definition of "administrative action". So extensive indeed has this exclusion been that the South African courts have fallen back on the "principle of legality" to justify the imposition of principles of fair administration on public decisions not within the definition of "administrative action".[14] So, the South African experience of codification of the grounds of review is not encouraging. Codification is not likely to improve legal certainty and can readily led to complex and arid formalism.

[14] Hoexter, Cora --- "The Principle of Legality In South African Administrative Law" [2004] MqLawJl 8; (2004) 4 Maquarie Law Journal 165

One final point should be made on the codification of the grounds of review. Grounds of review are inherently fuzzy edged and allow space for wriggle room. So, codifying them is unlikely to led to much greater legal certainty. And judicial creativity is unlikely to be much constrained.

JUSTICIABILITY

2. *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 the Government.*

No comment made.

3. *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.*

No comment made.

PROCEDURAL REFORM

4. *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 affects 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.

My immediate response is that procedural reform of the application for judicial review is not urgent. There should first be a review of the effectiveness of the reforms introduced by section 84-90 of Criminal Justice and Courts Act 2015(whether it was 'highly likely' that relief/ leave would make no substantial difference; cost capping orders; provision of financial information; interveners and costs). These reforms were foreshadowed by a White Paper *Judicial review – proposals for further reform* (Cm 8703, Ministry of Justice, 6 September 2013. The White Paper spoke of many unmeritorious cases brought 'simply to generate publicity or to delay implementation of a decision that was properly made'. One needs to form a view on whether the unmeritorious applications that prompted the 2015 Act persist or whether the Act has been effective. This requires an empirical study.

My off the cuff view is that the 2015 reforms did not lead to a refusal of leave or relief in many cases where under the common law leave/relief would have been granted. (I am aware that the redundancy of the duty to give reasons is thought to flow from these reforms). But an empirical study might show otherwise. For the rest these reforms have surely made the application for judicial review more complicated and with more to argue over and likely to generate delay and waste. Reforms designed to streamline often have the opposite effect which is why it is prudent to be cautious.

Again, my off the cuff view is that the duty to consult in the formulation of policy and the duty of candour (once permission has been granted) have become more onerous in recent years. But I am unaware of hard evidence to this effect.

One reform (easy to describe difficult to achieve) that I know about through sitting as deputy High Court judge in the Administrative Court is the improvement in the quality of the Acknowledgement of Service (AOS). It is commonplace for the respondent (often a government department) to provide no AOS or not to provide one timeously. This means that the judge considering the application for permission has only one side of the dispute before him. The result must be that permission is sometimes granted by the judge when it should not be granted. And that obviously leads to delay and waste of costs and judicial resources. But when this judge came upon an application for permission in which there was a competent AOS he was able to decide the application confident that he had been able to consider both sides of the case adequately.

NOTES:

A. Scope of the Review: (1) The review should consider public law control of all UK wide and England & Wales powers that are currently subject to it whether they be statutory, non-statutory, or prerogative powers. (2) The review will consider whether there might be possible unintended consequences from any changes suggested.

B. Experience in other common law jurisdictions outside the UK. The position in other common law jurisdictions, especially Australia (given the legislative changes made there), will be considered.

C. Para 1. In GMC v Michalak [2017] 1 WLR 4193 the Supreme Court noted that substantive public law is all judge made and would continue to exist, even if for example, the procedural provisions of the Senior Courts Act permitting JR were to be repealed. Should substantive public law be placed on a statutory footing? Would such legislation promote clarity and accessibility in the law and increase public trust and confidence in JR?

D. The Panel will focus its consideration of the justiciability of prerogative powers to the prerogative executive powers as defined in 3.34 of the Cabinet Manual.

NULLITY

E. Paras 2 and 3: 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?

NULLITY

The orthodox view as set out in the note is that judicial review is concerned with whether the exercise of a discretion has been lawful. Has the decision-maker stayed within the limits laid down by Parliament, being the crucial question to ask? Judicial review is not about the wisdom or otherwise of the exercise of a discretion but it about the legality of its exercise. Executive decision-makers are accountable to the courts for the lawfulness of what they do and accountable, directly or indirectly, to elected representatives for the wisdom of what they have done.

All this is elementary administrative law. But the distinction between merits and legality (or "scope" and "exercise" to use the jargon of the note) is under pressure in the main because of the introduction into domestic law of the doctrine of proportionality. Modern orthodoxy holds that all errors made within the "exercise" of a discretion are treated as jurisdictional and so the exercise of the discretion marred by such an error is a nullity.

This is an unsatisfactory situation. If all errors of law are jurisdictional then the most trivial of legal errors leads to nullity and an explosion of nullity follows. It becomes necessary to have some principled explanation of how an invalid act can have legal effect. To rely on judicial discretion to treat invalid acts as valid is unsatisfactory. See Wade and Forsyth, *Administrative Law* (11th ed, 2014)251 (Theory of the second actor).

F. Paras 1-3: These issues affect all cases involving public law decision making, and not simply JRs, since they would modify substantive law. So, they would apply, for example, to the tenant raising as a defence in private law housing

proceedings the illegality of a rent increase by the council as in Wandsworth LBC v Winder [1985] AC 461.

G. Para 4: There are a number of procedural issues of possible concern that have been raised over the years. As part of this comprehensive assessment of Judicial Review, this is the time to conduct a review of the machinery of JR generally.

F. The panel will issue the report to the Lord Chancellor who will work with interested departments to determine the publication timelines as well as the Government response.