INDEPENDENT REVIEW OF ADMINISTRATIVE LAW[1]

Response from
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Introduction: judicial review and separation of powers

Why judicial review? It is to give judges – who are independent of the executive and of the legislature – the ability, on application by a private individual, to review the administrative decisions made by or on behalf of the state or other public body.

In the United Kingdom we do not have a true separation of powers, whatever Montesquieu may have thought. If one accepts for now that a separation of powers regards the executive, the legislature and the judiciary as having separate powers, in UK the executive – Prime Minister and his cabinet – are part of the legislature.

The judiciary are broadly independent of legislature and executive. They can supervise the executive and be a check on what they do in constitutional and rights law terms; but in United Kingdom law they are subsidiary to Parliament; and judges frequently acknowledge that in their judgments and their disposal of cases. I will deal with this later.

By any objective and fair standard, a responsible government should recognise its powers must not be unlimited; but that there should be certain checks on what it does from an independent body, such as the judiciary. This has been understood for most of the period since 1689.

The present government must face the political fact that to inhibit judicial checks on, or review of, its work is part of the 'slippery slope' towards fascism which is so fashionable amongst some modern governments. This is a political debate, led by politicians who are not in the British tradition of understanding the balance of political institutions. The members of the review panel must please try to understand the important principles which the likes of our present Home Secretary and Prime Minister (especially) seem unable or unwilling to understand

Focus of 'Independent Review'

The panel asks for the following to be considered:

> 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.

[1] 'Independent Review of Administrative Law (IRAL)' https://www.gov.uk/government/groups/independent-review-of-administrative-law

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.

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.

4. Whether procedural reforms to judicial review are necessary, in general to "streamline the process",[2] 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.

Saving of costs

I understand that costs savings is not a primary concern of the review; but it is to be hoped that it can be considered. In what follows I mention a number of areas where a change in the law and of the rules could promote costs savings, of benefit for the tax-payer and for the parties. These include:

- More use of district judges in the Administrative Court especially at the permission stage
- Streamlining of disclosure (duty of candour) and close control on the extent to which documents and other material is relevant to any judicial review issue
- Drawing in judicial review procedures to other civil proceedings with a public law element (I mention especially family law and child support, two of my specialist areas)

Structure of law

For present purposes I will assume the law to be substantive and procedural. Substantive law consists of statute law (passed by Parliament) and common law (judge-made law). The latter can only be altered by the former (ie not by rule or (mostly) by other delegated legislation). Most judicial review law is common law; though limited aspects of it are codified in Senior Courts Act 1981 and procedural rules (notably Civil Procedure Rules 1998 Part 54).

[2] The inverted commas here were inserted by the Ministry of Justice; though it is not clear why. To streamline a procedure is a respectable intent

The first three questions above mostly go to substantive law. I have my own views on this area; but I am sure many – better qualified than I – will comment. I will restrict my reply to the fourth question on procedural aspects.

First I will explain my experience of practice generally and then of judicial review. Attached is a form of curriculum vitae which shows that I am predominantly a family lawyer; but in that capacity I dealt with a variety of legal aid work and (almost unique amongst solicitors) I did a variety of child support work. I have marked judicial review reported case I conducted as advocate with a * (though they are mostly obvious from their title). I am now largely retired; but I still have a small caseload. I write extensively on family law and related matters.

I do my own advocacy whenever I can. I am a founder contributor to the *Family Court Practice* (the 'Red Book': the family lawyer's equivalent of the 'White Book'). I am familiar with a variety of aspects of procedural law (eg my most recent book is on 'Open Justice in family proceedings' (October 2020) for the Law Society).

My experience of judicial review was mostly in child support – judicial review of the Secretary of State for Work and Pensions; but also in judicial review of the Commissioners and later the Upper Tribunal (it was my judicial review application for Mr Cart which eventually emerged in the Supreme Court as *Cart v The Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663, [2012] 1 FLR 997) and very occasionally of the Legal Aid Board (as it was). My experience there will, I hope, feed one or two answers below.

When a district registry of the Administrative Court was first set up in Cardiff in about 2008 I was in practice in Bristol and had a substantial proportion of its early cases.

PROCEDURAL QUESTIONS

I will divide my answers into:

- Reply to the review paper
- Further thoughts on procedure
- Judicial review and family law
- Limits to judicial 'interference'

(1) REPLY TO REVIEW

(a) 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;

My short answer to this is that whether it is called 'disclosure' or 'duty of candour' they come to much the same thing; but both must be distinguished from public interest immunity (PII). So long as there is a clear basis for PII (whether common law or statute) – and it may be that that must be made statutory in the context of any administrative law bill – then beyond what is covered by any PII claim, the public body should open its file. However, it is important that this be in respect only to information relevant to the claim, in clear terms, so

that ‘disclosure’ should not be *carte blanche* and be relevant only to issues in the judicial review claim.

‘Government’ need be no exception, so long as any relevance rules are written tightly so as not to inhibit progress of case; and not to waste the court’s time.

(c) on possible amendments to the law of standing;

No comment

(d) on time limits for bringing claims,

I suggest 3 months is about right.

(e) on the principles on which relief is granted in claims for judicial review,

This is substantive law.

(f) on rights of appeal, including on the issue of permission to bring JR proceedings;

There must be a tightly controlled appeal process, as now; with a brief appearance available on permission hearings which could be dealt with by junior judges (see below).

There should also be the ability to applicant to reply to defendant’s summary grounds. My experience was certainly not that defendants were always as scrupulous as they should be about telling the truth to the court. High Court judges always believed the lawyers for the Child Support Agency and Secretary of State (with the honourable exception of such experienced judges as Collins J). They did not always tell the full truth; but to challenge them at the summary grounds stage was more or less impossible.

The Court of Appeal should keep its originating judicial review jurisdiction (*Chief Adjudication Officer v Foster* [1992] QB 31, [1991] 3 W.L.R. 473; *Farley v Child Support Agency* [2005] EWCA Civ 869 (a case of mine)).

(g) on costs and interveners.

Protected costs orders – I have read that the prime minister and Home Secretary are opposed to ‘lefty lawyers’ and to ‘do gooders’; but I hope still that the concept of the protected costs order will be retained in any review of the scheme. To lose the PCO idea would be a blot on the extent of the judicial review scheme.

Costs of summary grounds of defence – Similarly, the limit on defendant’s summary grounds costs should be retained, to keep a fair balance between applicant and defendant.

Stream-lining of procedure – That said, I am sure – as I mention below – there are ways procedure can be stream-lined and made more economic for both parties. This will then impact on costs.

(2) STREAM-LINING PROCEDURE

The procedure for most judicial review is much simpler than most people – including experienced practising lawyers – think. With perseverance it may be possible to make it – in many cases – more simple still. Some thoughts follow.

All judicial review is dealt with by High Court judges; though in practice this may be by circuit judges and QCs sitting as High Court judges. It is a high judicial level which is assured to parties.

Is this necessary? Much of the child support judicial review work I did could have been dealt with, without any derogation to fairness, by district judges trained within the Administrative Court. Would it not be possible for Administrative Court district judges to deal with the paper-work stage of permission? They would know when to refer up, and they could define the level of judge to deal with any restored hearing.

I mentioned limits on disclosure and emphasis on relevance in the previous section.

(3) JUDICIAL REVIEW AND FAMILY LAW

Below, under 'Administrative law and family proceedings', is a slightly abbreviated article on the extent to which administrative law and its principles could apply directly in family proceedings (published in *Family Law* in August 2020). This might considerably assist in both judicial review and family proceedings to the benefit of the parties, and to the saving of costs and multiplicity of proceedings all around.

For example in *Smith v Child Maintenance Enforcement Commission* [2009] EWHC 3358 (Admin) (16 October 2009), HHJ Jarman QC, sitting as a High Court judge and related proceedings, the Secretary of State (for the CMEC) refused to join in the parties' matrimonial proceedings in which the residue of financial relief proceedings remained to be resolved. Both sets of proceedings had to be dealt with in parallel court files in separate buildings at the extra expense to the tax-payer, HM Courts and Tribunal Service and to the parties. (The Smiths also saw their earlier child support proceedings considered by the House of Lords (*Smith v Secretary of State for Work and Pensions & Anor* [2006] UKHL 35, [2006] 1 WLR 2024, [2007] 1 FLR 166) but that is another story….)

(4) LIMITS TO JUDICIAL 'INTERFERENCE'

The role of the judge

The inverted commas above are important. I do not accept that there is any question of judicial 'interference' in our society; and I hope that Edward Faulks (as I knew him when we were at school together) would recognise that. Many of those involved in litigation – by definition – will disagree with a judge. Cases such as *Oliver v Shaikh* [2020] EWHC 2658 (QB) (8 October 2020), Nicklin J show the depth to which that disagreement can go with the very unfortunate His Honour Judge Oliver. Comments such as those of the *Daily Mail*, as judges being the 'Enemies of the people', an attitude unchecked by Faulks's erstwhile ministerial colleague as 'Lord Chancellor', plainly do not help; and that should not be regarded as a political comment.

To attack a judge is cowardly. It is rare that they can defend themselves or answer back (as, in the end, did Judge Oliver) in any real or effective way.

It is important, however, for politicians to understand that our judges frequently defer to Parliament, and accept their subservience to the legislative branch of the three powers. Examples on this point in various public law fields follow.

Law reform: a matter for Parliament

In *R (Prudential plc and anor) v Special Commissioner of Income Tax* [2013] UKSC 1, [2013] 2 AC 185 the Supreme Court showed itself willing to leave legal professional privilege, in this case legal advice privilege (LAP) – quintessentially a common law doctrine – to Parliament if there was to be reform. A company obtained advice from a firm of accountants on the tax law aspects of a proposed transaction. An inspector of taxes served notices on the company requiring them to deliver to the inspector documents containing information relevant to the company's tax liability, including material passing between the company and the accountants during the giving of the advice. The claimant company challenged issue of the notices, including on grounds that the material sought was covered by LAP. The judge dismissed the claim. LAP applied only to advice given by a member of the legal profession. The Court of Appeal dismissed the claimants' appeal.

A seven justice court dismissed the claimant's further appeal (Lords Clarke and Sumption dissenting). At common law, said the majority LAP was universally understood as applying only to communications between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice. The extent of the privilege was clear, consistent and certain. It was allowed for by the rules and practice of the courts and in legislation. If there was scope for reform, that was a matter for Parliament not for the judges.

Towards the end of his judgment (with which Lord Walker agreed) Lord Neuberger – who describes himself generally as "something of a swing vote" judge (p 182) – introduced a section entitled "A policy issue best left to Parliament" as follows:

> [61] Apart from these concerns, it seems to me that this appeal gives rise to an issue, possibly a series of issues, of policy, which constitutes an area into which the courts should generally be reluctant to tread. Rather than extending LAP beyond its present accepted boundaries, we should leave it to Parliament to decide what, if anything, it wishes to do about LAP.

Judges not to extend any administrative role beyond what Parliament provided for

Where Parliament had entrusted administration to one branch of the state, judges should not try to extend that role beyond what Parliament had already provided for. This was emphasised in the period prior to Children Act 1989 (CA 1989) when on two occasions, at least, the House of Lords stressed that where parliament had given a job – in this case child care – to the local authority then wardship could not be used judicially to oversee the actions of the social workers. This was explained in the House of Lords in *A v Liverpool City Council* [1982] AC 363, [1981] 2 WLR 948 where a parent had sought to challenge operation of a care order by the local authority. The point returned in *Re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791 where Lord Scarman spoke emphatically of the importance of

the need to understand that where Parliament had "entrusted" powers to a public body, the courts cannot exercise any powers it might have to intervene (at 797):

> … The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the court, if seized of the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority.

This division between state and private individuals was one of the principles on which Children Act 1989 was based. The *A v Liverpool* principle survives in relation to housing law. In *Holmes-Moorhouse v Richmond upon Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413 a family court used a Children Act 1989 shared residence order to put pressure on a housing authority to provide housing for both parents. The House of Lords said this was not permissible. The existence of a shared residence order was a relevant, but it could not be regarded as a determinative factor for the housing authority. A family court, exercising its own jurisdiction under the 1989 Act, could not use the order as a means of exerting pressure on the housing authority to provide housing for a parent irrespective of all the other considerations which a the housing authority must take into account.

The family court has no power to control operation of a housing department. The point came back in the family courts more recently in *F v M & Anor* [2017] EWHC 949 (Fam), [2018] 2 WLR 178, [2018] 1 FLR 1217 where in a child arrangements order Hayden J was considering a decision on asylum made by the Secretary of State for the Home Department (the 'Home Office'). He explained the mother's position in this country as follows, and his powers to differ – if he wanted to do so – from the decisions of officials within the Home Office. He explained this (by quotation from Lord Scarman in *Re W* (above)) as follows:

> [41] … The determination of the refugee status of any adult or child falls entirely within "an area entrusted by Parliament to a particular public authority". In this case the public authority is the [Home Office].

Administrative law and family proceedings

Judicial review: a remedy against a public body

This article explains how judicial review can be part of family proceedings and how administrative law principles may apply in proceedings. It considers:

- law and procedure of judicial review, and its relative simplicity;
- the contexts in which judicial review may apply in family proceedings; and
- the procedural contexts in routine cases where its principles may be relied upon.

Judicial review enables a private individual to seek a remedy against a public body where it either fails to act, or it does something which it has no power (*ultra vires*) to do. The doctrine of *vires* has been described by the influential text-book *Administrative Law* (2014) Wade & Forsyth (11th Ed) as perhaps the 'central principle of administrative law'. Has a decision-maker got the power to proceed as that decision-maker is doing?

A judicial review application proceeds by CPR 1998 Part 8 'as modified by' CPR 1998 Pt 54 (r 54.1(2)(e)). Pt 8 provides a simplified claim procedure: a party seeks a court decision on a specific point where there is unlikely to be a 'substantial dispute of fact' (CPR 1998 r 8.1(2)(a)). Application is in the High Court, Administrative Court for review of (1) the lawfulness of subsidiary legislation, (2) the decision of a public body or (3) the body's failure to act (CPR 1998 r 54.1(2)(a)). It is by anyone who claims to be aggrieved by a decision, or failure to act.

The respondent is a public body. In family proceedings the bodies susceptible to judicial review will include: local authorities; The Lord Chancellor (Legal Aid Agency (LAA) and HM Courts and Tribunal Service (HMCTS); Department of Work and Pensions (child support); and housing and education departments. The claimant is a person who 'has a sufficient interest' in the issue (SCA 1981 s 31(3)); and this includes a 'victim' of the unlawful act of a public authority (Human Rights Act 1998 s 7(3)).

Categories of judicial review

In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock categorised of applications in terms which still apply: illegality (unlawfulness), irrationality ('*Wednesbury* reasonableness') and procedural impropriety.

Illegality – is a failure to act within the law. A decision-maker who contemplates a decision must understand the law on which it is based and must apply it correctly (for an application of this principle under the legal aid scheme, see *R (Gudanaviciene and others) v The Director of Legal Aid Casework* [2014] EWCA Civ 1622, [2015] 1 WLR 2247). A decision-maker must approach every decision with an open mind and not according to prescribed formulae ('a tick box approach').

Irrationality – remains as in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, CA: did the public body take into account matters it should not have done; or did they fail to take into account matters they should have considered. If not, did they nevertheless come to a conclusion 'so unreasonable that no reasonable authority could have come to it'? Powers depend on the authority vested in the public body: 'Statutory

power conferred for public purposes is conferred as it were upon trust, not absolutely – that is to say, it can be validly used only in the right and proper way which Parliament … is presumed to have intended': (*R (Chetnick Developments Ltd) v Tower Hamlets LBC* [1988] AC 858, Lord Bridge of Harwich at 872).

Procedural impropriety a decision-maker must act fairly, that is to say in accordance with the principles of natural justice and procedure. For example, whilst there is no common law duty to consult, it will generally be anticipated that a local authority will in fact consult with those likely to be affected by its decision (*R (Mosley) v London Borough of Haringey* [2014] UKSC 56).

Pre-action protocol and protected costs

The process (in the absence of urgency) starts with the claimant writing a judicial review pre-action protocol letter https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_jrv ('PAP letter') to the public body (or their representative: see Annex A Section 2 to the protocol). The public body (or representative) must normally reply within 14 days (time limits are tight as will be seen). [Explained further.]

Judicial review procedure is simple. The claimant's costs up to permission stage (PAP letter; claim form and 'grounds and reasons') should be relatively modest. Defendants are discouraged from coming to any permission hearing (*PD54* para 8.5, and should not get their costs of so doing). If permission is refused, the public body's costs are likely to be limited to their costs only of preparing their summary defence.

If the issue goes to a full hearing, ordinary rules as to costs (SCA 1981 s 51(3) and CPR 1998 r 44.2) apply, subject to protected costs orders (PCO). A PCO is a non-statutory remedy and is intended to allow a claimant of limited means to make a claim without fear of a substantial adverse costs order (*R (Corner House Research) v Secretary of State for Trade & Industry* [2005] EWCA Civ 192, [2005] 1 WLR 2600. An order can be made at any stage of the proceedings, on such conditions as the court thinks fit, including that the issues raised are of public importance; the applicant has no private interest in the case; and that without an order the claimant would probably discontinue.

Application of judicial review in family proceedings

Recently there has been a series of decisions where often highly disturbed adolescents have been deprived of their liberty (DoL) in circumstances where secure accommodation has been unavailable. In *Re S (Child in Care, Unregistered Placement)* [2020] EWHC 1012 (Fam), Cobb J made a DoL order on a 13 year old girl in care in an unregistered placement. In doing so he quoted comments of Sir Andrew McFarlane P in similar circumstances (*Re T (A Child)* [2018] EWCA Civ 2136):

> [5] It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament.' Why the High Court judges do not make administrative law orders which require the Secretary of State to make the necessary provision is not explained.

In neither of *Re* S or *Re T* were the judges, they said, able to help the children concerned, beyond writing letters to government departments (eg the Secretary of State for Education). What is not clear is why the Secretary of State was not joined in the proceedings – or to parallel judicial review proceedings – and made subject to any mandatory order. There may be good reason for this; but neither case makes it clear.

By contrast, in *Giltinane v Child Support Agency* [2006] EWHC 423 (Fam), [2006] 2 FLR 857, Munby J took the administrative law issue head on (he had an Administrative Court ticket which not all High Court judges have). He was dealing with an appeal against a magistrates' court child support order. The father was out of time with his appeal, which made it impossible to take the appeal any further (as procedure then was); but still his arrears of child support maintenance might be incorrectly calculated. 'I am an Administrative Court judge,' said Munby J. 'I can deal with the out-of-time appeal in judicial review.' He directed that the Child Support Agency to provide information which Mr Giltinane said was lacking. Making no promises as to the final outcome of the appeal Munby J case managed the appeal.

The Child Support Agency could provide the answer the court needed. Is not the Department of Education in the same place in relation to secure accommodation – even though the answer may be more complex than in *Giltinane*?

'Simple expression' of Family Procedure Rules 2010

'Illegality' may arise from Courts Act 2003 ss 75 and 76 which defines the powers of Family Procedure Rules Committee (FPRC). Section 75(5) says that rule-makers should ensure that rules are 'simple and simply expressed'. Representation of children in family proceedings is dealt with by FPR 2010 Pt 16. Black LJ (as she then was) has described Part 16 for child representation (rr 16.6 and 16.29) as of 'complexity' ('Wendy's' case: *Re W (A Child) (Care Proceedings: Child's Representation)* [2016] EWCA Civ 1051, [2017] 1 WLR 1027 at [20]).

That a highly experienced lawyer of many years' experience (Lady Black is now in the Supreme Court) finds the rules 'complex' suggests they are plainly not 'simple and simply expressed'. Were the point taken for a child, there must be an open-and-shut case for saying the rules are not 'simple' – Black LJ says so – and are *ultra vires* under s 75(5). They should, surely, be made clear so children and judges can easily follow them?

Black LJ may have been overwhelmed by the 'complexity' of the rules. It is impossible to see that 'Wendy' should ever have had a children's guardian in the first place. That appointment looks to be unlawful: see list in Children Act 1989 s 41(6). That guardian could not then have instructed a solicitor. Wendy could have gone back to her own solicitor as she had always wanted, but the Family Court had denied. Had the law been followed in the first place her case would not ever have got to the Court of Appeal.

Wendy's administrative law position might be: for application against the Lord Chancellor: (1) as HMCTS so that the children's guardian appointment is quashed; and (2) as LAA for a mandatory order so her chosen solicitor gets a representation certificate. If she still has the energy she might seek (3) a declaration against FPRC that the 'complexity' of FPR 2010 Pt 16 are *ultra vires* s 75(5) – has Black LJ already made that case? – and (4) a mandatory order that they be put right.

Boddington: application in the family proceedings

Another live area of law where the rules are open to challenge is the requirement that almost all proceedings under FPR 2010 are to be in 'private' (r 27.10(1)). The common law says that proceedings must be in open court (eg *A v British Broadcasting Corporation* [2014] UKSC 25, [2015] 1 AC 588) subject to cases in CPR 1998 r 39.2(3) (including eg children proceedings). Rules cannot change the law, only regulate its application (*Dunhill v Burgin* [2014] UKSC 18, [2014] 1 WLR 933). There is nothing in Courts Act 2003 ss 75 and 75 which says FPRC can alter the common law; so what makes FPRC think it can tell judges they must sit in private? No-one knows.

Suppose a lawyer is instructed to act in domestic abuse proceedings case where a complainant (Clara) wants two friends to come to a hearing with her. The respondent objects. The judge agrees: after all, FPR 2010 rr 10.5 and 27.10 says the proceedings must be in private. What is to be done? (The point will be more topical still under Domestic Abuse Bill when its criminal procedures are dealt with in public.) Is there any way, short of judicial review, that a party to proceedings can raise the issue of the powers of rule-makers or other public bodies where this crops up in their case?

Boddington v British Transport Police [1998] UKHL 13, [1999] 2 AC 143 provides one answer. Mr Boddington travelled daily by train from Brighton. He was a smoker. He was prosecuted for breach of a byelaw which prevented anyone from smoking on a train. He contended that the smoking ban was *ultra vires* the relevant bye-laws. How was that challenge to the legality of the bye-law to be dealt with by the Brighton stipendiary magistrate before whom he was charged? In Clara's case, how does the judge consider her challenge to the courts ability to sit in public?

The House of Lords said the magistrate had been wrong to say Mr Boddington could not raise *vires* as a defence. He was entitled to make a collateral challenge in the criminal proceedings. It was not necessary for him to take separate judicial review proceedings. Lord Steyn considered that if courts could not deal with the validity of subsidiary legislation, they might be left in the position of having to 'convict defendants and to punish them despite the fact that the invalidity of the byelaw [affords] an answer to the charge'. Not to permit a collateral challenge Lord Steyn found (at 173) to be too 'austere and indeed too authoritarian to be compatible with the traditions of the common law'.

Friends, family or supporters not permitted attendance at court

A case more akin to Clara's is provided by Matthew O'Connor (MO) once (perhaps still?) a leading member of Fathers4Justice. He was due to be tried by magistrates for a public order offence. Court managers heard that there might be a demonstration at the court and decided to bar anyone who might be associated with MO unless they were listed as defence witnesses. When MO and eight to ten associates attempted to enter the court building, only MO and his lay representative were allowed in. MO applied to the court for those excluded to be admitted: he was being denied the right to a public hearing. On advice the magistrates said not. MO secured an adjournment and challenged the refusal on judicial review.

In *R (O'Connor) v Aldershot Magistrates' Court* [2016] EWHC 2792 (Admin), [2017] 1 WLR 2833 the Divisional Court emphasised the open justice principle by reference to cases such as *Scott v Scott* [1913] UKHL 2, [1913] AC 417 *R (Guardian News) v Westminster*

Magistrates' Court [2012] EWCA Civ 420, [2013] QB 618). Admission to the court must be resolved by the court on the day; not by incurring the extra time and expense of judicial review in an already busy Administrative Court.

In Clara's case, the court must hear from her and consider as a preliminary issue the lawfulness of FPR 2010 rr 10.5 and 27.10 on a declaration basis. What are the *vires* of FPRC; what does the common law say (including Keene LJ in the Court of Appeal in *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 FLR 565 (at [120]-[121]): that domestic abuse cases without children might be heard in open court)? The Family Court must resolve this issue when it is raised (*Boddington* and *O'Connor*).

David Burrows
14 May 2020
[slightly abbreviated: 14 October 2020]

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Solicitor Advocate

David Burrows is a solicitor advocate who has dealt with all aspects of family breakdown. As a solicitor advocate he has appeared in family courts and appellate courts at all levels (including in the House of Lords). He was the first solicitor to lead as advocate in the House of Lords.

As practitioner, teacher and writer he has a specialist interest in law in relation to confidentiality and privacy; and concerning rules of evidence, procedure and legal aid in family proceedings. He gives advice on English family law in French marriage breakdown cases. He has recently published *Evidence in Family Proceedings* (Lexis/Nexis-Family Law, 2016) and *Children's Views and Evidence* (Bloomsbury Professional, 2017). Since October 2017 he has edited Bloomsbury Family Law Briefing a project which he was closely involved in setting up.

He was chairman of SFLA (now *Resolution*) in 2003/4, and remains an active member. He is a founder (and continuing) contributor to *Family Court Practice* (the 'Red Book': first edition 1993). He was secretary to the steering committee for the first mediation service in UK in 1975/6, and of its trustees thereafter. He was a member of the Legal Action Group committee from 1978-80.

David Burrows has a current practising certificate (Solicitors' Regulation Authority).

Born: London, [redacted]

1 March 1973 – admitted as a solicitor (articled clerk in London and Bristol)

1 July 1997 – appointed solicitor advocate

OU Arts degree (BA): 1985

History of practice as a solicitor

March 1973 – July 1974: Veale Benson & Co (now Veale Wasborough)
- assistant solicitor dealing with crime and family law

August 1974 – December 1988: E J Watson Cox & Counsell (now Kirby Simcox)
- Assistant solicitor August 1974 - October 1976; Partner October 1976 – December 1988
- Specialised in family and child law; with some crime (replaced later by civil litigation)

March 1989 to November 2010 – David Burrows, Solicitors and Advocates: sole principal – started own specialist family law firm in Bristol.

December 2010 to date – legal writer and commentator, teacher/trainer and adviser, jurist and solicitor advocate.

Areas of specialist practice

- Most forms of family proceedings under Family Procedure Rules 2010.
- Administrative law (judicial review) especially in legal aid and child support cases.
- Advice on English family law to French avocats.

Law lecturer

Since 1987 David Burrows has lectured regularly as a specialist family lawyer to solicitors all over England and Wales including:

- Jordans – Family Law
- Bristol University and University of the West of England
- Central Law Training
- LexisNexis (formerly Butterworths)

Reported cases

Appearances of David Burrows as advocate in reported decisions

Peacock v Peacock [1984] 1 WLR 532, [1984] FLR 263 Booth J
AR v Avon County Council [1985] FLR 252
Re B (Agreed Findings of Fact) [1998] 2 FLR 968, CA
**R v Secretary of State for Social Security exp Harris* [1999] 1 FLR 837 (QBD), Scott Baker J
Channon v Lindley Johnstone [2000] 2 FLR 734
Re C (Legal Aid: Preparation of Bill of Costs) [2001] 1 FLR 602, CA
**Newmarch Singh*
Farley v Secretary of State for Work and Pensions [2005] EWCA Civ 778
**Farley v Child Support Agency* [2005] EWCA Civ 869
Farley v Secretary of State for Department of Work and Pensions [2006] UKHL 31, [2006] FLR 12443, [2006] 1 WLR 1817
Smith v Secretary of State for Work and Pensions [2004] EWCA Civ 1318, [2005] 1 FLR 606
Smith v Secretary of State for Work and Pensions & Anor [2006] UKHL 35, [2006] 1 WLR 2024, [2007] 1 FLR 166
**R (Howes) v Child Support Commissioners* [2007] EWHC 559 (Admin), [2008] 1 FLR 1691, Black J
Gelber v Griffin [2006] EWHC (Fam) 3666
**R (C) v HM Court Service (North Devon Magistrates' Court, Barnstaple) & Ors* [2009] EWHC 3610
David Truex, Solicitor (a firm) v Kitchin [2007] EWCA Civ 618, [2007] 4 Costs LR 587, [2007] 2 FLR 1203
**R (Starling) v Child Support Commissioners* [2008] EWHC Admin 1319, Collins J
**Smith v Child Maintenance Enforcement Commission* [2009] EWHC 3358 (Admin)
RC v Secretary of State for Work and Pensions [2009] UKUT 62 (Chadwick LJ and UT Judge Jacobs)
DB v CMEC (CSM) [2010] UKUT 356 (AAC)
Child Maintenance and Enforcement Commission v Mitchell [2010] EWCA Civ 333, [2010] 2 FCR 526, [2010] 2 FLR 622

Cart v Cart [2013] EWCA Civ 1006

Other relevant activities

Founder member and first management committee secretary of first family conciliation (now mediation) service in the country: Bristol 1976.
Founder member (1981) of SFLA (now *Resolution*). Member of National Committee (1995-2004), vice chair (2001-3), chair (2003-4). Returned to *Resolution* NC (2005/9). Chaired: children committee; procedure committee; set up and first chair of accreditation committee; Editor of *Review*; chair of contact working party.
Law Society's Children Panel – 1980 to 2009.

Publications

(1) As author
Legal Aid and the Family Lawyer (Jordans, 1987)
Civil Legal Aid: a practical guide (Bristol Classical Press, 1988)
Child Support Act 1991: a practitioner's guide (Butterworths, 1993)
Family Law Legal Aid Guide (Jordans, 1994 and 1995)
Family Law Act 1996 (Central Law Publishing, 1996)
Ancillary Relief Pilot Scheme: a practical guide (Jordans, 1997)
Civil Procedure Rules and family proceedings (Jordans, 1999)
Evidence in Family Proceedings (Jordans, 1999: editor and main contributor)
Ancillary Relief: the New Rules (Jordans, 2000)
Funding family litigation (Jordans, 2003)
New costs rules in ancillary relief proceedings (Jordans 2006)
Ancillary relief for low income families (Jordans, 2006)
Stack v Dowden: *a commentary* (Jordans, 2007)
Child Maintenance: the New Law (Jordans, 2008)
Family Procedure Rules 2010: a practitioner's guide (Resolution, 2011)
Practice of Family Law: evidence and procedure (Jordans, 2012)
Evidence and Family Proceedings (Lexis/Nexis-Family Law, 2016)
Children's Views and Evidence (Bloomsbury Professional, 2017)
Privilege and confidentiality in family proceedings (Bloomsbury Professional, 2019)
Divorce, Dissolution and Separation: A guide to the new Act and related legal issues (Law Society, in preparation)
Open justice in family proceedings (Law Society, October 2020)

(2) As editor and contributor
Encyclopaedia of Forms and Precedents, vol 16(2) (Family Law) (Butterworths, 1996)
Family Law Guide (Butterworths, 1996)

(3) As contributor
Family Court Practice (founder contributor – First Ed in 1993, and continuing)
Accountant's legal service (Butterworths, loose leaf)
The Family Lawyer's Handbook (Law Society, 1998)
Cohabitation Law (Sweet & Maxwell, loose leaf)
Emergency Remedies (Jordans, loose-leaf and continuing)
WestLaw encyclopaedia (2013-5)

(4) Articles and other writings

Since the late 1980s: writing for a variety of legal and other publications including

- *Family Law* – the specialist family lawyer's journal (1989-2020)
- *New Law Journal* (1995 to date)
- *Law Society's Gazette* – a regular family law column: 1996-2005
- *Solicitor's Journal*
- *Resolution Review*
- *Legal Action* (LAG)
- *Criminal Law & Justice*
- *Bloomsbury Family Law Briefing* – as editor and main contributor since October 2017