39 Essex Chambers Webinar

25th October 2021, 5.00 p.m.

SPEAKING NOTES: PROPOSALS IN THE JUDICIAL REVIEW AND COURTS BILL REGARDING *CART* AND OUSTER CLAUSES

David Feldman

I. What do the relevant provisions of the Judicial Review and Courts Bill do?

Clause 2(1) would insert a new section 11A in the Tribunals, Courts and Enforcement Act 2007 designed to reverse the central effect of *R. (Cart) v. First-tier Tribunal* [2011] UKSC 28, [2012] 1 AC 663, namely that the High Court has jurisdiction to conduct judicial review of decisions of the Upper Tribunal but, where the decision in question is about giving or refusing permission to appeal, should not exercise that jurisdiction unless an important issue of law or practice is at stake or there is some other compelling reason to permit an appeal. The IRAL (Report, paras. 3.35-3.46) found that, contrary to the Supreme Court's expectations, there had been a great many applications for judicial review of decisions about permission to appeal (averaging just under 800 per year), that a low proportion of those succeeded (on average, probably around 7 per year) and a still lower proportion led to an error of law being found and remedied (around 2 per year). The IRAL recommended, and the Government agreed, that this took up an amount of judicial time that is disproportionate to the good that is done by it either to individual litigants or to the public interest. The accuracy of the figures is contested: there are

probably more successful cases than the IRAL found; but it still seems likely that the success rate of *Cart* judicial reviews is very low indeed.

II. Is it a good idea to end *Cart* judicial review?

Some people have criticised this on rule-of-law grounds, arguing that people should have every opportunity to protect their legal rights and interests. In *Cart* itself, however, the Supreme Court decided that the rule of law did not, indeed could not, require an infinite number of opportunities to challenge decisions. The Court asked, 'How many appeals or reviews does the rule of law require?' In the context of appeals against a decision of a judicial tribunal on a procedural matter, the Court decided that the extra security offered by judicial review should be limited to the grounds on which an appeal from the Upper Tribunal to the Court of Appeal would have been available had the 2007 Act not expressly precluded such an appeal. In view of the current overstretching of judicial time and resources and delays in hearing cases, it does not seem to me to be unreasonable to try to prevent applications for judicial review of permission-to-appeal decisions by the Upper Tribunal.

III. How likely is it that the proposed provisions will be effective?

Putting aside, therefore, the question whether the proposal to exclude judicial review of such decisions is a good idea, a further question arises: how likely is it that the attempt to exclude it will succeed? This arises because of doubts concerning the effectiveness of legislative attempts to exclude the High Court's supervisory jurisdiction over "inferior courts and tribunals".

By way of background, all attempts to exclude the supervisory jurisdiction of the courts are always constitutionally suspect on two grounds. First, access to independent and impartial courts and tribunals to determine the lawfulness or otherwise of decisions or actions affecting people is a key aspect of the rule of law. It should rarely if ever be possible to cut that down. Secondly, the idea of Parliament as supreme legislature seems logically inconsistent with allowing officials the uncontrolled freedom to decide for themselves what the law means and whether they are acting in accordance with it. If one allows preclusive provisions in legislation, it is necessary, and very difficult, to define the circumstances in which they should be allowed to have effect.

(a) Background: "jurisdiction" and the interpretation of preclusive provisions

In *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 concerned a statutory assertion that a determination of the Foreign Compensation Commission "shall not be called in question in any court of law". The House of Lords held that this did not protect a decision taken outside the Commission's jurisdiction in the sense that the Commission had misconstrued the Order in Council governing its activities and as a result had embarked on an inquiry which it had not been empowered to consider. Over the ensuing half century, the idea of limits to a body's "jurisdiction" had expanded to the point at which anything that could be designated an "error of law" came to be regarded as outside its "jurisdiction". The implication for preclusive provisions was that they were thought to be less and less likely to be effective in protecting determinations from judicial review. In *R. (Privacy International) v. Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491 the Supreme Court made a valiant effort to clarify the position, but differences of view among the seven Justices make it hard to discern a coherent ratio decidendi. So far as there was consensus, it was that the effect of a preclusive provision

depends on its proper interpretation. Nevertheless, the process of interpretation took place in a web of principles which included:

- The requirement of the rule of law that a person should be able to test the lawfulness of official action before a court or tribunal;
- The sovereignty of Parliament's requirement that courts should be able to ensure that parliamentary legislation was given effect in accordance with its terms;
- leading (according to three Justices) to a presumption that legislation is not intended to exclude the jurisdiction of the ordinary courts to decide what the law is;
- a principle that any restriction of judicial review should be expressed in clear language in the legislation.

There had also been a constitutional argument that Parliament lacked competence ever to exclude wholly the jurisdiction of courts to determine the lawfulness of decisions or acts. In the *obiter* view of three Justices (Lord Carnwath, with whom Lady Hale and Lord Kerr agreed), this was well founded, both because of the centrality of the rule of law to the constitution and because of the logical contradiction between allocating ultimate legislative authority to Parliament and preventing courts from ensuring that parliamentary legislation was complied with (although Lord Sumption, with whom Lord Reed agreed, thought that it would not be illogical for Parliament to provide for a decision-maker to be the final arbiter of its own jurisdiction, removing the need for judicial review). Lord Wilson thought that there was much to be said for that view, as long as it was limited to review of errors that would deprive a decision-maker of competence rather than "ordinary errors of law". Lord Sumption thought that preclusive

provisions should not be interpreted as excluding judicial review of decisions of non-judicial decision-makers; people should always be able to challenge such decisions before a judge, but need not be able to get judicial review of a tribunal which was itself conducting judicial review of a decision.

(b) Proposed section 11A

Against this background, we can examine proposed section 11A of the 2007 Act. It provides that a ***decision (or purported decision***: see sub-section (7)) by the Upper Tribunal to refuse permission or leave to appeal "is **final**, and ***not liable to be questioned or set aside in any other court***" (s. 11A(2)). Sub-section (3) enlarges on this: the Upper Tribunal "is **not to be regarded as having exceeded its powers** by reason of **any error** made in reaching the decision", and "the supervisory jurisdiction **does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision**".

This seeks to cut off judicial review in four separate ways:

1. by making the ***decision or purported decision*** final and not to be questioned, akin to the approach in the legislation considered in *Anisminic*;
2. by removing error of law from the list of ***grounds for review***;
3. by ***limiting the High Court's supervisory jurisdiction*** so that it no longer extends to such decisions.

In addition, proposed section 11A(6) prevents litigants from evading the preclusive provision by seeking judicial review of the First-tier Tribunal.

This belt-and-braces approach is informed by the provision proposed in the Nationality and Immigration (Treatment of Claimants, etc.) Bill in the 2003-04 session of

Parliament. It was not ultimately enacted in that form, but in *Privacy International* the majority treated it as making it abundantly clear that the legislation was designed to exclude judicial review; the failure of the legislation at issue in *Privacy International* was a major reason for the majority to conclude that it was ineffective, as a matter of interpretation, to exclude review of the Investigatory Powers Tribunal.

(c) Likely effectiveness

If any preclusive provision can succeed, this one will.

Judges are, I think, unlikely to be regard this as a major issue of principle, for the following reasons.

1. The judiciary does not want to continue to have to hear a large number of cases most of which have little chance of success.
2. The decision to refuse permission or leave to appeal is taken by a judicial tribunal interpreting and applying statutory criteria. It is essentially different from a decision made by a political or administrative officer. The Upper Tribunal is a judicial decision-maker reviewing decisions of administrative officials or hearing appeals from another judicial tribunal, the First-tier Tribunal. There is a limit to the number of judicial tribunals to which a person must have access to comply with the rule of law.
3. A permission-to-appeal decision is not usually primarily concerned with the legal merits of the substantive judgment, although if the grounds for the proposed appeal are thought to be unarguable it would strongly militate against giving permission. The main issue is whether the statutory criteria for

permitting an appeal are met. This weakens the rule-of-law argument for making judicial review of such decisions widely available.

4. As a matter of interpretation, the belt-and-braces approach of proposed new section 11A makes it absolutely clear that judicial review is not to take place, far more clearly indeed than did the legislation in the *Privacy International* case.
5. Proposed new section 11A is a partial, not total, exclusion of the supervisory jurisdiction. The supervisory jurisdiction would continue in respect of:
    a. decisions of the Upper Tribunal made before the amendment comes into force (clause 2(2) of the Bill);
    b. complaints that –
        i. there had been no valid application before the Upper Tribunal when it made its decision (proposed section 11A(4)(a) of the 2007 Act), or
        ii. the Upper Tribunal is or was not properly constituted to deal with the application (proposed section 11A(4)(b)), or
        iii. the Upper Tribunal is acting or has acted in bad faith or in fundamental breach of the principles of natural justice (proposed section 11A(4)(c)).

The proposal thus appears to me to be well focused, proportionate and unequivocal. It continues to allow challenges for what were described in *Privacy International* as absence of jurisdiction in the pre-*Anisminic* sense. Nobody will be deprived of at least one judicial hearing of their case, and in many instances there will have been two, first before the First-tier Tribunal and then an appeal heard by the Upper Tribunal. Review will still be possible where it is claimed that for some reason the Upper Tribunal as constituted simply

lacked the competence to make its decision or committed a fundamental breach of the principles of natural justice. This does not seem to me to infringe or endanger the rule of law in any way.

What about a constitutional challenge to the legislative competence of Parliament? For similar reasons to those outlined above, it seems to me inconceivable that a court would hold on rule-of-law grounds that Parliament is not competent to enact these provisions. There could conceivably be an argument that the partial exclusion of judicial review is logically inconsistent with the legislative sovereignty of Parliament, as the proposed provision does not give power to the Upper Tribunal to determine the scope of its own jurisdiction; but the proposals to leave the key determinants of old-style, pre-*Anisminic* jurisdiction subject to judicial review, while excluding judicial review from other decisions of law and discretion.

At the same time, the drafting of the third exception from proposed section 11A does leave room for debate. What is meant by "fundamental breach of the principles of natural justice"? Is not any breach of the principles of natural justice a fundamental one in terms of its principled significance? And are "the principles of natural justice" limited to the classic grounds of bias failing to allow each party a fair hearing, i.e. a failure to act judicially, or do they extend further to other manifestations of procedural unfairness? I think that the phrase limits the category of reviewable faults under the third exception to those which *significantly* rather than trivially interfere with a litigant's ability to put forward arguments and evidence and *materially affect* the outcome. We are used to making such judgements and in practice courts and tribunals are, I think, unlikely to find that the formulation presents much difficulty on the facts of cases.

IV. Additional points

I add two postscripts.

(a) Practical impact

What practical effects is proposed section 11A likely to have? I suspect that the number of applications for leave to apply for judicial review of permission-to-appeal decisions will start to fall, but the number will continue to be fairly high initially, with parties exercising ingenuity to bring themselves within one of the exceptions in proposed section 11A(4) until the case-law settles down and the number of cases diminishes. In terms of the likely effect on the jurisprudence of the courts, I think it possible that, as courts deal with the legislation, it will further encourage them to elaborate a distinction which was part of pre-*Anisminic* jurisprudence between what might be called "true jurisdictional error" and other errors of law, fact and discretion. Whilst that distinction fell into disfavour in the 1980s and subsequently, courts have once again woken up to its usefulness, despite its practical and conceptual difficulties, in judgments such as *Privacy International* and *R. (TN (Vietnam)) v. Secretary of State for the Home Department (Helen Bamber Foundation and another intervening)* [2021] UKSC 41, [2021] 1 WLR 4902, SC. The latter judgment shows that there is not necessarily a direct link between unlawfulness affecting a piece of legislation providing for a decision-making procedure and the unlawfulness of a judicial decision made in the course of that procedure. See also, in the context of the duty to comply with judicial orders until they are successfully appealed or quashed, *R. (Majera) (formerly SM (Rwanda)) v. Secretary of State for the Home Department* [2021] UKSC 46 (20 October 2021).

(b) Drafting of other preclusive provisions

Does the drafting of proposed new section 11A tell us anything about how drafters are likely to approach the task of drafting preclusive provisions in other legislation in the light of *Privacy International*? Professor Young suggested to me that one might usefully compare proposed section 11A with a provision in another Bill now before Parliament, the Dissolution and Calling of Parliament Bill. The purpose of the latter Bill is to repeal the Fixed-term Parliaments Act 2011 and revivify the Crown's prerogative power to dissolve Parliament and call a new one. Clause 3 of the Bill, probably with an eye to the Supreme Court's decision regarding the prerogative power of prorogation in *Miller (No. 2)*, provides, "A court or tribunal may not question –

(a) the exercise or purported exercise of [the prerogative powers to dissolve Parliament and summon a new one],

(b) any decision or purported decision relating to those powers, or

(c) the limits or extent of those powers."

This does not include the elaborate belt-and-braces provisions in proposed section 11A(2) and (3) from the Judicial Review and Courts Bill. Does this mean that it is less likely to be accepted by courts as excluding their supervisory jurisdiction?

On the one hand, the prerogatives are that of the monarch, by convention exercised on the advice of the Prime Minister, a political rather than judicial decision-maker, and there is no mechanism for questioning the lawfulness of the exercise of the prerogatives, or advice regarding it, before a court. On the other hand, the formulation in the drafting goes beyond the "determination" language in *Anisminic* by including "purported" as well as lawful or real exercise or decisions, and precludes review of the limits or extent of the

powers as well as decisions taken within judges' assessment of the limits of the powers. This is a clear indication that it is meant to be effective against even "jurisdictional" errors. There is no logical inconsistency, because here Parliamentary legislation is being used to prevent recourse to courts to determine the scope of prerogative powers and related decisions and acts, not to allow a decision-maker to determine the scope of its powers under statute. As a matter of interpretation, it seems to me likely that, on balance, courts would be willing to give effect to the clause in the very special context to which it applies.

But if this is right, would the Supreme Court would consider that the provision lies outside the legislative competence of Parliament? The rule-of-law argument would, it seems to me, be plausible but not strong. Despite what the Supreme Court wrote in *Miller (No. 2)* about prorogation affecting the rights and duties of parliamentarians, no private rights, or rights of the kind that would be regarded under the ECHR as "civil rights and obligations", are in play, and this weakens the force of arguments for access to court. It is as clear as can be that the clause is drafted to ensure that the Supreme Court's push into the field of highly political prerogatives in *Miller (No. 2)* cannot be further extended to review of the dissolution of Parliament if the Fixed-term Parliaments Act 2011 is repealed.

But, but… Suppose a Prime Minister were to advise Her Majesty to dissolve Parliament but there was to be no date set for a General Election, opening the possibility of executive rule without parliamentary scrutiny for a significant period. Is it certain that a court, seeing itself as a guardian of a constitutional to which representative, parliamentary democracy is fundamental (as the Supreme Court did in *Miller (No. 2)*),

would not hold that Parliament lacked capacity to legislate to remove the only judicial constraint on untrammelled executive rule? I wonder…