Judicial Review and Courts Bill Webinar

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Background: IRAL Press Release

- IRAL initial MOJ Press release:
  - The Government established an Independent Review of Administrative Law, Chaired by Lord Faulks QC;
  - General Brief to consider "whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government."
- More specifically, the Review was to consider 4 issues:
  - Whether the terms of judicial review should be written into law;
  - Whether certain executive decisions should be decided on by judges;
  - Which grounds and remedies should be available in claims brought against the government; and
  - Any further procedural reforms to judicial review, such as timings and the appeal process.

Background: IRAL – Terms of Reference

- The IRAL Terms of Reference fleshed out the preceding 4 issues:
  - 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.
  - 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", 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.

IRAL Report

- The IRAL Panel generally came out against significant change in relation to the issues that it was asked to consider:
  - Issue 1: it was against codification;
  - Issue 2: it was also doubtful as to whether there could or should be any general changes in relation to the second issue, which concerned justiciability, while recognizing that Parliament might legitimately so legislate on a particular issue;
  - Issue 3: The Panel was equally sceptical concerning legislative intervention in relation to whether there should be some statutory tailoring of the grounds of intervention and the subject matter of the case. It rightly concluded that the courts already do this to varying degrees, and that there would be very great difficulties in legislating in this regard ;
  - Issue 4: no change recommended in relation to rules of standing or time limits.

IRAL Report

- Two Recommendations:
  - 1. *Cart JR* applications should be stopped, given the number of such applications, the resource implications thereof and the very low incidence of success (para. 3.46).
  - 2. Courts should be accorded power to make a suspended quashing order, which would automatically take effect when certain conditions were met (paras. 3.49, 3.68).

MOJ Response

- The Government Response to the Independent Review of Administrative Law', CP 408: set in train a second consultation exercise; the range of questions posed was far-reaching;
- The MOJ included a range of more specific inquiries concerning suspended quashing orders and prospective only remedies, and also raised questions concerning nullity and ouster clauses;
- However, the MOJ decided in the Judicial Review and Courts Bill to concentrate on remedies.

Judicial Review and Courts Bill

- Suspended Quashing Orders: to be introduced via s 29A of the Senior Courts Act 1981: key points:
  - Discretion: It empowers courts to make a suspended quashing (SQA), which can either make provision for the suspension not to take effect until a specified date, or remove/limit any retrospective effect of the order; an SQA can be subject to conditions; if an SQA is issued then the impugned act is upheld until the quashing takes effect, assuming that it does so, s 29A(1)-(6);
  - There is a broad list of considerations for a court to take into account in deciding whether to issue an SQA, s29A(8);
  - Mandatory sting: if the court is to make a quashing order and it appears to the court that an SQA 'would, as a matter of substance, offer adequate redress in relation to the relevant defect' then the court must make such an SQA unless it sees a good reason not to do so.

Judicial Review and Courts Bill

- Removal of Cart JRs: to be introduced via amendment to Tribunals, Courts and Enforcement 2007, new s 11A: key points:
- It renders decision of Upper Tribunal final in relation to its decision to refuse permission or leave to appeal pursuant to s 11(4)(b);
- It is backed up by an ouster clause in s11A(2)-(3), (6), subject to limited exceptions in (4):
- s11A(2): ‘The decision is final and not liable to be set aside in any court’;
- s11A(3):
  - The UT is not to be regarded as exceeding its jurisdiction by reason of any error made in reaching the decision;
  - The supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made in relation to, the decision.
- s 11A(6): you cannot circumvent the above through seeking JR of the FTT.
- The ouster clause is clearly a ‘belt and braces’ job, and is intended as a ‘trial’ for use of such clauses in other contexts.

The HRA: IHRAR

- The Independent Human Rights Act Review (IHRAR) is to submit its Report by the end of October 2021; the content remains to be seen;
- ‘Pre-empted’ by comments from the Dominic Raab, who now heads the MOJ; what transpires remains to be seen, but they indicate his desired direction of travel.
- They merit some brief consideration here.

The HRA: IHRAR

- 1. Ad hoc legislation to overturn HRA decisions that the government dislikes. However:
- It is axiomatic that Parliament is sovereign and can thus do this already if it so wishes.
- There are then two logical possibilities:
  - First: the government will make greater use of this power;
  - Second: it will enact primary legislation to render it easier for the government to do this in the future, through, for example, a Henry VIII clause so crafted that the government could overturn any such judicial decision, and alter any primary legislation that underpinned the decision, via delegated legislation.

The HRA: IHRAR

- 2. Weaken the force of Strasbourg decisions on UK courts: However,
  - s 2 HRA is framed in terms of UK courts taking account of Strasbourg decisions, not clear how this could be ‘weakened’ while the UK remains a member of the ECHR;
  - The courts case law on s 2 (mirror principle) etc reveals two points that are salient for these purposes:
    - UK courts do push back on Strasbourg case law where they feel this is warranted; and they are willing, in some instances, not to treat that case law as a ceiling;
    - UK courts remain strongly inclined to regard that ECtHR case law as a floor in part because we are bound by the ECHR, and in part because if they do not do so, litigants will then pursue their case in Strasbourg.