How to Improve the Judicial Review and Courts Bill

Richard Ekins

How to Improve the Judicial Review and Courts Bill

Richard Ekins

Policy Exchange

About the Author

Professor Richard Ekins is Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government, University of Oxford.

Published by
Policy Exchange, 8 – 10 Great George Street, Westminster, London SW1P 3AE

www.policyexchange.org.uk

ISBN: 978-1-910812-XX-X

Contents

Introduction

The Lord Chancellor introduced the Judicial Review and Courts Bill to Parliament on 21 July this year. Only the first two clauses of the Bill address judicial review. The first clause makes provision in relation to remedies in judicial review proceedings, authorising courts to suspend quashing orders in certain cases. The second clause reverses the Supreme Court's *Cart* judgment,[1] protecting certain decisions of the Upper Tribunal from challenge by way of judicial review proceedings.

The Bill is a welcome, if modest, first step in the wider project of restoring the balance of the constitution. In his keynote lecture at Policy Exchange,[2] the Lord Chancellor explained the reasoning behind the Bill. The Lord Chancellor reasoned that the Supreme Court, under the leadership of Lord Reed, had begun to correct some of the excesses of recent years. There was no need for radical reform; instead, the Bill should make measured changes, with more to follow later if necessary.

While there are reasons to hope that the Supreme Court is beginning to mend its ways,[3] and incremental reform can have the advantage of minimising controversy and avoiding institutional conflict, the Bill's modesty may be excessive. Parliament enjoys primary responsibility for legal change and courts often have difficulty correcting past errors, not least since judges who recognise the limits of their role will eschew any general capacity to remake the law.[4] The Bill provides an opportunity to make some corrections to recent legal developments and Parliament should consider whether the Bill goes far enough in helping restore principled limits on judicial power.

This paper, which draws on submissions to the Independent Review of Administrative Law (IRAL) and the Government Consultation on Judicial Review Reform,[5] sets out a number of amendments that Parliament may wish to consider making to the Bill. The first two amendments concern the Bill's first two clauses. The other amendments would introduce new clauses to the Bill: some would reverse particular judgments;[6] others would make general (but targeted) changes to the procedures and grounds of judicial review. The amendments are likely to fall within the scope of the Bill, which encompasses the broad field of law (the law of judicial review) that its operative clauses address. The Supreme Court's recent change of tack, while encouraging, does not involve correction of the legal points that the proposed amendments would address.

If Parliament were to adopt some of the amendments set out in this paper, the Bill would remain a measured, incremental reform. That is, the amendments this paper proposes are consistent with the spirit of the Bill, even if they would extend its reach and strengthen its effect. The point of the paper is precisely to outline to Parliament some ways in which it might go about strengthening the Bill and thereby vindicate the rule of law and the political constitution.

1. *R (Cart) v The Upper Tribunal* [2011] UKSC 28
2. Rt Hon Robert Buckland QC MP, "Banishing the Ghosts of Judicial Review Past", Policy Exchange, 21 July 2021
3. See *R (Begum) v Home Secretary* [2021] UKSC 7, *R (SC) v Work and Pensions Secretary* [2021] UKSC 26, and *R (A) v Home Secretary* [2021] UKSC 37. On *Begum*, see R Ekins, "The significance of the Supreme Court's Begum judgment", Policy Exchange, 3 March 2021; on *SC*, see A Tomkins, "Two-child tax credit limit: Take the argument to Holyrood, not the Supreme Court", The Herald, 14 July 2021
4. See further J Finnis, "Judicial Power: Past, Present and Future" in R Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018), 26, 36-37.
5. Later published as R Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 2019), S Laws, *How to Address the Breakdown of Trust Between Government and Courts* (Policy Exchange, 2020), and R Ekins, *How to Reform Judicial Review* (Policy Exchange 2021). I have also drawn on submissions my colleague Professor Jason Varuhas (Melbourne Law School) made to IRAL and the Consultation.
6. A course of action IRAL recognised to be legitimate: see the report of the Independent Review of Administrative Law, March 2021, CP 407, 2.91-2.92.

The Bill's first two clauses

Quashing orders

(1) After section 29 of the Senior Courts Act 1981 insert—

"29A Further provision in connection with quashing orders

(1) A quashing order may include provision—

(a) for the quashing not to take effect until a date specified in the order, or

(b) removing or limiting any retrospective effect of the quashing.

(2) Provision included in a quashing order under subsection (1) may be made subject to conditions.

(3) If a quashing order includes provision under subsection (1)(a), the impugned act is (subject to any conditions under subsection (2)) ~~upheld~~ to be treated as legally valid until the quashing takes effect.

(4) If a quashing order includes provision under subsection (1)(b), the impugned act is (subject to any conditions under subsection (2)) ~~upheld~~ to be treated as legally valid in any respect in which the provision under subsection (1)(b) prevents it from being quashed.

(5) Where (and to the extent that) an impugned act is ~~upheld~~ to be treated as legally valid by virtue of subsection (3) or (4), it is to be treated for all purposes as if its validity and force were, and always had been, unimpaired by the relevant defect.

(6) Provision under subsection (1)(a) does not limit any retrospective effect of a quashing order once the quashing takes effect (including in relation to the period between the making of the order and the taking effect of the quashing); and subsections (3) and (5) are to be read accordingly.

(7) Section 29(2) does not prevent the court from varying a date specified under subsection (1)(a).

(8) In deciding whether to exercise a power in subsection (1), the court must have regard to—

(a) the nature and circumstances of the relevant defect;

(b) whether, and to what extent, the impugned act has legislative effect;

(~~b~~c) any detriment to good administration that would result from exercising or

failing to exercise the power;

(~~c~~d) the interests or expectations of persons who would benefit from the quashing of the impugned act;

(~~d~~e) the interests or expectations of persons who have relied on the impugned act;

(~~e~~f) so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;

(~~f~~g) any other matter that appears to the court to be relevant.

(9) If—

(a) the court is to make a quashing order in relation to a statutory instrument or other instrument or decision with legislative effect or otherwise setting out or approving any policy, strategy or other framework for decision making, and

(b) it appears to the court that an order including provision under subsection (1) would, as a matter of substance, offer adequate redress to the claimant in relation to the relevant defect,

the court must exercise the powers in that subsection accordingly unless it sees good reason not to do so.

(10) In applying the test in subsection (9)(b), the court is to take into account, in particular, anything within subsection (8)(e).

(11) In this section—

"impugned act" means the thing (or purported thing) being quashed by the quashing order;

"relevant defect" means the defect, failure or other matter on the ground of which the court is making the quashing order."

(2) In section 31 of the Senior Courts Act 1981 (judicial review)—

(a) in subsection (5), for "quashes" substitute "makes a quashing order in respect of";

(b) in subsection (5A)(b), for "decision is quashed" substitute "quashing order is made".

(3) In section 17 of the Tribunals, Courts and Enforcement Act 2007 (supplementary provision about quashing orders made by the Upper Tribunal)—

(a) before subsection (1) insert—

"(A1) In cases arising under the law of England and Wales, section 29A of the Senior Courts Act 1981 applies in relation to a quashing order under section 15(1)(c) of this Act as it applies in relation to a quashing order under section 29 of that Act.";

(b) in subsection (2)(b), for "decision is quashed" substitute "quashing order is made".

(4) The amendments made by subsections (1) to (3) have effect only in relation to proceedings commenced on or after the day on which this section comes into force.

Explanatory note:

Clause 1 of the Bill introduces a new section 29A to the Senior Courts Act 1981, empowering judges to make a quashing order that only takes effect from a date specified in the order or that limits or removes any retrospective effect of the quashing. Subsections (3), (4) and (5) of section 29A, as introduced, speak of an impugned act being "upheld" by a quashing order. This phrasing is inapposite. The clause should be amended (in the way set out in the text highlighted above) to make clearer that the relevant order gives continuing legal effect to an act otherwise found to be unlawful, in order to protect settled expectations and avoid uncertainty or inconvenience.

Section 29A(9) as introduced sets out a weak presumption requiring judges to exercise the power in subsection (1) if such an order would "offer adequate redress". The clause has a very broad application, which is likely

to give rise to unnecessary litigation. The case for delaying, or removing or limiting the retrospective effect of, a quashing order is strongest when the impugned act is a statutory instrument, or policy, on which others are likely to have relied. Modern judicial review proceedings increasingly involve systemic challenge, rather than the traditional focus on a particular public act. Quashing a statutory instrument, policy or other general framework for decision-making is likely to give rise to uncertainty, which the court should aim to minimise if possible. The clause should thus be amended (in the way set out in the text highlighted above) to narrow the reach of the presumption, thus minimising the risk of collateral litigation about remedies. It should also be clear that the question is whether making an order under subsection (1) would offer adequate redress *to the claimant*, rather than redress to a wider class of persons outside the court. Again, the text highlighted above would amend clause 1 to this effect.

Note that clause 1 only applies to quashing orders. The mischief the clause targets may arise in other proceedings, where a quashing order is not an available remedy. Parliament should consider amending the clause to address this point. Parliament might make provision for other proceedings to be adjourned to consider whether a quashing order should be made and thus whether the effect of the order should be delayed or suspended. Alternatively, Parliament might specify that a quashing order is an available remedy, subject to the section 29A power, in the context of other proceedings in which the lawfulness of a public act is in question.

Exclusion of review of Upper Tribunal's permission-to-appeal decisions

(1) In the Tribunals, Courts and Enforcement Act 2007, after section 11 insert—

"11A Finality of decisions by Upper Tribunal about permission to appeal

(1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).

(2) The decision is final, and not liable to be questioned or set aside in any other court.

(3) In particular—

(a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;

(b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.

(4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—

(a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),

(b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or

(c) the Upper Tribunal is acting or has acted—

(i) in bad faith, or

(ii) ~~in fundamental breach of the principles of natural justice~~ in some other way that constitutes a fundamental procedural defect.

(5) Subsections (2) and (3) do not apply so far as provision giving the First-tier Tribunal jurisdiction to make the first-instance decision could (if the Tribunal did not already have that jurisdiction) be made by—

(a) an Act of the Scottish Parliament, or

(b) an Act of the Northern Ireland Assembly passed without the consent of the Secretary of State.

(6) The court of supervisory jurisdiction is not to entertain any application or petition for judicial review in respect of a decision of the First-tier Tribunal that it would not entertain (whether as a matter of law or discretion) in the absence of this section.

(7) In this section—

"bad faith" includes corruption, malice and actual bias;

"decision" includes any purported decision;

"first-instance decision" means the decision in relation to which permission (or leave) to appeal is being sought under section 11(4)(b);

"the supervisory jurisdiction" means the supervisory jurisdiction of—

(a) the High Court, in England and Wales or Northern Ireland, or

(b) the Court of Session, in Scotland,

and "the court of supervisory jurisdiction" is to be read accordingly."

(2) The amendment made by subsection (1) does not apply in relation to a decision (including any purported decision) of the Upper Tribunal made before the day on which this section comes into force.

Explanatory note:

Clause 2 of the Bill introduces a new section 11A into the Tribunals, Courts and Enforcement Act 2007, reversing the Supreme Court's judgment in *Cart*.[7] The new section is an effective ouster clause. The ouster is not absolute and subsection (4) provides that it does not apply in relation to any question as to whether the Upper Tribunal has acted, amongst others things "in fundamental breach of the principles of natural justice". This is an imprecise formulation and may result in unnecessary litigation. The clause should be amended (in the way set out in the text highlighted above) to make clear that relevant decisions of the Upper Tribunal may not be challenged on the grounds of natural justice at large. The proposed amendment replaces "fundamental breach of the principles of natural justice" with the more narrowly framed formulation "in some other way that constitutes a fundamental procedural defect". If Parliament amends the clause to make clear that bad faith includes malice, corruption and actual

7. *R (Cart) v The Upper Tribunal* [2011] UKSC 28

bias, it might simply delete the "fundamental breach of the principles of natural justice" formulation and not replace it. This would clearly limit judicial review on the grounds of natural justice in this context to cases involving bad faith.

General changes

Acting on behalf of the Secretary of State

After section 12 of the Interpretation Act 1978, insert –

"12A Exercise of powers and duties

(1) Where the provision of any enactment confers a power or imposes a duty on any Minister of the Crown it is implied, unless the contrary intention appears, that the *Carltona* principle applies.

(2) Where the provision of any enactment confers a power or imposes a duty on a Minister of the Crown it is implied, unless the contrary intention appears, that the power may be exercised or the duty carried out on the Minister's behalf by any person for whose actions the Minister, pursuant to his office, takes responsibility.

(3) Where the provision of any enactment confers a power or imposes a duty on a Minister of the Crown it is implied, unless the contrary intention appears, that the Minister is not required personally to exercise the power or carry out the duty.

(4) Where the provision of any enactment provides (in whatever terms) that the instrument by which any power or duty is to be exercised or carried out by a Minister of the Crown may be signed by a specified office holder, that enactment is to be construed, unless express provision is made to the contrary, as authorising that office holder to exercise or carry out that power or duty without consulting that Minister in relation to that particular case.

(5) In this section –

(a) "Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975; and

(b) "office holder" means a person holding office as a Minister of the Crown or an official in a government department of the level of seniority specified in the enactment.

(6) This section applies to enactments contained in Acts and subordinate legislation whenever passed or made [and also to any Northern Ireland legislation (within the meaning of section 24)] whenever passed or made."

Explanatory note:

This amendment is similar in form to section 12 of the Interpretation Act, which concerns the continuity of powers and duties. The amendment is necessary to respond to the Supreme Court's decision in *Adams*,[8] a judgment that badly misrepresented the relationship between the powers of the Secretary of State and other ministers and (senior) civil servants. Before *Adams*, it was uncontroversial that the *Carltona* principle (named after the 1943 case)[9] framed the relationship between the Secretary of State and the persons for whom he takes constitutional responsibility, viz. civil servants acting under his direction and others ministers in his department. The *Adams* judgment puts in doubt the validity of a host of public acts and is likely to unsettle government decision-making. The proposed amendment reverses this aspect of the judgment and thereby restores a pivotal principle of our constitution, which is highly relevant to judicial review. That is, it prevents litigation alleging that the Secretary of State has failed personally to exercise the powers Parliament conferred upon him, when it should be quite clear that the presumption is that Parliament intends powers conferred upon him to be exercised on his behalf.

8. *R v Adams* [2020] UKSC 19
9. *Carltona v Commissioner of Works* [1943] 2 All ER 560

Primacy of legislative intent

After section 11 of the Interpretation Act 1978, insert –

"11A Interpretation of ouster clauses

(1) Unless the contrary intention appears, an Act does not limit or exclude the supervisory jurisdiction of the High Court.

(2) The presumption about legislative intent in subsection (1) is defeasible.

(3) Accordingly, for the removal of all doubt the supervisory jurisdiction of the High Court is limited or excluded to the full extent that Parliament, in enacting any Act, intends it to be limited or excluded.

(4) In reading or construing an Act that purports to limit or exclude the supervisory jurisdiction of the High Court, no court may depart from the actual intention of the enacting Parliament.

(5) This section applies to Acts whenever enacted."

Explanatory note:

Clause 2 of the Bill reverses *Cart*, aiming expressly to oust the supervisory jurisdiction of the High Court in relation to the Upper Tribunal. The Bill thus aims to set out an ouster clause that the courts are likely to view as constitutionally unobjectionable, which might serve as a model in some other case. However, the Bill does not address the Supreme Court's judgment in *Privacy International*,[10] in which the majority of the Court misinterpreted an important ouster clause. This judgment is constitutionally significant and warrants express reversal. The amendment set out above addresses paragraph 107 of Lord Carnwath's judgment (with which Lady Hale and Lord Kerr agreed), in which Lord Carnwath asserts that ouster clauses are *not* to be read in the way that other enactments are to be read, that is with a view to ascertaining Parliament's intended meaning. This assertion is constitutionally objectionable and should be rejected in terms. The proposed amendment would not abrogate the presumption that Parliament does not intend to oust the jurisdiction of the courts, which is a sound presumption that is well-grounded in our legal tradition. On the contrary, the proposed amendment expressly affirms that presumption. What it would do would be to make clear that Parliament does not accept that the courts are free to ignore Parliament's intentions. The court's duty is to infer and give effect to Parliament's lawmaking intention.

10. *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22

Primacy of parliamentary sovereignty

After section (1) of the Constitutional Reform Act 2005, insert –

"1A Parliamentary sovereignty and the rule of law

(1) Nothing in this Act limits in any way the doctrine of parliamentary sovereignty.

(2) The principle of the rule of law to which section 1 refers does not:

(a) allow the construction of an Act in any way that departs from the actual intention of the enacting Parliament; or

(b) support any exercise of any jurisdiction for the purpose of qualifying or questioning the exercise of parliamentary sovereignty in the enactment of any Act.

(3) Section 1 is to be read subject to this section."

Explanatory note:

Section 1 of the Constitutional Reform Act 2005 provides that nothing in the Act adversely affects the existing constitutional principle of the rule of law or the Lord Chancellor's existing constitutional role in relation to that principle. The proposed new clause addresses the misuse of section 1 in Lord Carnwath's judgment in *Privacy International* to cast doubt on parliamentary sovereignty and to conjure up a jurisdiction to quash Acts of Parliament. Lord Carnwath's remarks are the sequel to Lord Hope and Lord Steyn's scepticism about parliamentary sovereignty in *Jackson* many years earlier.[11] The proposed clause makes clear that Parliament firmly rejects attempts to leverage the 2005 Act into a ground of challenge to Parliament's intentions or parliamentary sovereignty. An alternative would be to replace section 1 with a new section that provided that nothing in the Act adversely affects the doctrine of parliamentary sovereignty, the constitutional principle of the rule of law or the Lord Chancellor's constitutional role in relation to the principle of the rule of law.

11. *Jackson v Attorney General* [2006] 1 AC 262; for criticism, see R Ekins, "Legislative Freedom in the United Kingdom" (2017) 133 LQR 582 and R Ekins, "Acts of Parliament and the Parliament Acts" (2007) 123 LQR 91.

Non-justiciability of parliamentary accountability

(1) No court or tribunal shall hold an act, or a failure to act, unlawful on the grounds that it is incompatible with, or limits, or otherwise interferes with, parliamentary accountability.

(2) No court or tribunal shall have jurisdiction to consider—

(a) whether either House of Parliament or any committee of either House has given adequate or appropriate consideration to any matter;

(b) the grounds or premises on which either House or any such committee has made any decision; or

(c) whether any information or opinion provided to either House or any such committee for the purposes of its consideration of any matter was truthful, accurate or complete, or in the case of an opinion, reasonable, soundly based or sincere.

(3) Nothing in subsection (2) changes or limits the criminal law.

(4) This section is without prejudice to the generality of Article IX of the Bill of Rights 1689.

Explanatory note:

Subsection (1) aims to unpick one of the premises of *Cherry/Miller (No 2)*,[12] preventing the courts from expanding judicial review to supervise the political relationship between Parliament and government. In our constitution, this is not, and never has been, a matter for the courts. The subsection restores the previous law. Subsection (2) makes clear that, inter alia, the extent to which ministers give an account to Parliament is not for courts to consider. The subsection is necessary in order to enable free and frank debate amongst parliamentarians. Subsection (3) avoids inadvertent change to the criminal law, which might arise, for example, in relation to a charge of perjury if a witness under oath before Parliament gives false witness. Subsection (4) makes clear that the clause does not limit the generality of Article IX of the Bill of Rights 1689.

12. *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

Non-justiciability of the political constitution

(1) No court has jurisdiction to decide:

(a) whether a constitutional convention exists;

(b) what conduct a constitutional convention requires or forbids; or

(c) whether any person has complied with, or failed to comply with, a constitutional convention.

(2) No court may question whether ministers have complied with the Ministerial Code or whether the Prime Minister has upheld or enforced the Code.

(3) Nothing in this section prohibits a court from considering or recognising a constitutional convention if necessary in order to determine a question of law.

(4) The question whether a person's actions were or would be in accordance with or compatible with a constitutional convention is not a question of law.

Explanatory note:

The clause responds to *Cherry/Miller* (No 2),[13] in which the Supreme Court considered whether the Prime Minister acted properly (constitutionally) in advising Her Majesty to prorogue Parliament. The clause also addresses the problem of litigation that has been threatened or initiated in relation to compliance with the Ministerial Code, which like other rules of our political constitution should not be enforced by litigation. In one sense, the clause gives statutory force to the Supreme Court's sound statement of principle about constitutional convention in *Miller* (No 1),[14] in the context of denying that it had jurisdiction to enforce the Sewel Convention. That sound statement of principle is hard to reconcile with *Cherry/Miller* (No 2) and thus legislative intervention is warranted.

13. *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41
14. *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5

Proportionality

(1) Proportionality is not a ground of judicial review.

(2) No court or tribunal may hold a public act or omission unlawful on the grounds that it is disproportionate.

(3) Nothing in this section prevents a court or tribunal from considering proportionality in relation to Convention rights or retained EU law.

Explanatory note:

The clause forecloses the possibility of the Supreme Court introducing proportionality as a general ground of judicial review, a possibility that the Supreme Court has entertained in a number of judgments but which other senior judges have rightly said would be an illegitimate legislative act, which a court should not contemplate.[15] Subsection (3) avoids the clause inadvertently changing the law more widely: that is, it limits the clause to judicial review outside the context of the Human Rights Act 1998 or the application of retained EU law in which proportionality is well established. There are good reasons to change the Human Rights Act, but not in the course of this Bill.

15. P Sales, "Rationality, Proportionality and the Development of the Law" (2013) 129 LQR 223

Limits in particular contexts

Exclusion of review of the Investigatory Powers Tribunal

(1) Section 67 of the Regulation of Investigatory Powers Act 2000 is amended as follows.

(2) For subsection (8) substitute –

"(8) Subject to section 67A and subsections (9) and (10), determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether the Tribunal has jurisdiction and purported determinations, awards, orders and other decisions) shall be final and shall not be subject to appeal or be liable to be questioned in any court.

(9) In particular –

(a) the Tribunal is not to be regarded as having exceeded its powers by reason of any error of fact or law made in reaching any decision; and

(b) the supervisory jurisdiction of the courts does not extend to, and no application or petition for judicial review may be made or brought in relation to, any decision of the Tribunal.

(10) Subsections (8) and (9) do not apply so far as the decision involves or gives rise to any question as to whether the Tribunal –

(a) has a valid case before it;

(b) is or was properly constituted for the purpose of dealing with the case;

(c) is acting or has acted in bad faith, with actual bias or corruption or in some other way that constitutes a fundamental procedural defect.

(11) No error of fact or law made by the Tribunal in reaching any decision is to be construed as relevant to the question

whether the Tribunal had a valid case before it or was properly constituted for the purpose of dealing with it."

(3) The amendment made by subsection (2) applies to determinations, awards, orders and other decisions of the Tribunal (including purported determinations, awards, orders and other decisions) made before the day on which this section comes into force.

Explanatory note:

This clause would reinstate the ouster clause in section 67 of the 2000 Act, which the majority of the Supreme Court misinterpreted in *Privacy International*. That is, the clause would restore Parliament's decision in enacting the section, a decision the Court of Appeal upheld (in a judgment given by Lord Justice Sales,[16] as he then was; now Lord Sales of the Supreme Court) and three judges in the minority (including Lord Reed, now President of the Court) would have upheld. In enacting this clause, Parliament would help protect the jurisdiction of the Investigatory Powers Tribunal – a specialist court – from challenge by way of judicial review proceedings. The clause is similar to clause 2 of the Bill, which excludes review in relation to certain decisions of the Upper Tribunal.

16. *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868

Exclusion of review of prorogation

(1) A court or tribunal may not question:

(a) the scope or exercise of Her Majesty's prerogative power to prorogue Parliament;

(b) any decision or purported decision relating to that power; or

(c) any ministerial advice or action relating to that power

(2) For the purposes of Article 9 of the Bill of Rights 1689, a prorogation or purported prorogation of Parliament is a proceeding in Parliament.

(3) Nothing in this section amends any statutory limitation on Her Majesty's power to prorogue Parliament or affects any statutory power or duty to recall Parliament if prorogued.

Explanatory note:

This clause is a response to *Cherry/Miller (No 2)*,[17] in which the Supreme Court departed from long-standing constitutional law and supervised the lawfulness of the exercise of Her Majesty's prerogative power to prorogue Parliament. The Court purported merely to police the scope of that power, but it framed the scope of the power in such a way as to collapse scope and exercise, changing the law so that prorogation is only lawful if the courts agree that the Prime Minister has a good reason for seeking a prorogation. In our constitution, this has never been for courts to decide. The clause would restore the law as it stood until the Supreme Court changed it.

Note that similar concerns arise in relation to judicial review of Her Majesty's prerogative power of dissolution, a prerogative which the Dissolution and Calling of Parliament Bill is set to restore. There are good reasons to amend clause 3 of that Bill in order more effectively to prevent judicial review proceedings challenging a dissolution. I outlined amendments to this effect in written evidence to the Joint Committee on the Fixed-term Parliaments Act, published on 14 January this year and raised in the House of Commons on 6 July. The clause set out above addresses prorogation rather than dissolution to avoid overlap with the Dissolution and Calling of Parliament Bill. However, one could amend subsection (2) to provide that dissolution is also a proceeding in Parliament.

17. *R (Miller) v Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41

Limitation of review of the power to set tribunal fees

(1) Subject to subsection (2), the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 is to be treated as made under section 42(1) of the Tribunals, Courts and Enforcement Act 2007.

(2) Fees paid under the Employment Appeal Tribunal Fees Order 2013, SI 2013/1893 that have been repaid before this section comes into force are not recoverable.

(3) Section 42 of the Tribunals, Courts and Enforcement Act 2007 is amended as follows.

(4) After subsection (2), insert –

"(2A) An order made under subsection (1) may be challenged only on the grounds of:

(a) improper purpose,

(b) irrelevant considerations, or

(c) Wednesbury unreasonableness.

(2B) No court may hold that an order falls outside the scope of subsection (1) on the grounds that the scale or rate of a fee set by the order is too high otherwise than in respect of whether they exceed the amount required for the recovery of the expenditure out of public funds required in connection with the cases in relation to which they are levied.

(2C) The scales or rates of fees (and exemptions from, reductions in, or remissions of fees) are matters on which the Lord Chancellor is to be accountable to Parliament, and accordingly are for him to decide subject to that accountability, and are not to be questioned by any court in judicial review proceedings or otherwise.

(2D) In particular, no court shall hold that a fees order falls outside the scope of subsection (1) on the grounds that the scale or rate of the fee (or the exemption, reduction in or remission of the fee, including a failure to make an exemption, reduction in, or remission of the fee) unreasonably limits access to justice or has limited or might limit such access."

Explanatory note:

This clause is a response to the Supreme Court's judgment in *R (UNISON) v Lord Chancellor*,[18] which is a significant landmark in the recent law of judicial review. The first two subsections restore the Fees Order quashed in *UNISON*, without permitting recovery of fees repaid in reliance on

18. *R (UNISON) v Lord Chancellor* [2017] UKSC 51

the Court's judgment, but making it clear that the Court was wrong to conclude that the Fees Order fell outside the scope of section 42(1) of the Tribunal, Courts and Enforcement Act 2007. It is important to note that the clause does not affect fees for access to the High Court or other ordinary courts.

Subsection (4) amends section 42 of the 2007 Act in order to limit future judicial review of the Lord Chancellor's power to set tribunal fees. The Supreme Court held that the Lord Chancellor had no power to set fees at a level that created a risk of persons being unable to access tribunals or to interfere disproportionately with the principle of access to justice. The amended section 42 makes clear that a challenge against a fees order may proceed only on limited, traditional grounds and that section 42(1) is not to be interpreted so that it only authorises the making of a fees order that in the court's view does not disproportionately interfere with access to justice.

Finality of certificates by accountable persons under the Freedom of Information Act 2000

(1) Section 53 of the Freedom of Information Act 2000 (exemption from duty to comply with decision notice or enforcement notice) is amended as follows.

(2) For subsection (2) substitute—

"(2) A decision notice or enforcement notice to which this section applies has no effect if the accountable person in relation to the authority in question issues a certificate stating that there are grounds on which that person has formed the opinion that compliance with the notice would not be in the public interest.

(2A) The grounds on which the certificate may be issued may consist of, include or involve any factor that appears to the accountable person to be relevant, even if it is inconsistent with a determination already made (whether by the Commissioner or on an appeal or further appeal arising from a decision of the Commissioner) as to one or both of the following—

(a) how the balance between the public interest in the disclosure of the information and the public interest in maintaining an exemption is to be struck in the case in question;

(b) the existence, nature or relevance of the factors that are to be taken into account, or have been left out of account, in the striking of that balance."

(3) In subsections (3) and (6), for "gives a certificate to the Commissioner" substitute "issues a certificate".

(4) After subsection (3) insert—

"(3A) A certificate under subsection (2) must be signed by the accountable person and is issued by being given to the Commissioner no later than the twentieth working day following the effective date."

(5) In subsection (4), for "subsection (2)" substitute "subsection (3A)".

Explanatory note:

This clause responds to the Supreme Court's judgment in R (*Evans*) v *Attorney General*,[19] which involved judicial review of the Attorney General's exercise of his power under section 53 of the Freedom of Information Act 2000 to

19. [2015] UKSC 21; for criticism see R Ekins and C Forsyth, *Judging the Public Interest: The rule of law vs. the rule of courts* (Policy Exchange, 2015). The clause set out in the main text is Appendix 1 to that paper.

prevent disclosure of information on public interest grounds. Three of the judges in the majority misinterpreted section 53 so that the accountable person (the Attorney General or a minister) is unable to exercise the power if the Upper Tribunal, as opposed to the Information Commissioner, has ordered disclosure. The other two judges in the majority reasoned that it would be an unreasonable (and thus unlawful) exercise of section 53 for the accountable person to take a different view to the Upper Tribunal of the public interest in disclosure. The judgment brazenly misconstrues section 53, effectively forbidding the accountable person from disagreeing with the Upper Tribunal and introducing significant legal risk if the accountable person takes a different view from the Information Commissioner. The proposed clause restores the intended meaning and effect of section 53, making clear by implication that the Supreme Court's judgment in *Evans* was wrong, and sharply limiting future judicial review.

Exclusion of review of ombudsman reports

After section 10 of the Parliamentary Commissioner for Administration Act 1967, insert –

"10A Non-justiciability of the Commissioner's reports and their reception

(1) No court may question a minister's response, or failure to respond, to a report of the Parliamentary Commissioner for Administration.

(2) No court may find that a person has acted unlawfully in failing to:

(a) respond, or respond adequately, to a report of the Commissioner;

(b) accept, in whole or in part, the findings or recommendations of the report; or

(c) accept, in whole or in part, the findings or recommendations of the report unless he has cogent reasons for disagreeing with them.

(3) The matters mentioned in subsections (1) and (2) are matters on which the minister in question is accountable only to Parliament.

(4) Accordingly, decisions concerning any report of the Commissioner shall not be questioned in any legal proceedings.

(5) No court shall question the Commissioner's investigation or report on the grounds that the Commissioner has taken into account an irrelevant consideration or failed to take into account a relevant consideration or has acted unreasonably."

Explanatory note:

This clause is a response to the *Bradley* and *Equitable Management Action Group* judgments,[20] which involved courts superintending the political reaction to a report of the Parliamentary Commissioner for Administration. In enacting the 1967 Act, Parliament did not intend to impose legal duties on Ministers or others to respond to a report – on the contrary, the Act clearly contemplates and makes provision for the reception of the Commissioner's report to be a political question. The clause restores the intended meaning and effect of the 1967 Act, making clear that it is not open to courts to police the political response to the Commissioner's report.

Subsection (5) aims to prevent juridification of the ombudsman

20. *R (Bradley) v Secretary of State for Work and Pensions* [2008] 3 All ER 1116; *R (Equitable Members Action Group) v HM Treasury* [2009] EWHC (Admin) 2495; for criticism, see J Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange, 2016).

process,[21] preventing persons dissatisfied with the Commissioner's investigation and eventual report from undermining the process by way of judicial review proceedings. The Act sets out an informal accountability mechanism that complements judicial review. The Commissioner does not exercise power over any person, save incidentally in the course of an investigation, and judicial review is unnecessary in this context to prevent abuse of power. Limiting the availability of judicial review in this context helps to restore the intended scheme of the Act and avoid needless delay and cost.

21. For an example of such juridification, see *R v Parliamentary Commissioner for Administration, ex p Balchin (No 1)* [1997] COD 146; *R v Parliamentary Commissioner for Administration, ex p Balchin (No 2)* [2000] 2 LGLR 87; *R v Parliamentary Commissioner for Administration, ex p Balchin (No 3)* [2002] EWHC (Admin) 1876.

Limitation of review of devolved legislatures

(1) Section 29 of the Scotland Act 1998 (legislative competence) is amended as follows.

(2) After subsection (2), insert –

"(2A) A provision is not outside that competence on the grounds that it is incompatible with the principle of the rule of law or a common law right.

(2B) For the removal of doubt, subsection (2) is an exhaustive list of limitations on that competence and courts may not imply further limitations.

(2C) Nothing in subsection (2A) limits or changes subsection (2)."

(3) Section 94 of the Government of Wales Act 2006 (legislative competence) is amended as follows.

(4) After subsection (6), insert –

"(6A) A provision is not outside the Senedd's legislative competence on the grounds that it is incompatible with the principle of the rule of law or a common law right.

(6B) For the removal of doubt, subsection (6) is an exhaustive list of limitations on the Senedd's legislative competence and courts may not imply further limitations.

(6C) Nothing in subsection (6A) limits or changes subsection (6).

(5) Section 6 of the Northern Ireland Act 1998 (legislative competence) is amended as follows.

(6) After subsection (2), insert –

"(2A) A provision is not outside that competence on the grounds that it is incompatible with the principle of the rule of law or a common law right.

(2B) For the removal of doubt, subsection (2) is an exhaustive list of limitations on that competence and courts may not imply further limitations.

(2C) Nothing in subsection (2A) limits or changes subsection (2)."

Explanatory note:

The clause is a response to the Supreme Court's judgment in *AXA*,[22] in which the Court introduced the risk that Acts of the Scottish Parliament might be quashed even if not breaching the express terms of the Scotland Act (which incorporate Convention rights and EU law limitations). The judgment rejects ordinary judicial review of Acts of the Scottish Parliament, including Wednesbury unreasonableness challenges, but holds open the prospect that they might be quashed by reference to the principle of the rule of law. Subsection (2) removes that litigation risk, and thus vindicates Parliament's intention in empowering the Scottish Parliament. Subsections (4) and (6) make related provision for the Welsh Parliament (the Senedd) and the Northern Ireland Assembly.

22. *AXA General Insurance Ltd v Lord Advocate* [2011] UKSC 46

Power to act for UK foreign policy or defence policy

(1) The Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (SI 2016/946) are to be treated as having been validly made under section 3 of the Public Service Pensions Act 2013.

(2) Section 3 of the Public Service Pensions Act 2013 (scheme regulations) is amended as follows.

(3) After subsection (1), insert –

"(1A) In making regulations under subsection (1), the Secretary of State may act in the interests of UK foreign policy or defence policy.

(1B) It is for the Secretary of State, accountable to Parliament, to decide what scheme regulations, if any, are required in the interests of UK foreign policy or defence policy."

Explanatory note:

The clause is a response to the Supreme Court's judgment in *Palestine Solidarity Campaign*,[23] where the majority held that the Secretary of State had no authority to take UK foreign policy and defence policy into account in making regulations prohibiting public pension funds from participating in Boycott, Divestment and Sanctions campaigns (against Israel in this case, as in most cases). Subsection (1) restores the validity of the Regulations quashed in that case. Subsection (3) makes clear that the Secretary of State acts lawfully in considering UK foreign policy or defence policy, which would prevent future challenge on the ground that he has taken into account an irrelevant consideration or acted for an improper purpose.

23. *R (Palestine Solidarity Campaign) v Secretary of State for Communities and Local Government* [2020] UKSC 16

Exclusion of review of decisions about inquiries

After section 1 of the Inquiries Act 2005, insert –

"1A Non-justiciability of the power to cause an inquiry to be held

(1) Neither a minister's decision to cause an inquiry to be held under this Act, nor his decision that an inquiry shall not be held under this Act, shall be called into question in any court.

(2) Subsection (1) does not apply if the minister's decision is corrupt or made in bad faith."

Explanatory note:

The clause addresses the *Litvinenko* judgment,[24] in which the High Court held the Home Secretary's decision not to order an inquiry was unlawful (because unreasonable, which in context simply meant the court thought the decision was wrong) and then ordered an inquiry to be held. The clause restores ministerial discretion to cause an inquiry to be held, or not to be held, which is obviously a political judgment for which ministers should answer to Parliament not the court. Subsection (2) preserves the possibility of judicial review proceedings if it is alleged that a minister has caused an inquiry to be held, or refused to cause an inquiry to be held, corruptly or in bad faith.

24. *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194; for criticism, see J Varuhas, *Judicial Capture of Political Accountability* (Policy Exchange, 2016).

Procedural changes

Prohibition of abstract review

No court may grant permission for judicial review proceedings to proceed unless:

(a) there is an actual dispute between different parties about a matter that is neither hypothetical nor academic, nor a matter involving an issue the determination of which is contingent on the future enactment of any proposal for legislation; and

(b) the act that is the subject of challenge involves a question of law relating to the exercise of legal power or a question relating to a breach of legal right or duty.

Explanatory note:

The clause addresses the trend in judicial review proceedings for courts to be open to argument even when there is no particular dispute. The clause may help discourage systemic challenge, helping to restore the more traditional focus of judicial review proceedings on some particular act. If extended to Scotland, the clause would address the Inner House of the Court of Session's *Wightman* judgment,[25] in which the Court took it upon itself to serve as Parliament's legal advisor. The clause would also make clear, in partial answer to *Cherry/Miller* (No 2) and the ombudsman cases noted above, that judicial review proceedings are a means to challenge legal acts – the exercise of public power – not a free-ranging means to question reasoning or action, or inaction, at large.

25. *Wightman v Secretary of State for Exiting the European Union* [2018] CSIH 62; for criticism, see S Laws, *Judicial Intervention in Parliamentary Proceedings* (Policy Exchange, 2018).

Evidence in judicial review proceedings

(1) Unless there are compelling reasons to the contrary, no court shall:

(a) permit oral evidence to be elicited in judicial review proceedings ; or

(b) order public bodies or any person exercising or entitled to exercise public authority to disclose evidence in anticipation of or in the course of judicial review proceedings.

(2) In relation to any judicial review proceedings, or in anticipation of any judicial review proceedings, in which a public body or a person exercising or entitled to exercise public authority argues, or indicates its intention to argue, that:

(a) the proceedings concern a matter that is non-justiciable, or

(b) that an enactment excludes or limits judicial review,

no evidential duty arises on that body or person until a court determines that the matter is justiciable and that no enactment excludes or limits judicial review.

(3) In subsection (2), "evidential duty" means any principle of law or rule of court touching the identification of relevant facts or reasoning underlying the measure or other matter in respect of which judicial review is sought, or any order of the court to adduce oral or other evidence.

(4) Nothing in subsection (2) or (3) affects an evidential duty that may arise in relation to judicial review proceedings other than in relation to a measure or other matter that is argued to be non-justiciable or to be excluded from judicial review by legislation.

Explanatory note:

Subsection (1) would help avoid judicial review departing from a narrow focus on particular public acts and becoming a free-ranging inquiry into government decision-making. The trend to this effect arises partly from the slippage of traditional limits on the use of evidence in judicial review proceedings.[26] The clause aims to restore those limits.

Subsection (2) would help avoid the situation in which the launch, or even the threat, of judicial review proceedings forces public bodies to disclose information, or to give evidence, in relation to matters that the public body argues are non-justiciable or are excluded from liability to judicial review by an ouster clause. If the matter is non-justiciable or if

26. See further, J Varuhas, "Evidence, Facts and the Changing Nature of Judicial Review", UK Constitutional Law Blog, 15 June 2020.

legislation excludes review, the public body should not have to disclose information or give evidence in relation to it. Provision of information or evidence in such a case may be inimical to the public interest and may distort the court's consideration of whether the matter is justiciable or excluded by legislation. The subsection would limit any duty to cases in which a court has concluded – likely as a preliminary matter – the matter is justiciable and that legislation does not exclude review. Subsection (3) is framed by reference to Practice Direction 54.16, which specifies the defendant's duty to provide information.

The onus in judicial review proceedings

(1) In judicial review proceedings, a party challenging the lawfulness of:

(a) an exercise or purported exercise of public authority, or

(b) any other public action,

bears the legal and evidential onus of establishing that that exercise or action is unlawful and bears it throughout the proceedings.

(2) This section does not apply in the context of Convention rights.

Explanatory note:

The clause would address the emerging practice in some judgments effectively to make the government defend the lawfulness of its action, rather than require the claimant to establish its unlawfulness.[27] One saw this tendency at work in *Cherry/Miller (No 2)*.

27. For an example of similar legislation, in the private law context, see section 5PB(6) of the Civil Liability Act 2002 (WA): "In determining liability for damages for harm caused by the fault of a health professional, the plaintiff always bears the onus of proving, on the balance of probabilities, that the applicable standard of care (whether under this section or any other law) was breached by the defendant." The example is drawn from Professor Varuhas's submission to IRAL.

Interveners in judicial review proceedings

(1) In deciding whether to permit an intervener to participate, whether in writing only or orally, in judicial review proceedings, the court or tribunal must take into account:

(a) whether the intervention is likely to add materially to the submissions made by the parties; and

(b) the importance of maintaining a fair balance of representation between the parties.

(2) If the court or tribunal permits an intervention, the court or tribunal must provide reasons.

Explanatory note:
Major public law cases routinely feature many interveners, some of whom are repeat players, such that the government is routinely outnumbered and outgunned. This practice risks encouraging the idea – and the public perception – that final appellate litigation involves an exercise of pseudo-legislative power, which is why it is important to allow a range of groups to address the court. The clause would help to limit excess by requiring courts to justify publicly their decision to permit interventions and framing how and on what grounds courts are to grant or refuse permissioss

£10.00
ISBN: 978-1-910812-XX-X

Policy Exchange
8 – 10 Great George Street
Westminster
London SW1P 3AE

www.policyexchange.org.uk