Where next for Judicial Review? Some lessons from 8 years in the Supreme Court

Bar Law Reform Group Lecture 2020[1]

In July this year, the Lord Chancellor announced the setting up of a panel, led by Lord Faulks QC to look at judicial review. At about the same time that the review was announced, I was invited to give this lecture. It is not intended as a detailed response[2] but to offer a more personal perspective, by way of some comments on the law as its stands and some practical suggestions for improvement. I do so as one who has been actively involved in public law proceedings, as practitioner and judge, for some 50 years, going back to the time before the development of modern judicial review in the 1980s.

The Faulks review, it was said, gave effect to a manifesto commitment -

> "to guarantee that judicial review is available to protect the rights of the individuals against an overbearing state, while ensuring that it is not abused to conduct politics by another means or to create needless delays…"[3]

It would consider whether "the right balance" was being struck between "the rights of citizens to challenge executive decisions and the need for effective and efficient government".

No examples were given of the type of cases which might be thought to involve abuse, or "politics by another means", or to strike the wrong balance. There was no indication why a new review was needed so soon after the last government review in 2013-4, leading to the changes made in Part 4 of the Criminal Justice and Courts Act 2015. While I have great respect for Lord Faulks as a lawyer, there was no indication why either he or this particular team had been selected for the task. If there had been thought to be serious underlying issues, the appropriate course would surely have been to refer the matter to the Law Commission, as was done in 1990s[4], not to an *ad hoc* panel with a timescale of a few months.

A worry, also, was the implication in some press reports that the Manifesto commitment may have been a knee-jerk reaction to the Supreme Court's decision last year in the Prorogation case. This impression was fuelled by more recent press reports[5] of a proposed "shake-up" of the highest court, and even the faintly ludicrous suggestion that the name "Supreme Court" had "encouraged us into inappropriate judicial activism" and needed to be changed.

As I am sure Lord Faulks' team will acknowledge, the two Brexit cases arose out of wholly exceptional circumstances. They throw no light on the ordinary working

[1] This lecture is dedicated to the memory of my dear friend and colleague Lord Kerr, who died unexpectedly on 1 December 2020, and in recognition of his notable contribution to the development of law in this field.

[2] A detailed response has been submitted by the President of te Supreme Court.

[3] Cf *R (Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 221 (Admin) at [326]: "Judicial review is not, and should not be regarded as, politics by another means."

[4] Law Commission, Administrative Law: Judicial Review and Statutory Appeals LC126 26 October 1994

[5] Sunday Telegraph 15 November 2020

of judicial review. However, I will come back to them briefly at the end of this lecture, in order, if possible, to refute the idea that as judges we were doing anything other than our normal task of deciding cases in accordance with the law as we understood it.

Judicial activism – then and now

If one is looking for a period of judicial activism in public law, it would be difficult to beat the period when I was beginning my career. In *CCSU* in 1984, Lord Diplock opened his speech by recording with evident pride that the law in this field had been developed by the judges in a way "which has virtually transformed it over the last three decades". That, for example, was the case which were able to cite last year as establishing beyond argument that the existence of a prerogative power, and its legal limits, were within the competence of the courts.[6] By contrast, a further three decades on, it might be said that, at least as regards the common law, very little has changed since Lord Diplock's time. Far from judicial activism, we might be accused of being rather unadventurous.

One can test this by looking at Lord Diplock's famous three-part formulation in *CCSU*, which was no more than a summary of the case-law as it had developed. His three headings were "illegality," "irrationality" and "procedural impropriety."

Illegality speaks for itself:

> "By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

No-one, I hope, can quarrel with that. You will, of course, find hundreds of cases in the textbooks, but they are generally no more than examples of the working out of the principle in different statutory and factual contexts.

I should add that "illegality" must be taken as including what can be called "*Padfield* illegality" and "legally relevant and irrelevant considerations". Both concepts were clearly established at the time of CCSU, and both are aspects, in Lord Diplock's words, of "correctly understanding the law regulating the power". *Padfield* means no more than that a statutory power must be used for the purpose for which Parliament intended it.

Similarly, relevant and irrelevant considerations are narrowly defined, by reference to the legal basis of the power. As I said in a judgment earlier this year (citing the leading authorities, again dating back to the 1980s)[7]:

> "…it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one

[6] *Miller 2* para 35
[7] *Samuel Smith Old Brewery (Tadcaster) & Ors, R (on the application of) v North Yorkshire County Council* [2020] UKSC 3 (5 February 2020)

which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'." [8]

Conversely, irrelevant considerations are those which the statute expressly or impliedly requires to be left out of account.

Similarly, statutory interpretation was the basis of our recent decision in *Privacy International.*[9] We declined to give effect to a statutory provision purporting to oust the jurisdiction of the court to review decisions of the Investigatory Powers Tribunal. That attracted some controversy, but in essence, it was a straightforward application of a precedent established by the activism of our predecessors 50 years before, in the famous *Anisminic* case.[10]

Lord Diplock's concept of procedural impropriety is equally straightforward and equally valid today. He saw it as including failure to observe basic rules of natural justice or to act with procedural fairness towards those affected, and failure to observe procedural rules laid down by the relevant legislative instrument. The judiciary has also long asserted special competence over the procedures of other agencies, "in accordance with the principles of fair procedure which have been developed over the years and of which the courts are the author and sole judge"[11]

Lord Diplock's third term "irrationality" is perhaps more controversial, at least in academic discussions. Personally, I prefer the word irrationality, as a substitute for the traditional formula of *Wednesbury* unreasonableness. It better expresses the essential concept, that is of a decision which lacks any logical justification in the policy or factual context within which is set. But we have, I hope, long since dispensed with Lord Diplock's unconvincing attempt at definition by reference to what a judge might find logically or morally "outrageous".[12]

However, examples of the practical application of the pure irrationality test in the higher courts are hard to find. Thus, the editors of De Smith, having examined many cases supposedly turning on irrationality or unreasonableness, concluded that on "deeper analysis" -

[8] *CreedNZ Inc v Governor General* [1981] 1 NZLR 172, 182, adopted by Lord Scarman in *In re Findlay* [1985] AC 318, 333-334.

[9] *Privacy International, R (on the application of) v Investigatory Powers Tribunal & Ors* [2019] UKSC 22 (15 May 2019) [2019] 2 WLR 1219

[10] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147

[11] *IBA Health Ltd v Office of Fair Trading* [2004] EWCA Civ 142, [2004] ICR 1364, paras 90-92 per Carnwath LJ (citing *R v Panel on Take-overs and Mergers, Ex p Guinness plc* [1990] 1 QB 146, 184, per Lloyd LJ). This was part of a passage cited with approval by Lord Mance in *Kennedy v Charity Commissioners* [2014] UKSC 20, [2015] 1 AC 455 para 53.

[12] "In modern terms, …'irrationality' as a ground of review can surely hold its own without the underpinning of such elusive and subjective concepts as judicial 'outrage' (whether by reference to logical or moral standards)." *Gallaher Group Ltd & Ors, R (on the application of) v The Competition and Markets Authority* [2018] UKSC 25 (16 May 2018) [2019] AC 96 paras 40-1 per Lord Carnwath

> "in virtually every instance the decision could have been held unlawful on the ground of a much more specific tenet or principle of substantive judicial review…"[13]

That accords with my own experience.[14] Indeed, in 26 years as a judge, I cannot remember a single case which I have decided on this ground, and certainly none in my time in the Supreme Court.[15]

It is true that different concepts have been tossed around in the cases and the academic commentaries.[16] There has been a lot of talk for example of "anxious scrutiny" in certain special cases and of "sliding scales" or "rainbows" of intensity of review.[17] But it is difficult to find cases where such concepts have made any difference in practice. Indeed, to suggest that some categories of cases are treated with anxious scrutiny raises serious questions about what we do with the rest, and sliding scales only work if one has measurable standards to which they can be applied.[18]

In the same way, in recent cases, the Supreme Court has resisted attempts to widen the grounds of substantive review by reference to such imprecise concepts as "conspicuous unfairness" or "abuse of powerAs I said in a recent judgment:

> "Substantive unfairness… is not a distinct legal criterion. Nor is it made so by the addition of terms such as 'conspicuous' or 'abuse of power'. Such language adds nothing to the ordinary principles of judicial review …"[19]

On the other hand, I make no apology for one important area where we have perhaps been more proactive than our predecessors. That is in clarifying and expanding the rules of standing[20]. Our intention, as Lord Reed explained in the one case[21], has been to put an end to an "unduly restrictive approach" which -

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[13] De Smith 8th Ed para 11-023; cited with approval by Lord Mance in *Kennedy v Charity Commission* para 55.

[14] For an example see perhaps *Kelsall & Ors, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs* [2003] EWHC 459 (Admin) (13 March 2003) para 45. The case related to a statutory scheme designed to compensate farmers whose businesses were damaged by the Fur Farming Prohibition Act. The scheme provided compensation for breeding females but not for breeding males. This was challenged by a mink-farmer who pointed out that, for someone whose income was derived from breeding mink, the former were not much use without the latter, and it was unfair and irrational to distinguish between them. The judge (Stanley Burnton J) agreed.

[15] A very recent and interesting example of "irrationality" in practice may be the Court of Appeal decision in *Secretary of State for Work And Pensions v Johnson & Ors* [2020] EWCA Civ 778 (22 June 2020) concerns the calculation of earnings under the Universal Credit Regulations 2013. Since it may be subject to further appeal, I refrain from comment at this stage. See also *R (on the application of Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577: modification of regulations dealing with childcare due to coronavirus; "irrational" not to consult the childrens' commissioner.

[16] For a recent comprehensive discussion, see Tim Sayer and C.R.G. Murray *A Tale of Two Doctrines: Revaluating Bifurcation in Substantive Review before the Supreme Court* [2021] PL 47

[17] See e.g. *Kennedy v Charity Commission* para 51ff per Lord Mance

[18] Otherwise it is a matter less of sliding scales than "slithering about in grey areas": Professor Andrew Le Sueur *The rise and ruin of unreasonableness?* (2004) p 6

[19] *Gallaher Group Ltd & Ors, R (on the application of) v The Competition and Markets Authority* [2018] UKSC 25 (16 May 2018) [2019] AC 96 paras 40-1

[20] Cf *IRC v National Federation of Self-Employed* [1982] AC 617 (the "*Mickey Mouse*" case).

[21] *Walton v Scottish Ministers* [2012] UKSC 44

> "presupposed that the only function of the court's supervisory jurisdiction was to redress individual grievances, and ignored its constitutional function of maintaining the rule of law."

I would strongly resist any attempt to impose a more restrictive approach. This right has been particularly important in the context of environmental law which, as Lord Hope memorably said, "proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone". But this is not to be seen as a licence for a free for all. As we also emphasised in the same case, a necessary counterbalance to wider rules of standing is the discretion to refuse or limit remedies where appropriate, taking account of the many interests, public and private, which may be in play.

Human rights

The biggest change in the substantive law during my time as a judge has been the introduction in 2000 of the European Convention on Human Rights. Given that this country led the way in drafting and negotiating the Convention, and was the first state to ratify it in March 1951, it seems extraordinary that it took half a century for it to be brought into domestic law. It is noteworthy that judicial activism in the development of the common law was not matched by any enthusiasm for the Convention. Even so progressive a judge as Lord Denning said of the Strasbourg court: "let us not be bound by the decisions of judges who do not know our way of life – nor anything of the common law".[22]

In retrospect, there was a missed opportunity. Lord Denning, of course, played a leading role in the rapid development of judicial review in the 1970s and 80s. Had the Convention on Human Rights been part of our law, it would have been integral to that developing jurisprudence, at a time when the principles of the Strasbourg court were themselves at a formative stage. The merger would have created much less of a shock then than it did in 2000 when the Human Rights Act 1998 attempted to make up for 30 lost years. By then, a substantial body of Strasbourg jurisprudence had been developed without any significant input from the higher UK courts. The result unfortunately has been continuing suspicion of the Convention and of the Strasbourg Court.

The Faulks panel has not been asked to look at human rights law in the context of judicial review. My own sense in the Supreme Court is that, with a few exceptions mainly in the field of immigration (to which I will come), we have been able to establish a generally acceptable balance between the protected rights and executive discretion. We have, for example, resisted attempts to use the Convention to draw us into detailed investigation of politically controversial issues in the social security field, short of a policy or decision which is "manifestly without reasonably foundation".[23]

One human rights case, in which we can perhaps be criticised for judicial activism beyond that required by the Strasbourg court, was our decision in *Cheshire*

[22] Lord Denning, *What's next in the law?* (1982) p 292

[23] See e.g. the "benefit cap" cases: *SG & Ors, R (on the application of) v Secretary of State for Work and Pensions* [2015] UKSC 16 (18 March 2015) [2015] 1 WLR 1449 *DA & Ors, R (on the application of) v Secretary of State for Work and Pensions* [2019] UKSC 21 (15 May 2019) [2019] WLR 3289. As I said in the latter case: "At times it has seemed as though the court were being invited to take on the task of a Parliamentary Select Committee, undertaking a review of the policy and factual basis of the legislation. That is not our role."

West.[24] The majority held that a person without mental capacity, who was being kept in a home environment under a care regime no more intrusive or confining than required for his protection, was "deprived of his liberty" for the purpose of Article 5 of the Convention, so requiring judicial supervision under the Deprivation of Liberty Safeguards (DOLS). As the minority pointed out, this went beyond any previous decision in Europe and beyond any ordinary understanding of the words "deprivation of liberty". But the majority took the view that what it means to be deprived of liberty must be the same for everyone, regardless of their physical or mental disabilities and even if the living arrangements are as good as they could possibly be; "a gilded cage is still a cage."[25]

While I must, of course, respect the majority view, it is unfortunate that the responsible government department was not represented, and we were not alerted to potential consequences. They turned out to be dramatic. As the Law Commission later reported, and we recorded in a judgment last year, the decision led to a massive and unanticipated increase in cases requiring to be dealt with by local authorities and the courts (from 11,300 in 2013-4 to 113,300 in 2014-5) and, in due course, major legislative change to restore a degree of order[26]. The lesson I would draw is that judicial activism, even on occasions where it can be justified in principle, needs to be accompanied by full understanding of its practical implications.

Proportionality

Lord Diplock in 1985 thought that the standard grounds for judicial review might be developed by the courts by the possible adoption in the future of the principle of "proportionality" as "recognised in the administrative law of several of our fellow members of the European Economic Community" (para 53). That has not happened in any general sense. The subject has been touched on in a number of judgments,[27] but in *Keyu* (in 2015),[28] in which the court was invited to adopt a general proportionality test, it was decided that such a major change would require a nine-justice court.

We have, of course, taken proportionality on board where required to do so by statute, domestic or European legislation, or indirectly through the Human Rights Act. We have, perhaps, gone a little further by applying the same concept to interference with rights or interests of recognised importance under the common law.[29]

As to the content of proportionality, I cannot help feeling that we have over-complicated a relatively simple concept, in a way which is neither helpful nor accurate

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[24] *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19 (19 March 2014) [2014] 1 AC 896

[25] *Ibid* para 46, per Lady Hale (agreed by Lord Sumption).

[26] Mental Capacity (Amendment) Act 2019; see *D (A Child) (Rev2)* [2019] UKSC 42 (26 September 2019), [2019] WLR 5403 para 128

[27] See e.g. *Pham v Secretary of State for the Home Department* [2015] UKSC 19 (25 March 2015) [2015] 1 WLR 1591, where four of the justices commented on this topic.

[28] *Keyu and others (Appellants) v Secretary of State for Foreign and Commonwealth Affairs and another (Respondents)* [2015] UKSC 69 (25 November 2015)

[29] See *Pham* (supra) at para 119 per Lord Reed: "where Parliament authorises significant interferences with important legal rights, the courts may interpret the legislation as requiring that any such interference should be no greater than is objectively established to be necessary to achieve the legitimate aim of the interference: in substance, a requirement of proportionality."

as a description of the degree of judicial intervention involved. In the course of a succession of cases since 1999[30], we have developed a four-fold test: in short (as authoritatively formulated by Lord Sumption in the *Bank Mellat* case), the importance of the objective, a rational connection to the objective, whether a less intrusive measure could have been used, and whether a fair balance has been struck between the rights of the individual and the interests of the community. [31]

In practice, the answers to first two questions tend to be statements of the obvious; so, attention shifts to the third and fourth. But they overlap and are in any event misleading. We do not, in practice, dig around for all possible alternative measures, nor do we exercise our own independent assessment of where the fair balance lies. We consider the justification put forward by the competent authority and only interfere if that judgement is seriously flawed in some way. Arguably, the only significant difference from the traditional *Wednesbury* approach is that the burden of proof is in effect reversed.

Thus, in *Bank Mellat* itself, the Treasury had made a direction in effect shutting down the UK activities of the Bank for national security reasons. The statute itself imposed a requirement that the measures must be "proportionate" to the statutory purposes. The evidence showed that the problem was not specific to Bank Mellat. Nothing in the Treasury's case explained why it was necessary to eliminate Bank Mellat's business in London if the same objective could be achieved in the case of comparable banks in other less damaging ways. The direction was therefore, in Lord Sumption's words, "irrational in its incidence and disproportionate to any contribution which it could rationally be expected to make to its objective". Thus, in practice, the boundary between proportionality and rationality is very narrow and, in my view, likely to remain so.[32]

Immigration

Immigration has always been a sensitive area for the relationship of Ministers and the courts, particularly since the Human Rights Act brought Article 8 (protection for private and family life) into play. As Senior President of Tribunals, both hearing cases myself and with leadership responsibilities for immigration judges working in this field, I developed admiration and sympathy in equal measure, not only for the judges and lawyers but also for the immigration officers trying to operate fairly and predictably with a complex and constantly changing set of rules. It is not an easy or pleasant task for any of those involved.

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[30] See *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 19 (Lord Bingham of Cornhill)

[31] *Bank Mellat v Her Majesty's Treasury (No. 2)* [2013] UKSC 39 (19 June 2013) [2014] 1 AC 700 para 20.

[32] See also *A v Secretary of State for the Home Department* [2005] 2 AC 68. The case concerned a derogation from the Convention permitting the detention of non-nationals whose presence in the United Kingdom was considered by the Home Secretary to be a risk to national security and who could not be deported. The House held that this was not a proportionate response to the terrorist threat, because it applied only to foreign nationals but not to the similar threat posed by comparable UK nationals. As Lord Hope put it (para 132): "the distinction … raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also."

Unfortunately, tribunal judges and lawyers can be easy political targets. Recently, we have seen attacks by Ministers on "activist lawyers", or sometimes "lefty lawyers", for allegedly frustrating the department's efforts to deport people with no right to remain in the UK. But it is the duty of lawyers to be activist in their clients' interests, whatever their own politics – lefty or righty or neither. No-one should be attacked for doing their job.

Such attacks are nothing new. I can remember, when I was still Senior President in Autumn 2011, Mrs May as Home Secretary, in a speech to the Conservative party conference, listing some horror stories about supposed misuse of Article 8, including:

> "The illegal immigrant who cannot be deported because – and I am not making this up – he had a pet cat."

Not surprisingly, the story attracted a lot of attention in the press. Unfortunately, as I discovered on investigation, the story was largely fake news.

There was indeed a cat, by a happy coincidence called "Maya", but she played no part in the final decision. It concerned a Bolivian over-stayer relying on a Home Office concession for someone who could show "a genuine and subsisting relationship akin to marriage" of at least 2 years with a person settled here. Maya had been mentioned incidentally in one of several letters in support and in the Home Office decision-letter, but in the end, the Department accepted that there was ample evidence of a qualifying relationship and did not contest the appeal. The case would probably have been forgotten there if the Upper Tribunal judge, when allowing the appeal by consent, had not introduced a note of levity, commenting:

> "The immigration judge's determination is upheld, and the cat, Maya, need no longer fear having to adapt to Bolivian mice."

The moral may be that judicial jokes are too easily misunderstood, but it shows how easy it is for misleading stories about the Convention to gain currency.

Not many immigration cases find their way to the Supreme Court. When they do, it is, as often as not, because of the obscurity or complexity of the underlying rules or policies - "an impenetrable jungle", as it was described in one judgment.[33]

A striking example of the problem came up in a case in 2018, in which I wrote the leading judgment (*KO(Nigeria)).*[34] It related to the circumstances in which a child with no formal residence rights should be allowed to stay in this country and, in particular, what account if any could be taken of parental misconduct. I found the case particularly depressing, because the legislation in question[35] had been intended as a

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[33] *Patel & Ors v Secretary of State for the Home Department* [2013] UKSC 72 (20 November 2013) [2014] AC 651. See also *MM (Lebanon) & Ors, R (on the applications of) v Secretary of State and another* [2017] UKSC 10 (22 February 2017) [2017] WLR 771 paras 62ff*; Kiarie and Byndloss, R (on the applications of) v Secretary of State for the Home Department* [2017] UKSC 42 (14 June 2017), [2017] 1 WLR 2380 para 84

[34] *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53 (24 October 2018), [2018] 1 WLR 5273

[35] Part 5A of the Nationality, Immigration and Asylum Act 2002 (headed "Article 8 of the ECHR: Public Interest Considerations"), introduced by amendment with effect from 28 July 2014 (section 19 of the Immigration Act 2014)

genuine attempt to bring some statutory order to the practical operation of Article 8 after years of legislative and policy confusion going back to the 1990s.[36] Sadly, the 2014 amendments only compounded the uncertainty. As I observed in my judgment,[37] they had led to "disagreement among some of the most experienced Upper Tribunal and Court of Appeal judges", significant differences of approach at each level and changing views in the Department itself. [38]

Fortunately, help may be at hand. The Law Commission recently published its report on Simplifying the Immigration Rules.[39] Its verdict on the current rules was damning ("…overly complex and unworkable… poorly drafted… frequency of change fuels complexity…"); but it made detailed recommendations for radical restructuring and improvement. The recommendations have been generally accepted by government, and revised rules are due to be published in the near future.[40] According to the government response, they will be consolidated and simplified, restructured so that they are easy to use and understand and drafted in plain English. We wait in hope.

Remedies

I turn briefly to a topic which may deserve more attention that it usually gets. That is what happens when a decision or action is found to be unlawful. The normal remedy is to quash the decision, leaving the decision-maker to start again, but that takes no account of the potential administrative upheaval in the meantime, nor does it provide for any effective judicial supervision of that process[41]. It is open to question how flexible an approach is possible under the law as it stands,[42] or whether we need wider powers to tailor our remedies to the needs of particular cases.

I can illustrate the point by reference to the *Unison*[43] case (2017), in which it was held that fees imposed by the Lord Chancellor on applications to employment tribunals were set at a level which seriously impeded access to justice and were therefore unlawful.[44] Although the court left open the possibility of replacing the Order with fees at a more acceptable level, it did nothing to say what would happen in the

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[36] Uncertainty could be dated back at least to policy guidance the 1990s (Deportation Policy 5/96 revised in February 1999), the application of which had been "plagued by confusion caused by differing or uncertain Ministerial and Departmental statements over the ensuing years"

[37] See *KO (Nigeria)* (supra) at paras 14, 58.

[38] I suggested that, in the future, use should be made of the procedure for "leapfrog" of appeals from the Upper Tribunal to the Supreme Court, introduced by section 64 of the Criminal Justice and Courts Act 2015 (inserting sections 14A and B into the Tribunal, Courts and Enforcement Act 2007)

[39] Law Commission, Simplification of the Immigration Rules: Report LC388

[40] Simplifying the Immigration Rules: A response to the Law Commission's report and recommendations on Simplification of the Immigration Rules, Home Office, March 2020

[41] See for example *ClientEarth, R (on the application of) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28 (29 April 2015) in which we held that the government was in breach of its obligations to limit air pollution in accordance with mandatory European standards. We made a mandatory order requiring the Secretary of State to prepare new air quality plans, in accordance with a defined timetable, and made provision for liberty to apply to the Administrative Court for further supervision of issues.

[42] See for example the discussion in *HM Treasury v Ahmed & Ors* [2010] UKSC 5 (04 February 2010) [2010] 2 AC 534, in which the Supreme Court (by a majority) affirmed, but declined to exercise, its power to suspend its order quashing the Terrorism (United Nations Measures) Order 2006

[43] *UNISON, R (on the application of) v Lord Chancellor* [2017] UKSC 51 (26 July 2017), [2017] 3 WLR 409

[44] *Ibid* paras 98. 100-101

meantime. The court took a strict line, ruling that the Fees Order had been unlawful from the start and must be quashed. Although I was not a party to that decision, I readily accept the underlying principle. However, as a former Senior President responsible for helping to regulate business in the employment tribunals, I might have asked for submissions on the possibility of a form of order which allowed time to work out the consequences and limit uncertainty, pending the development of a new and acceptable structure.

Contrast our approach in the Privy Council in a Trinidad case, in which we upheld a challenge to regulations fixing fees for licences under the Control of Pollution policy. [45] We accepted that simply to quash the regulations could create great uncertainty as to the status of the permits issued since the Rules were first applied ten years before and any enforcement action taken in respect of them. Accordingly, without objection, we made an order requiring new regulations to be made within a defined period but indicating that our declaration of illegality was "without prejudice to the validity of anything previously done or fees collected under the Water Pollution Rules 2001, or to their continuing operation pending the taking effect of amended Regulations…"

There are no easy answers, but it is a subject which deserves careful thought.

Courts and tribunals

I now touch briefly on a subject which is close to my heart, even if not directly within the Faulks remit. As Senior President, I was particularly interested in the distribution of work between the administrative court and the specialist tribunals. Most of the senior tribunal judges were highly experienced in their respective fields and not only competent but sometimes better equipped to take on cases currently being handled by generalist judges in the High Court. This was particularly true of complex areas of the law, such as immigration, tax, and social security. An advantage of the new statutory scheme was the power to have judges from the courts at all levels, up to and including the Court of Appeal, sitting in the Upper Tribunal.

At that time, the administrative court was being swamped by immigration cases, and there was a strong case for relieving the pressure, which could be equally well or better handled by the specialist judges of the Upper Tribunal, familiar with the complex and rapidly changing legislation in this field. Against some Parliamentary resistance, we managed to secure power for the Upper Tribunal to conduct judicial review cases and, having done so, to arrange the transfer of the vast majority of immigration cases from the Administrative Court. That resulted in a dramatic reduction of cases in the Administrative Court.

I see considerable scope for developing the role of the specialist tribunals, not only in the areas in which they are currently involved, but into new areas. For example, in the Environment Bill currently before Parliament, provision was originally made for judicial supervision by a specialist environmental chamber of the Upper Tribunal. This followed discussions with the Department in which I had been involved. I regret that,

[45] *Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment (Trinidad and Tobago)* [2017] UKPC 37 (27 November 2017). We held that they were unlawful as failing to achieve the policy objective of ensuring that overall fees reflected the costs of remedying environmental damage from the licensed activities.

for reasons which are not clear, an amendment has now been put forward transferring jurisdiction to the administrative court.

One specific reform which I would support in this context, possibly within the Faulks remit, relates to decisions of the Upper Tribunal refusing permission to appeal. In *Cart v Upper Tribunal*[46] it was held by the Supreme Court that these decisions are themselves subject to judicial review in the Administrative Court, although subject to the restrictive "second appeals test". It had been argued by the government in the Divisional Court that designation of the Upper Tribunal as a Superior Court of Record[47] rendered it immune to judicial review. However, that argument was rejected by Laws LJ in the Divisional Court and not renewed before the Supreme Court.

The consequence has been described to me informally by one experienced administrative court judge:

> "I would say that for every 10 days that I sit in the Administrative Court one day is occupied with dealing with spurious *Cart* applications. The rate of grant of permission for judicial review is minuscule…"

He points out that the facility to seek judicial review represents a third bite of the cherry for the litigant, who will have been previously refused permission to appeal by the First-tier and the Upper Tribunal.

Having been closely involved in the preparation of the relevant legislation, I can confirm that our intention was that the Upper Tribunal should, within in its specialist sphere, have the status of the High Court and thus be immune from review by the High Court. Our expectation, on the basis of the modern textbooks and authorities, was that designation as a Superior Court of Record would have that effect[48]. While I do not, of course, question Laws LJ's judgment, in the light of his more detailed examination of authority, I would welcome legislative amendment to re-establish the status of the Upper Tribunal as it was intended to be.

I have no doubt that there are other ways in which the interaction of the courts and tribunals could be improved and other ways in which their procedures generally could be streamlined. I limit myself to passing on one proposal, made to me by a senior Court of Appeal judge experienced in both. That is that the office of Senior President of Tribunals, presently held by a Court of Appeal judge with powers comparable to those of the Lord Chief Justice, could be developed and expanded into a new office of Head of Administrative Justice. That would allow for effective and unified judicial leadership of administrative courts and tribunal of all kinds, and at all levels; and close and continuing co-operation between the judges and the administrative departments and practitioners most directly concerned.

The Brexit cases

Finally, as promised, I come back briefly to the two Brexit cases. There has, of course, been some strong criticism of the court, not confined to politicians. For

[46] *Cart v The Upper Tribunal (Rev 1)* [2011] UKSC 28 (21 June 2011) [2012] 1 AC 663
[47] Tribunal, Courts and Enforcement Act 2007 s 3(5)
[48] That understanding had been shared by Sir Andrew Leggatt who had written the report on tribunal reform: see *Cart* para 30 per Lady Hale

example, of last year's Prorogation case, Professor Finnis[49] accused us of offending basic constitutional principles, including the Bill of Rights, and observed that the damage done to the rule of law could only be undone by "a change of heart, a reconsideration of what it is to exercise a truly judicial power." I mention his criticism in particular because it was picked up earlier this year by Lord Faulks[50], later to become chairman of the present review panel. Referring to the Professor's criticisms, he complained of "the damage (the decision) has done to the integrity of the UK's political constitution" adding:

> "Unless his analysis can be answered… lawyers and judges should look back on the Supreme Court's ruling as an historic mistake, a needless constitutional panic."

Answers to the Professor's criticisms have, I believe, been provided by other academics[51]. However, I can confirm that my own involvement in the judgment did not reflect any sudden surge of judicial activism. I agreed with the majority judgment in *Miller 2* because I thought it was correct in law on the arguments presented to us, just as I had dissented in *Miller 1* because, in that case, I thought the government was right and the majority wrong. The fact that in both *Miller* cases the public were able to follow the whole of the proceedings did much, I hope, to dispel the idea that we were engaged in anything other than a painstaking investigation of the legal issues. I was proud to have been part of that very transparent process.

Nor were we driven by "constitutional panic" (whatever that means). We had no choice but to deal with the case and to do so urgently. Conflicting decisions by the Divisional Court and the Court of Sessions in different parts of the UK, on a question of profound importance for the whole country, left the Supreme Court (as the only court with UK-wide authority) with no option but to sit as soon as practicable to resolve them. Although this had to be in the legal vacation, it owes much to the efficiency of the court staff, and the co-operation of the parties and their representatives, that a court of eleven justices was convened, the hearing was fixed and judgment was given in record time and in the full glare of publicity, and our decision was accepted and put into immediate effect by Parliament.

The judgments have been subject to detailed academic analysis. I would only add one observation. That is that, far from us being forced into an unfamiliar interventionist role, the issues were carefully presented by the parties in a way which kept the case within manageable and conventional limits. Thus, in *Miller 1*[52], we were invited to proceed on the agreed assumption that the Article 50 notification, once served, could not, under European law, be withdrawn[53]. It was, in David Pannick QC's

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[49] *The unconstitutionality of the Supreme Court's prorogation judgment* Policy Exchange website
[50] Conservative Home website 7.2.20 https://www.conservativehome.com/thinktankcentral/2020/02/edward-faulks-the-supreme-courts-prorogation-judgement-unbalanced-our-constitution-the-commons-needs-to-make-a-correction.html
[51] See e.g. Paul Craig *The Supreme Court, prorogation and constitutional principle*, P.L. 2020, Apr, 248-277. https://publiclawforeveryone.com/2019/04/02/brexit-the-executive-and-parliament-a-response-to-john-finnis/

[52] *Miller & Anor, R (on the application of) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5 (24 January 2017), [2018] AC 61
[53] *Ibid*, para 26.

attractive analogy, like pulling the trigger of a gun, sending the bullet inexorably on its way to the target of the treaties ceasing to apply in two years' time. That assumption was controversial at the time and has been shown by a later decision of the European Court to be simply wrong. However, it is not difficult to understand the parties' reluctance to open up in our court an argument which we probably have felt bound to refer for final resolution to the slow processes of the European Court.

In a different way, in *Miller 2*[54], difficult constitutional issues were effectively sidestepped by the form of the challenge and of the government's response. Contrary to some of the commentaries, the main challenge was directed not to any "proceeding" in Parliament, as such, but to the Prime Minister's prior advice to Her Majesty. No-one argued that this itself involved any issue under Article 9 of the Bill of Rights[55].

Another agreed assumption was that the Monarch was constitutionally bound to accept the Prime Minister's advice. That avoided potentially controversial issues about the extent of any independent role for the Monarch and her relationship with Parliament[56]. As the judgment explained (para 30):

> "It is not suggested in these appeals that Her Majesty was other than obliged by constitutional convention to accept (the Prime Minister's) advice. In the circumstances, we express no view on that matter. That situation does, however, place on the Prime Minister a constitutional responsibility, as the only person with power to do so, to have regard to all relevant interests, including the interests of Parliament."

Viewed in that way, it was the familiar judicial task of ensuring that ministerial power was used for the purpose for which it was conferred.

Another unusual feature of the case (indeed almost unique in my experience of judicial review) was the absence of any evidence by the defendant authority (in this case the Prime Minister) to explain the reasons for the decision under challenge. As the court said (para 61):

> "It is impossible for us to conclude, on the evidence which has been put before us, that there was any reason - let alone a good reason - to advise Her Majesty to prorogue Parliament for five weeks… We cannot speculate, in the absence of further evidence, upon what such reasons might have been."

The two Brexit cases were, on any view, exceptional cases. As I have said, they throw no light on the issues with which I would expect the Faulks panel to be concerned.

Conclusion

So where next for judicial review? Over 50 years of active practice as an administrative lawyer and judge, I have watched the system evolve and mature. It has had to absorb major changes, most notably the Human Rights Act 1998, but for the most part has proved highly resilient. I believe that the main principles are now well

[54] *Miller, R (on the application of) v The Prime Minister* [2019] UKSC 41 (24 September 2019) [2020] AC 373

[55] That issue was raised only incidentally in the context of arguments on remedies.

[56] See e.g. Ann Twomey *The Veiled Sceptre Reserve Powers of Heads of State in Westminster Systems*

settled. I hope that my own time on the Supreme Court may have contributed in some degree to both consolidation and simplification. I expect that to continue. I see no need for legislative intervention, still less for codification, which is hard to achieve and liable to cause more problems than it solves. Nor am I aware of evidence that the judiciary at any level has lost sight of its proper role to decide cases objectively on the evidence and within the law as they understand it to be.

There may well be room for improvements in practice and procedure, including the distribution of business between the courts and tribunals, but such improvements are best achieved with the active involvement of those most familiar with the day-to-day working of the system. Ensuring that judicial review is not abused should not be a political issue. It is a shared concern of judges and all directly involved. It should be a collaborative process.

In conclusion, I am encouraged that in the press release which announced the review the work was said to be -

> "… part of the Lord Chancellor's duty to defend our world-class and independent courts and judiciary that lie at the heart of British justice and the rule of law."

I welcome that assurance. I note further that the manifesto commitment came in passage which opened with these words:

> "As Conservatives, we stand for democracy and the rule of law. Our independent courts and legal system are respected throughout the world."[57]

I am confident that the Faulks review, and the government's response to it, will show equal respect.

Robert Carnwath

3 December 2020

[57] Conservative Manifesto 2019 p 47