**The Constitutionality of Ouster Clauses**

Talk for the ALBA Conference, 20th July 2019

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This talk examines the implications of *Privacy International* for statutory interpretation of ouster clauses. It seems clear that there is at least majority support in *Privacy International* for the following propositions.

* It is constitutionally objectionable, from the point of view of the rule of law, to seek to prevent the lawfulness of official acts from being adjudicated on by a court or tribunal which is independent of the parties and of the executive and has power to grant a remedy if acts are unlawful.
* The Queen in Parliament has power under the UK’s constitution to enact such a provision, but it will require very clear words indeed to persuade a court that this is really the effect of the legislation. (Different views are expressed as to whether this is a form of presumption of interpretation or a constitutional principle.)
* It is not necessarily constitutionally objectionable to allocate that adjudicative role to an independent court or tribunal which is not the High Court but has power to grant an effective remedy for unlawful action.
* Nevertheless, it is constitutionally desirable that the High Court should be the tribunal of last resort (subject to any appeal) unless there are particularly strong reasons for replacing it with another tribunal.
* The interest in maintaining independent oversight is particularly strong where it is alleged that a decision-maker has purported to exercise a power which he or she did not have in the circumstances, as in *Anisminic*. The distinction between such cases (want of jurisdiction) and other errors became increasingly difficult to draw when following *Anisminic* the types of error which were treated as depriving a decision-maker of power became progressively wider.

Nevertheless, working out how to approach the interpretation, and by implication therefore the drafting, of ouster clauses is not straightforward, because the Justices differed among themselves as to the appropriate approach, and the extent to which it would depend on the type of decision-maker and the type of issue.

According to Lord Sumption, with whom Lord Reed agreed (dissenting), the issue ‘is agreed on all sides to turn on the requirements of the rule of law’ (para [187]), and the meaning of section 67(8) of the 2000 Act was a question of construction, and clear words are required if [the provision] is to be regarded as ousting the review jurisdiction of the High Court’ (para [199]). Much depended, of course, on what one thought the rule of law required, and what approach should be taken to construing the statutory provision. As Lord Sumption said at para [199], ‘However, we must not lose sight of the reason why clear words are required. The reason is, as all the authorities (and indeed Lord Carnwath JSC in his judgment in the present case) agree, that Parliament is presumed not to legislate contrary to the rule of law…. The degree of elaboration called for in a statutory provision designed to achieve a given effect must depend on how anomalous that effect would be…. There is nothing inconsistent with the rule of law about allocating a conclusive jurisdiction by way of review to a judicial body other than the High Court. The presumption against ouster clauses is concerned to protect the rule of law, which depends on the availability of judicial review. It is not concerned to protect the jurisdiction of the High Court in some putative turf war with other judicial bodies on whom Parliament has conferred an equivalent review jurisdiction.’

***Plain meaning, ordinary meaning and constitutional meaning***

The plain or ordinary meaning of the words of a statute, read in the context of the statute as a whole, is usually the starting point and often the finishing point of statutory interpretation. Only Lord Wilson at para [229], disagreeing with Lord Carnwath and saying, ‘With respect, I consider the words of the subsection to be totally clear in excluding judicial review of all the IPT’s decisions…’, treats the words in the context of the statute as a whole as the starting point or the finishing point. The other six Justices reached different conclusions as a result of starting from constitutional principles and presumptions, into which they tried to fit the words of the statute.

Why was this so? It was the result of the character of the provision as an ‘ouster’ of the ordinary courts’ jurisdiction over decisions of the IPT. Provisions ousting the jurisdiction of the High Court have always been given a somewhat restrictive reading, preventing challenges to decisions only if they were within the powers, or jurisdiction, of the decision-maker. *Anisminic* was far from novel in that regard. A difficulty emerged, however, when in *Anisminic* itself and subsequent decisions the range of errors which could deprive a decision-maker of jurisdiction was progressively stretched until it could be said, respectably if not correctly, that any error of law would be outside the decision-maker’s jurisdiction and render the decision null. To complicate the matter, different rationales were offered at different times for this, including a presumption that Parliament could intend to allow judicial bodies, but not administrative bodies, to make final decisions as to the law, or a rule-of-law requirement that there be an impartial and independent decision-maker on questions of law at the level of the High Court or a body of equivalent status.

The interaction of these developments and uncertainties came together in *Privacy International*. In that case, the alleged error of the IPT related to the ‘ordinary’ law. It could be considered to go to jurisdiction only on the basis of the extended meaning given to ‘jurisdictional error’ since *Anisminic*. Lord Wilson rightly disapproved of that extension, and would have regarded a jurisdictional error as one which resulted in a decision-maker embarking on an inquiry in circumstances where that inquiry was precluded by statutory provisions establishing the decision-maker’s ‘jurisdiction’.

***Presumption?***

For Lord Carnwath, with whom Baroness Hale and Lord Kerr agreed, *Cart* reaffirmed ‘the continuing strength of the fundamental presumption against ousting the supervisory role of the High Court over other *adjudicative* bodies, even those established by Parliament with apparently equivalent status and powers to those of the High Court’ (para [99]; italics added). The Investigatory Powers Tribunal is an adjudicative body. (The presumption against excluding judicial oversight would apply *a fortiori* in respect of administrative or executive decision-makers.)

Lord Carnwath considered that the court’s function when interpreting ouster clauses was not merely to work out the policy objective of the legislation. That would be a way of approaching ordinary legislation, but courts must take account of the ‘critical importance of the common law presumption against ouster’ (para [107]). This seems to mean that ordinary interpretative methods do not hold sway in relation to ousters. Why? The reason must be that they are constitutionally suspect, even if permitted.

In effect, as Dinah Rose QC had submitted on behalf of the claimant (see para [22]), a statute should not be interpreted as ousting the High Court’s supervisory jurisdiction over inferior courts and tribunals if another tenable interpretation can be found.

This effectively reverses the usual starting position in statutory interpretation: the words must be fitted into the presumptions if at all possible, rather than being the chief guides to interpretation. Lord Wilson’s response (at [224]) is salutary. He accepted that there was an initial presumption that Parliament did not intend to exclude judicial oversight and in favour of a strict construction, but they ‘have to yield to what I consider to be the only reasonable meaning of its words, which is to the contrary’.

***Sovereignty of Parliament***

Lord Lloyd-Jones, who said that he agreed with Lord Carnwath on the interpretation of the ouster clause (para [147]), commented at [160]-[161] on the importance of there being, as Laws LJ had said in the Divisional Court in *Cart* ([2011] QB 120, [2010] 2 WLR 1012 paras [37], [39]) an interpreter of legislation who is ‘impartial, independent both of the legislature and of the persons affected by the texts’ application, and authoritative – accepted as the last word, subject only to any appeal. Only a court can fulfil the role’ (para [37]). It is, said Lord Lloyd-Jones, ‘a necessary corollary of the sovereignty of Parliament that there should exist an authoritative and independent body which can interpret and mediate legislation made by Parliament’ (para [160]). Lord Lloyd-Jones wrote that ‘in the case of a judicial body, by contrast with a purely administrative body, there is no presumption that Parliament did not intend to confer a power to decide questions of law as well as questions of fact…. It is, rather, a matter of the interpretation of the legislation concerned in each case, unencumbered by such a presumption. Nevertheless, if the jurisdiction of the High Court is to be displaced or varied in some way, this is a matter of great importance and clear words will be required to achieve that result.’ (para [161]). Lord Lloyd-Jones thus seems to part from Lord Carnwath on the ‘critical importance of the common law presumption against ouster’, while reaching a somewhat similar result by requiring clear words.

***Comparison of legislative texts: s 4(4) of the Foreign Compensation Act 1950***

For Lord Carnwath, the interpretation of s 67(8) of the 2000 Act required comparison between it and s 4(4) of the 1950 Act which had been in issue in *Anisminic*. This set up the 1950 Act as interpreted in *Anisminic* as the metwand, and required the court to consider whether there were differences between the two sub-sections and between the circumstances of *Anisminic* and *Privacy International* respectively which would justify giving a more extensive effect to the ouster in the later case than in the earlier one (para [105]).

Foreign Compensation Act 1950, s. 4(4): ‘The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.’

Regulation of Investigatory Powers Act 2000, s. 67(8): ‘Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court.’

Lord Carnwath considered that, as in *Anisminic*, the 1950 provision did not protect a ‘nullity’, and at any rate following *O’Reilly v Mackman* ‘the concept of “nullity” for these purposes is extended to any decision which is erroneous in law, and in that sense legally invalid’ (para [107]). If, therefore, the IPT had been wrong in deciding that a ‘thematic’ warrant was permitted by section 5 of the Intelligence Services Act 1994, their decision would be a nullity and, following *Anisminic*, would not be protected by the ouster. The additional words in parentheses in the 2000 Act would not affect the matter, because the Tribunal’s decision in *Privacy International* that a thematic warrant could be lawful was not ‘a decision “as to whether [the IPT] had jurisdiction”, nor even as a decision “as to jurisdiction” under the apparently broader language of the 1985 Act’ (para [108]).

Lord Carnwath did not come down firmly in favour of an explanation for the presence of the words in parenthesis in section 67(8) or what effect they might have. As Lord Wilson pointed out, if the words in parenthesis are clear enough to exclude review of IPT decisions as to the tribunal’s jurisdiction, it is hard to understand why the rest of the sub-section should not be sufficient to exclude review of ‘ordinary’ determinations of law, which would be constitutionally less damaging than excluding review of decisions as to jurisdiction (using ‘jurisdiction’ in its original, or ‘true’, sense of matters required to be satisfied in order for a decision-maker to have jurisdiction.

***Legislative history and historical contexts, taking account of the developing case-law***

 Several earlier statutory provisions in addition to the Foreign Compensation Act 1950 were examined as part of the quest for the meaning of section 67(8) of the 2000 Act. First, and most obviously justifiable, was section 7(8) of the Interception of Communications Act 1985 relating to the Interception of Communications Tribunal, which the IPT replaced: ‘The decisions of the Tribunal (including any decisions as to their jurisdiction) shall not be subject to appeal or liable to be questioned in any court.’ It has to be said that the words in parenthesis (which seem to be wider than those in parenthesis in section 67(8) of the 2000 Act) do not seem entirely well drafted if their purpose was, as Lord Wilson said (*Privacy International* at paras [223]-[224]), to ‘encompass within the exclusion of judicial supervision all the decisions of the [Tribunal] in relation to its “jurisdiction”; and to ascribe to that word the strained extension of its effect adopted in the *Anisminic* case so as to cover ordinary errors of law as well, of course, as errors in the proper sense of it’. This was because the drafter of the 1985 Act would have been well aware of the effect of *Anisminic* on section 4(4) of the 1950 Act and also of Lord Diplock’s influential dictum in *O’Reilly v Mackman* [1983] 2 AC 237 at p. 287 explaining *Anisminic* as a case in which the Foreign Compensation Commission’s determination had flowed from the Commission’s having asked itself the wrong question, thereby acting outside its ‘jurisdiction’, so that its decision was a ‘nullity’. The object in the 1985 Act was to ensure that the failed ouster in the 1950 would not fail on similar grounds in relation to the Tribunal.

Dinah Rose QC had submitted that, as Lord Carnwath and Lord Lloyd-Jones thought possible (paras [110], [166), the words in parenthesis in the 1985 Act were prompted not by *Anisminic* as explained in *O’Reilly* but by an immigration case, *R. v Secretary of State for the Home Department, ex part Khawaja* [1984] AC 74, where the House of Lords, overruling its own recent decision in *Zamir v Secretary of State for the Home Department* [1980] AC 930, held that judicial review could be brought to protect the liberty of a person whom the Secretary of State had determined to be an illegal immigrant, where the applicant claimed not to be an illegal immigrant. The Home Secretary’s decision had to be correct in fact and law, and a reviewing court had to satisfy itself that it was correct, not merely that it was not unreasonable, because that being an illegal immigrant was a ‘precedent fact’ to be established correctly before the Home Secretary could make any consequential order.

As noted above, Lord Wilson was unimpressed by this, preferring to focus on the words of section 67(8).

A further provision which attracted some attention was on which never became part of an Act at all. This was draft clause 11 which the Government sought unsuccessfully to introduce to the Asylum and Immigration (Treatment of Claimants, etc.) Bill in the 2003-04 session of Parliament. Tabled at a late stage, it sought to exclude judicial review of almost all immigration decisions, providing (a) that determinations of the new Asylum and Immigration Appeal Tribunal were to be final and not to be questioned, including decisions as to jurisdiction, (b) that no court or tribunal other than the AIAT was to have jurisdiction to hear any appeal or application in which a determination of the AIAT could be questioned, or to permit such appeal or application, and (c) that those provisions ‘prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of – (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) breach of natural justice, or (v) any other matter’. Lord Carnwath and Lord Lloyd-Jones compared these belt-and-braces provisions with the terms of section 67(8) of the 2000 Act to show that the latter could have been more explicit about its objective.

***Need for clear and explicit words***

For Lord Carnwath, with Baroness Hale and Lords Kerr and Lloyd-Jones in agreement, whatever other principles might be applied, there was a fundamental requirement that any provision ousting the jurisdiction of the High Court to review decisions of inferior courts and tribunals or administrative bodies must use ‘the most clear and explicit words’ if it is to achieve its goal (Laws LJ in *Cart* in the Divisional Court [2011] QB 120, [2010] 2 WLR 1012 at para [31], quoting Lord Denning MR in *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 at 583; Lord Carnwath in *Privacy International* at para [111]. Lord Carnwath thought that the words of s 67(8) of the 2000 Act could have been more explicit; the drafter could have used the belt-and-braces formulae deployed in proposed amendment to the Asylum and Immigration (Treatment of Claimants, etc.) Bill in the 2003-04 session of Parliament to introduce a new clause 11. Lord Lloyd-Jones did something similar: he regarded proposed new clause 11 as ‘a more recent example of an attempt to achieve the required degree of clarity if such a provision is to be effective. That provision, which was not enacted, can at least be said to have squarely confronted what it sought to achieve as required by the principle of legality.[[1]](#footnote-1) To my mind, section 67(8) does not satisfy this requirement’ (para [165].

There can be little doubt that the ouster clause tabled at a late stage by way of amendment to that Bill would have been effective, if any provision could ever be, to exclude judicial review of nearly all immigration decision on more or less every conceivable ground of review. However, to say, as Lord Carnwath did in *Privacy International*, that the ouster clause in the 2000 Act is insufficiently clear and explicit by comparison with that in proposed clause 11 of the 2003-04 Bill implies that only a provision of the latter kind would suffice. That cannot be correct: a provision may be absolutely clear and explicit without having to dot every conceivable ‘I’ and cross every imaginable ‘t’.

Lord Sumption, with whom Lord Reed agreed, thought that the effect of the presumption that Parliament does not intend to invest a body other than the High Court with exclusive authority to determine questions of law, including questions concerning its own jurisdiction, depended on the character of the decision-maker. He rejected the idea that there is a distinction between a tribunal (to which the presumption would apply) and a court (to which it would not), and preferred to distinguish between judicial bodies (to which the presumption would not apply) and other bodies. ‘Almost all tribunals are obliged in some respects to act judicially, for example in acting fairly and without bias. But not all tribunals are judicial bodies. What matters is not the nomenclature of the decision-maker but its statutory functions. On an issue which is agreed on all sides to turn on the requirements of the rule of law, it would in my view be absurd to suggest that there is no distinction to be made between a statute providing for an administrative authority’s decisions to be conclusive and a statute making corresponding provision for the decisions of a judicial body. As I shall explain, the Investigatory Powers Tribunal is indistinguishable from a court in every respect that matters to the present issue’ (para [187]).

Reading s 67(8) on its own, however, it is hard to disagree with Lord Wilson: ‘I consider the words of the subsection to be totally clear in excluding judicial review of all the IPT’s decisions; and an exclusion of judicial review in relation only to legally valid determinations seems to me to make no sense (para [229]; and ‘Had Parliament’s intention been to allow judicial review of the IPT’s errors of jurisdiction in the proper sense, it would not have borrowed from the 1985 Act words in parenthesis which, on any conventional construction of them, so obviously appear to exclude it’ (para [231]).

***Institutional considerations***

There were suggestions from some Justices that the presumptions were different depending on whether the body concerned was judicial (Lord Sumption), or required to act judicially (Lord Lloyd-Jones), or adjudicative rather than administrative (Lord Carnwath). These flowed from the fact that it was easier to contemplate Parliament committing authority to make final decisions on matters of law, free from oversight by the courts, to a body which was judicial rather than administrative (Lord Sumption and Lord Lloyd-Jones), although for Lord Carnwath and Lord Lloyd-Jones the key distinction was between the High Court and all other courts and tribunals, respect for the status and expertise of inferior courts and tribunals being shown, as in *Cart* in the Supreme Court, not by allowing judicial review of such bodies to be freely excluded but by carefully managing the circumstances in which permission to apply for judicial review of them would be granted, even if the tribunal had, like the Upper Tribunal in *Cart*, ‘apparently equivalent status and powers to the High Court’ (at para [99]). None the less, for Lord Sumption and Lord Reed the fact that the IPT is a body with virtually all the powers and functions of the High Court in relation to matters within the IPT’s jurisdiction meant that the 2000 Act should be interpreted as excluding all review of the merits of decisions, although not of decisions as to the tribunal’s jurisdiction.

***Conclusion***

Despite (or because of) the elaborate analysis in the four opinions in *Privacy International*, it is not easy to extract from them any clear rule as to the way in which ouster clauses should be interpreted. There are a number of principles which have greater or less support, and we know that it is all to do with the requirements of the constitutional principles of parliamentary sovereignty and the rule of law. But as Professor Raz has said, ‘The rule of law, as I will understand it, is a specific virtue or ideal that the law should conform to. There is no agreement about what it is: this lack of agreement is common to important normative institutions and principles, like freedom of speech. The lack of agreement is often a source of strength – people unite in supporting such institutions and principles in spite of diverse views about their nature…. There is no point in verbal disputes about which ideals deserve to be called the rule of law. However, it may also be important to distinguish the different ideals, as they are likely to differ in at least some of their implications.’ (Joseph Raz, ‘The law’s own virtue’ (2019) 39 *OJLS* 1-15 at pp. 1-2) *Privacy International* is a good example of the opportunities and problems arising from this.

1. As understood by Lord Hoffmann in *R (Simms) v, Secretary of State for the Home Department* [2000] 2 AC 115 at p. 131F (footnote added). [↑](#footnote-ref-1)