JUDICIAL REVIEW AND COURTS ACT 2022, RESTRICTING OVERSIGHT OF THE HIGH COURT AND OUSTING THE APPEALS FROM HIGHER TRIBUNALS

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Abstract
The Judicial Review and Courts Act (JRCA) 2022 includes an ouster clause which limits the raising of judicial review of an appeal from the Upper Tribunal's decision. This prevents appeals reaching the courts from administrative decision that includes an error of fact and law. Its impact is most severe on immigration appeals and it overrides the test established in *R (on the application of Cart) v Upper Tribunal* [2011] UKSC 28, which allowed the High Court to judicially review a decision of the Upper Tribunal to refuse permission to appeal to the court. This concerned the review that arose from breaches of the Human Rights Act that had denied an immigrant leave to remain in the UK. The exclusion clause in the JRCA is likely to restrict review of decisions when the fundamental rights are challenged and this will circumvent the powers of the judiciary to review cases. The argument in this paper is that the narrowing down of the judicial oversight over the decisions of public bodies will impact on the rule of law and also cause applicants to suffer injustice from executive decisions.

Keywords
Judicial Review and Courts Act. Supervisory jurisdiction. Quashing orders. Exclusion clause,.Cart principle. Immigration appeals. Human Rights Act. Errors of law.

Summary

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INTRODUCTION

The Judicial Review and Courts Act (JRCA) 2022 includes an ouster clause which excludes the court's jurisdiction from cases decided by the Upper Tribunal. The long Title of the Act[2] indicates that it is an ambitious legislation and its ambit covers not only in England, Wales and Northern Ireland, but also Scotland.[3] The enactment of the Act has made structural changes such as suspension of quashing orders and includes an ouster clause which restricts an appeal from the administrative tribunals for the High Court to review.[4] The JRCA gives a court a power to review decisions where the permission to appeal has been rejected. It also precludes the right of appeal against (non-excluded) substantive decisions to the Court of Appeal that still exists under the Tribunals, Courts and Enforcement Act 2007. The impact will be on substantive and procedural justice which needs to be considered because of its impact on public law and human rights.

The JRCA has the power to suspend the quashing orders which are for applicants who are seeking redress from public bodies by judicial review.

Section 1(1)(1) of the JRCA states :

'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'.

This a clause that affects decisions that have already been reached by an administrative body (a 'prospective-only quashing order') which can result in applicants who have already been affected by an unlawful measure,

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[2] 'A Bill to Make provision about the provision that may be made by, and the effects of, quashing orders; to make provision restricting judicial review of certain decisions of the Upper Tribunal; to make provision about the use of written and electronic procedures in courts and tribunals; to make other provision about procedure in, and the organisation of, courts and tribunals; and for connected purposes'.

[3] Section 50

[4] There is still a right of appeal against (non-excluded) substantive decisions to the Court of Appeal under the Tribunals, Courts and Enforcement Act 2007.

including the person bringing the judicial review claim not obtaining a remedy or relief. The courts will have to consider whether to make a suspended or prospective-only quashing order which may infringe human rights, including the right to an effective remedy guaranteed by Article 13 of the European Convention on Human Rights, of any individual affected. [5]

The exercise of a restraint on government power can lead to the public body modifying its *ultra vires* decision but also for the legislation to continue to be valid, which would render a decision already reached as a lawful act. [6] The other restriction is by Section 2(1)(2) which states that the Upper Tribunal could refuse permission to appeal from the First-tier Tribunal and that such a 'decision is final, and not liable to be questioned or set aside in any other court'. The supervisory jurisdiction is ousted in s 2(3)(b) and s 2(7) which expressly states that the decision 'includes any purported decision'. There are exceptions to the exclusion clause that are set out in the subsection 2 (4). [7]The impact will be on cases concerning human rights, including immigration appeals which commence in the tribunal system and after the appeals process is exhausted they can be raised as merits based judicial review. This is with a view to prevent deportation orders of those refused leave to remain by the Secretary of State of the Home Department.

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[5] Article 13. *' Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity '.*

[6] Ibid p 81

[7]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 such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

The grounds for appeal were limited to "which permission has been granted" and "often claimants succeeded in *Cart* [8]judicial reviews on different grounds than those used previously before the FtT and the UT".[9] The permission to amend grounds were often granted and a "successful quashing of a UT refusal of permission to appeal did not constitute a permission to appeal, much less permission to appeal on new grounds".[10] The permission to appeal were generally granted and the amendment to this procedure was only necessary to make "any procedural or administrative changes and not substantive changes".[11] The JRCA has altered the public law landscape because of the need to achieve finality sooner which means that dispensing cases at the tribunal stage has taken priority over the possibility of human rights based challenges.

In this paper there are 4 sections which are as follows: Part I considers the quashing orders that have been part of the supervisory procedural justice and the power of suspension by the JRCA; Part II examines the impediment to the Public Sector Equality Duty (PSED) under Section 149 of the Equality Act and the their delayed implementation; Part III examines the inclusion of the ouster clause, abrogation of the Anisminic principle, and the preclusion of review by the High Court; and Part IV explores the effect on the merits based judicial review that its reversal for procedural justice based on the argument that the JCRA will narrow the scope of the judicial review powers and will impact on substantive and procedural justice.

1. QUASHING ORDERS AND PROCEDURAL JUSTICE

[8] R *(on the application of Cart) v Upper Tribunal* [2011] UKSC 28

[9]Mikołaj Barczentewicz (2021) Cart Judicial Reviews through the Lens of the Upper Tribunal, Judicial Review, 26:3, 179-191

[10] Ibid p 180

[11] Ibid p 191

The JRCA has wide ambit in amending judicial review proceedings that are raised in England when the claimant is seeking the remedies listed in rule 54.2 of the Civil Procedure Rules, formerly known as the prerogative orders. These are mandatory orders (formerly mandamus), prohibiting orders (formerly prohibition), and quashing orders (formerly certiorari). The order for Certiorari was often granted without an accompanying mandamus and at other times both remedies were granted, eg, if power was abused by a tribunal or authority. [12]

Historically, this has led to uncertainty about the exact scope of certiorari and as to whether every legal "act" implies a "decision" to do that act. [13] Despite their longevity the prerogative orders had continuing utility and effect as a public law remedy. These were integral to English procedural law and were enforced as part of the supervisory jurisdiction of the High Court in matters appertaining to rights of the appellants.

In *R v Panel on Take-overs and Merger, ex parte Datafin plc*[14] the regulatory Take-overs panel was a self-regulating unincorporated association which devised and operated the city code on take-overs and mergers. The issue was whether it was "performing a public duty", and if it was subject to public law remedies. Lord Donaldson MR endorsed the ruling in Queen v. Criminal Injuries Compensation Board, ex parte Lain [1967] 2 Q.B. 864,

[12] Ibid

[13] The issue has arisen whether a refusal by a local authority to act under statutory powers imply a decision by that authority not to act, so that certiorari will be available. Lord Diplock held that certiorari will be available in R v Inland Revenue Commissioners ex p Rossminster Ltd [1980] AC 952 at 18 In *Board of Education v Rice* [1911] AC 179 the managers of a non-provided school complained that the local authority had failed to pay the fees of teachers. The Board's decision was held to be ultra vires since they had addressed their enquiry to the wrong considerations that were not under their remit as a statutory body.

[14] [1987] QB 815

882, when Lord Parker C.J., held that " *the exact limits of the ancient remedy of certiorari had never been and ought not to be specifically defined. They have varied from time to time being extended to meet changing conditions. At one time the writ only went to an inferior court. Later its ambit was extended to statutory tribunals determining a lis inter partes.* [15]

Lord Donaldson stated further in enforcing certiorari the "*only constant limits throughout were that it was performing a public duty. Private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned*". [16]

The JRCA may lead to suspension of quashing orders that will enable the public bodies to escape liability that have infringed fair process in public procurements where the relevant cause of action does not exist under applicable statutory instruments. The court in determining a case under the JRCA would have powers of discretion to grant a full remedy to the claimant, but will limit the retrospective effects of the judgment for any other individual who had not issued a claim before the date of its ruling. The impact of this will be to provide power to delay and narrow the decision making of the court to grant the remedy most appropriate in the case before it.[17] The ability to suspend certiorari would encourage courts to grant public bodies a second opportunity to comply and preserve the substantive policy of the statute or government regulation.[18]

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[15]At 28

[16]Ibid

[17] Section 29A(1)(a) deals with suspension: that the quashing order does not take effect until a date specified in the order, to be specified by the court. Subsection (7) of new section 29A makes further provision that Section 29(2) of the Senior Courts Act 1981 does not prevent the ability of the court to vary the time specified for the suspension

[18] Judicial Review Reform The Government Response to the Independent Review of Administrative Law, Ministry of Justice, CO 431, 21 March 2021. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf

The impact of delay that JRCA provides the quashing orders has to be considered in the context of the two important factors which are the public procurement policy and the Public Sector Equality Duty (PSED). The requirements on public bodies are affected by the quashing orders that will be instituted by the judicial review process. The courts have the power to declare an action or decision unlawful when a public procurement decision is made by a public body which is in breach of a PSED.

The public procurement framework is subject to the EU Treaty principles of non-discrimination on grounds of nationality, free movement of goods, freedom to provide services, and freedom of establishment. [19] The same duties apply to a "A person/organisation that is not a public authority but exercises public functions will be subject to the PSED in respect of those functions".[20] The Public Contracts Regulations 2015 which are based on the Public Sector: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement repealing Directive 2004/18/EC. [21]

This implies that if the public body is making purchases then if they are buying supplies, services or works for central government, a non-ministerial department, executive agency, or non-departmental public body, they must follow the procedures laid down in the Public Contracts Regulations before awarding a contract to suppliers. These Regulations do permit a quashing order but not a suspended quashing order as would be possible under the

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[19] Treaty on the Functioning of the European Union – consolidated version of the Treaty on the Functioning of the European Union, Official Journal of the European Union (OJEU), C 326, 26 October 2012.

[20] The Explanatory Notes state: "Public function" is given the same meaning as it has in the Human Rights Act 1998. This term is used in subsection (2) of section 149, which extends the Public Sector Equality Duty to persons not listed in Schedule 19 but who exercise public functions. Equality Act Explanatory Notes Para 486

[21] Public Procurement Policy, Crown Commercial Office. 2015. https://www.gov.uk/guidance/public-sector-procurement-policy

new dispensation in the JRCA. The High Court faced with a procurement claim raised in a judicial review proceedings that is not based on the PCR may have greater scope than a court reviewing a procurement claim brought under the Regulations.[22]

The government consultation chaired by Lord Faulks investigated the impact of the JRCA and its delayed quashing orders and published its report 'Independent Review of Administrative Law'. [23] The Panel considered two general areas where a suspended quashing order may be useful which were, potentially, when " *a case raised significant constitutional questions, or where quashing a decision would pose significant risks to national security or the public interest, a suspended quashing order could be used to allow Parliament to clarify or amend the position".* The second reason was when a suspended quashing order "*would allow the defect to be corrected*". [24]

The Committee examined the example, in *R (Hurley and Moore) v Secretary of State for Business, Innovation & Skills*[25] where the High Court found that the Secretary of State had, in issuing Regulations allowing universities to charge students up to £9,000 in fees, "failed fully to carry out his public sector equality duties" to assess properly whether the proposed Regulations would prove unacceptably discriminatory on grounds of race, sex or disability. Despite this, the High Court declined to quash the Regulations because of the inconvenience that it would cause. Instead, the Court issued a declaration that the Secretary of State had acted unlawfully. [26]

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[22] Judicial Review in Procurement, Lexis Nexis Legal Guidance, accessed 201/1/22. https://www.lexisnexis.co.uk/legal/guidance/judicial-review-in-procurement

[23] Independent Review of Administrative Law, Committee takes evidence on Judicial Review and Human Rights, 15 June 2021, https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/155886/committee-takes-evidence-on-judicial-review-and-human-right

[24] Ibid

[25] [2012] EWHC 201 (Admin)

[26] Ibid

As a remedy, a suspended quashing order may have provided more flexibility. Such an order could have indicated that that the Regulations would be quashed within a couple of months of the Court's judgment but would give the Secretary of State time to prepare for the effect of any quashing or to consider the "public sector equality duties" and whether the Regulations needed to be revised. In formulating the JRCA the Government's perspective was the argument for increased remedial flexibility extends to providing the courts with a further power to modify the retrospective effects of a quashing order. [27]

The Government's public consultation proposed legislating for 'prospective' quashing order and in the Consultation the respondents "had mixed views on this proposal and a number argued that they struggled to conceive of many cases where such a remedy would be appropriate". The Government acknowledged that these circumstances may arise relatively rarely, however, it believed that the courts will apply their discretion appropriately and as an additional tool for them to use in deciding on remedies the proposal does have merit. Therefore, the JRCA provides the courts an additional power to remove or limit the retrospective effect of any quashing order. [28]

Moreover, Committee's report stated that " *the new remedial powers that the Government is providing for in this JRCA Bill it considers it appropriate to provide the court with a non-exhaustive list of factors that it should consider when deciding whether to suspend or alter the retrospective effects is suitable in that specific case. This should aid consistency as the courts consider when and how to apply the new remedies*". [29]

The general assumption was that these powers will be used as remedial powers in circumstances where it appears to the court that they afford adequate redress unless there is a good reason not to implement them. The court has discretion as what kind of remedy would be appropriate in terms of suspending or altering the retrospective effect of a quashing order which

[27] Ibid
[28] Ibid
[29] Ibid

may allow the defendant public authority the time period to remake their decision. The different circumstances in judicial review makes it difficult to presume that any one remedy or compatible remedies would be most appropriate in all circumstances.

2. PSED AND THE SUSPENDED QUASHING ORDERS

The most significant change in the Section 29 (2) powers given to the courts is in the form of suspended quashing orders (SQO) and prospective quashing orders (PQO),which will allow the unlawful acts to remain valid at least for a longer period of time. This amendment means the court will no longer need to justify making a 'regular' quashing order, so giving the court greater discretion as to when to use the new remedies. The court's new powers will undoubtedly give rise to arguments as to when SQOs and PQOs are appropriate as opposed to a regular quashing order and these will arise in cases when the citizen applies that the public authority is in breach of its Public Sector Equality Duty (PSED).[30]

The consideration of the PSED in public procurement will be impacted by the gradual implementation of the quashing orders. This is because they are contingent on the public authority carrying out its previous functions for the citizens whose rights have been effected by substantial principles decided by the courts. The court's decisions had to be in compliance with the Bracking Principles and the Brown Principles which are set out in case law.

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[30] Section 149 Public sector equality duty
(1)A public authority must, in the exercise of its functions, have due regard to the need to—
(a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
(b)advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c)foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

In ***R (Bracking & others) -v- Secretary of State for Work & Pensions***[31] **the** applicants in raising judicial review sought to quash a decision by the Minister for Disabled People (within the Department of Work & Pensions (DWP)) to close the *Independent Living Fund ("ILF")*. The ILF was a trust fund that was established by the DWP which operated in partnership with local authorities to devise and provide joint care packages of services and direct payments to assist disabled persons to lead independent lives. The mandatory exercise of an equality impact assessment and public consultation exercise were carried out before the decision was taken.

The judge at first instance dismissed the application and ruled that the Minister had misconstrued the PSED under *Section 149, Equality Act 2010* . The applicants appealed on two grounds (a) that the consultation exercise that preceded the decision was flawed and did not meet public law standards, and (b) that the Minister failed to comply with the PSED when making her decision. The Court of Appeal ruled the first ground of challenge was invalid but that the Minister had not adequately complied with the PSED.

Lord Justice McCombe held :

"In the end, drawing together the principles and the rival arguments, it seems to me that the 2010 Act imposes a heavy burden upon public authorities in discharging the PSED and in ensuring that there is evidence available, if necessary, to demonstrate that discharge. It seems to have been the intention of Parliament that these considerations of equality of opportunity (where they arise) are now to be placed at the centre of formulation of policy by all public authorities, side by side with all other pressing circumstances of whatever magnitude".[32]

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[31] [2013]EWCA Civ 1345)

[32] Para *60.*

His Honour stated that "there is a need for a 'conscious approach' and the duty must be exercised 'in substance, with rigour and with an open mind'. In the absence of evidence of a structured attempt to focus upon the details of equality issues a decision maker is likely to be in difficulties if his or her subsequent decision is challenged".[33]

This implies that the decision maker must be aware of the duty to have "due regard" to the relevant matters and the public sector duty must be fulfilled prior to and contemporaneously when a particular policy is being considered. The duty must be "exercised in substance, with rigour, and with an open mind". [34] In any judicial review process that a claimant may initiate in court the public authority needs to make express reference to the relevant duty and the criteria should narrow the scope for argument.

The second layer of principles that applies in the discharge of the public sector duty is *Brown v Secretary of State for Work and Pensions*[35] the Court had identified six general principles demonstrating what "due regard" requires in practice: (i) *First, those in the public authority who have to take decisions that do or might affect disabled people must be made aware of their duty to have "due regard" to the identified goals...Thus, an incomplete or erroneous appreciation of the duties will mean that "due regard" has not been given to them…*[36] *It involves a conscious approach and state of mind…Attempts to justify a decision as being consistent with the exercise of the duty when it was not, in fact, considered before the decision, are not enough to discharge the duty…*[37]

"It is good practice for the policy or decision maker to make reference to the provision and any code or other non–statutory guidance in all cases where section 149A(1) is in play. In that way the [policy or] decision maker is more likely to ensure that the relevant factors

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[33] Para 61.
[34]Ibid

[35] [2008] EWHC 3158 (Admin)
[36]Para 90
[37]Para 91

are taken into account and the scope for argument as to whether the duty has been performed will be reduced";[38]

The court emphasised that *"the duty imposed on public authorities that are subject to the section 149A (1) duty is a non–delegable duty. The duty will always remain on the public authority charged with it;"*[39] *"the duty is a continuing one";* [40] *and it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their disability equality duties and pondered relevant questions".* [41]

The courts consider these principles alongside the Lord Justice Dyson ' ruling in *Baker & Ors* [42]which formulated 'due regard' as " *that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged ... group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing*". [43]

The duty to have 'due regard' places a high threshold for local authorities to implement the PSED because the claimants need to establish that the duty is non-delegable and continuous. It should be transparent and it should be open to scrutiny and accountability.[44] The JRCA by its powers of suspension

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[38]Para 93

[39]Para 94

[40]Para 95

[41]Para 96

[42] R (on the application of) v Secretary of State for Communities & Local Government & Ors [2008] EWCA Civ 141.

[43] para 31

[44] An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements: R (BAPIO Action Ltd) v Secretary of State for the Home Department [2006] EWCA Civ 1293, [2006] IRLR 934, [2006] 1 WLR 3213 (Stanley Burnton J

of quashing orders has given the opportunity to public bodies to escape liability when in breach of Section 149 of the Act which is a substantive duty that binds the Council to be proactive in eliminating discrimination ". [45] In providing the court with the suspended order for quashing a decision there is possibility of a denial of right to the claimant who is effected by administrative error or lack of compliance.

3. ABROGATION OF THE 'CART' PRINCIPLE

i) Tribunal appeals and procedural justice

The objective of Section 2 of the JRCA is to deny judicial review from the Upper Tribunal which was a process that was established by the Tribunals, Courts and Enforcement Act (TCEA) 2007. This was the statute that institutionalised the First-tier Tribunal and the Upper Tribunal in the administration of justice in the UK. The STT became a 'superior court of record'. [46] Section 2 of the TCEA covers a broad range of tribunals over which it has formulated its procedural rules. [47] Under the JRCA the TCEA

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[45] Sandra Fredman argues that the right to substantive equality should consist of concepts such as "dignity" or "equality of opportunity" and there is a need for a linear approach that reverses "disadvantage, stigma, stereotyping, prejudice and violence" and which is inclusive and embraces diversity and is geared for "structural change". Fredman contends that the substantive equality should be framed to overcome those who marginalized. This is premised on "dimensions" to cause it to be fused and dynamic and not a predetermined hierarchy of "lexical priority". Sandra Fredman, Substantive Equality revisited; International Journal of Constitutional Law, Vol 14, Issue 3, 2016, pp 712-738 https:/doi.org/10.1093/icon/.

[46] Section 3

[47]Section 2 (4)In subsection (3) "tribunals" means—
(a)the First-tier Tribunal,
(b)the Upper Tribunal,
(c)employment tribunals, and
(d)the Employment Appeal Tribunal.

has been amended by insertion of Section 11A which provides that the "*Finality of decisions in exercise of the supervisory jurisdiction (1) Subsection (2) that applies 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) Subject to subsections (3) and (4), a decision made by the court of supervisory jurisdiction in relation to any such refusal by the Upper Tribunal, whether such decision of the court of supervisory jurisdiction is to refuse permission to proceed or is to dismiss the substantive claim in the supervisory court or is any other order, is final and cannot be questioned or set aside or reversed whether by way of renewal or appeal or otherwise".
This serves as the ouster clause that the JRCA has inserted into the TCEA that will transform the judicial review process that was formulated in *R (on the application of Cart) v Upper Tribunal*[48] *when* the Supreme Court unanimously departed from the approach of the Divisional Court and the Court of Appeal and held that "*judicial review of the Upper Tribunal should be available whenever the intended challenge raises an important point of principle or practice or where there is some other compelling reason for the High Court to hear the claim*".[49] The Court integrated the test for bringing judicial review proceedings against the Upper Tribunal into the Civil Procedural Rules 54.7A with the circumstances "in which the Court of Appeal will hear a second appeal (i.e. an appeal against a decision which was itself a decision on appeal)". [50]

The Supreme Court's decision recognised that the "*Tribunals function within a separate framework and have their jurisdiction over a determined area of cases that should*

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[48] [2011] UKSC 28. The Supreme Court heard two cases (*R (on the application of Cart) v The Upper Tribunal*; *R (MR (Pakistan)) v The Upper Tribunal and Secretary of State for the Home Department*). In both cases, the appellants challenged the Upper Tribunal's decisions to refuse permission to appeal the First-tier Tribunal decision. Both appeals before the Supreme Court were dismissed.
[49] Ibid [26]
[50] Ibid [27]

not be interfered with by the High Court". [51] The ruling affirmed the High Court's supervisory power in exceptional circumstances when in instances of applying the second-tier appeal criteria, if the STT denied permission to appeal the FTT 's decision on an important point of principle or practice, or where some other compelling reason existed to hear the appeal. [52]

The Supreme Court also stated that the supervisory jurisdiction is a common law creation that "protects the rule of law in the British constitution". [53] Moreover, there was a "possibility that the existence of incorrect and *'local law'* principles originating from the appeals process in the Tribunal system would detrimentally effect the common law". [54] Their Lordships considered second-tier "appeal criteria, as opposed to the arguability test was stringent enough to limit the judicial review litigation".[55]

The Court's decision to affirm the scope of review *was a benchmark for the judicial review process from an appeal that had failed in the Upper Tribunal.* Prior to the enactment of the JRCA, the Joint Committee on Human Rights (JC-HR) a Parliamentary body of cross party MPs, had argued that the overruling by statute of 'Cart' judicial reviews by means of an 'ouster clause' would remove an area of decision making from review by the courts "*that is based on the concern that the lack of supervisory jurisdiction for the purpose of judicial review of public bodies will weaken a crucial mechanism for enforcing rights*".[56] The

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[51] Ibid [33].
[52] Ibid [27].
[53]Cart [37].
[54]*Cart* [41].

[55] Ibid

[56] Joint Committee on Human Rights (JCHR) recommended amendments to Judicial Review and Courts Bill in Parliament, 7 December 2021https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/159492/committee-recommends-amendments-to-judicial-review-and-courts-bill/

removal of the judicial review by an ouster clause in the promulgation of the JRCA is to effectively prevent claimants from challenging decision that breach human rights and support the government's claim that they "are expensive and have low success rate". [57]

The JC-HR stated in their report that the '*Cart'* judicial reviews can provide "an important protection against legal error" and that it "*could result in people being wrongfully removed from the UK, putting them at risk of grave human rights violations in their country of origin. It calls on the Government to attempt procedural reform, for example extending time limits for cases to be brought, before removing a potentially crucial safeguard against tribunal errors*". [58]

The scope of *Cart* reviews in the immigration context were very limited as confirmed in the case of *PR (Sri Lanka) v SSHD* [2011] EWCA Civ 988 and *JD (Congo) v SSHD* [2012] EWCA Civ 327, but it still provided recourse to an appellant to raise the matter if there was a breach of the HRA at the tribunal hearing. The aftermath of the ouster clause will be that the STT's decision not to permit the review of its decision will not be challengeable. This in itself is a significant obstacle that will be an impediment to the applicant who has exhausted their appeals in the tribunal process of hearings of an administrative decision that may be a consequence of law.

ii) ***Undermining the Compatibility challenges***

The outcome of Section 2(2) of the JRCA would prevent the Tribunals' decisions being reviewed by the High Court, and the judiciary would be

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[57] Ministry of Justice, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law' (March 2021) [51].

[58]Joint Committee on Human Rights (JCHR) recommended amendments to Judicial Review and Courts Bill in Parliament, 7 December 2021https://committees.parliament.uk/committee/93/human-rights-joint-committee/news/159492/committee-recommends-amendments-to-judicial-review-and-courts-bill/

excluded from providing authoritative guidance on developing jurisprudence by case law. The most pertinent reason to view the ouster clause as against the provisions of human rights is that it will prevent a certain level of challenge to the immigration and asylum cases being heard that involve fundamental rights. [59] The question is where to draw the line on the rights of appeal and in such a case, the decision would have been considered by (1) the Secretary of State; (2) the F TT; (3) another judge of the FTT in considering whether to grant permission to appeal; and (4) a judge of the STT in considering whether to grant permission to appeal.

The ouster clause will preclude the judicial review under the supervisory jurisdiction of the High Court from the STT's refusal to grant permission-to-appeal. The reason is that the STT's decisions would not be regarded as *ultra vires* 'by reason of any error made in reaching the decision'. [60] The weakness in the JRCA is that it does not enable a supervisory body that could override the Tribunals' decisions and offer the same level of procedural rights and guarantee the protection under the High Court's judicial review. Consequently, there is a possibility of an infringement of the principle of natural justice, and the right to a fair hearing and freedom from bias and statutory right to a fair trial under Article 6 of the ECHR. This is despite the exceptions set out in Section 2 (4) of the Act which allows the judicial review in certain circumstances such as when a tribunal is irregularly constituted, mala fides or decision may be vitiated for bias.

Furthermore, the JRCA has eliminated the distinction between the errors or law and errors of fact that have been the cornerstone of public law since the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*. [61] The claimant Anisminic had owned property in Egypt which

[59] Ibid [36].

[60] Judicial Review and Courts Act s 2(1)(3)(a).

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

was sequestrated by the Egyptian Government in 1956 and the company applied for compensation from the UK government for the loss of its property. The Foreign Compensation Commission misinterpreted the Foreign Compensation Act 1950, s. 4(1) that stated those decisions "shall not be called in question in any court of law" (s 4(4)) and, consequently, refused to grant damages to Anisminic.

A majority of the House of Lords held that the exclusion clause did not oust judicial review in such instances, since the determination of refusing compensation made by the Commission was only a purported determination which was amenable to judicial review, and, therefore, ruled that the Commission's ruling was a nullity. This provision was one of the two expressly formulated principles excepted from the general abrogation of such clauses in section 11 of the Tribunal and Inquiries Act 1958. Lord Reid held that the exclusion clause was held not to be effective in ousting the jurisdiction of the High Court to set aside a decision which "*was a nullity, because it was ultra vires even if it was made by the tribunal acting within its powers*" *which were conferred on it by the Act".* [62]

Lord Pierce held that "*It would lead to an absurd situation if a tribunal, having been given a circumscribed area of inquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandateto inquire and decide as set out in the Act of Parliament*".[63] The Court effectively removed the distinction between error of law and excess of jurisdiction of the public body exercising its jurisdiction.

Feldman has argued that the English administrative law and theory has not respected the three main principles which are *"(1) All errors in the course of making a decision or rule are to be regarded as errors of law. (2) All errors of law make*

[62] Lord Reid at p 170
[63] Lord Pierce at p 194

the decisions to which they relate null and void. (3) If a 'decision' is a nullity, it can have no legal effect". There will be an impediment to executive functioning if "every error which infringed a legal requirement" in effecting a rule or decision were to deprive it of legal effect because it could be a "minor error" or do "no harm" and may not make the decision "inappropriate" or legally invalid which will be disproportionate to the error itself. [64].

The courts will no longer be able to rely on the ruling in *Anisminic*, although it does not explicitly state that the case has been overruled by the JRCA Section 2(1)(2), which states with regard to the STT's permission-to-appeal decision that because its decision is final, it is not liable to be 'questioned or set aside in any other court'. The supervisory jurisdiction is not ousted in its entirety in section 2(1)(3)(b) and Section 2 (4) and the Explanatory Notes state that the following decisions are not affected by the section:
"*a. decisions of the Upper Tribunal in relation to applications for permission (or leave) to appeal from bodies other than the First-tier Tribunal; b. decisions of the Upper Tribunal which do not relate to applications for permission (or leave) to appeal under section 11(4)(b). Subsection (2) of the new section 11A provides that no other court can question or set aside the Upper Tribunal's decision about permission (or leave) to appeal. It should be noted that subsection (7) of new section 11A defines "decisions" as including "purported decisions"*". The decisions will be subject to judicial review irrespective of the ouster clause by Subsection (4)(c) which "*covers circumstances where the Upper Tribunal acted in bad faith or in such procedurally defective ways as amounts to fundamental breaches of the principles of natural justice*".[65] This exclusionary clause would prevent the courts from circumventing an ouster by not being able to rely on the decision in *R (on the application of*

[64]David Feldman, Error of law and effects of flawed Administrative decisions and Rules. The Cambridge Law Journal, Volume 73, Issue 2, 2014, 275-314.
[65]Judicial Courts and Review Act, Chapter 35, Explanatory Notes, p 27 https://www.legislation.gov.uk/ukpga/2022/35/pdfs/ukpgaen_20220035_en.pdf

Privacy International(Appellant) v Investigatory Powers Tribunal[66] which invoked section 67(8) of the Regulation of Investigatory Powers Act 2000 ("RIPA") and if it had the effect of "ousting" the supervisory jurisdiction of the High Court over decisions of the Investigatory Powers Tribunal ("IPT"). The underlying proceedings arose out of a preliminary issue of law concerning the power of the Secretary of State, under section 5 of the Intelligence Services Act 1994 ("ISA"), to issue a "thematic" warrant authorising "computer network exploration" (hacking) in respect of a broad class of property which breached Article 8, Right to Privacy of the Human Rights Act. The Supreme Court ruled that unless stated explicitly a clause does not oust the supervisory jurisdiction over a 'purported determination'.[67] There is a separate remedy where the Tribunal already has an appeal structure in place for aggrieved parties to raise by means of a review which refers to the possibility of raising an appeal to the Investigatory Appeals Tribunal which is established to hear complaints against the security services for breaching human rights.

While the general presumption against 'ouster' clauses was already established prior to this case, the Supreme Court has reassessed the subtle balance of the rule of law, interpreting s 67(8) of the 2000 Act in a manner that is against the Parliament's stated intention. The Court was emphatic that the Parliament would never be able to exclude the jurisdiction of the High Court to review the decision of an inferior court or tribunal even in there was an ouster clause. The effect will "*also be felt in the statutory*

[66] (2019) UKSC 22

[67]Purported determination refers to the decision-maker's decisions that purports to be a determination but is not actually a determination because of the error of law which was made by the decision-maker. as per Lord Lloyd-Jones [163], [164]

establishment of adjudicatory bodies, given that it is difficult, if not impossible, for Parliament to afford those bodies sole (limited) jurisdiction". [68]

The Cart review is pertinent in this formulation because in interpreting the RIPA s 67(8) can "*lead to judicial review because it could be interpreted as committing non-jurisdictional matters of fact to the exclusive determination of the IPT, but it could also be pertinent for the courts, to exercise restraint before declaring that there is a reviewable error. This could take the form of R (Cart) review based on the limitation on the types of issue that the High Court can review; of a limitation on the types of error that the High Court can by its supervisory jurisdiction remedy for instance that are unreasonable errors of law or fact*".[69]

Under the established principles the issues are not non justiciable because the courts retain their flexibility in considering the applicability of an ouster clause based on the legislation that was being challenged. This is specifically reliant on the claimant's *locus standi* and on the increased scope of applying the *"sufficient interest"* test to raise judicial review. The *Cart* procedure for judicial review allowed the supervisory jurisdiction over the flawed reasoning of the FTT, and where the appeal was allowed from the STT. It will be not be possible under the JRCA because under Section 2 (2) (1) there is an ouster clause that will preclude the reviewing powers of the court and will also remove the distinction between the error of law and error of record when such a determination was considered a nullity. The legislation has been enacted to achieve more resource allocation, and to draw the line in accepting the possibility of error. The only basis for judicial review will be Section 2 (4) where there is review for a decision made mala fides of if the tribunal had not been properly constituted.

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[68] Connor Wright, R (on the application of Privacy International)v IPT & others (2019) UKSC22 https://justice.org.uk/r-on-the-application-of-privacy-international-v-investigatory-powers-tribunal-and-others-2019-uksc-22/

[69] Paul Daly, Three Aspects of Anisminic, Administrative Law Blog, 29 November '19 https://www.administrativelawmatters.com/blog/2018/11/29/three-aspects-of-anisminic/

4. MERITS BASED REVIEW AND IMPACT ON HUMAN RIGHTS

The instrumentation of the JRCA will have an impact on the claimants who have had a departmental decision that impacts on their legal rights. This is of particular relevance in the immigration and asylum appeals where the ouster clause will prohibit judicial review with the exception of Section 2 (4). These include those claimants who anticipate being deported when their appeals have failed after the Home Office has refused to grant them indefinite leave to remain in the UK, and they have been served with a deportation order.

The merits based judicial review which the *Cart* principle safe guarded was against decisions made by the executive that breached the Wednesbury rules of reasonableness. There would be breach of the fundamental rights of the claimant which are dependent on reasonableness and proportionality of the decision maker . In considering the breach of the ECHR the power of review is based on the assumption that the decision maker may have the power to act or a duty to act.

In R (Lord Carlile) v SSHD[70]Lord Neurberger stated " *although the decision in question is, by definition, one which the Secretary of State (or other statutory decision-maker) was legally entitled to make, so that in that sense she is the primary decision-maker, the court has to decide whether that decision is incompatible with a convention right. She is in the same position as a police officer, using his statutory or common law powers of arrest. He is the primary decision maker. But the court has to form a judgment as to whether or not a convention right has been violated ".* [71]

His Lordship confirmed that the ECHR at issue are very important the "freedom of expression being one of the essential foundations of a democratic society".[72] It also confirms that rights under Articles 10 and 11

[70] [2015] AC 945
[71]Para 87
[72]Para 13

are *"qualified and not absolute"*[73] The proportionality was confirmed as that which was applied by Lord Sumpton in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 which states :

"the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community". (At 20)

Lord Neuberger held that the "proportionality of interference with those rights is ultimately a matter for the Court but it cannot substitute its own decision for that of the primary decision-maker or the decision without itself considering it.[74]

The question in judicial review is the weight to be allotted the decision of a administrative body, its category and the reasons accorded in the process. There are duties upon the judges who have the remit or competence to make the decisions and there are exceptional circumstances which would justify invalidation. This will only be *"in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality".*[75]

It has been proffered that the '*Cart*' and *Privacy International* cases illustrate that the Supreme Court fails to give effect to Parliament's intention as expressed in the exclusion clauses and therefore conflicts with the doctrine of parliamentary sovereignty. These decisions are based on *Anisminic* which established that all legal errors are jurisdictional and open to review. It is, however, the case that they also refer to the common law rights of individuals under the rule of law to invoke merits based judicial review.

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[73]Para 37
[74] Para 68
[75]Para 68

The present approach to statutory interpretation in most judicial review cases will be an interpretation which takes into account the common law principle of legality or the rule of law as defined in the *Axa General Insurance Ltd and Others v The Lord Advocate*[76]Lord Reed held "*The principle of legality means not only that Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so*."[77]

The merits based judicial review is a form of checks and balances on the exercise of executive power that has been restricted by the JRCA Section 1 (1) and Section 2 (3) (b). The statute allows under Section 2 (4) for the STT to grant permission to appeal a decision from the FTT, after an appeal to the STT up to the High Court exercising supervisory jurisdiction. The non availability of the judicial review of ministerial decisions will reduce the flexibility of the remedies the court is able to offer after the decision has been made by the Upper Tribunal. This will undermine procedural justice at the expense of improving the efficiency of the court system by removing the *Cart* judicial review.

The executive power that has been restricted by the JRCA section 1 (1) and section 2 (3) (b) by the insertion of an ouster clause that has disallowed the challenges to a decision from the FTT to the Court exercising supervisory jurisdiction. This will undermine procedural justice at the expense of improving the efficiency of the court system by removing the *Cart* judicial review. The legislation has led to the abolition of the process of judicial review that was put in place by the TCEA 2007 by which the STT had become the superior court of record in the administrative tribunal hierarchy.

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CONCLUSION

[76][2011] UKSC 46

[77]Para 152

The enactment of the Judicial Review and Courts Act has made structural changes to the review process in reviewing the decisions from the administrative bodies by judicial review. The impact will be both on substantive law and procedural justice by its reforms that have led to the suspension of the quashing orders. The instrument of the Section 1(1)(1) of the JRCA defers the implementation under the 54.2 of the Civil Procedure Rules, of the prerogative orders. The most notable effect will be the quashing order of a public authority which will be not be imposed contemporaneously but will be conditional and allow the public authority to retain their policy measures.

The second significant reform is by the enacting an ouster clause under Section 2 (2) which prevents the judicial review of tribunal decisions. The only possibility of review is on the grounds of procedural fairness under Section 2(4). This impacts on the rule of law's basic principle that the courts' supervisory function is to review the abuse of power of public bodies that have executive authority and who make decisions that impact on citizens. There was a further power granted for judicial review from decisions that were also errors of law and also errors of record that is inherent in the common law powers that are inherent in the court's jurisdiction and oversight of administrative powers.

The JRCA has overridden the certainties of administrative law by increasing the administrative control of public bodies and their decision making functions. The expediency of allowing the judges to enforce the writ of the state and allow more discretion to public bodies may impact of the substantive powers granted under the Equality Act. This could also impact on the administrative tribunals who will have greater scope in deciding their public policy which could make it difficult for citizens to achieve procedural justice.