

## No Superior Form of Law? *R. (Oceana) v Upper Tribunal*

In *R. (Oceana) v Upper Tribunal (Immigration and Asylum Chamber)*<sup>1</sup> the Administrative Court dismissed a claim for judicial review of a refusal of permission to appeal to the Upper Tribunal (UT). The Court held that the claim was precluded by section 11A of the Tribunals, Courts and Enforcement Act 2007, which partially restricts or “ousts” its ability to judicially review such claims. An ouster clause is a statutory provision which wholly or partly immunises decisions against court scrutiny. Such provisions usually state, inter alia, that all or part of a decision shall not be “questioned in any court”.<sup>2</sup>

Mary Oceana arrived in the United Kingdom from the Philippines on a student visa in 2008. She subsequently cheated in an English language examination and her leave to remain was cancelled by the Home Office. She stayed in the country illegally until she was served with a notice of removal in 2019. Her further application to remain in the UK was refused in February 2021. The First Tier Tribunal (FTT) subsequently refused her appeal against this decision. During the FTT hearing, Oceana gave oral evidence about her English language examination. She considered the recording of the evidence by the FTT judge to be defective and procedurally unfair. On this basis, she sought permission to appeal to the UT.

In August 2022 permission to appeal was refused by a different FTT judge who considered a recording of her oral testimony. In November 2022, an unidentified High Court judge granted permission for judicial review, applying the criteria in *R. (Cart) v Upper Tribunal*.<sup>3</sup> The *Cart* test was that unappealable decisions of the UT would attract judicial review if they raised “some important point of principle or practice” or should be heard for “some other compelling reason”.<sup>4</sup> The Home Office subsequently brought the existence of section 11A of the 2007 Act to the Administrative Court’s attention. This provision had been inserted into the 2007 Act by section 2 of the Judicial Review and Courts Act 2022, which had been in force since July 2022.

Three interconnected issues arose in the Administrative Court. First, the relationship between the second-tier appeals criteria in *Cart* and section 11A of the 2007 Act fell to be determined. Secondly, the Court had to decide whether a procedural defect Oceana alleged had occurred in the FTT’s refusal of permission constituted a “fundamental breach of the principles of natural justice”.<sup>5</sup> If the fundamental breach threshold was met, then the Court’s supervisory jurisdiction could be exercised. Finally, Oceana argued that section 11A was a constitutionally impermissible restriction upon judicial review, and the Court had a common law power to refuse to enforce it.

Saini J (for the Court) held that section 11A removed the availability of *Cart* judicial review claims. Secondly, he held that no procedural defect vitiated the decision of the FTT

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1 *R. (Oceana) v Upper Tribunal (Immigration and Asylum Chamber)* [2023] EWHC 791 (Admin).

2 At the time of writing, an “advanced search” on <http://www.legislation.gov.uk> for this phrase returned thirty-eight results.

3 *Cart v The Upper Tribunal (Rev 1)* [2011] UKSC 28.

4 *Cart* [2011] UKSC 28.

5 Tribunals, Courts and Enforcement Act 2007, s. 11A(4)(c)(ii).

judge's refusal of permission to appeal. Therefore, there was no "fundamental breach" of the principles of natural justice to bring the claim within the scope of the supervisory jurisdiction. Finally, from the perspective of the common law, there was nothing unconstitutional about the restrictions imposed upon judicial review by section 11A.

*Oceana* is the first judicial interpretation of the ouster clause in section 11A of the 2007 Act. The clause is only a partial, as opposed to full, restriction on the supervisory jurisdiction. It also enumerates the grounds of review which it restricts. Nevertheless, the restriction on judicial review is severe. Section 11A represents a significant departure from the approach in *Cart*. Whilst the conclusion on the claimant's case was correct, the Court's justification regarding the constitutional effect of ouster clauses is contentious.

This comment argues that the constitution contains no single set of rules for interpreting ouster clauses. The relationship between the "inherent" supervisory jurisdiction of the High Court<sup>6</sup>, and the legislative supremacy of Parliament will vary according to the nature and extent of any ouster clause. In short, Saini J's proclamation that there is "no superior form of law" beyond Acts of the Westminster Parliament may not always hold true.<sup>7</sup> Any accurate account of ouster clauses is a contextual exercise. This exercise should consider an ouster clause along four axes: (1) the clarity of statutory language, (2) the extent of restriction on the role of the court, (3) the character of the institution and decision shielded from review, and (4) the impact (if any) on fundamental rights and the wider legal system.

## **The Interpretation of Section 11A**

The first issue to be determined concerned the relationship between the Supreme Court's decision in *Cart* and section 11A of the 2007 Act. Saini J held that the effect of section 11A was to overrule *Cart*, removing the possibility of recourse to the second-tier appeals criteria. The "plain and ordinary meaning" of section 11A meant it removed the right of judicial review of UT decisions, subject to the narrowest of exceptions.<sup>8</sup> The incumbent government's manifesto was committed to ensuring that the judicial review procedure was "not abused to conduct politics by another means or to create needless delays".<sup>9</sup> And Hansard statements by the minister sponsoring the Judicial Review and Courts Bill revealed that the purpose of section 11A was to "overturn...*Cart* judicial review".<sup>10</sup>

Section 11A creates a seismic shift in the relationship between the tribunals system and the supervisory jurisdiction, significantly attenuating the types of legal error which will be channelled towards the general courts. When considering a judicial review claim, the High Court is now confined to assessing whether a refusal of permission to appeal is vitiated by either an improperly constituted UT, or by the UT acting in "bad faith"<sup>11</sup> or "in such a

6 R. (*Privacy International*) v *Investigatory Powers Tribunal* [2019] UKSC 22 at [60].

7 R. (*Oceana*) [2023] EWHC 791 (Admin).

8 R. (*Oceana*) [2023] EWHC 791 (Admin) at [29].

9 R. (*Oceana*) [2023] EWHC 791 (Admin) at [25].

10 R. (*Oceana*) [2023] EWHC 791 (Admin) at [28].

11 Tribunals, Courts and Enforcement Act 2007, s. 11A(4)(c)(i).

procedurally defective way as amounts to a fundamental breach of the principles of natural justice.”<sup>12</sup> The term “bad faith” encompasses elements of both misuse of statutory powers and misuse of discretion.<sup>13</sup> It is generally understood to be an extremely high threshold for judicial intervention.<sup>14</sup>

The approach in section 11A mirrors the approach of the lower courts in *Cart*.<sup>15</sup> Both the High Court and the Court of Appeal held that limiting judicial review of unappealable decisions of the Upper Tribunal to pre-*Anisminic* jurisdictional error sufficiently protected the rule of law. This approach restricted review to two scenarios: where the decision-maker had clearly exceeded the ambit of its statutory powers; or where it had committed a procedural irregularity which constituted a denial of the applicant’s right to a fair hearing. In the High Court, Laws LJ confirmed that satisfying the second criteria required “something as gross as actual bias on the part of the tribunal.”<sup>16</sup> Sedley LJ in the Court of Appeal agreed.<sup>17</sup>

*Cart* judicial review, as it was known, was broader in scope, and was derived from a statutory test.<sup>18</sup> Before the insertion of section 11A, the 2007 Act was silent on the availability of judicial review. In *Cart*, the Supreme Court filled this legislative silence. The allocation of judicial review was approached as “an issue of principle”<sup>19</sup> involving a choice between three possibilities: (1) make judicial review available in full; (2) endorse the approach of the lower courts which favoured reverting to “pre-*Anisminic* jurisdictional error”, described above; or (3) transpose the criteria for second-tier appeals. A second-tier appeal (from a lower court to the Court of Appeal) was permitted where a case raised “some important point of principle or practice; or (b) there is some other compelling reason for the relevant appellate court to hear the appeal”.<sup>20</sup>

Option three prevailed. Lady Hale explained that it struck an appropriate balance between devoting legal resources to reaching correct individual outcomes,<sup>21</sup> and the risks posed by the radical restriction upon, or complete removal of, recourse to judicial review. Without some judicial review there was a genuine risk that the UT would become “the final arbiter of the law, which is not what Parliament has provided. Serious questions of law might never be ‘channelled into the legal system’.”<sup>22</sup> Other Justices echoed the view that the

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12 Tribunals, Courts and Enforcement Act 2007, s. 11A(4)(c)(ii).

13 *Padfield v Minister of Agriculture, Fisheries, and Food* [1968] AC 997; *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] EWCA Civ 1.

14 H. Woolf *et al.*, *De Smith’s Judicial Review* (London: Sweet & Maxwell, 8<sup>th</sup> edn, 2018) at [5-012].

15 *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin); *Cart v Upper Tribunal* [2010] EWCA Civ 85.

16 *R (Cart) v Upper Tribunal* [2009] EWHC 3052 (Admin), Laws LJ at [99].

17 *R (Cart) v Upper Tribunal* [2010] EWCA Civ 85, Sedley LJ at [26].

18 Access to Justice Act 1999, s 55. See further J. Bell, “Rethinking the Story of *Cart v Upper Tribunal* and Its Implications for Administrative Law” (2019) 39(1) O.J.L.S. 74.

19 *Cart* [2011] UKSC 28 at [61].

20 *Cart* [2011] UKSC 28 at [27].

21 *Cart* [2011] UKSC 28, Lady Hale at [41].

22 *Cart* [2011] UKSC 28, Lady Hale at [43].

second-tier appeals criteria struck a “necessary and proportionate”<sup>23</sup> balance between the autonomy Parliament had vested in the new system of tribunals, the expertise of the UT, and the presence of judicial review to ensure fidelity to the rule of law.

Subsequently, the Court of Appeal narrowed both limbs of the test. Meeting the threshold for a “compelling reason” required a “*legally* compelling [reason], rather than [a] compelling [reason]...from a political or emotional point of view.”<sup>24</sup> Similarly, the phrase “important point of principle or practice” was restricted to cases which are “not merely important” but which require “attention by the higher courts, specifically the Court of Appeal” rather than remaining within the tribunal system.<sup>25</sup>

But a little less than a decade later, the tides had turned against the Supreme Court’s approach. Ministry of Justice statistics demonstrated that *Cart* judicial review formed the largest category of applications before the Administrative Court.<sup>26</sup> Furthermore, scepticism towards the *Cart* criteria came from multiple perspectives. The incumbent Conservative Government launched the Independent Review of Administrative Law (IRAL). Robert Buckland QC, then Lord Chancellor, explained that one aim of the review was to evaluate the use of courts’ resources. He also explained that the *Cart* test was considered problematic because it diverted a significant proportion of judicial resources towards unmeritorious claims. Pressure to consider the excessive impact of *Cart* judicial also came from at least one senior member of the judiciary.<sup>27</sup> Lord Hope, who was on the Supreme Court bench in *Cart*, said “experience has shown that our decision has not worked”.<sup>28</sup>

The IRAL Report decided *Cart* judicial reviews could “usefully be cut back”.<sup>29</sup> An empirical study conducted for the Review concluded that a mere 0.22% of *Cart*-judicial review claims were successful. In view of this, “continued expenditure” on *Cart* applications was indefensible and “the practice...should be discontinued.”<sup>30</sup> The figure of 0.22% was both contested<sup>31</sup> and contestable.<sup>32</sup> When introducing the Judicial Review and Courts Bill at

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23 *Cart* [2011] UKSC 28, Lady Hale at [37], Lord Dyson at [124].

24 *R. (PR (Sri Lanka)) v Secretary of State for the Home Department* [2011] EWCA Civ 988, Carnwath LJ [36], emphasis original. For further analysis see M. Elliott and R. Thomas, “Tribunal Justice and Proportionate Dispute Resolution” (2012) 71(2) C.L.J. 297.

25 *R. (PR (Sri Lanka))* [2011] EWCA Civ 988, Carnwath LJ at [37].

26 Report of the Independent Review of Administrative Law (IRAL) CP 407, March 2021 [3.37].

27 (IRAL) CP 407, March 2021 [10], 7.

28 HL Debs Vol. 811, col. 710, Lord Hope of Craighead (XB).

29 (IRAL) CP 407, March 2021 at [3.35].

30 (IRAL) CP 407, March 2021 at [3.46].

31 J. Bell, “Digging for Information about *Cart* JRs”, U.K. Const. L. Blog (1st April 2021) (available at <https://ukconstitutionallaw.org/>); and J. Tomlinson and A. Pickup, “Putting the *Cart* before the horse? The Confused Empirical Basis for Reform of *Cart* Judicial Reviews”, U.K. Const. L. Blog (29th Mar. 2021) (available at <https://ukconstitutionallaw.org/>).

32 M. Barczentewicz, “*Cart* Challenges, Empirical Methods, and Effectiveness of Judicial Review” (2021) 84(6) M.L.R. 1360.

Second Reading, Dominic Raab MP described a significantly higher success rate of “just 3.4%.”<sup>33</sup>

It is important to remember that the Supreme Court rejected pre-*Anisminic* jurisdictional error because it was an insufficient safeguard for the rule of law.<sup>34</sup> Lord Dyson put it best: “non-jurisdictional error may be egregious and obvious... a decision ‘which gets it wrong, even extremely wrong’ will not justify judicial review, whereas if the issue can be classified as ‘jurisdictional’, mere error will suffice.”<sup>35</sup> Confining review to pre-*Anisminic* jurisdictional error would mean that “a non-jurisdictional error of law on a point of general public importance (for example, an important point of statutory interpretation) would not be amenable to judicial review.” Paradoxically, however, “a one-off jurisdictional error of no general significance would be”.<sup>36</sup>

Section 11A undoubtedly mirrors the contours of pre-*Anisminic* jurisdictional error. A hypothetical example helps illustrate the shift in availability of review from the *Cart* criteria to the rules in section 11A. Consider a fictional statutory provision which is ambiguous. As a result of that ambiguity, various FTT judges have ascribed it different meanings in factually similar cases. Under the old *Cart* test, a refusal of permission to appeal to the UT could be the subject of judicial review, because clarifying the meaning of the provision would have potentially systemic consequences for the operation of the tribunal system.

Under section 11A the situation is very different. If the same fictional issue were to be refused permission to appeal to the UT, scope for review is radically limited. Review would only be available if, in so refusing, the UT was either improperly constituted, had acted in “bad faith” or had breached the “fundamental principles of natural justice”. Under the section 11A criteria there is no opportunity to accord weight to the relative importance of the substantive dispute. The real difference between section 11A and the second-tier appeals criteria is that section 11A focuses squarely on the conduct and constitution of the UT in the context of its refusal decision. By contrast, the second-tier appeals criteria permitted a reviewing court to take a broader view of the consequences of a refusal of permission upon the operation of the tribunals system.

The second, related, issue in *Oceana* was the scope of a “fundamental breach” of the principles of natural justice. *Oceana* alleged that in refusing permission to appeal her oral evidence was mishandled. This mishandling allegedly occurred because she had not been notified of a discrepancy between her own recollection of her oral evidence and an audio recording (which was checked by the FTT judge who refused permission). She claimed that this satisfied the criteria for a “fundamental breach”. The Administrative Court held that there was no procedural error by the FTT “in any sense” let alone a “fundamental breach” of natural justice.<sup>37</sup> It described the approach of the FTT judge as “scrupulously fair”.<sup>38</sup>

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33 HC Debs Vol. 702 Col. 189 (26 October 2021), Dominic Raab (Con).

34 *Cart* [2011] UKSC 28, Lord Dyson at [110].

35 *Cart* [2011] UKSC 28, Lord Dyson at [110].

36 *Cart* [2011] UKSC 28, Lord Dyson at [110].

37 *R. (Oceana)* [2023] EWHC 791 (Admin) at [39].

38 *R. (Oceana)* [2023] EWHC 791 (Admin) at [38].

Saini J also glossed the definition of the term “fundamental breach”, construing it narrowly. He explained that any judicial definition must not “frustrate the intention of Parliament”.<sup>39</sup> Only an error which was “so grave as to rob the process of any legitimacy” would suffice.<sup>40</sup> The application of this test would be made after consideration of “the *entire* process”<sup>41</sup> as opposed to “the discrete aspect which is the subject of the claim”.<sup>42</sup>

Saini J’s approach mirrored the views of Dominic Raab MP. At the second reading debate Raab explained that the clause which would become section 11A preserved the High Court’s jurisdiction in the event of “the upper tribunal deciding a type of case outside its jurisdiction, in bad faith or with some fundamental procedural error, such as not hearing one side of the case.”<sup>43</sup> The explanatory notes to the subsequent Act suggest that jurisdiction may also be preserved where a decision is “tainted by bias or corruption”.<sup>44</sup>

Whilst faithfully applying the intentions of Parliament as expressed in legislation is undoubtedly a means of giving effect to the rule of law, it also creates a potential rule of law cost. Doing so may undermine other background values inherent in more expansive versions of the rule of law.<sup>45</sup> The term “rule of law” is, after all, not a singular concept, but a placeholder for a constellation of contested and sometimes competing concepts. The utility of the second-tier appeals criteria was its ability to facilitate review of systemic error in the tribunal system, and shield against the creation of “local law”<sup>46</sup> by ensuring that significant errors not channelled through the appeal system were judicially reviewable. Section 11A, by both legislative design and judicial endorsement, will ostensibly shield many systemic errors of law from review.

## The Constitutional Status of Ouster Clauses

Oceana submitted that section 11A was a constitutionally impermissible removal of the High Court’s “inherent supervisory jurisdiction”<sup>47</sup> and that the court had a common law power to ignore the effect of section 11A. Both submissions were rejected. The first was unfounded because Parliament was empowered to oust judicial review using “clear words”.<sup>48</sup> As to the second, upholding “Parliament’s will expressed in legislation” was necessary to vindicate the

39 *R. (Oceana)* [2023] EWHC 791 (Admin) at [32].

40 *R. (Oceana)* [2023] EWHC 791 (Admin) at [33].

41 *R. (Oceana)* [2023] EWHC 791 (Admin) at [33], emphasis original.

42 *R. (Oceana)* [2023] EWHC 791 (Admin) at [33].

43 HC Hansard Vol. 702 Col. 190 (26 October 2021), Dominic Raab (Con).

44 Judicial review and Courts Act 2022, Explanatory Notes at [105].

45 See further: J. King, “The Rule of Law” in R. Bellamy and J. King (eds), *The Cambridge Handbook of Constitutional Theory* (Cambridge: CUP, 2024) K. Rundle, *Revisiting the Rule of Law* (Cambridge: CUP 2022), Ch 1; and P. Sandro, *The Making of Constitutional Democracy* (London: Hart: Bloomsbury 2022) pp. 226-27.

46 *Cart v The Upper Tribunal (Rev 1)* [2011] UKSC 28, Lady Hale at [42].

47 *R. (Oceana)* [2023] EWHC 791 (Admin) at [46].

48 *Cart* [2011] UKSC 28 at [37].

rule of law. Moreover, it was constitutional orthodoxy that Acts of Parliament stood at the apex of the legal system. So there existed “no superior form of law” empowering courts to ignore Acts of Parliament.<sup>49</sup>

However, the Court’s mapping of the constitutional landscape is inadequate. Not all ouster clauses are created equal. *Oceana* is the first contemporary challenge to an ouster clause which enumerates the specific grounds of review it precludes. Unlike clauses considered in previous landmark cases, such as *Anisminic*<sup>50</sup> and *Privacy International*,<sup>51</sup> section 11A ousts judicial review only partially rather than completely. Due to the different statutory language, institutional and decisional contexts, and wider impact upon rights that ouster clauses may have, the conclusion that there is no “superior form of law”<sup>52</sup> is premature. A more accurate cartography suggests there is no one approach that courts would take to either full or partial ouster clauses, or clauses which are either general or specific in the form of review that they restrict.

It is tempting to begin discussion of the jurisprudence on ouster clauses with the 1968 House of Lords decision in *Anisminic*. However, the history of statutory provisions insulating decisions from being “questioned in any court” stretches back much further. One such example is Article 9 of the Bill of Rights Act 1689. It states that “Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.” Even though it is never described as an ouster clause, it meets the definitional criteria. What constitutes a “proceeding in Parliament” technically remains a question of law for the courts,<sup>53</sup> but this absolute ouster clause has been deemed completely effective.<sup>54</sup>

When applying common law principles, courts have consistently treated Article 9 as an absolute bar to the bringing of any species of legal claim against a lawful exercise of privilege.<sup>55</sup> This absolute bar extends to a blanket refusal to engage in evaluation of the quality of the legislative process.<sup>56</sup> The justification for this strict approach is based on fidelity to the foundational constitutional principle of “the separation of powers”,<sup>57</sup> which requires that both Parliament and the courts “abstain from interference with the functions of the other” and “treat each other’s proceedings and decisions with respect.”<sup>58</sup> In *SC*, Lord Reed

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49 *R. (Oceana)* [2023] EWHC 791 (Admin) at [29].

50 *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6.

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

52 *R. (Oceana)* [2023] EWHC 791 (Admin) at [29].

53 *R. (Miller) v Prime Minister* [2019] UKSC 41; *R. v Chaytor and Others (Rev 2)* [2010] UKSC 52.

54 *R. (Project for Registration of Children as British Citizens and Another) v Secretary of State for the Home Department* [2021] EWCA Civ 193 at [86]-[110].

55 *R. v Chaytor and Others (Rev 2)* [2010] UKSC 52.

56 *British Railways Board v Pickin* [1974] UKHL 1.

57 *R. (SC, CB, and 8 Children) v Secretary of State for Work and Pensions and Others* [2021] UKSC 26 at [144].

58 *R. (SC, CB, and 8 Children)* [2021] UKSC 26 at [165].



explained that the very different institutional structures, natures, and practices of legislatures and courts weighed against judicial intervention in legislative proceedings. Parliamentary and judicial methods of dispute resolution were different in kind. For example, unlike a court, Parliament did not issue a “corporate statement of reasons” for its Acts, so the “will of Parliament finds expression solely [its] legislation”.<sup>59</sup>

Nevertheless, it is well known that not all “full” ouster clauses are considered completely effective. Different contexts compel different judicial interpretations. The emerging picture from the leading cases is more complex than a straightforward hierarchy of norms. An accurate picture becomes clear if we accept that the common law has a “zone of tolerance” for ouster clauses. The boundaries of this zone are determined according to four considerations: the clarity of the statutory language in the clause, the extent to which the role of the court is curtailed, the nature of the institution and decision insulated from review, and the impact of the ouster clause on both fundamental rights and the legal system.

Unlike section 11A, previous apex court decisions in *Anisminic*<sup>60</sup> and *Privacy International*<sup>61</sup>, concerned clauses which ostensibly removed the supervisory jurisdiction in full. Neither the House of Lords, nor the Supreme Court respectively, gave full effect to these clauses. In *Anisminic*, the House of Lords held that section 4(4) of the Foreign Compensation Act 1950 would not prevent review of a determination which was a “nullity”.<sup>62</sup>

In *Privacy International*, decided in 2019, the Supreme Court held that section 67(8) of the Regulation of Investigatory Powers Act 2000 was insufficiently clear to remove jurisdiction to control for error of law. Section 67(8) was a full ouster clause, which did not enumerate any specifically excluded grounds of review. It sought to wholly immunise the Investigatory Powers Tribunal (IPT) from further scrutiny. The IPT is a specialist tribunal which hears complaints related to the covert surveillance powers of the police, public authorities, and agencies responsible for national security. Section 67(8) read: “determinations, awards 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.”<sup>63</sup>

No doubt the comprehensive nature of the ouster, combined with the absence of any reference to specific grounds of review, compelled the conclusion of a four-justice majority<sup>64</sup> that section 67(8) was insufficiently clear to remove the “inherent”<sup>65</sup> jurisdiction of the High Court to control for errors of law. Lord Carnwath, for the majority, concluded that case law “reaffirm[ed] in no uncertain terms the continuing strength of the fundamental presumption

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59 R. (*SC, CB, and 8 Children*) [2021] UKSC 26 at [171].

60 *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6.

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

62 *Anisminic Ltd v Foreign Compensation Commission* [1968] UKHL 6, Lord Reid.

63 RIPA 2000, s. 67(8).

64 Lords Carnwath, Kerr and Lady Hale. Lord Lloyd-Jones wrote a separate concurring judgment.

65 R. (*Privacy International*) [2019] UKSC 22 at [38].



against ousting the supervisory role of the High Court over other adjudicative bodies”.<sup>66</sup> Defeating this fundamental presumption required “no less than the clearest wording” in an Act of Parliament. This conclusion was described as an “application” of the principle of legality.<sup>67</sup> To exclude judicial review of inferior adjudicative bodies, “Parliament must squarely confront what it is doing and accept the political cost”.<sup>68</sup> By contrast, Article 9, considered above, is treated differently. This is because it insulates Parliament, a supreme legislature partly staffed by democratically elected representatives, from review by the courts. Conversely, the IPT is a judicial body with a limited statutory jurisdiction. Although both Article 9 and section 67(8) are clauses which ostensibly completely preclude review, they pertain to different institutions which serve very different purposes. As such, courts have treated the clauses as having very different effects.

However, the ouster clause in *Privacy International* was still deemed by five of the seven Justices to be partially effective. Lords Carnwath, Kerr, and Lady Hale accepted the view of counsel that the words in brackets would preclude review of jurisdictional errors of fact, of the type identified in *Khawaja*.<sup>69</sup> Lords Reed and Sumption, in dissent, adopted the view that section 67(8) insulated the IPT from challenges based upon the “merits” of its decisions.<sup>70</sup> However, procedural errors which “deprive[d] the Tribunal of its adjudicatory competence” remained reviewable.<sup>71</sup> Lord Lloyd-Jones did not form a “concluded view” upon the effect of the words in parenthesis on error of fact.<sup>72</sup> In a lone dissent, Lord Wilson deemed the clause to be entirely successful in achieving its aims.

But in respect of ouster clauses which insulate judicial bodies from review statutory clarity alone is insufficient to determine the effect of an ouster clause. Lord Carnwath explained that there was a “strong case” to hold that “binding effect” would not be given to an ouster clause which appears to “wholly...exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law.”<sup>73</sup> Such a clause would be inconsistent with the principle of the rule of law. When addressing this issue, Lord Carnwath (with Lord Kerr and Lady Hale) referred to clause 11 of the Asylum and Immigration (Treatment of Claimants) Bill (AITCB).

During the debates on the Judicial Review and Courts Bill, Dominic Raab MP, held this clause out as an example of a more restrictive ouster than what would become section 11A.<sup>74</sup> Unlike section 11A, the AITCB clause made fewer exceptions for review of egregious forms of legal error. It was an almost complete ouster which also enumerated the grounds of

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66 R. (*Privacy International*) [2019] UKSC 22 at [99].

67 R. v *Secretary of State for the Home Department*, ex parte *Simms* [1999] UKHL 33.

68 R. (*Privacy International*) [2019] UKSC 22 at [100]; ex parte *Simms* [1999] UKHL 33.

69 R. (*Privacy International*) [2019] UKSC 22 at [110]-[111].

70 R. (*Privacy International*) [2019] UKSC 22 at [172].

71 R. (*Privacy International*) [2019] UKSC 22 at [205], Lords Sumption and Reed.

72 R. (*Privacy International*) [2019] UKSC 22 at [166].

73 R. (*Privacy International*) [2019] UKSC 22, Lord Carnwath at [114].

74 HC Hansard Vol. 702 Col. 191 (26 October 2021), Dominic Raab (Con).

judicial review it sought to prevent. Had it been enacted; it would have removed recourse to judicial review or appeal over “any decision or purported” decision of the Immigration Appeal Tribunal. It sought to prohibit review on the following grounds: (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) breach of natural justice, or (v) any other matter. Only one ground of review remained, and that was consideration of whether a tribunal member had acted in “bad faith”. An allegation of bad faith could only be entertained in the face of “significant evidence” of “(a) dishonesty, (b) corruption, or (c) bias”. Rawlings described the clause as “extraordinarily broad” and animated by the desire to cast administrative law back to “the sleepy days of the 1950s.”<sup>75</sup> In *Privacy International*, Lord Carnwath noted that in response to significant political pressure, this clause was withdrawn.<sup>76</sup>

However, complete<sup>75</sup> and specific ouster clauses exist and, if litigated, may yet be deemed constitutionally permissible. Section 2 of the Dissolution and Calling of Parliament Act 2022 contains a “non-justiciability clause”. This section is functionally a complete and specific ouster of the jurisdiction of the courts. It applies in respect of the “revived” prerogative power to dissolve Parliament. The section 2 “non-justiciability clause” is an attempt to prevent review of the type undertaken by the Supreme Court in *R (Miller) v Prime Minister*.<sup>77</sup> In *Miller*, the Supreme Court held that the extent (or scope) of a prerogative power was always a question of law for the courts; one upon which arguments about non-justiciability did not impinge.<sup>78</sup>

It is not immediately clear that the reasoning in *Privacy International* should automatically be transposed to the context of decisions about dissolution. A dissolution of Parliament is undertaken for the purpose of returning power to the electorate in the form of a General Election. When the prerogative power to dissolve Parliament is used, it does not directly impact upon fundamental rights or the wider legal system. If anything, it is central to facilitating electoral rights. Nor is it a discretionary decision by a purely administrative body, or inferior judicial body, which requires judicial supervision. It is taken by the Prime Minister.

Nevertheless, if a court considering the interpretation of section 2 were to adopt the approach of Saini J in *Oceana* by simply giving words their “plain and ordinary meaning” this would create a significant risk of abuse of power.<sup>79</sup> For example, if Parliament were dissolved because the Prime Minister had taken a bribe, judicial review would be unavailable. Although a General Election would follow such an event, this might be an insufficient constitutional antidote. This is why the reasoning in *Oceana* to the effect that there can be “no superior form of law” is a blunt constitutional instrument. The optimal conception of the relationship between the common law and legislative supremacy is not hierarchical, but symbiotic.

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75 R. Rawlings, “Review, Revenge and Retreat” (2005) 68(3) M.L.R. 378, 379.

76 R. (*Privacy International*) [2019] UKSC 22, Lord Carnwath at [101].

77 R. (*Miller*) v *Prime Minister* [2019] UKSC 41 at [32].

78 R. (*Miller*) v *Prime Minister* [2019] UKSC 41.

79 House of Lords Select Committee on the Constitution Committee, *Dissolution and Calling of Parliament Bill* (8<sup>th</sup> Report 2021-2022, HL Paper 100) [31]; R. (*Oceana*) [2023] EWHC 791 (Admin) [29].

## Conclusion

Section 11A of the Tribunals, Courts and Enforcement Act 2007 represents a sea-change in the relationship between the tribunals structure and the supervisory jurisdiction of the High Court. But it was not catalysed solely by a government seeking freedom from the perceived shackles of judicial review or the strictures of the rule of law. Support for changing the relationship between judicial review and the tribunals system came from both politicians and judges. It is too soon to speculate on what, if any, consequences this will have for the rule of law. The Administrative Court emphasised that giving effect to Parliament's clear legislative intent is a core feature of the rule of law. It is, however, one core feature among many. The rule of law is a dynamic, as opposed to static concept. The preservation of the supervisory jurisdiction permitted by section 11A of the 2007 Act is extremely restricted. It pushes the limits of the constitutionally acceptable exclusion of judicial review.

*Oceana* also sharply illustrates the inherent difficulty of attempting to distil general constitutional rules about ouster clauses from particular cases. This comment argued that the relationship between Parliament's legislative supremacy and the supervisory jurisdiction of the High Court is not a simple hierarchy. Instead, it is both context dependent, and reciprocal. The constitution is a complex ecosystem. Lord Reed appropriately characterised the mutual interdependence of Parliament and the courts in *UNISON*. He explained that without sufficient respect for the jurisdiction and function of the courts "laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade".<sup>80</sup> Or, to adopt the position of Lord Lloyd-Jones in *Privacy International*: the preservation of the courts' supervisory jurisdiction is "a necessary corollary of the sovereignty of Parliament".<sup>81</sup>

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<sup>80</sup> *R. (UNISON) v Lord Chancellor* [2017] UKSC 75, Lord Reed at [68].

<sup>81</sup> *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, Lord Lloyd-Jones at [160].

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