WESTERN CIRCUIT RESPONSE TO THE CALL FOR EVIDENCE FROM THE INDEPENDENT REVIEW OF ADMINISTRATIVE LAW

The Western Circuit thanks the Independent Review of Administrative Law (IRAL) panel for the invitation to submit evidence in relation to its Terms of Reference and this response has been prepared on its behalf.

The Western Circuit is a body representing the interests of barristers in the South and South West of England and is one of six geographical circuits that make up the Bar of England and Wales.

We have seen the response prepared on behalf of South West Administrative Lawyers Association (SWALA) [here] and agree and endorse its conclusions.

We would, however, like to add some additional observations in relation to the Terms of Reference, which we are concerned, with the greatest respect, may betray a fundamental misunderstanding as to the relationship between the Her Majesty's Government, Her Majesty's Courts and the Crown in Parliament in the United Kingdom as presently constituted. Or, at least, raise important and unresolved constitutional issues as to which there are different views, held in good faith, and which neither the Government nor Parliament can unilaterally resolve.

The first paragraph of the Terms of Reference speak of a "balance" to be struck between *"the role of the executive to govern effectively under law"* and *"the legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts"* and implicitly assumes it is for Parliament to strike such a balance. This supposed approach makes a number of assumptions and consequently raises a number of constitutional issues, which were thought to have been finally settled in the 17th Century through a number of seminal decisions of the courts, a Civil War, the restoration of the monarchy and the constitutional settlement of 1688, which forms the basis of our current constitutional order.

Firstly, though it is undoubtedly the role of the executive to govern effectively *"under law"*, what that means is that under our constitution the executive only has (as a matter of Crown prerogative) or has been granted (by Parliament) limited powers of government. The extent of those powers is defined by law. It was settled in the *Case of Proclamations* [1610] EWHC KB J22, (1611) 12 Co. Rep 74 that the Crown has no prerogative other than the law of the land allows. This is because, as was first recognised at least in the 12th Century by Bracton, the Crown as a public institution is constituted by law and is under the law. If an officer of the Crown purports to act in a manner not authorised by law, he or she does not exercise any public authority at all - *Entick v Carrington* [1765] EWHC KB J98, rather their purported decision or exercise of power is simply not attributable to the Crown at common law (though

the Crown may be vicariously liable for his or her actions and/or under the ECHR jurisprudence such acts might be attributed to the Crown). At common law, there are no shades of nullity - *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 A.C. 147 - either there has been a lawful exercise of public authority or not. The Crown simply does not have the institutional capacity to do wrong. That is not to say that the Crown in Parliament cannot in good faith make any law or grant any power for the proper government of the country. Rather, it is hopefully inconceivable that Parliament would ever invite the Queen to approve legislation that was not promulgated in good faith for proper purposes and, if it purported to do so, would probably not be acting as a Parliament at all and arguably it would not be legislation that the Queen could lawfully approve. In other words, this is a boundary that no Parliament would conceivably test.

Secondly, the Crown has irrevocably delegated the administration of justice according to law to Her Majesty's Judges, learned in the law. This was affirmed in the reign of King James I of England in the *Case of Prohibitions* [1607] EWHC KB J23, (1607) 12 Co. Rep. 64. The jurisdiction of the superior courts of record is an original jurisdiction derived from the Crown, whether the courts were created by Act of Parliament or otherwise - Blackstone's *Commentaries on the Laws of England* Bk 3 Ch 3 pg 23-4. It is therefore only the courts that can finally determine what the law is and whether the actions of any body or person has acted lawfully. The courts therefore necessarily have a supervisory jurisdiction over all persons and bodies exercising public or private powers within their jurisdiction. The corollary of this is that anyone affected by the purported exercise of governmental power, who is subject to such authority, must be able to bring the matter before the court.

Judicial review is merely one procedure (originating in the early medieval period) which the courts have devised for bringing questions as to the legality of purported decisions or actions before the court for their determination. It is not the only procedure under which such questions may arise. If the same matters arise in private proceedings, then the same issues arise and must be answered by the courts in the same manner. If the legality of decisions or actions cannot be determined, then such decisions or actions are no longer *"under the law"* at all. Furthermore, if such decisions and actions are to remain *"under the law",* any person or body affected, whether or not they have the legal status of "citizen", must be able to petition the court for relief.

It follows there is no balance to be struck between *"legitimate interest in the citizen being able to challenge the lawfulness of executive action through the courts"* and *"the role of the executive to govern effectively under law"*, rather it is the right of any person affected to petition the court for relief that ensures that Government is *"under law"*.

That is not to say that there cannot be appropriate procedural limitations on the process of judicial review in order to ensure effective executive action. For instance, there may be circumstances in which, if the decision to act could have been lawfully taken, that it may become too late for anybody to practicably challenge the lawfulness of the action with the consequence that the decision or action is thereafter to be treated as lawful. If, however, there is not a proper opportunity to challenge the lawfulness of the decision or action, then the exercise of the powers of government are no longer *"under law"* at all. The people's trust in government, upon which effective government depends, would also be damaged or lost.

It is appreciated that the Terms of Reference take as a premise that government must be *"under law"*. If Parliament excluded certain decisions and actions from the supervision of the courts or re-defined, on a blanket basis, what is or is not lawful (which would effectively deem certain unlawful action lawful) executive action would no longer remain *"under law"*. Such an outcome would be at odds with our constitution and is strenuously opposed.

THE WESTERN CIRCUIT
20.10.20
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