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Quashing the rebellion – or inciting it?

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15 November 2021

Following the defeat of the Government in respect of the prorogation case in 2019 (which now seems to be as famous for Lady Justice Hale's spider brooch as it is for being a seminal case in which the Supreme Court ruled against the Government on whether or not it had the power to prorogue (suspend) Parliament to avoid a debate on Brexit by MPs), the Government commissioned an Independent Review of Administrative Law in 2020.

The Review was Chaired by Lord Faulks QC and reported earlier in 2021. It was asked to look at whether there was merit in streamlining the process of judicial review; whether the 'duty of candour' (a duty on public bodies to be open and honest with the Court and put all relevant materials before it) gave rise to concerns "*particularly as it affected Government*"; whether time limits were a problem; and whether standing rules (around who has the right to bring a judicial review) were too wide.

The 2019 Manifesto gives a sense of the Government's desired outcome stating, as it does, that it would ensure that judicial review was "*available to protect the rights of the individual by an overbearing state, whilst ensuring that it is not abused to conduct politics by another means or to create needless delays*".

The Review did not provide what the Government was seeking. Although it suggested some changes, its concluding observations included the following:

"*The Panel considers that the independence of our judiciary and the high reputation in which it is*

held internationally should cause the government to think long and hard before seeking to curtail its powers."

The Government was, nevertheless, not entirely deterred and the Judicial Review and Courts Bill 2021/22 had its first reading on 21 July 2021 and had its second on 26 October 2021. What follows may be impacted by amendments made as the Bill progresses through Parliament.

Although the Review largely advised the Government against making changes to judicial review, its main recommendation for change was to allow quashing orders to be suspended for a period of time. The Government accepted this recommendation and, following a further consultation of its own, also included powers within the Bill to enable quashing orders to restrict or eliminate the retrospective effect of a finding of illegality.

The current position

The current legal position is that once an act or exercise of power is found to be unlawful, anything flowing from that unlawful act or exercise of power is considered to be *void ab initio*, or void from the outset. This means that, strictly, quashing orders are not required, as it is as if the original unlawful decision has never been taken; although they are often issued for clarity, or to reinforce the consequences of the decision.

This can currently cause problems, where third parties have relied on the decision taken and then are not protected from liabilities, or other costs or consequences, which might flow from the voiding of the decision.

There is some debate about whether courts can already 'suspend' the effects of a quashing order/unlawful decision. For example, in the case of *R (Hurley and Moore) v Secretary of State for Business, Innovation and Skills [2021] EWHC 201 (Admin),* the court found that the Government had breached its duties under the Equalities Act 2010 when making regulations which raised the maximum level of university tuition fees in England. The court made a declaration about the unlawfulness but indicated that it did not consider that quashing flowed from the declaration alone, and declined to make a quashing order, on the basis that to do so would cause "*administrative chaos*".

The Review referred to the *Hurley and Moore* case as an example of a case where a suspended quashing order would have been a suitable remedy (without the uncertainty about whether the court had the power to do what it did in *Hurley and Moore*). A suspended quashing order would preserve the original decision-making to a defined point in the future. The intention would be for Parliament to use the intervening time to correct, and if necessary, retrospectively amend the law.

The proposal

Section 1 of the Bill as currently drafted will see the Act introduce a new section 29 into the Senior Courts Act 1981. It provides that a quashing order may include provision for the quashing order "*not to take effect until a date specified in the order*" or "*removing or limiting any retrospective effect of the quashing*".

Subsection (8) sets out the matters which the court will need to "*have regard to*" when deciding whether or not to exercise the new powers. These are:

1. *the nature and circumstances of the relevant defect;*
2. *any detriment to good administration that would result from exercising or failing to exercise the power;*
3. *the interests or expectations of persons who would benefit from the quashing of the impugned act;*
4. *the interests or expectations of persons who have relied on the impugned act;*
5. *so far as appears to the court to be relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act;*
6. *any other matter that appears to the court to be relevant.*

Subsection (9), is currently badly drafted, but seems to suggest that if the court intends to make a quashing order, it must exercise its powers to suspend and/or remove or limit any retrospective effect of the quashing if it appears to the court that a suspended quashing order, or a quashing order removing or limiting retrospective effect of the quashing, would "*as a matter of substance, offer adequate redress in relation to the relevant defect*" and that there is no "*good reason*" not to.

Accordingly, insofar as the court felt that a suspended quashing order, or an order removing or limiting retrospective effect of the quashing order, would not offer an adequate remedy, or that there was a good reason not to, it is not obliged to make one.

The effect?

What does this all mean for the higher education (HE) sector?

Much depends on any amendments to the wording made during the Bill's passage through Parliament; however, if the broad thrust of the drafted wording remains the same then, going forward, the courts will have a very clear power to suspend a quashing decision (so as to allow Government to close a legislative loophole or correct the law through the legislature), and/or remove the retrospective effect of quashing (so, ensuring that an unlawful decision can be relied upon by a third party up to the date of any order quashing it).

This power will mainly benefit the body whose decision is being challenged by way of judicial review, and third parties, rather than the complainant.

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Accordingly, this change could be regarded as a 'good thing' by universities and other HE institutions which are susceptible to judicial review.

However, the question remains as to the extent to which this power will be used by courts, if implemented. The "*adequacy of redress*" and "*good reason*" safeguards could mean that the new powers are rarely used.

In our view, if the powers are used at all, they will only be used in major cases where there would be far-reaching ramifications of allowing the original decision to be quashed, such as in the *Hurley and Moore* case. We highly doubt that most administrative court judges would balance the various competing interests and very often conclude that justice is better served by allowing an unlawful act to continue, to the detriment of the claimant in the matter.

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