Principles of Public Law

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RESTRICTIONS ON REVIEW: OUSTER CLAUSES

16.1 Introduction

Government may want to protect public decision makers from judicial review of their decisions for a number of reasons. In some cases, there may be a pressing need for 'finality in administration'; for example, where a large public project, such as the construction of a motorway, is at risk of being held up by uncertainty during the period in which a person could ordinarily apply for judicial review. In such a case, even the requirement that an application for permission to apply for judicial review be made 'promptly and in any event within three months' (see below, 17.3.1) may be considered too long to leave such a project 'in the air'. Another reason that government may be 'anti-' judicial review may be simply that it believes that the public authority would be better off without the interference of the courts in its decision making process. Bearing in mind that the government is the most frequent respondent to judicial review applications, we might expect this latter train of reasoning not to be uncommon!

One way in which the opportunities to challenge a decision by way of judicial review may be reduced is by providing the applicant with an alternative remedy. Where, for example, there is an appeal from a decision to a tribunal or other 'appellate' body, then, in the ordinary course of events, a person wishing to challenge the decision must avail himself or herself of that statutory appeal rather than seeking judicial review (see below, 17.2). Alternatively, it may be possible to 'divert' people from making a formal challenge to the decision at all, by providing alternative means of redress, such as the ombudsmen (see Chapter 10).

A more radical way of limiting the scope of judicial review is by means of a statutory provision which seeks either to limit or to exclude entirely the right to challenge the decision in the courts. It is these types of provision, often called 'ouster clauses', with which we are concerned in this chapter. The history of the court's attitude towards ouster clauses is a complex one, and even today the law on the subject is far from straightforward. On the one hand, the courts, in dealing with such clauses, are faced with what is often a fairly obvious intention of Parliament – to exclude or limit their power to intervene. On the other hand, the courts are often hostile to ouster clauses on the basis that they present a challenge to the rule of law, because they displace the court's proper constitutional role of scrutinising and regulating the actions of public bodies. It is feared that, if the courts are precluded from adjudicating on the legality of the actions of government departments or other public

bodies, there may be no effective check on their actions. It may also constitute a breach of the right of access to a court, which is constitutionally protected both under Art 6 of the ECHR (see Chapter 21) and under the common law (see *R v Lord Chancellor ex p Witham* (1997)). There is, therefore, a general presumption that such clauses have as narrow an ambit as possible. Indeed, the court's restrictive interpretation of some ouster clauses has limited their effect almost to nothing, notwithstanding the clear intention of the parliamentary drafter to the contrary.

The difficulty has been that, in their attempts to avoid the apparent legislative intention of such clauses (that is, that the court's jurisdiction is to be limited or excluded), the courts have developed principles of statutory construction which, if consistently applied, would have *too great* an effect, because they would logically lead the courts to bypass most, or all, ouster clauses entirely. The courts have shied away from such a radical result, which would so obviously flout the intentions of Parliament. There has thus been an uneasy attempt to walk a fine line between the theory and the practice; the result has been apparent, and real, conflicts between different authorities, and distinctions of almost excruciating complexity. Students often have great difficulty with this topic; indeed, some courses avoid the subject altogether. There is some sense in doing so, because, in practice, cases on ouster clauses are comparatively rare; no more than a very few every year, if that. On the other hand, for those who do have to deal with the topic, some path through the minefield is required.

In what follows, we seek to give an overview of the subject, although it not possible in the space available to discuss the full intricacies of even the major decisions. We have divided ouster clauses into two types.

16.2 Two types of ouster clause

Although ouster clauses come in a number of different formulations, there is a broad distinction between two types of clause, which the courts treat in very different ways. On the one hand, there are clauses which do not try to exclude the court's jurisdiction completely, but only seek to *time limit* it by providing for a specified period of time (almost always six weeks) within which any challenge to the decision must be brought; after that time, any challenge is excluded (and there is no discretion to extend time, unlike the time limit for applying for judicial review under Ord 53, considered below, 17.3). On the other hand, there are the so called *total ouster clauses*, which seek to exclude the court's powers entirely, by providing that 'the decision shall not be challenged in any court of law', or some similar formulation.

The history of the two types of ouster clause is very different. Whilst total ousters, often known as 'no *certiorari* clauses', have a statutory pedigree going back centuries, six week ousters are a more recent invention. The first such

clause was enacted in s 11 of the Housing Act 1930, and dealt with slum clearance orders; indeed, many early six week ouster clauses were enacted in the context of public works schemes, and were framed to combat difficulties which had arisen following a series of cases in which successful applications for certiorari had been made to quash orders of local authorities, when the schemes concerned had been brought almost into operation, and after considerable expense had been incurred. Since that time, six week ouster clauses have been enacted in a wide variety of statutory contexts; some modern examples of their use being:

(a) s 14 of the Petroleum Act 1987;

(b) s 49 of the Airports Act 1986;

(c) s 18 of the Telecommunications Act 1984;

(d) ss 287, 288 of the Town and Country Planning Act 1990;

(e) s 55 of the Ancient Monuments and Archaeological Areas Act 1979;

(f) Sched 2 to the Highways Act 1980.

We will have to look in some detail at how the courts respond to the two different types of ouster clause, and examine how they distinguish between them. It is worth summarising straight away, however, the end result of the discussion:

(a) the courts will almost invariably give effect to a six week ouster clause. If such a clause provides that a decision may not be challenged in any way after a six week period, then the courts will not entertain a challenge after that period – even, apparently, if the applicant claims that the reason that he or she did not bring a challenge within six weeks was due to bad faith on the part of the decision maker (see *R v Secretary of State for the Environment ex p Ostler* (1976), discussed below);

(b) by contrast, the courts are very unwilling to give effect to a total ouster clause – although there are occasions where the courts have accepted that judicial review is barred by such a clause.

16.3 General principles: the court's attitude to ouster clauses

The court's 'respectful' attitude to ouster clauses is best illustrated by a classic decision of the House of Lords which concerned a six week ouster clause. In *Smith v East Elloe RDC* (1956), Mrs Smith wished to challenge a compulsory purchase order made by the council in respect of her property. She had various grounds of challenge, including an allegation that the order had been procured in bad faith by the clerk of the council. Unfortunately, she did not bring her challenge until almost six years after the order was made; indeed, until after a house on her land had been demolished and new houses had

been built. She was therefore met with the argument that her claim could not succeed, because the Acquisition of Land (Authorisation Procedure) Act 1946 (Part IV of Sched 1) provided that:

> 15(1) If any person aggrieved by a compulsory purchase order desires to question the validity thereof ... on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act, ... he may, within six weeks from the date on which notice of the confirmation or making of the order ... is first published ... make an application to the High Court ...
>
> 16 Subject to the [above], a compulsory purchase order ... shall not ... be questioned in any legal proceedings whatsoever.

The House of Lords unanimously held that this six week ouster clause precluded *any* challenge after the six week period had expired – even a challenge on a ground such as bad faith. As Viscount Simonds put it,

> I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court ... But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of paragraph [16] .... What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words.

It is important to note that the House of Lords did not suggest in *East Elloe* that their decision was dependent upon the fact that para 15 of the Schedule allowed a challenge within a six week period. If you read Lord Simonds' words quoted above, it appears that he would have come to the same conclusion if the legislation had simply contained a *total* ouster clause, framed as in para 16.

However, the decision in *East Elloe* was called into question by another decision of the House of Lords, in the landmark case of *Anisminic v Foreign Compensation Commission* (1969). This case involved a 'total' ouster clause: the Foreign Compensation Act 1950 provided that determinations of the FCC 'shall not be called into question in any court of law.' Anisminic wished to challenge a determination of the FCC on the ground that the FCC had misconstrued the legal effect of the statutory framework under which it operated, and had therefore reached a decision which was a nullity. Could Anisminic avoid the ouster clause? Or did the reasoning of *East Elloe* apply, so that the statutory words were wide enough to exclude 'any kind of challenge'?

The House of Lords held, by a majority, that the ouster clause did not prevent Anisminic from challenging the decision of the FCC. The leading speech of Lord Reid is well worth reading in full, but its essential reasoning can be summarised in a series of propositions. He held:

(a) Anisminic's challenge involved a claim that the FCC had, by misconstruing the statutory framework, acted beyond its powers (that is, 'outside its jurisdiction');

(b) if Anisminic was right, the FCC's decision was therefore a 'nullity' – the determination had no legal effect;

(c) although the ouster clause provided that determinations of the FCC 'shall not be called into question in any court of law', this could have no effect because *the FCC had never made a determination* – it had simply made a purported determination, which was a nullity. Thus, Lord Reid did not *ignore* that statutory wording; rather, he found a way round it, by holding that *there never was a valid determination in respect of which the court's powers could be ousted*. The court was not 'calling into question' a determination; instead, it was pointing out that a determination had never been made.

The reasoning in (c) is clearly the crucial step which enabled the House of Lords to avoid the total ouster clause without simply defying the words of Parliament. But the case left at least two important questions unanswered: which grounds of judicial review, if established, mean that the public authority has acted 'outside its jurisdiction' in the sense of (a) above? All errors? Only misconstructions of law? And what was the status of *East Elloe* after *Anisminic*? The House of Lords, in the latter case, did not overrule *East Elloe*; instead, it purported to distinguish it. But surely the reasoning of Lord Reid at (c) above applies with equal force to the *East Elloe* ouster contained in para 16 of the Schedule of the Acquisition of Land Act: it could be said that the compulsory purchase order was a nullity, and that the court could, therefore, quash the purported purchase order even within the six week period without infringing the ouster's prohibition on 'questioning' any determination. Was *East Elloe*, therefore, impliedly overruled by *Anisminic*?

It is easier to examine these two questions in reverse order.

16.4 Six week ouster clauses

The answer to the second question is quite clear: *East Elloe* has survived *Anisminic*, and the former decision remains good law in respect of six week ouster clauses. The Court of Appeal was given the opportunity to choose between (or to attempt to reconcile) the two decisions in *R v Secretary of State for the Environment ex p Ostler* (1976). In that case, Mr Ostler asked the courts to quash an order authorising the construction of a new road, and associated compulsory purchase orders, on the basis that they were vitiated by a breach of natural justice and by bad faith on the part of the Secretary of State or his Department. As in *East Elloe*, the legislation in question contained a six week ouster clause providing that, after the six week period, the scheme 'shall ... not be questioned in any legal proceedings whatsoever'. And, like Mrs Smith, Mr Ostler had failed to challenge the scheme within six weeks. However, he

submitted that at least part of the reason why he had not brought his challenge earlier was that he had been unaware of a secret agreement between the Department and a particular firm. In other words, he blamed the Secretary of State for the fact that he had not brought his challenge within the statutory time limit. The Court of Appeal rejected the argument that *East Elloe* was inconsistent with *Anisminic*. Lord Denning MR (with whom Shaw LJ agreed) advanced a number of distinctions between the two cases, not all of which are totally convincing (indeed, Lord Denning himself later 'recanted' in his book, *The Discipline of Law* (1979)). Perhaps his most important distinction was that whereas Anisminic concerned a total ouster clause, in *East Elloe* (and in *Ostler*):

> ... the statutory provision has given the court jurisdiction to inquire into complaints so long as the applicant comes within six weeks. *The provision is more in the nature of a limitation period than of a complete ouster.*

In other words, Lord Denning was suggesting that a six week ouster is more in the nature of the three month time limit for judicial review applications: simply a stipulation as to the time for bringing a claim, rather than an 'ouster' of the court's jurisdiction. But it may be objected that, while this provides a practical reason for distinguishing the two types of ouster (and, indeed, a potential justification of the constitutional legitimacy of six week ousters), it does not provide a *principled* answer to the question posed above: why is it that Lord Reid's reasoning does not apply to ouster clauses where a six week 'grace period' is allowed? There is no simple answer to this objection. In one sense, Lord Reid's reasoning is just too strong: its logic impels the conclusion that all ouster clauses providing that decisions 'shall not be questioned' or 'are conclusive' are of no effect (as long as the decision in question is a nullity) – whether or not an applicant is afforded a six week period within which to bring a challenge.

Nevertheless, *East Elloe* and *Ostler* have been followed in a number of more recent cases. Thus, in *R v Secretary of State for the Environment ex p Kent* (1988), the applicant was frustrated by a six week ouster clause, even though the reason that he had not challenged the decision in question (a grant of planning permission) within six weeks was that the local council had mistakenly failed to notify him of the application for planning permission! (See also *R v Cornwall CC ex p Huntingdon* (1992)).

The absence of principle in the case law can be illustrated by asking a simple question: what would happen if legislation included a 'one week' ouster clause? Or a 'one day' ouster clause? Presumably, at some point, the courts would conclude that such a provision was no longer 'more in the nature of a limitation period than of a complete ouster', to quote Lord Denning's words – and when that dividing line had been crossed, the court would treat the provision according to the principles governing total ouster clauses (see below, 16.5). But, at present, the basis upon which such a dividing line could be drawn is not clear.

16.5 Total ouster clauses

In relation to total ouster clauses, the reasoning of Lord Reid in *Anisminic* remained undisturbed by *Ostler* and the other six week ouster clauses cases. We therefore need to return to the first of the two questions which we asked at the end of 16.3. Which grounds of judicial review will, if established, lead the court to conclude that the decision in question is a 'nullity', such that Lord Reid's reasoning that 'there never was a decision' can operate? This is the same question that we touched on, in a different context, above, 12.9, where it was asked whether all errors of law are now 'jurisdictional'.

Lord Reid himself did not, in *Anisminic*, provide a formal answer to the question. But he made it clear that his answer would have been a wide one, from the range of examples which he gave:

> There are many cases where, although the tribunal had jurisdiction to enter into the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provision giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive ...

Lord Reid may not have meant the list to be exhaustive, but, in fact, with the exception of irrationality, it is difficult to think of any head of review which does not fall within Lord Reid's catalogue. He himself clearly did not think that all errors which a authority might make would lead to the decision being a nullity, because he continued the above passage as follows:

> But if [an authority] decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

The difficulty, post-*Anisminic*, has been to identify any errors which fall within this latter category; that is, errors which do not take the authority outside its powers (which are not 'jurisdictional errors'). Without going through the subsequent case law in enormous detail, the following different (and contradictory) views of the law can be suggested.

View 1: All errors of law are jurisdictional; any public law decision which is judicially reviewable takes the decision maker outside its powers

You may remember that we suggested that this is the everyday working assumption of the courts in cases where an ouster clause is not involved

(above, 12.9). It was also the view taken by Lord Denning MR in *Pearlman v Governors of Harrow School* (1978). There, the question was whether a challenge to the decision of a county court judge that a central heating system was not a 'structural alteration' for the purposes of the Housing Act 1974 was barred by a provision that 'any determination [of the judge] shall be final and conclusive'. Lord Denning (in the minority of the Court of Appeal on this point) held that the distinction between jurisdictional and non-jurisdictional errors of law was so fine that it could now be 'discarded'; all errors of law were jurisdictional, and, since the judge had (he thought) made an error of law, the Court of Appeal could avoid the ouster clause and quash the decision by holding that there never was a valid 'determination' for the ouster clause to protect.

View 2: There is still, for all public decision makers, a distinction between 'jurisdictional' and 'non-jurisdictional' errors of law

This was the view of the other two members of the Court of Appeal in Pearlman, Lane and Eveleigh LJJ. Unfortunately, the two judges then disagreed as to whether the particular decision before them was or was not jurisdictional! Eveleigh LJ held that the error did take the county court judge outside his powers, and the decision could therefore be quashed (thereby agreeing with Lord Denning in the result), while Lane LJ, dissenting, held that the decision was one on which Parliament had given the judge the power to decide wrongly as well as rightly – and that his decision, therefore, could not be questioned. Lane LJ's view has been supported by the Privy Council in *South East Asia Fire Bricks v Non-metallic Mineral Products Manufacturing Employees Union* (1981), and by the High Court of Australia.

View 3: The compromise position of Lord Diplock in Re Racal Communications Ltd *(1981)*

In the decision of the House of Lords in *Re Racal*, Lord Diplock (with whom Lord Keith agreed), set out a position midway between Lord Denning's and Lane LJ's views in *Pearlman*. He held:

(a) that as regards *administrative tribunals and authorities*, the effect of *Anisminic* is effectively (as Lord Denning said) that any error of law takes such a authority outside its powers; there is no longer any distinction between jurisdictional and non-jurisdictional errors of law;

(b) however, as regards *inferior courts of law* (such as county courts), there was 'no similar presumption'; Parliament may have given an inferior court the power to decide questions of law wrongly. The 'subtle distinctions' between jurisdictional and non-jurisdictional errors of law thus survive in this context. Since *Pearlman* concerned the decision of a county court judge, Lane LJ's dissenting judgment was, on the facts, correct.

The practical reasoning behind Lord Diplock's distinction between administrative bodies and inferior courts is that Parliament is more likely to

have intended to leave the ultimate power to adjudicate upon questions of law to a court than to an administrative authority which may not be legally qualified. This has been translated by Lord Diplock into a 'presumption' about the intention of Parliament.

Many students find the above distinctions not only of great complexity theoretically, but confusing practically, because the present state of the law is so uncertain. However, strictly in point of authority, it can now be said that neither view 1 (Lord Denning's view in *Pearlman*) nor view 2 (Lane LJ's approach) have been followed by later decisions. Instead, Lord Diplock's view in *Re Racal* now represents the law. Even though only Lord Keith of the House of Lords explicitly agreed with him in that case (and even though Slade LJ did not accept Lord Diplock's view in the later case of *R v Registrar of Companies ex p Central Bank of India* (1986)), Lord Diplock's view appears to have been approved (*obiter*) by the House of Lords in *R v Hull University Visitor ex p Page* (1992), and followed in *R v Visitors to the Inns of Court ex p Calder* (1993).

One is still left with no clear answer to the question of *how* one identifies those errors of law which an inferior court has the power to decide rightly or wrongly. Lord Diplock, in *Re Racal*, suggested that, where the question at issue is 'an interrelated question of law, fact and degree' (for example, does the installation of central heating count as a 'structural alteration'?), the courts should be slow to hold that Parliament did not intend a county court judge to have the power ultimately to decide the question. Nevertheless, it is difficult not to have some sympathy with the view of Lord Denning in *Pearlman* that, in reality, the tail is wagging the dog:

> So fine is the distinction [between errors within and without jurisdiction] that in truth the High Court has a choice before it whether to interfere with an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in the words: 'The court below had no jurisdiction to decide this point wrongly as it did.' If it chooses not to interfere, it can say: 'The court had jurisdiction to decide it wrongly, and did so.' Softly be it stated, but that is the reason for the difference between the decision of the Court of Appeal in *Anisminic* and the House of Lords.

16.6 'Super-ouster clauses'?

In this chapter, we have not, for reasons of simplicity, distinguished between different types of total ouster clause. On the whole, this is justifiable, because Lord Reid's basic *Anisminic* reasoning applies to all such clauses, however worded. Thus, the courts have found that review for jurisdictional error is not excluded notwithstanding a provision that:

(a) the decision 'shall not be questioned' (*Anisminic* itself);

(b) the decision is 'final and conclusive': *R v Medical Appeal Tribunal ex p Gilmore* (1957);

(c) the decision 'shall not be removed by certiorari': *per* Lord Denning, *obiter*, in *Gilmore*.

However, it should not be assumed that this will necessarily always be the case. It is at least possible that a super-ouster clause could be framed so as to defeat Lord Reid's reasoning, thereby excluding judicial review entirely. For example, consider a clause providing that:

> ... any decision or *purported decision* made or *purported to be made* under the authority of [the statutory power] shall not be called into question in any proceedings whatsoever.

It could not be argued that, because the decision was a nullity, there was no *purported* (as opposed to actual) decision; thus it might be that a court would hold that such an ouster was effective to exclude judicial review. The question is largely theoretical, because no ouster clause in such terms has been enacted. However, you might want to consider the effect of s 4 of the Local Government Act 1987, which provides that:

> Anything done by the Secretary of State before the passing of this Act for the purposes of the relevant provisions ... shall be deemed to have been done in compliance with those provisions.

Whilst there is no reported case dealing with s 4, it may be that the courts would still seek to resist the 'deeming' effect of the provision by holding that anything done by the Secretary of State which was in fact *not* for the purposes of the relevant provisions is not, by reason of the provision, to be the subject of the 'deeming' clause. In that way, the court would preserve, at least in a limited measure, the ability to scrutinise by way of judicial review decisions taken under the relevant provisions. In addition, it is important to have in mind the right of access to a court guaranteed by Art 6 of the ECHR, enforceable in English law by virtue of the Human Rights Act. If the underlying right at issue is one which is protected by Art 6 (as to which, see Chapter 21), then a super-ouster clause may violate the convention, and would not be a legitimate device to protect the decision from review.

RESTRICTIONS ON REVIEW: OUSTER CLAUSES

An ouster clause is a legislative provision which purports to limit or exclude the power of the courts to review a decision.

The courts interpret ouster clauses as restrictively as possible; there is a presumption that Parliament did not intend to prevent the courts from exercising their constitutional role of scrutinising exercise of power by public bodies, and of quashing decisions flawed by errors of law. In addition, an ouster clause in interfering with the right of access to the court may violate Art 6 of the European Convention.

There is a clear distinction between the court's attitude to two types of ouster clauses:

(a) *six week ouster clauses* (providing that a decision may not be challenged in any way after a six week period); and

(b) *total ouster clauses* (which purport to exclude the jurisdiction of the court completely by providing, for example, that a decision 'shall not be questioned' in any court of law).

The courts will almost invariably respect a *six week ouster clause*. An applicant may not challenge a decision after the six week period, even if it is alleged that the delay is the responsibility of the respondent: *Smith v East Elloe RDC* (1956); *R v Secretary of State for the Environment ex p Ostler* (1976); *R v Secretary of State for the Environment ex p Kent* (1988).

There is a far greater reluctance to accept that the court's jurisdiction has been excluded by a *total ouster clause*. In *Anisminic v Foreign Compensation Commission* (1969), the House of Lords held that, if the error of law allegedly committed by the decision maker takes the authority outside its powers (that is, if it is a 'jurisdictional error'), then the court's ability to intervene is not excluded by a 'shall not be questioned' clause, because the court, in reviewing the decision, is not 'calling into question' the decision, but, rather, finding that a valid decision was never made.

Anisminic left open the question of which errors of law are 'jurisdictional errors' such that the court can avoid the effect of a total ouster clause and intervene. This generated great confusion in the subsequent case law. The position now appears to be that enunciated by Lord Diplock in *Re Racal Communications Ltd* (1981):

(a) as regards *administrative tribunals and authorities*, all errors of law are jurisdictional errors, so that the court, if it finds that the decision maker has made an error of law, can always evade the ouster clause and intervene to

quash the decision (approving, in this context, the view of Lord Denning MR in *Pearlman v Governors of Harrow School* (1978));

(b) as regards *inferior courts of law*, it may be that, in particular circumstances, Parliament did intend to give an inferior court the power to decide questions of law wrongly as well as rightly – that is, in this context, an error of law may be 'non-jurisdictional' (approving, in this context, the dissenting opinion of Lane LJ in *Pearlman*).

This distinction was approved by the House of Lords in *R v Hull University Visitor ex p Page* (1992). It is not, however, very clear how one identifies which errors of law are non-jurisdictional, beyond the point that 'interrelated question of law, fact and degree' are more likely, in so far as they are treated as questions of law, to be non-jurisdictional. As Lord Denning has suggested, in practice, the tail appears to wag the dog; if the court wishes to intervene, then it will label the error of law as going to jurisdiction.