
GARDEN COURT
CHAMBERS

# Public Law Issues with Statutory Instruments

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# Public Law Issues with SIs

## Grounds of Challenge

Michael Etienne, Garden Court Chambers

# Grounds of Challenge

**Classic statement**

CCSU v v Minister for the Civil Service [1985] A.C 374, per Lord Diplock at p.410:

- Illegality
- Irrationality
- Procedural Impropriety
- Incompatibility with ECHR/EU law principles

# The Context

**_R (PLP) v Lord Chancellor_ [2016] UKSC 39, [2016] AC 1531, Per Lord Neuberger at paras 20-39:**

**[20]** The draft order, once formally made, would, of course, be secondary, or subordinate, legislation, unlike LASPO itself which, as a statute, is primary legislation. Primary legislation is initiated by a Bill which is placed before Parliament. To the extent that Parliament considers it appropriate, all or any of the provisions of a Bill can be subject to detailed scrutiny, discussion, and amendment in Parliament before being formally enacted as primary legislation; it is then formally approved by the monarch, whereupon it becomes a statute. In our system of parliamentary supremacy (subject to arguable extreme exceptions, which I hope and expect will never have to be tested in practice), it is not open to a court to challenge or refuse to apply a statute, save to the extent that Parliament authorises or requires a court to do so.

# The Context

**_R (PLP) v Lord Chancellor_ [2016] UKSC 39, [2016] AC 1531, Per Lord Neuberger at paras 20-39:**

**[21]** Subordinate legislation consists of legislation made by members of the Executive (often, as in this case, by Government ministers), almost always pursuant to an authority given by Parliament in primary legislation. The draft order in the present case would be a statutory instrument, which is a type of subordinate legislation which must be laid in draft before Parliament. Some statutory instruments are subject to the negative resolution procedure - ie they will become law unless, within a specified period, they are debated and voted down. Other statutory instruments, such as the draft order in this case, are subject to the affirmative resolution procedure - ie they can only become law if they are formally approved by Parliament - see sub-ss (6) and (7)(a) of s 41.

# The Context

**_R (PLP) v Lord Chancellor_ [2016] UKSC 39, [2016] AC 1531, Per Lord Neuberger at paras 20-39:**

**[22]** Although they can be said to have been approved by Parliament, draft statutory instruments, even those subject to the affirmative resolution procedure, are not subject to the same legislative scrutiny as bills; and, unlike bills, they cannot be amended by Parliament. Accordingly, it is well established that, unlike statutes, the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court. As Lord Diplock said in *F Hoffmann-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295, 365, "even though [subordinate legislation] is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament, … I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred upon him by the … Act of Parliament under which the order [was] purported to be made …".

# Grounds of Challenge

**Statutory Instruments specifically**

***a) Ultra vires/ illegality***

***R (PLP) v Lord Chancellor***

[23] Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate legislation is *ultra vires*, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.

# Grounds of Challenge

**Statutory Instruments specifically**

***b) Irrationality***

***R (on the application of Salvato) v Secretary of State for Work and Pensions* [2021] EWHC 102 (Admin)**

122 As can be seen from [47], the claimants said that it was irrational to decline to fix the problem. The Secretary of State argued that other factors outweighed the desirability of finding an answer to the problem. It was this judgment that was challenged as irrational. At [49], Rose LJ cited a passage from *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649, at [113]:

"A policy-maker may reasonably decide that the disadvantages of a finely tuned solution to a problem outweigh its advantages and that a broader measure is preferable, even if the broader measure is both over- and under-inclusive in that it catches some cases in which there is no or no significant problems and fails to catch some cases in which the problem occurs".

# Grounds of Challenge

## *b) Irrationality*

### *R (on the application of Salvato) v Secretary of State for Work and Pensions* [2021] EWHC 102 (Admin)

123 Rose LJ continued at [50]:

"That, I believe, provides a helpful framework for how to approach irrationality in this case too. We need to consider what are the disadvantages of deciding not to 'fine-tune' the Regulations thereby allowing the non-banking day salary shift problem to persist unresolved; what are the disadvantages of adopting a solution to the non-banking day salary shift problem; would a solution be consistent or inconsistent with the nature of the universal credit regime; and has a reasonable balance been struck by the SSWP – or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?"

# Grounds of Challenge

## *b) Irrationality*

## *R (on the application of Salvato) v Secretary of State for Work and Pensions* [2021] EWHC 102 (Admin)

175 The approach adopted by the authorities when considering whether a discriminatory measure is objectively justified has much in common with the approach to considering whether a measure is rational. As Leggatt LJ noted in *C's* case at [90], the intensity of review applicable in a common law rationality challenge also varies depending on context. This point was made by Lord Mance in *Kennedy*, at [50]-[55]. The main contextual feature mentioned there was the impact of the matter under challenge on the fundamental rights of the claimant, but *Johnson* is clear authority that the intensity of review will be greater (and the discretionary area of judgment open to the decision-maker correspondingly narrower) if the matter under challenge was not specifically considered by the decision-maker. Ultimately, as Rose LJ said at [50] of her judgment in *Johnson*, the key question is very similar to that which arises when considering objective justification: "has a reasonable balance been struck by the SSWP – or rather is it possible to say that no reasonable Secretary of State would have struck the balance in the way the SSWP has done in this case?"

# Grounds of Challenge

***b) Irrationality***

***R (on the application of Salvato) v Secretary of State for Work and Pensions* [2021] EWHC 102 (Admin) [177]:**

1. "Deliberate choices" about systems and design – less so about the effects of implementation – the "key issue" on the appeal.
2. The Minister had not recognized the problem but decided to do nothing about it.
3. Evidence about the cost implications of fixing the problem was generalized.
4. "The feature under challenge has effects that are antithetical to one of the underlying principles of the overall scheme."
5. The justifications for the general rule did not adequately explain the need to maintain the feature of the system under challenge.

# Grounds of Challenge

***c) Lack of consultation***

***R (on the application of Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 [82-85 & 87]**

- Statutory duty
- Established practice
- Scale of impact

# Grounds of Challenge

***c) Lack of consultation***

***R (on the application of Article 39) v Secretary of State for Education* [2020] EWCA Civ 1577 [82-85 & 87]**

- Statutory duty
- Established practice
- Scale of impact

# Grounds of Challenge

### *c)* PSED

### *R (on the application of Adiatu and the IWGB (claimants)) v HM Treasury*

- The PSED applies to decisions given effect to under secondary legislation, including the laying of such regulations: [216 – 220]:

> 220. In our judgment, it is clear from the *C* case, and the authorities cited by the Court of Appeal, that the public functions exercised by the Defendant which are covered by s149 include the steps which are taken before delegated legislation is laid before Parliament. As the Court of Appeal made clear in *C*, the function of taking those preparatory steps is distinguishable from the function of Parliament, which is to approve and disapprove the rules as laid down. It follows that there is no inconsistency with constitutional principle for Parliament to have decided, through s 149, to give the courts a role in reviewing the process followed by a Government Department before laying a statutory instrument before Parliament.

# Grounds of Challenge

### *c)* PSED

### *R (on the application of Adiatu and the IWGB (claimants)) v HM Treasury*

- The PSED **does not** apply to decisions that are given effect by primary legislation: [229-238]:

230. In our judgment, the position is different where the challenge is to a decision to invite Parliament to amend primary legislation. The making of primary legislation is the quintessential Parliamentary function. In our, view it would be a breach of Parliamentary privilege and the constitutional separation of powers for a court to hold that the procedure that led to legislation being enacted was unlawful. The consequence of this would be that the legislation itself would be *ultra vires* and void (even though the Claimants in this stage seek declaratory relief only). The court has no power to declare primary legislation void on a basis such as this.

# Grounds of Challenge

### *c)* PSED

### *R (on the application of Adiatu and the IWGB (claimants)) v HM Treasury*

- The PSED applies to decisions that a public authority takes or contemplates taking but not to matters never within serious contemplation: [239-244]:

242. In our judgment, the Defendant's submission is correct. The "exercise of the [public authority's] functions" for the purposes of s149(1) consists of the implementation of the measures that the public authority decides upon. In the present case, these were the steps that were taken to change the rule relating to SSP, and to introduce the JRS, in order to combat the effects of the coronavirus pandemic. A public authority must have regard to the equalities implications of the steps that it intends to take. It need not have regard to the equalities implications of other steps, which it is not taking, and is not even considering. Otherwise, the PSED would indeed go on ad infinitum. A public authority would not only have to comply with the PSED in relation to the decision which it takes, but also in relation to the infinite spectrum of other decisions which it might have taken instead.

# Grounds of Challenge

### *c)* PSED

### *R (on the application of Adiatu and the IWGB (claimants)) v HM Treasury*

- The origin of indirect discrimination: [149]

149. In relation to the rate of SSP, there is no "hidden barrier". *Essop* is not authority for the proposition that something places those with protected characteristics at a particular disadvantage because their circumstances, unconnected with the PCP, are less favourable than those of others. In our judgment, the Defendant is right to submit the Claimants do not rely upon any disadvantage that is caused by the rate of SSP itself. Rather, they rely upon an alleged disadvantage, the absence of other financial resources, which is not caused or related to the rate of SSP in any way. This does not turn the rate of SSP into a PCP which places women or BAME employees at a particular disadvantage. In our view the EU law challenge to the rate of SSP is wholly unsustainable.

# Public Law Issues with Statutory Instruments

Ollie Persey, Garden Court Chambers

30 September 2021

# Considerations when challenging SIs

1) Timing
2) Parliamentary scrutiny
3) Judicial review reform

# Timing

1) Ordinary principles on prematurity and ripeness apply: see e.g. *R. (on the application of Burkett) v Hammersmith and Fulham LBC (No.1)* [2002] UKHL 23; [2002] 1 W.L.R. 1593

2) Can challenge when in draft: *R. (on the application of Public Law Project) v Secretary of State for Justice* [2016] UKSC 39; [2016] A.C. 1531

3) Yet to finish the process of Parliamentary scrutiny: *R. (on the application of TP) v Secretary of State for Work and Pensions* [2019] EWHC 1127 (Admin); [2019] P.T.S.R. 2123

4) Need to see how powers are exercised: *R. (on the application of ClientEarth and Marine Conservation Society) v Secretary of state for Environment, Food and Rural Affairs* [2019] EWHC 2682 (Admin)

5) Fast-changing scenarios: *R. (on the application of Shaw (A Child)) v Secretary of State for Education* [2020] EWHC 2216 (Admin); [2020] 8 WLUK 113; *R. (on the application of Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 W.L.R. 2326

6) Collateral attack: i.e. attack once there is evidence of impact and decisions made pursuant to SI: *R. (on the application of Salvato) v Secretary of State for Work and* Pensions [2021] EWHC 102 (Admin); [2021] P.T.S.R. 1067

# Parliamentary scrutiny

1) Irrationality in timing of laying regulations
2) Parliamentary material and proportionality

# Irrationality in timing of laying regulations- justiciability

*"150. In my judgment, the judicial exclusion zone applies to decisions to lay delegated legislation as well as primary legislation before Parliament, except in cases where statute and not merely parliamentary convention bestows upon the court authority to intervene. Unless there is some specific statutory obligation affecting the laying of secondary legislation, the decision when to lay an instrument is as much taken in the political capacity of Member of Parliament as the decision whether to lay one.*
*151. In my judgment, the court would be dictating the terms on which the minister should exercise his or her political functions if it were to decide when the minister is free or not free to lay legislation before Parliament. I accept that, as decided in Adiatu and other cases, the position is different where it is not the court or the common law but an express statutory obligation which limits the minister's freedom to lay secondary legislation before Parliament."*

# If justiciable, not irrational

*"154. The absence of the usual 21 days for parliamentary scrutiny must be viewed in the light of the pandemic and the destruction it was wreaking at the end of April and the beginning of May 2020. If the 21 day convention was to be observed, the 2020 Regulations would either have had to be drafted weeks earlier – during the first part of the period of discussion and research into what should happen – or come into force weeks later, by which time some deadlines relaxed by the regulations would have expired and local authorities placed in further breach of the duties it was impossible for them to perform."*

# Proportionality

*Wilson v First County Trust Ltd (No 2)*[2004] 1 AC 816 at [67]
*"it is a cardinal constitutional principle that the will of Parliament is expressed in the language used by it in its enactments. In discharging their duties under the Human Rights Act 1998 (HRA) the Court is to assess the proportionality of legislation on that basis"*. However, a Court sometimes need "*additional background information"* in order to discharge its constitutional functions under the HRA.

Poorly reasoned justification in Parliamentary debates does not *"count against"* the legislation on issues of proportionality. *However, see e.g. Mathieson v Secretary of State for Work and Pensions [2015] 1 WLR 3250* where negative inferences were drawn from the lack of Parliamentary debate.

# Judicial review reform: suspended and prospective only quashing orders

1. See factsheet: jr-courts-bill-fact-sheet-jr.pdf (publishing.service.gov.uk)
2. A non-event? Lewis Graham: Suspended and prospective quashing orders: the current picture – UK Constitutional Law Association

# Thank you

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