Jurisdiction revisited: The inherent supervisory power of the courts to review administrative decisions - the case of R (Ignaoua) v SSHD [2013] EWCA Civ 1498

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Jurisdiction revisited: The inherent supervisory power of the courts to review administrative decisions - the case of R (Ignaoua) v SSHD [2013] EWCA Civ 1498

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Introduction: The Court of Appeal handed down its decision in R (Ignaoua) v SSHD1 on 21 November. Ignaoua emphasizes that Parliament does not purport to remove the court’s jurisdiction to entertain judicial review proceedings under Section 15 of the Justice and Security Act 2013. The Court of Appeal had to decide had to decide with reference to Section 15 whether the Secretary of State had lawful authority to terminate judicial review proceedings relating to the exclusion of Habib Ignaoua from the United Kingdom. The court’s power (jurisdiction) to review the legality of administrative decisions through the process of judicial review does not come from statute (like some tribunals – see R (Cart) v Upper Tribunal [2011] QB 120). This power is inherent to the courts and has great constitutional significance. The courts often use statutory rules of construction to thwart legislative attempts limiting access to courts or ousting their supervisory jurisdiction (see Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147)).

The case of Ignaoua revisited this issue. Lord Justice Richards makes the point that Section 15 of the Justice and Security Act 2013 (which inserts a new Section 2C to the Special Immigration Appeals Commission Act 1997) “...does not block an application to the court by way of judicial review.”

This paper argues that the provisions in both the primary and secondary legislation in Ignaoua are clear enough to convey Parliament’s intention to give the Home Secretary the power to terminate judicial review proceedings or appeal from judicial review proceedings relating to a direction to exclude a foreign national from the United Kingdom. However, the Court of Appeal used a long established common law principle that a statutory provision would be interpreted narrowly if it purports to deny access to the courts unless it has clear words to that effect.

The case / discussion: In July 2010, the Home Secretary made Habib Ignaoua the subject of an exclusion direction from the United Kingdom on the ground that his presence here was not conducive to the public for reasons of national security. In October 2010, Habib Ignaoua issued a judicial review claim to challenge the exclusion direction. Ignaoua’s application passed the permission stage but the Home Secretary notified the court that she relied on secret materials to defend the claim. The court directed the Home Secretary to issue a public interest immunity (PII) certificate to enable the court to determine appropriateness of disclosing or withholding the secret materials.

Over two years, the issues of disclosure and PII remained unresolved and so the court re-fixed the PII hearing for 18 July 2013. On 16 July 2013, the Home Secretary made a further application to adjourn the re-fixed hearing but this application was refused by Ouseley J. As a result, the Home Secretary used her new powers by issuing a certificate under Section 2C of the 1997 Act and Article 4(3) of the Justice and Security Act 2013 (Commencement, Transitional and Saving Provisions) Order 2013) which came into force only on 25 June 2013. The purported effect of issuing the certificate was to terminate Habib Ignaoua’s the judicial review proceedings. Habib

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1 [2013] EWCA Civ 1498
Ignaoua had no statutory right of appeal against such powers (Section 2C(1)(b)) but was allowed to utilise the alternative regime introduced under Section 2C(2) to the 1997 Act. The problem was that the procedural rules to enable Habib Ignaoua to apply to the SIAC to set aside the certificate had not been put in place. Although Habib Ignaoua submitted an application to the SIAC under Section 2C of the 1997 Act on a protective basis, he made a new judicial review claim to challenge the legality of the certificate. He also pursued this appeal at the Court of Appeal against the decision of Cranston J to give effect to the Home Secretary’s certificate under Section 2C.

Cranston J at the Queen’s Bench Division had ruled in a judgement handed down on 9 August 2013 (at paragraph 34) that the clear Parliamentary intention expressed in Section 15 Justice and Security Act 2013 is that where a person has been excluded from the United Kingdom on grounds of the public good, in reliance on information which in the Secretary of State’s opinion should not be made public for national security or similar reasons, a challenge to the exclusion direction must be advanced in SIAC [rather than in the High Court] if the Secretary of State has certified the direction. At paragraph 35, Cranston J also ruled that the language of termination in the statute is hard-edged and indicates the intention that the court does not retain any residual jurisdiction. Although termination itself is pursuant to the Order made under the legislation, the power to terminate (and the language of termination) is in the Act itself, not subordinate legislation. Paragraph 4 of schedule 3 to the Act gives the power to certify this type of exclusion direction and for the termination of any judicial review proceedings which relate to a direction so certified. In Cranston J’s view no court order was necessary to terminate the proceedings.

The Court of Appeal was asked to rule on whether the Home Secretary’s certificate was effective to terminate the judicial review proceedings relating to the exclusion direction made against Habib Ignaoua on 16 July 2013. By virtue of Section 15 of the Justice and Security Act 2013, the new Section 2C(1) to the Special Immigration Appeals Commission Act 1997 empowers the Secretary of State to issue a certificate in relation to an exclusion direction. According to Article 4(3) of the Justice and Security Act 2013 (Commencement, Transitional and Saving Provisions) Order 2013, “A certificate issued under paragraph (2) terminates any judicial review proceedings, or proceedings on appeal from such proceedings, which relate to the direction or decision to which the certificate relates (whether the proceedings began before, on or after 25th June 2013).” The terms of the 2013 Order reflect the text of Schedule 3 Paragraph 4(2)(b) to the Justice and Security Act 2013: “the termination of any judicial review proceedings, or proceedings on appeal from such proceedings, which relate to a direction or decision which is so certified (whether such proceedings began before, on or after the section 15 commencement day).” Having regarding to the provisions in both the primary and secondary legislation, one cannot help but agree with Cranston J that the language of termination is clear enough to convey the intention of Parliament that a certificate under these provisions in relation to an exclusion direction has the effect of terminating the judicial review proceedings.

Of course the Court of Appeal does not endorse this view. It can only be submitted that the Court of Appeal adopted a narrow interpretation of the statutory provisions which attempt to oust the court’s jurisdiction and/or restrict access to it without express language or unambiguous provision in the legislation. The Court noted at paragraphs 20 – 22 that the power to make provision for the termination of judicial review proceedings is couched in very general

\[2\] S.I. 2013/1482
terms but that generality does not assist the Secretary of State. If it had been intended to empower the making of provision whereby the Secretary of State, by making a certificate, could cause existing judicial review proceedings against her to terminate automatically and without the intervention of the court then specific and express language to that effect would be expected in the legislation and in the absence of such express language, Schedule 3 Paragraph 4(2)(b) should not be read as conferring on the Secretary of State such a striking power.

The Court also contrasted these provisions with the express provisions in Sections 97 - 99 of the Nationality, Immigration and Asylum Act 2002 in stating that, where a certificate was issued, any existing appeal "may not be continued" and "shall lapse". If the intention had been to produce a similar result in Habib Ignaoua’s case in respect of judicial review proceedings relating to exclusion directions, the model of the 2002 Act was to be followed – this was not done. The Court concluded that the statute did not preclude an application to the court by way of judicial review and that the statute did not empower the secretary of state to automatically terminate existing judicial review proceedings by a certificate made after the commencement day, 25 June 2013. Accordingly, in purporting to provide, by article 4(3) of the 2013 Order, that a certificate under section 2C(1)(c) of the 1997 Act in relation to a direction made before the June 25, 2013 "terminates any judicial review proceedings, or proceedings on appeal from such proceedings", the secretary of state was acting outside the powers conferred on her by the 2013 Act. For these reasons, Habib Ignaoua’s judicial review claim (made in October 2010) had not been terminated by the making of the certificate so that his case was remitted to the Administrative Court to decide on the future of those proceedings (see paragraphs 23-26, 31 and 34 of the judgment).

**Conclusion:** This is undoubtedly an important decision in clarifying the extent and the effect of a certificate issued under section 15 of the 2013 Act with the court making it clear that it is prepared to exercise its discretion in favour of claimants whom statutes attempt to restrict their access to the court. A similar approach was used in the case of *Anisminic* in disapplying ouster clause in primary legislation. The court achieved this outcome by employing a narrow statutory interpretation approach and ruling that the provisions in question were of general and not specific terms and were incapable of excluding the court’s supervisory powers. In cases like *R (A) v (B)* [2010] where the court adopted a wide rule of statutory construction in favour of precluding the court’s supervisory role, such decisions accord with the court’s inherent jurisdiction to entertain or not to entertain a claim. Therefore the court’s jurisdiction cannot necessarily be limited by legislation (especially secondary legislation) unless the court itself is prepared to give such legislation a favourable interpretation.

*Ignaoua* may well be regarded as important to the Justice and Security Act 2013 as is *Cart* to the Tribunals, Courts and Enforcement Act 2007. This is at least in terms of clarifying whether or not by these enactments judicial review claimants are now precluded from pursuing claims at the High Court. Like in *Cart*, *Ignaoua* confirms that the Administrative Court retains jurisdiction to entertain judicial review claims. However, claimants should be aware that as judicial review is a remedy of last resort, the High Court is likely to refuse permission if a claimant for the purpose of Section 15 of the Justice and Security Act 2013 failed to pursue an application at the Special Immigration Appeal Commission and chooses to pursue a claim at the High Court.

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3 2 WLR 1, [2009] UKSC 12