



Taxing Matters

"The future of judicial reviews... and what it means for your business" with Saima Hanif QC

Alice

Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.

Taxing Matters' regular listeners will recall, from our previous episodes on judicial review, the importance of this form of challenge described as the "...last bastion of the citizen against the Government". As some of you may be aware in July 2020 the government announced that it was lodging an independent panel to conduct a review of how judicial reviews operate. To explain what this means both for the future of judicial reviews and for your businesses we are joined by Saima Hanif.

Saima recently elevated to silk and now boasts the title of 'Saima Hanif Queen's Counsel'. She is a barrister at 3VB where she has a practice spanning banking, financial services, commercial litigation, insurance and, significantly for our purposes, judicial review.

Her judicial review experience is unparalleled - having acted in one of the few successful judicial reviews of a decision made by the FCA - and, as you would expect, she is described in exclusively glowing terms: "Fantastic litigator", "...technically gifted", "...excellent judgment", "...persuasive before any forum" - the list goes on! She has also been productively using her pandemic time to become familiar with every single boxset on Amazon Prime!

Saima, welcome to Taxing Matters!

Saima

Thank you for that, Alice. Nice to be here!

Alice

So, I mentioned the independent review. What exactly is it?

Saima

So, as you said, Alice, in July 2020 the government launched a review into administrative law. Now, that in itself is a hugely wide-ranging definition so essentially what they've done is they've issued a series of questions which purport to cover every aspect of judicial review you could think about. So, it starts by looking at the substantive issues underlying judicial review, namely, what are the sorts of grounds upon which a Claimant should be able to bring a judicial review? What sorts of areas should a Claimant be able to challenge? It then moves into procedural issues such as standing - namely the ability to sue - time limits, then it moves into remedies and asks a number of questions around that. So, it's an incredibly extensive and broad enquiry into what looks like the whole gamut of administrative law.

In addition to launching the enquiry they issued terms of reference and they set out in a bit more detail the specific issues that the panel would be looking at and in addition to that there has been a specific call for evidence. So various experts in judicial review, or law firms/academics have provided consultation responses to this review, which the government is currently considering.

Alice

So, what has brought this review about?

Saima

So, that's a very good question, Alice. Before I actually answer your question specifically it might be useful if we just cast our minds back to 2019 and just refresh ourselves as to the chronology and then the listener, and indeed yourself, can draw your own conclusions.

So, as you might recall, Alice, in October 2019 we had the landmark decision of the Supreme Court in which the court unanimously ruled that the prorogation of parliament was unlawful. Obviously, that was a huge decision at the time. It got huge amounts of press attention and I think, in some ways - actually what I thought was interesting about it - I found for the first time, lay-people, who may ordinarily not have had any interest in court decisions, they were actually interested in this and you could hear people talking about it.

So that's October 2019. We move forward two months to November 2019 and that is when the Tory Party launched their manifesto in anticipation of the election that was to take place in December 2019. And, interestingly, in that manifesto there was mention about the government wanting a "review" of the relationship between the government, the parliament and the court. Now some of us may say that that was directly linked to the outcome of the Supreme Court decision, or, one may say I'm being cynical, but I leave you to draw the facts that you wish to draw. So, it was a manifesto which embedded the position of the Tory Party and, interestingly, they said within that manifesto that they wanted to "update" administrative law to ensure that there was a proper balance between the citizen challenging it and the need for effective decision making.

So, that was a catalyst. Then we fast forward to July 2020 where the government officially launched the review. Evidence has been submitted by various parties. At the end of last year Robert Buckland reported back to parliament that the panel was in its "final-phase". He said that the "hope" was that they would report back to parliament in Spring 2021, but he was candid enough to say that that's a "speculation". So, at the moment, Alice, there's no defined timetable as to when they will report back, but the hope is it will be in the course of this year. **[On 18 March 2021, the Panel published a report in which it recommended two reforms to substantive law. There is a further period for consultation on the Panel's recommendations, which will end on 29 April 2021.]**

Alice **So, that's an interesting series of breadcrumbs that you've drawn out for us. So, what, exactly, are the government's concerns that this review is proposing to address?**

Saima Again, that's an excellent question. So, I think I would probably start by saying: if we step back and take a first-principles approach, it's actually quite a good thing to say look, let's have a review of the constitutional system within this country, let's examine how it functions and let's examine how we can make it function better. So, at a high-level view there is in theory a good aim and objective behind this and in particular if one thinks about the use of the royal prerogative, there is a lot of ambiguity and uncertainty in terms of what does that mean/what is its scope? So, it's no bad thing actually to want to look at something like that in more detail. However, if you look at the manifesto itself and then the actual terms of reference which accompanied the launch of this review, what you see is a subtext in terms of what is actually really concerning the government. And it's interesting the language that they have used, actually, within both the manifesto and the terms of reference-and I just want to give you a few examples.

So, as part of the manifesto, the Tory Party said that it wanted to ensure that judicial review was "...not abused to conduct politics by another means or to create endless delays...". There is other language that is used within the terms of reference so, for example, if we turn to 'standing' - which is one of the procedural issues - namely: who has a right to sue? The question says, are the rules around standing treated too leniently by the court?

There is also language about wanting to "...strike a balance between the rights of citizens to challenge executive decisions and the need for effective and efficient government..." and then it goes on elsewhere to say that "...citizens should be guaranteed a right to challenge overbearing decisions". There is almost this view, Alice, that some of the statements are - as lawyers, we would say they are leading, actually.

So, let's take the question around standing; rather than saying 'are the courts treating the rules too leniently?', if you are approaching this neutrally you would say 'what are the rules of standing, could they be improved in any way?' So, there is something inherent in the language which suggests that, in the *subconscious* of the draftsman, there's almost this tension - as they see it - between what government wants to do and what they see as the court, primarily through the vehicle of judicial review, as preventing them from wanting to do these things. So, I would say 'What are the government's concerns?' Well, it seems to me if you look at the language they have used and if you look at the chronology against which the review was first launched, clearly their underlying concern is that, effectively, this process of judicial review is hampering, or impeding their ability as a government to do what they wish to do.

Alice **And from your perspective, looking on as a legal practitioner in this area, do you think that these concerns are valid? Have the government got a point or is this very much a politically charged issue based on the 'breadcrumbs' that you have told us about?**

Saima Again, this is another really insightful question, Alice. It's the sort of thing we could sit around and debate all day! It won't surprise you to know that different people have different views on your very question. I think my view looking at this, purely as a barrister and from the narrow perspective of a practitioner, my view is this: if you are concerned about something you approach it in a neutral, data driven way...and my only concern is, if you look at the way this has come about, I'm not sufficiently satisfied that this has been approached in a neutral, data driven way.

So, for example, although the terms of reference raise various questions as to potential concerns, such as '...are the rules on standing too lenient?' or, the concern in the manifesto that 'Judicial reviews are leading to endless delay' - my question would be: "Well, look, what's the starting point, where is the data that gives rise to that question?" So, what I would have expected to see is something within the review which would have said, well, look, very informally: 'We've looked at the court data, we've looked at the statistics, we've gone out informally to the marketplace and it's clear that there are,' quote, unquote, 'endless delays.' The absence of what I would call that "reliable empirical data", to my mind, does bring to the floor the very good question that you have asked which is, actually, all-things-said-and-done: "Is this really politically motivated?"

The other thing that gives me slight pause for concern is the huge expanse of this enquiry - it's seeking to review the entire A-to-Z of administrative law. As you know, we have the law commission which will look substantively at areas of law which are in need of reform or, somehow, are in need of an update. And, interestingly, in respect of judicial review, that is one of the areas where the law commission has effectively said that if we are going to look at it substantively it needs to be done properly with a properly qualified panel. And, interestingly, the law commission is effectively saying: 'Well, look, the law commission itself may not be the best organisation to do that'...and with the greatest respect to the panel which has been set up by the government - which, admittedly, has a huge breadth of expertise on it - there is a real question mark as to whether that panel is properly resourced and properly equipped to carry out an enquiry of this size and this expansiveness; which, again, returns to the point: if you actually had a genuine desire to approach this objectively, to look at it just intellectually and just to look at it in a detached way, would you do it this way? And my view is I'm not sure.

Alice **So, given that this review is underway what are the flavour of the submissions that are coming out of the legal profession - What are the concerns, what comments are being made?**

Saima Absolutely, so, as you pointed out, there was a call for evidence and that closed in October last year and there have been a range of submissions made by law firms, barristers, academics. There have been specialist bar associations like the Administrative Law Bar Association - which has also submitted a response - and I think it's fair to say this: at an abstract level, the responses accept, and quite rightly say that, actually, there is nothing wrong with doing a review of judicial review or administrative law and, actually, we've all got a vested interest in making sure that the system functions properly and functions well and, therefore, it is good to look at these things.

So, I think at that broad high level, there is certainly no *resistance* to an enquiry of this kind, quite the opposite. However, you do see recurrent themes in the consultation responses and, interestingly, I would say one theme that comes across quite strongly - at a practical level - is, actually, the scope of what is being considered is too big to be done properly in the short time available. So, if you just think of the timeline - end of July they launch it - and so realistically that is the 1 August it really gets underway. They've asked for the consultation responses to be in by the end of October - that's three months essentially. The original expectation was the government would report back end of 2020, obviously that's not happened. We're now being told, possibly spring 2021, but on any view it's a really truncated timetable so the first concern, actually, is: is it even possible to do an enquiry of this size justice in the short time available?

Secondly there have been concerns expressed about the panel itself. Not of any individuals - and I really want to emphasise all the individuals are huge experts in their field - but a general concern that actually, if you are going to do a *belts-and-braces* review of the fundamentals of judicial review - looking at, substantively, an area of law - maybe there needed to be a different sort of panel. But that's the second generic concern that I think you do see in the responses.

The third concern, and I think it is right to highlight this, actually - that there is a concern that - the way the terms of reference have been phrased are not necessarily conducive to, as it were, a neutral and open and effective debate of the issues. One point I've seen in repeated consultations, is that: by using this language that the government has used, namely that it recognises that judicial review is a useful tool when there is an *overbearing* government, but that actually it thinks there needs to be a balance between effective and efficient government and the rights of citizens to challenge it - It's almost as if the government seems to be saying 'well actually efficiency may, in some cases, trump the need to do something lawfully'.

Now, if you go back to the way our constitutional system works and, in particular, the rule of law and, whether they are academics or practitioners, they will tell you the rule of law is a sacrosanct touchstone of our legal and judicial system; and the point is: rule of law trumps all else. You can't depart from it and justify it by saying "...oh well, look, this is effective and efficient government decision making." That - that sort of language and that conceptualisation doesn't exist. But there's a real concern amongst the consultation responses that by positing the concept in this way it's almost as if the government itself is implicitly saying 'actually we think you can fashion out a case for departing from the rule of law where its efficient government

decision making'. So, I think that concern about this perceived tension on the part of the government has definitely come through.

Another concern, I think, that is definitely coming through all the responses is that what nobody supports, quite rightly, is that if the purpose of these reforms is somehow to weaken or otherwise hamper the ability of the courts to effectively scrutinise the lawfulness of government decision making then the responses have said, quite clearly, they are not in favour and are not going to support reforms of that nature. And all the responses have highlighted how crucial it is to the separation of powers that the courts in this country *are* able to scrutinise government decision making and are able to call it out as being unlawful if, on the facts of the case and the applicable legal framework, that's exactly what has happened. So, I think, very reassuringly, it's really good to see that sort of strong robust position from the consultation responses because, hopefully, it pushes back against some of the rather unhelpful language that one sees within the terms of reference.

Alice **So, I guess the next question is, from a business point of view: why should they care, what is this to them?**

Saima Absolutely, Alice! And I think that is absolutely the way to look at this because I think, ultimately - courts and legal principles - they shouldn't exist in an abstract vacuum. They are there to effect and facilitate the lives of businesses and individuals. So, I think that's an excellent question, Alice, and I'd answer it in two parts.

So, firstly, there is a slightly high-level principle...and I think it is this: that society, as a whole, functions best when there is a mechanism to challenge and scrutinise government decision making. It's naïve and infantile to assume that the government always knows best or that the government always acts lawfully. We know that's not the case. And what we also know is where you have instances of governments either acting unlawfully, or public bodies acting in a way which, contrary to what they may assume is not in the best interests of that particular situation, the damage it can cause - not just to the effected individual, but to society at large - actually, is huge. Therefore, it is absolutely vital that there is a mechanism that citizens can use to challenge it.

There have been recent cases, I think, which are currently in the public domain, which illustrate why we absolutely need this mechanism there. So, let's look at the current situation around COVID. It's an emergency situation - we all accept that - and emergency situations sometimes require difficult responses, we also accept that too. But does that mean that effectively governments can be excused from acting within the law? No, it does not. But what we have seen, for example, with the manner in which this government has entered into contracts around the provision of PPE, it has raised huge questions about whether the process is fair. But, more importantly, have the government favoured business A over business B just because business A happens to have a personal connection to various bodies within Westminster? And that, to me, illustrates why businesses should be absolutely concerned about these reforms because, whether we like it or not, as I say, governments do sometimes act unfairly and we're seeing it play out in the world around us as we speak and it's vital that citizens can challenge this in the most effective means possible.

The second point I want to make, is that I think rule of law is at the heart of any democratic society. No government should be able to justify departing from the law just because it's efficient and the moment you go down that road it's a slippery-slope to other situations which I think would be highly unsatisfactory. And this isn't to be alarmist in any sense, or to scaremonger, but it is just to illustrate to businesses that we live in a world now where there is - and I think in some cases for good, actually - there is huge amounts of government intervention and regulation. I fully appreciate that businesses sometimes refer to it as "red-tape" - but, actually there is often a need for that sort of thing - but the point is that if governments are going to interfere with the way that businesses carry out their day-to-day activities, or if it's going to prevent or require businesses to act in certain ways; it should only do so, if on the converse, there is a right for that business to challenge that action and that intervention if it feels aggrieved by it.

Alice **Great! So, we've got this review, where is it going, where are we going to end up?**

Saima It's an excellent question and I think in a sense the question is really difficult to answer because of the way that this has come about. So, you know, we have the prorogation decision in October, the Tory Party then issue the manifesto - and they use this language of "updating the administrative law", I mean, it's not even clear to me what the draftsman had in mind at the time when they wrote that manifesto. We've, obviously then, now had the terms of reference. I think at this stage it's very unclear and I think for two reasons. Firstly, you know, it'll be interesting to see how they respond to the consultation responses especially given the high degree of concern that a number of the consultation responses have expressed. Also I think there is an issue here about timing actually. Now, bearing in mind we're now in the throes of Brexit - which from a legal perspective is itself a huge conundrum - I would query whether, in addition to that, a government can also carry out a root and branches review of administrative law.

	<p>Initially the thought process was 'well are they going to bring in new legislation, actually, to somehow modify or update judicial review?' Currently that seems unlikely, so I still think there is a long way to go and I suspect even spring 2021* - which is the timetable that Robert Buckland referred to- I mean, he referred to it as "...speculative", which I read as an admission on his part that he is giving a date because he has to give a date because he's saying this in a public meeting; but even he doesn't believe that spring 2021 is going to happen. So, my best guess is in the latter end of this year, at some stage, we will receive a panel response to what the consultees have said and I would guess that, actually, there will then have to be a further round of discussion. I.e., they won't go straight into implementing the recommendations whatever they may be. So, I think there is still a long way to go. [On 18 March 2021, the Panel published a report in which it recommended two reforms to substantive law. There is a further period for consultation on the Panel's recommendations, which will end on 29 April 2021.]</p> <p>Whether we like it or not, I do think there is a strand, or maybe a greater strand of politicisation behind the review so I think a lot of what will happen depends on the political dynamics within the Tory Party, to be frank.</p>
Alice	<p>If the consultation was going to come out with a recommendation that in any way limited the court's power and limited the rights of people to access it, how likely do you think it is that the court would develop its inherent jurisdiction in order to avoid that?</p>
Saima	<p>Gosh, I mean, it's a huge question! I mean, genuinely a really, really fantastic and profound question. If they sought to limit it, gosh! I mean, firstly the question is: 'how are they going to do it, are they going to do it by the legislative parliamentary process?' It will have to go through a specific process where it would have to be debated both within the Commons and Lords. As you know there are a number of Law Lords that sit in the House of Lords - a number of whom were administrative and public lawyers – so, no doubt, they would have huge amounts of comments to contribute to this debate. So, the first thing, it would have to pass into our legislation, as you say, what would that - what would then happen when you get a particular case and that legislation somehow has to come into force?</p> <p>I think it's really difficult to say, Alice, and I think at this stage it would be both premature of me to shoot-from-the-hip and I think it is too profound an issue for me to do so without researching properly. But you have highlighted and, I think, hit-the-nail-on-the-head as to why this is, actually, such a hugely significant review and why in my view, whatever happens next, the panel would do well to proceed cautiously.</p>
Alice	<p>So, thank you very much for that. Now, just as a final thought, is there any "top-tips" that you would give for businesses watching this space?</p>
Saima	<p>So, absolutely, Alice. I mean, the difficulty, I think, with this particular exercise is, obviously, it started last year as a fairly abstruse high-level sort of intellectual exercise and it is still very much in its infancy so I think, firstly, businesses will have to wait and see how the panel responds to the consultation responses that have gone in and what we'll have to see is what, if any, recommendations the panel then makes to come out of this exercise. I mean, one thing we may see is: if this proceeds in a way that it ought to – namely, there's an evidence gathering process - what might be/what could be quite a useful exercise to gather data, in terms of what, for example, is a lead time between a claim for judicial review being filed - between it then being determined on the papers - and if permission is given, to it then being determined substantively.</p> <p>So, if, for example, it is felt like - within the court process itself - the cases are proceeding too slowly, what that might prompt is, as it were, a review of the internal mechanisms within the court. And we may find people asking themselves: well, look, is there a better way to do this functionally within the courts? And, obviously, as we're now living in a world where you have video-link court hearings it may be that there is greater use of I.T. and that sort of technology to, as it were, speed along the mechanics of lodging claims and getting them through the court system. And that will be no bad thing because I think no party, whether it is a Claimant or a Defendant, wants a claim to hang around. All parties want the case to be determined as promptly as possible. So, it may well be that it might create some very helpful and sort of practical reforms in that sense.</p>
Alice	<p>Thank you very much Saima for taking us through the proposed reforms to judicial reviews.</p> <p>As ever a big thank you goes to our miracle working producer Mary Mitchell, Josh McDonald who does all the work pulling each episode together, our music is from musical genius Andrew Waterson, and of course a big thank you to all of our listeners for joining us.</p> <p>A full transcript of this episode together with our references can be found on our website at www.rpc.co.uk/taxingmatters and you can find Saima on her Chambers website at 3VB or LinkedIn; Saima Hanif.</p> <p>If you have any questions for Saima or for me or any topics you'd like us to cover in a future episode please do email us on taxingmatters@rpc.co.uk. We'd love to hear from you.</p>

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Thank you all for listening and talk to you again in two weeks.

After this episode was recorded, on 18 March 2021, the Panel published a report in which it recommended two reforms to substantive law. There is a further period for consultation on the Panel's recommendations, which will end on 29 April 2021.



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