***R (Evans) and another v Attorney General*** [2015] UKSC 21

Supreme Court

Lord Neuberger, President

**“….**

52. **….** Secondly, it is also fundamental to the rule of law that decisions and actions of the executive are, subject to necessary well established exceptions (such as declarations of war), and jealously scrutinised statutory exceptions, reviewable by the court at the suit of an interested citizen.

**….**

53. In *M v Home Office* [1994] 1 AC 377, 395, Lord Templeman in characteristically colourful language criticised “*the proposition that the executive obey the law as a matter of grace and not as a matter of necessity [as] a proposition which would reverse the result of the Civil War*”. The proposition that a member of the executive can actually overrule a decision of the judiciary because he does not agree with that decision is equally remarkable, even if one allows for the fact that the executive’s overruling can be judicially reviewed. Indeed, the notion of judicial review in such circumstances is a little quaint, as it can be said with some force that the rule of law would require a judge, almost as a matter of course, to quash the executive decision.

54. The constitutional importance of the principle that a decision of the executive should be reviewable by the judiciary lay behind the majority judgments in the famous case, *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, where the House of Lords held that a statutory provision, which provided that any “*determination by the commission*” in question “*shall not be called in question in any court of law*”, did not prevent the court from deciding whether a purported decision of the commission was a nullity, on the ground that the commission had misconstrued a provision defining their jurisdiction. Lord Reid said at p 170D that if it had been intended “*to prevent any inquiry [in all circumstances] I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law”*. And see per Lord Diplock in *In re Racal Communications Ltd* [1981] AC 374, 383, where he held that there is a presumption that Parliament did not intend an administrative body to be the final arbiter on questions of law.

55. This is scarcely a recent development. In *R v Cheltenham Commissioners* (1841) 1 QB 467, a statute provided that any decision of the Quarter Sessions as to the levying of certain rates was to be “final, binding, and conclusive to all intents and purposes whatsoever”, and that no order made in that connection “shall … be removed or removable by certiorari, or any other writ or process whatsoever, … ; any law or statute to the contrary thereof in anywise notwithstanding”. Despite this, Lord Denman CJ robustly stated at p 474 that

“[T]he clause which takes away the certiorari does not preclude our exercising a superintendence over the proceedings, so far as to see that what is done shall be in pursuance of the statute. The statute cannot affect our right and duty to see justice executed; and, here, I am clearly of opinion that justice has not been executed.”

56. The importance of the right of citizens to seek judicial review of actions and decisions of the executive, and its consequences in terms of statutory interpretation, was concisely explained by Lady Hale in *Jackson v Her Majesty's Attorney General* [2005] UKHL 56, [2006] 1 AC 262, para 159. She said that *“[t]he courts will, of course, decline to hold that Parliament has interfered with fundamental rights unless it has made its intentions crystal clear”.* The same point had been made, albeit in more general terms, by Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131E-F, where he said:

“[T]he principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document”

57. At least equally in point is the proposition set out by Lord Reed in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46, [2012] 1 AC 868, para 152, that:

“The principle of legality means not only that Parliament cannot itself override

fundamental rights or the rule of law by general or ambiguous words, but also that it cannot confer on another body, by general or ambiguous words, the power to do so.”

In support of this proposition, Lord Reed cited two passages from the decision of the House of Lords in *R v Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539. At p 575, Lord Browne-Wilkinson said that

“A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen or the basic principles on which the law of the United Kingdom is based unless the statute conferring the power makes it clear that such was the intention of Parliament.”

To much the same effect, Lord Steyn said at p 591 that *“[u]nless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law”.* **…”**