FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 4
P117/23

Lord President
Lord Pentland
Lord Tyre

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

in the petition for judicial review by

(FIRST) RAGBIR SINGH; (SECOND) LAL KAUR; and
(THIRD) BHUPINDER SINGH KHALSA

Petitioners and Reclaimers

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Petitioners: Byrne KC, Winter; Drummond Miller LLP (for Jain Neill and Ruddy, Glasgow)
Respondents: Pirie KC; Office for the Advocate General for Scotland

24 January 2025

Introduction

[1] This is a reclaiming motion (appeal) from an interlocutor of the Lord Ordinary dated 14 December 2023 refusing as incompetent a petition for judicial review of a decision of the Upper Tribunal which in turn refused leave to appeal against its refusal of the petitioners'

claims for asylum. The petitioners challenge the lawfulness of section 11A of the Tribunals, Courts and Enforcement Act 2007 which restricts the grounds upon which judicial review can be sought. The questions are whether the section is compatible with the Act of Union 1707 and whether it is consistent with the rule of law.

The Treaty of Union

[2] The Act of Union 1707 ratifying and approving the Treaty of Union with England provides:

> "XIX That the Court of Session, or College of Justice, do, after the Union, and notwithstanding thereof, remain, in all time coming, within Scotland, as it is now constituted by the Laws of that Kingdom, and with the same Authority and Privileges, as before the Union, subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great Britain."

[3] Whether this amounts to a constitutional foundation which places a restriction on the sovereignty of Parliament is a question which has occasionally been posed to the courts and sometimes answered, although not always in the same way. The issues are well known, particularly in Scotland. They were neatly set out more than half a century ago in Professor TB Smith's *Short Commentary* (chapter 3). Prof Smith outlined the history of the Scots Law approach to the sovereignty of the King and Parliament, as he saw it, before concluding (at 52-53) that the Acts and Treaty of Union may be considered to be "the fundamental law of the British Constitution"; "a new and revolutionary *Grundnorm* for a new state". Prof Smith pointed out (at 55) that some Articles, including Art XIX, were expressly liable to variation whilst others were apparently irrevocable. Nevertheless, Prof Smith recognised that several articles had been modified without any, or with little, analysis of their constitutional fundamentals.

[4] The *locus classicus* is *MacCormick* v *Lord Advocate* 1953 SC 396 (the EIIR case) in which Dicey's theories of Parliamentary sovereignty (*The Law of the Constitution*) were examined. The Lord President (Cooper) famously referred (at 411) to the idea of unlimited Parliamentary sovereignty as a "distinctively English principle which has no counterpart in Scottish constitutional law". On an ordinary construction of the Articles, those which were declared to be fundamental and unalterable "in all time coming" were inconsistent with the idea of absolute sovereignty. Perhaps influenced by Dicey's later views (*Thoughts on the Scottish Union* at 252-253), the Lord Advocate (later Lord President (Clyde)) had conceded in argument that Parliament could not "repeal or alter" such "fundamental and essential" conditions. The Lord President then examined whether a question about potential breaches of a fundamental article by Parliament was justiciable by the courts, as it would be in the United States of America; asking the pertinent question of "who can stop them if they do[?]" (at 412). Having reserved his opinion in relation to the Treaty's effect on private rights, he concluded (at 413) that:

> "This at least is plain, that there is neither precedent nor authority of any kind for the view that the domestic courts of either Scotland or England have jurisdiction to determine whether a governmental act of the type here in controversy is or is not conform to the provisions of a Treaty, least of all when that Treaty is one under which both Scotland and England ceased to be independent states and merged their identity in an incorporating union".

[5] The debate has continued both in academia (eg Mitchell: *Constitutional Law* (1st ed) at 69 *et seq*) and the courts. In *Gibson* v *Lord Advocate* 1975 SC 136 Lord Keith followed *MacCormick* (as he was bound to do) in holding (at 144) that:

> "The making of decisions upon what must be essentially a political matter is no part of the function of the Court and it is highly undesirable that it should be. The function of the Court is to adjudicate upon the particular rights and obligations of individual persons, natural or corporate, in relation to other persons or, in certain instances, to the State. A general inquiry into the utility of specific legislative measures as regards the population generally is quite outside its competence".

[6] Having examined these cases, and *Pringle Petnr* 1991 SLT 330, Lord Hope was able to say in the fox hunting ban case (*R (Jackson)* v *Attorney General* [2006]1 AC 262 at para 106) that: "… it may be said that the concept of a Parliament that is absolutely sovereign is not entirely in with the reality". That may be so when certain extreme examples are contemplated (see *R (Jackson)*, Lord Steyn at para 102), but most recently, in *In re Allister* [2023] 2 WLR 457, which concerned the interaction of Brexit with the Irish Act of Union in 1800, Lord Stephens, in dismissing the fundamental rights argument as "academic", said (at para 66) that:

> "…the suspension, subjugation, or modification of rights contained in an earlier statute may be effected by express words in a later statute. The most fundamental rule of UK constitutional law is that Parliament… is sovereign and that legislation enacted by Parliament is supreme".

There matters may be said to rest at present (see also *Cherry* v *Advocate General* 2020 SC (UKSC) 1 at para 42).

The 2007 Act, *Eba*, Amendment and *R (LA (Albania))*

The 2007 Act

[7] The Tribunals, Courts and Enforcement Act 2007 established, for UK Tribunals, the two tier (First and Upper) system following upon the Leggatt Report (*Tribunals for Users – One System, One Service*) of 2001. Section 11 provides for a right of appeal on a point of law from the FtT to the UT with permission of either tribunal. Section 13 provides a right of appeal, again only on a point of law, from the UT to the Court of Session with permission of the UT or the court. Certain decisions are excluded, including those by the UT refusing permission (s 13(8)(c)). There is thus no right of appeal to either the UT or the court if the FtT and the UT have refused permission to appeal. The Act gives the UT (but not the FtT) a judicial review jurisdiction in England and Wales. For Scotland, the Act presupposes the existence of the

court's powers of judicial review. It allows the court to transfer judicial review petitions to the UT (ss 20-21). If that happens, a judge of the Court of Session is likely to preside. There is no first instance judicial review jurisdiction otherwise in the UT.

Eba

[8] The question of whether decisions of the UT to refuse permission to appeal could be judicially reviewed at all was raised in *Eba* v *Advocate General* 2011 SC 70. The Advocate General argued that judicial review was not available because the UT had a status which was equivalent to the Court of Session. Alternatively, and following the English practice, it was only available in exceptional circumstances; "something as gross as actual bias" (*R (Cart)* v *Upper Tribunal* [2010] 2 WLR 1012, Laws LJ at para 99; see, on appeal, [2011] 3 WLR 107). The First Division disagreed and held that such decisions were amenable, without limitation, to the court's supervisory jurisdiction although restricted to questions of legality and not their merits (LP (Hamilton)), delivering the Opinion of the Court, at paras [40-41] and [60]). The UT was not an *alter ego* of the Court of Session (*ibid* at para [51]). If Parliament wished to exclude or restrict the supervisory jurisdiction of the Court of Session then it should legislate expressly to that effect (*Eba*, LP (Hamilton) at para 60). The court's opinion on the effect of Article XIX of the Union with England Act 1707 was reserved (*ibid* at para [60]).

[9] The First Division's assessment of its judicial review jurisdiction came under scrutiny in the Supreme Court of the United Kingdom (2012 SC (UKSC) 1) where it was heard along with an appeal ([2012] 1 AC 663) from the Court of Appeal's decision in *R (Cart)*. Lord Hope, delivering the judgment of the court in *Eba* (at para 8), defined the issue as follows:

> "On the one hand there is the rule of law, which is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of the power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it… This favours an unrestricted access to the process of judicial review

> where no other remedy is available. On the other hand there is the principle of finality. There is obvious merit in achieving finality at the tribunal level in the delivery of administrative justice. The new structure introduced by the 2007 Act lends force to this argument."

Before the UKSC, the Advocate General did not renew his argument that unappealable decisions of the UT were not subject to judicial review at all. This time he said that the extent of that review should be restricted to those grounds set out by the Court of Appeal in *R (Cart)*. Lord Hope took note of the new (2008) rule of court (RCS 41.59) which limited the grounds of appeal, for which permission would be granted by the Court of Session (but not by the UT), from UT decisions. These were restricted to appeals which raised "some important point of principle or practice" or where there was "some other compelling reason for the court to hear the appeal".

[10] Returning to the scope of judicial review, in *Eba* Lord Hope stated that there was no difference between the substantive grounds for review which were available throughout the United Kingdom (para [34], following *Anisminic* v *Foreign Compensation Commission* [1969] 2 AC 147 at 171 and *Brown* v *Hamilton DC* 1983 SC (HL) 1 at 42 and disapproving *dicta* in *Watt* v *Lord Advocate* 1979 SC 120 at 131). In the parallel decision in *R (Cart)*, the UK Supreme Court determined that the Court of Appeal's restriction on the judicial review of unappealable decisions of the UT was too narrow. Rather the second appeals criteria, which are basically those mentioned in RCS 41.59, were a rational and proportionate restriction on judicial review; recognising that a more restrained approach was appropriate for the new two tier tribunal structure. The ultimate conclusion (para [44]) recognised that the issue was not one about access to a remedy but of how best to tailor the scope of the remedy according to the nature of the UT and the subject matter which had been entrusted to it.

[11] There was no substantial difference between English and Scots law on the grounds for judicial review and (Lord Hope at para [46]) there should be no difference in the scope of review "of unappealable decisions of the Upper Tribunal on either side of the Border". The phraseology of RCS 41.59, which restricted the scope for a second appeal, provided a benchmark for the court to use in the judicial review of such decisions. Beyond that, it was for the Court of Session to provide further guidance on how the analogy with the second appeals guidance ought to be applied in practice (*ibid* para [49]). Thus, in what was a significant departure from the earlier position in Scots law, it was determined that unappealable decisions were reviewable only on the restricted grounds determined by the UK Supreme Court.

[12] In due course, the Tribunals (Scotland) Act 2014 created a similar two tier tribunal system for the devolved Scottish tribunals. The Courts Reform (Scotland) Act 2014 introduced (s 89) section 27B of the Court of Session Act 1988 whereby not only would the court's permission for all judicial review petitions to proceed be required on the basis of the application having "a real prospect of success" but also, in the case of appeals from the UT for Scotland, permission would only be granted if the second appeal test were met (s 27B(3); see *SA* v *Secretary of State for the Home Department* 2019 SC 451, LP (Carloway), delivering the Opinion of the Court, at paras [26]-[29]).

IRAL

[13] For reasons which were explored in "The Independent Review of Administrative Law" (2020-2021), and notwithstanding the Advocate General's position in *Eba* (*supra*), the UK Government was not content with the scope of the availability of judicial review. The IRAL concluded (at para 3.46) that the continued expenditure of judicial resources on whether applications met the *R (Cart)* test could not be defended and such applications should be

discontinued. It recommended overturning *R (Cart)* (see Explanatory Notes to the Judicial Review and Courts Act 2022, para 10). The IRAL had gathered (para 3.46) that the success rate of such applications was only 0.22% in England and Wales, although this was later revised in the Government's *Response to the Judicial Review Reform Consultation* to 3.4%. The original IRAL figures were based on an exercise which "trawled" (para 3.41) Westlaw and BAILII for *R (Cart)* cases in which the courts had detected and corrected an error of law on the part of the FtT which the UT had not corrected because it had refused permission to appeal the FtT's decision. A "positive" result would be if: the court had granted permission for a *R (Cart)* review on the basis of an error of law by the FtT; as a result the court had quashed the UT's decision to refuse permission to appeal the FtT's decision; or the court had granted permission to proceed with a *R (Cart)* review on the basis that there was an arguable case for review of the UT's refusal of permission, that refusal was quashed and the UT later determined that an error of law on the part of the FtT had occurred. This produced positives in 12 out of 5,502 cases (para 3.45).

[14] A section of the IRAL report on Scotland recorded (para 5.19) that a large proportion of immigration judicial review petitions were resolved or discontinued before the permission stage. Of those in which a permission decision was made, "roughly one in two are granted permission, slightly less than 30% (28.3%) (*sic*) of the petitions initiated". Where permission had been granted, the petitions did not normally proceed to a hearing but, of those which did, the success rate was "just under 30%" (para 5.21). The number of successful petitions was "therefore very small".

[15] The IRAL statistics were the subject of academic criticism, notably in Tomlinson and Pickup: *Putting the Cart before the Horse? The Confused Empirical Basis for Reform of Cart Judicial Reviews* in the UK Constitutional Review Association's publication of 29 March 2021. This was highlighted (at para 2.2) in a response from the Faculty of Advocates to the plans for reform.

The Faculty argued that the base figure of 5,502 was wrong and it ought to have been a success rate of 12 out of 45 (26.7%). Even then, reported cases were rare in England. If permission to proceed with a judicial review were granted, the Home Office seldom requested a hearing. The UT's decision would be quashed procedurally and the case remitted to the UT which would normally grant permission to appeal. The Faculty's view accepted the IRAL statistics for Scotland, pointing out that a success rate of 30% was not "very small". The second appeals test appeared to be working well as an important safety valve (para 2.3). The IRAL report had not looked at the potential for injustice (para 2.4).

Amendment

[16] Notwithstanding the criticisms, the IRAL recommendation to overturn *R (Cart)* was followed in the Judicial Review and Courts Act 2022 which introduced section 11A into the Tribunals, Courts and Enforcement Act 2007. The section is entitled "Finality of decisions by Upper Tribunal about permission to appeal". It provides (s 11A(2)) that a UT decision to refuse permission to appeal is "final, and not liable to be questioned or set aside in any other court". In particular, the section continues:

> "(3) …
>
> (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;
>
> (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision."

There are exceptions (ss (4)) to this where, *inter alia*, there are questions about whether the UT was properly constituted or had acted in bad faith or "in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice".

R (LA (Albania))

[17] The effect of section 11A was raised in England in *R (LA (Albania))* v *Upper Tribunal* [2024] 1 WLR 1673. The circumstances were, as here, that the UT had refused an application to appeal the judgment of the FtT. The applicants sought a judicial review. The judge of the High Court (King's Bench) refused permission to proceed because section 11A had effectively restricted the scope of judicial review in this type of case. The Court of Appeal refused permission to appeal that decision for want of jurisdiction. Dingemans LJ said (at para 31) that:

> "… the wording of section 11A of the 2007 Act is sufficiently clear to change the scope of judicial review from the second appeals test adopted by the [UK] Supreme Court in [*R (Cart)*] to the test set out in section 11A of the 2007 Act and the Court is bound to apply the wording in section 11A for a number of reasons. First it is essential to note that the supervisory jurisdiction of the High Court has not been excluded. The effect of section 11A has been to reduce the scope of the judicial review by setting out the exceptions on which the Upper Tribunal decision can be reviewed. The Upper Tribunal is a judicial tribunal, with decisions made by expert Upper Tribunal Judges.
>
> 32 Secondly, the effect of the wording is, in effect, to restore the "pre *Anisminic*" excess of jurisdiction and fundamental denial of justice tests which were adopted by the… Court of Appeal in *Cart*…
>
> 33 Thirdly, … there was no suggestion in the judgment of the [UK] Supreme Court in [*R(Cart)*] that either of the courts below had failed to have regard to the importance of the supervisory jurisdiction of the High Court …
>
> 34 Fourthly, although the effect of the test as to the scope of judicial review means that some errors of law… might not be corrected… the second appeals test adopted by the [UK] Supreme Court in [*R (Cart)*] expressly contemplated that some errors of law would not be corrected…
>
> 36 …therefore, the wording of section 11A is effective to limit the grounds on which the High Court may exercise its supervisory jurisdiction over a decision by [the] Upper Tribunal to refuse a party permission to appeal from a decision of the FTT. It is the duty of the courts to give effect to the clear words used by Parliament, because no one, including a court, is above the law…".

[18] The applicants attempted to appeal the Court of Appeal's decision to the UK Supreme Court. Permission to do so was refused (Lord Reed, Lord Sales and Lady Rose) because of a lack of jurisdiction. The panel reasoned that:

> "4 … It is hopeless to contend that the terms of section 11A are ineffective in limiting the grounds on which the High Court may exercise its supervisory jurisdiction over a

> decision by the Upper Tribunal to refuse an application for permission to appeal from a decision of the First-tier Tribunal. The language of the provision could hardly be clearer. It is equally hopeless to contend that Parliament lacks the power to enact such a restriction. Parliament's power to restrict judicial review of decisions of the Upper Tribunal was accepted by this court in *R (Cart)* …The dictum of Lord Carnwath in *R (Privacy International)* v *Investigatory Powers Tribunal* ([2020] AC 491) para 144, relied on by the [applicant] concerned a total ouster of judicial review, which is not the effect of section 11A."

Proceedings before the FtT and UT

[19] The petitioners claim to be Afghan nationals. They are a Sikh family; the first and third petitioners being brothers and the second petitioner their mother. There is a third brother, namely Jasmeet Singh. His claim was said to have become detached from the others. They arrived in the United Kingdom on 24 March 2018 and claimed asylum. Since the petitioners' arrival, they had obtained Afghan passports through the embassy in Bonn. If they were Afghans, they would be entitled to refugee status. The respondent maintains that they are Indian nationals. This was the primary issue at the hearing in May 2022 before the First-tier Tribunal (Immigration and Asylum Chamber).

[20] All four members of the family said that they were from Jalalabad in Eastern Afghanistan, where the father of the brothers ran a shop. He had been killed by the Taliban. The family's Tazkiras (Afghan identity cards) had been given to a third party for safekeeping. That person had been killed. The family had travelled together from Jalalabad to Karachi and on to London via Madrid. The third brother was on a later flight from Madrid. Also accompanying the petitioners was the first petitioner's second wife, namely Manpreet Kaur, and his step-daughter. The agent who had arranged their travel to the UK had, they said, told them not to bring their identity documents with them. The first petitioner had said at interview that they had left in a truck to Karachi (900 miles). The journey had taken 7 or 8 days; later amended to a day and a half. They had been put on a plane to an unknown destination which

they reached after an eight hour flight. Their agent was giving them, and then retrieving, their documents as they boarded the aircraft. The agent had held "booklets" and had obtained boarding cards for them. They arrived in the UK without their agent. They had last seen the documents in Madrid.

[21] Certain evidential problems bedevilled the petitioners' claims. First, as found by the FtT, a mutilated Indian passport containing the third brother's name and photograph was found in a bin at the airport in the UK. Secondly, a Turkish visa stating that brother to be an Indian national was also recovered. Thirdly, an Interpol search found that the first petitioner's second wife had visited the Czech Republic as an Indian national. Fourthly, she had also made an application for a UK visa from New Delhi as an Indian national. A fifth point whereby the third brother was found to be registered in the Indian Electoral Roll was rejected by the FtT as unreliable.

[22] The FtT considered evidence from Dr Jawad Hassan Zadeh, who was an expert on Afghanistan. He had produced four reports. He spoke to the authenticity of the petitioners' passports and other identity documents which were said to have been obtained from Afghanistan after the asylum claims had been made. The evidence of the petitioners, the third brother and the second wife, was all given in Punjabi, which is not one of the main languages of Afghanistan, where Pashtu or Dari are generally spoken, the explanation for that was that the family had lived a highly sheltered life; moving only between their home and the Gurdwara (Sikh temple).

[23] The FtT did not consider the petitioners' position, as narrated by the first petitioner, to be "in the least credible" (decision letter of 5 July 2022, para 27); "the claim that a family of turbaned Sikhs could be led through a succession of airports… with [the agent] standing waiting for them on arrival at each Passport Control, is inherently improbable". The mutilated

passport was indicative that this is what had happened to the petitioners' documents. In relation to the expert evidence, "false identity documents can readily be obtained in Afghanistan" (*ibid* para 32). The petitioners' evidence in relation to their ignorance of Dari and Pashtu was not consistent with their having been brought up in Afghanistan. Their account, as adults, of a restricted life was not credible. The account of the Tazkiras being given to a third party did not accord with their later production for their post arrival passport applications. The petitioners were unaware of the Persian calendar; an essential to living in Afghanistan. The petitioners' appeals to the FtT were refused.

[24] An application was made to appeal to the Upper Tribunal. This was based on the FtT having erred in fact in holding that the third brother was on a later flight from Madrid. That had been the third petitioner. Jasmeet Singh's claim was dependent upon the second petitioner's application; it had not been a separate claim. The mutilated passport was found at the time of the first flight. The FtT ought to have treated the documentation relative to the second petitioner's visit to the Czech Republic in the same way as that relating to the Indian Electoral Roll. The FtT had failed to assess the expert evidence adequately. Details of this were provided. The first petitioner had answered a large number of interview questions about Afghanistan.

[25] The application for permission to appeal was refused by the FtT on 30 August 2022. The reasons were shortly stated. The weight to be attached to the evidence was a matter for the FtT judge. He had provided a sufficiently detailed decision on the salient issues to reach negative credibility findings. Where errors of fact may have been identified, there was no basis to argue that these had been material to the overall outcome. No error of law had been identified.

[26] A direct application was made to the Upper Tribunal. This was refused on 13 November 2022. The grounds of appeal largely followed those presented to the FtT. The UT

judge reasoned that any error about who was on the later flight was not material. The FtT judge had analysed the documentary and oral evidence, including that of the expert. The credibility of the claims was a matter for him; that evidence being of wider scope than that available to the expert. Attacks on the FtT judge's use of the Czech Republic material did not disclose an error of law nor did arguments about the weight to be attached to the evidence. The judge's findings about the petitioners' lack of knowledge of Pashtu or Dari and the Persian calendar were open to him on the evidence. No material error of law was shown on the key issue of whether the petitioners were nationals of Afghanistan or not.

[27] The petitioners' judicial review is based on a contention that the FtT had "roundly ignored" the expert evidence about the Afghan passports and other identity documents. These were said to consist of, *inter alia*, the petitioners' original Tazkiras and passports. It is said that there was no finding in relation to these documents. Although the merits of these criticisms may not be immediately obvious, given the FtT's reference (at para 32) to Home Office material, which shows that false documents can be readily available in Afghanistan, the respondent does not resist the petition on its merits but only on its competence, standing section 11A of the amended 2007 Act.

The Lord Ordinary ([2023] CSOH 92 combined with *SOOY* v *Home Secretary* 2024 SLT 1)

[28] The petition for judicial review, which challenged the UT's decision to refuse permission to appeal, advanced two principal arguments. The first was that judicial review was a devolved matter and ought not to be restricted by legislation of the UK Parliament. The second was that section 11A ought not to be given effect as parliamentary sovereignty was constrained by Article XIX of the Treaty of Union 1707 and the rule of law. On the first issue, the Lord Ordinary noted that section 28 (7) of the Scotland Act 1998 made it clear that the UK

Parliament's power to make laws for Scotland was unaffected by the 1998 Act (*UNCRC (Incorporation)(S) Bill* 2022 SC (UKSC) 1). This issue was not revived in the reclaiming motion.

[29] On the second issue, the Lord Ordinary first considered whether Article XIX of the Treaty was justiciable. This had two aspects. The first was whether the Court had jurisdiction to determine that section 2 of the 2022 Act, which introduced section 11A of the 2007 Act, was compatible with the Article. The second was whether the Court could determine whether section 11A represented regulation for the better administration of justice. The Lord Ordinary tackled these issues in reverse order. He reasoned that, following *Gibson* v *Lord Advocate* (at 144), an inquiry into the "better administration of justice" was outside the competence of the court. There had been a lengthy process of consultation prior to the passing of the 2022 Act. The assessment of whether and how judicial review ought to be reformed had been "complex and multi-faceted". The petitioners could not offer any method by which the court could assess whether the reform was "for the better Administration of Justice" (see Lord Ordinary's Opinion at para [70]). Their criticisms of the IRAL statistics did not answer this problem. On this basis the Lord Ordinary held that the issue was not justiciable.

[30] The Lord Ordinary determined that there were two difficulties with the petitioners' arguments on the constraining effect of the rule of law on Parliamentary sovereignty. First, although the courts had power to decline to give effect to statutory provisions if they were contrary to the rule of law (*R (Privacy International)* v *Investigatory Powers Tribunal* at para 144), any attempt to demonstrate this would present a mountain to climb (*ibid* at para 209). Secondly, the petitioners were urging the court to take an unprecedented and highly constitutionally significant step (cf *Re JR 80's Application* [2019] NICA 58 at para 110 and *R (Oceana)* v *Upper Tribunal* [2023] EWHC 791 (Admin) at para 52; cf *R* (*Jackson)* v *Attorney General* [2006] 1 AC 262 at paras 103-104, 107 and *R (Privacy International)* at 144). The Lord Ordinary did not require to

take such a step because section 11A did not constitute an exceptional circumstance or a wholesale exclusion of the supervisory jurisdiction. There was nothing inherently or necessarily inimical to the rule of law about a provision which restricted the right of appeal or review (*R (Cart)* at para 40; *R (Privacy International)* at para 133). Section 11A represented an attempt to tailor the scope of a remedy to the nature of the UT and the subject matter entrusted to it by Parliament (*Eba* v *Advocate General* 2012 SC (UKSC) 1, at para 44). In introducing section 11A, Parliament had chosen a balance which differed from that set out in *Eba*. This was not inconsistent with the rule of law. The rule of law did not require a right of appeal from a judicial body (*R (Privacy International)* at para 72; *R (Oceana)* at para 49). There was no requirement to explore the broader questions raised by the petitioners (*Gibson* v *Lord Advocate* at 144). The court required to address the particular circumstances of the case rather than exploring more general issues.

Submissions

Petitioners

[31] The first ground of appeal was that the purpose of section 11A was to abolish the judicial review of decisions of an inferior body with very narrow exceptions. The Court of Session had authority to exercise supervisory control over inferior courts and tribunals in cases where there was no right of appeal (*Brown* v *Hamilton DC* at 42). This jurisdiction predated the Union with England and stemmed from the foundation of the College of Justice in 1532 (Erskine: *Institutes* I.iii.23; *Brown* v *Hamilton DC* at 28; *Eba* v *Advocate General* at paras [34] to [42]). The correct interpretation of the words "authority" and "administration" in Article XIX was that the former meant the court's power. The Article preserved that power, subject only to regulations for "the better Administration of justice". "Administration" was the means by

which the power could be exercised (Black's *Law Dictionary* (5h ed)). "Such regulation" did not encompass a regulation, including that in section 11A, that would remove or diminish the authority of the court, but rather one which would supplement or support that authority (see the Memorial by the Senators of the College of Justice to the House of Lords of 1807 referenced in Mitchell : *Constitutional Law* (2nd ed) 73).

[32] Section 37 of the Scotland Act 1998 said that the Acts of Union were to be of legal effect subject to the Act. They were therefore justiciable. They ought to be given appropriate status and importance. The intention of the Acts ought to be recognised where an Article guaranteed the court's authority for all time coming. In the hierarchy of Articles in the Treaty, Article XIX was one which was unalterable (*MacCormick* v *Lord Advocate* at 411, *Lord Gray's Motion* 2000 SC (HL) 46[1] at 58-60). It qualified parliamentary authority (*R (Jackson)* v *Attorney General* at paras 102 and 106; *Child Maintenance and Enforcement Commission Child Support Agency* v *Roy* [2013] CSIH 105 at para [25]; *Laughland* v *Wansborough Paper Co* 1921 1 SLT 341).

[33] There was nothing in section 11A which expressly, or by implication, indicated that Article XIX was to be repealed or qualified. For a constitutional section of an Act to be amended or repealed there would have to be an express provision in a later Act (*Thoburn* v *Sunderland CC* [2002] 3 WLR 247). The ordinary rules of statutory construction did not apply to constitutional principles or ouster clauses. Effect could not be given to a clause which wholly excluded the supervisory jurisdiction (*R (Privacy International)* at paras 114 and 116, 120, 125, 131-134 and 144). There was nothing in section 11A or the relative parliamentary materials that expressed an intention to qualify or repeal Article XIX. Even if Parliament could repeal foundational Acts, this court should expect to be fully satisfied in the clearest possible terms

[1] This is a decision of the Committee for Privileges of the House of Lords

that the reduction of this court's authority in violation of Article XIX had been given due consideration by Parliament and that it truly intended to repeal in part this critical Article of a foundational Act.

[34] The second ground was that Section 11A could not be said to be for the better administration of justice if the basis for that was materially flawed. It was open to the court to consider whether the regulation was truly for the better administration of justice (*Laughland*). Even if the court considered this to be a matter of policy and outwith the court's role, section 11A did not intend, and ought not be taken, to repeal or qualify Article XIX. The figures cited in the Independent Review of Administrative Law, which recommended the reform, were flawed insofar as they related to England (see Response by the Faculty of Advocates at paras 3.1-4, 6.1-4). The correct success rate on published immigration judicial review cases was 26.7%. The IRAL noted figures for Scotland at slightly less than 30%. The subsequent *Government Response to the Judicial Review Reform Consultation* stated that the success rate for *R (Cart)* judicial reviews in England was 3.4%. No challenge was made to the success rate in Scotland as determined by the IRAL. There was insufficient evidence for the claim that judicial review of unappealable UT decisions was disproportionately costly. Even if there were different success rates in judicial review of permission decisions and judicial review of other types of decision, that data was not provided by the government.

Respondent

[35] The respondent argued that the petitioners were wrong to say that the court should disregard section 11A on the ground that it breached Article XIX. First, there was no breach of Article XIX. Secondly, even if there were, the principle of the sovereignty of the UK Parliament required the court to apply section 11A. The authority of the Court of Session, as described in

Article XIX, was not altered by section 11A. Article XIX was qualified by the provision concerning the better administration of justice. If section 11A breached Article XIX, the petitioners' argument under reference to the *Eba* test, which had been contained in section 27B(3)(c) of the Court of Session Act 1988, was inconsistent with the proposition that the court's authority to exercise its supervisory jurisdiction over inferior bodies had been removed. The test restricted the substantive grounds or scope of judicial review under section 11(4)(b) of the 2007 Act (*Eba* v *Advocate General* at paras 44-46) as did section 11A *(R (LA (Albania))* v *Upper Tribunal* at paras 31 and 47). There was no restriction of some fundamental right which would require express words of repeal (*R(O)* v *Home Secretary* [2023] AC 255 at para 33).

[36] Section 11A made no difference to the authority of the Court of Session. It did not take permission decisions out of the supervisory jurisdiction. It did not alter the legal standing of the court's orders when exercising that jurisdiction. It changed the court's authority no more than any other change to the substantive law that applied when the court exercised its jurisdiction. The 2007 Act established a new UK wide unified tribunal system to hear appeals against certain administrative decisions. Section 11A was concerned with where finality should lie in the tribunal appeals' process.

[37] The Government had identified a mischief in relation to immigration judicial reviews. It had accepted that the IRAL statistics were erroneous and had therefore carried out its own research, which was not criticised and brought out a success rate of about 3%. The Government had promoted section 11A because of: (a) the number and success rate of applications for judicial review of permission decisions post *Eba*/*Cart*; (b) the standing of the UT; and (c) the other checks and balances in the system. No one could have had any of this in mind in 1706 and 1707.

[38] The sovereignty of the UK Parliament was "the foundational principle of our constitution" and "the most fundamental rule of UK constitutional law" (*Cherry* v *Advocate General* at para 42; *In re Allister* at para 66). The courts identified and applied the law in the cases brought before them. They had to give effect to section 11A because, as an Act of the UK Parliament, it was the supreme form of law in the UK. The idea that the rules of the UK constitution were fixed for all time in 1707 was wrong. The UK's constitutional arrangements had developed over time through a combination of statutes, events, conventions, academic writings and judicial decisions.

[39] The petitioners failed to face up to all the amendments to, or repeals of, the 1707 Act by Acts of the UK Parliament. For example, by the time of publication of Prof Smith's *Short Commentary* in 1962, the author had counted (at 56) nine Articles in the Treaty that had been wholly repealed and five which had been repealed in part. Article XIX itself had been partly repealed by the schedule to the Statute Law Revision (Scotland) Act 1964. Article XXII had been repealed by the Peerage Act 1963 (*Lord Gray's Motion* at 62). The UK Supreme Court had explained the characteristics of the UK Parliament in *R* (*Miller)* v *Secretary of State* [2018] AC 61 at para 43). *Miller* affirmed Dicey's concept of the sovereignty of the UK Parliament in the face of an argument that the Parliament was no longer sovereign in the Diceyan orthodox sense (see also *Keatings* v *Advocate General* 2021 SC 329 at paras [21] and [64]). It was not suggested that section 11A came close to the situation conceived in *R (Jackson)* (at para 102) whereby Parliament enacted oppressive and wholly undemocratic legislation by, for example, abolishing the judicial review of flagrant governmental abuses of power or the role of the courts in standing between the executive and citizens. There was no case in which the courts had declined to apply the provisions of an Act of the UK Parliament.

[40] There was no hierarchy of Acts that displaced the usual rules of statutory interpretation. Not every constitutional provision was important and not every important provision was constitutional. Parliament did not categorise Acts as constitutional or otherwise; nor did it say that membership of a constitutional category gave any Act greater protection from repeal than others (*Imperial Tobacco* v *Lord Advocate* 2013 SC (UKSC) 153 at para 15). The law required to change to meet modern conditions. Although unambiguous words were required to repeal a particular rule (*Thoburn* v *Sunderland CC)* that test had been met. It was not helpful to categorise some statues as constitutional or not.

Decision

[41] If the petitioners' submissions are correct, the consequence would be that, in the area of immigration and asylum, which is reserved to the UK Parliament, applicants would have different rights of judicial review over the decisions of the UK-wide Upper Tribunal depending on the place at which the First-tier Tribunal heard the case. This would be surprising and a result which the court would be cautious about before accepting that it was correct. It would mean that the Court of Session disagreed with the Court of Appeal in *R (LA (Albania))* v *Upper Tribunal* [2024] 1 WLR 1673 in circumstances in which, in relation to a UK statute, the UK Supreme Court had already refused permission to appeal to it because the argument, which contended that section 11A was ineffective in limiting the supervisory jurisdiction in England, was "hopeless"; the language of the statute "could hardly be clearer".

[42] The route which the petitioners wish the court to go down is, of course, more expansive to that advocated in *R (LA (Albania))*. It is to declare that section 11A of the Tribunals, Courts and Enforcement Act 2007 is inconsistent not only with the rule of law but also with the Act of Union with England 1707. Before considering going down any constitutional rabbit burrows,

the question must be whether section 11A does result in the authority of the Court of Session being diminished. The answer to that question is in the negative.

[43] It is no doubt correct to trace the supervisory jurisdiction of the Court of Session at least back to the College of Justice Act 1532. What, if any, jurisdiction the court had over immigration control in the early eighteenth century was not explored. In due course, in a major reform to tribunals generally, Parliament determined, in passing the 2007 Act, to create the new two tier tribunal system with the potential for appeals to go to the Court of Session (s 13) with permission of the Upper Tribunal or the court. The Act specifically limited appeals to the UT or to the court to points of law.

[44] The scope of judicial review in refusal of permission cases was canvassed in *Eba* v *Advocate General* 2012 SC (UKSC) 1 when, in disagreeing with the First Division, the UK Supreme Court decided that the scope of review would be limited further to the second appeals test which it applied in *R (Cart)* v *Upper Tribunal* [2012] 1 AC 663. The UK Supreme Court in *R (Cart)* expanded upon the jurisdiction perceived by the Court of Appeal in England and Wales but in *R (Cart)*'s Scottish cousin of *Eba* it defined the jurisdiction of the Court of Session in a narrower manner than had been determined by the court itself. Given that the scope of judicial review is generally a matter of policy for Parliament to determine (see *infra*), this step might be regarded as unusual but it was one which was nonetheless taken.

[45] Parliament decided that *R (Cart)* (and hence *Eba* too) ought to be overturned by statute. That is what the new section 11A did by redefining the scope of judicial review in refusal of permission cases. That is entirely within the scope of the legislature's powers and does not interfere with the rule of law. Against the historical background, it is not correct to say that this step diminished the authority of the court. As Dingemans LJ said (*supra* at para 31 of *R (LA (Albania))* in relation to the High Court in England and Wales, the supervisory jurisdiction has

not been excluded. The Court of Session remains as the supreme civil court in Scotland. It retains its supervisory jurisdiction but, as was said by Lord Hope in *Eba (*at para 8*)*, that jurisdiction is limited in the interests of finality. There may, over the years, have been a restructuring of the immigration and asylum tribunal system, including the introduction of an internal appeal route, but the Court of Session's authority remains intact. If anything, section 11A may be seen simply as a return to the scope of review as defined by the Lord President (Emslie) in *Watt* v *Lord Advocate* 1979 SC 120 (at 131). The court will only interfere where the UT did not have a valid application before it, was not properly constituted, had acted in bad faith or where, as section 11A(4) says, the UT has acted "in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice". In such circumstances, as Lord Stephens concluded in *In re Allister* [2023] 2 WLR 457 (at para 66), the constitutional issue is academic. There is no interference with Article XIX.

[46] If the court is wrong about that, the next question would be whether, nevertheless, section 11A was permitted because, in terms of Article XIX, it is a regulation "for the better Administration of Justice". The answer to that question has to be prefaced with further caution. What is, or is not, a measure which improves the system of civil justice is one primarily for the legislature to decide. The court can, of course, carry out internal procedural changes but the subject of its jurisdiction, that is to say the questions which it is there to answer as between civil litigants is determined, in a democracy, by Parliament (or the common law) and interpreted and applied by the court. The need for caution is consistent with the Lord President (Cooper)'s conclusion in *MacCormick* v *Lord Advocate* 1953 SC 396 (at 413). The Court of Session, as an institution, has neither the resources nor the skills to decide upon political matters of this sort. This conforms also to Lord Keith's remark (*supra*) in *Gibson* v *Lord Advocate* 1975 SC 136 (at 144)

that an inquiry into the utility of a specific legislative measure as regards the population generally is "quite outside its competence".

[47] Without going so far as to exclude the possibility of extreme cases of the type postulated by Lord Steyn in *R (Jackson)* v *Attorney General* [2006] 1 AC 262 (at para 102), it is not legitimate for a court to undermine a provision of an Act of the UK Parliament by arguing that the material upon which it was based, in this case in part the Independent Review of Administrative Law, was in some way flawed. That may be an interesting topic for academics, but it was not the IRAL that passed the legislation; it was the UK Parliament. The reasons for it doing so become largely irrelevant. The statistics may have contained an error but the message which the IRAL conveyed, and which Parliament must have accepted, was that too much resource was being spent on the very few applications for judicial review that resulted, not just in the quashing of the Upper Tribunal's decision to refuse permission to appeal, but also in ultimate success on the merits of the applications. That is a concern which Parliament was entitled to address by considering what the scope of judicial review should be where an application had already been considered by a First-tier and an Upper Tribunal, both of which are judicial in nature, and where the latter will often have a superior court judge presiding.

[48] The reclaiming motion is refused. The Court will adhere to the Lord Ordinary's interlocutor of 14 December 2023 but correct it by substituting "repels" for "refuses" where it first occurs and adding "to grant the remedies sought in Statement IV of the petition" where it occurs secondly.