**OUTER HOUSE, COURT OF SESSION**

**[2023] CSOH 93**

P1018/22

OPINION OF LORD RICHARDSON

In the Petition of

SOOY (FE/LA)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Petitioner: Winter; Drummond Miller LLP**
**Respondent: Pirie KC; Office of the Advocate General**

14 December 2023

**Introduction**

[1] The petitioner is a citizen of Nigeria. He entered the UK on 17 August 2004 as a visitor. He had a valid visa to enter the UK.

[2] On 4 March 2019, the petitioner made a human rights claim in application for leave to remain in the UK. That application was refused by the respondent on 21 April 2021. Thereafter, the petitioner appealed that refusal to the First-tier Tribunal. By decision dated 23 December 2021, the First-tier Tribunal refused the petitioner's appeal. The petitioner then made an application to the First-tier Tribunal for permission to appeal to the Upper

Tribunal. This was refused on 6 June 2022. The petitioner then sought permission to appeal from the Upper Tribunal. That application was refused on 5 September 2022.

[3] In the present proceedings, the petitioner seeks judicial review of the Upper Tribunal's decision. The respondent submits that such judicial review is incompetent standing the terms of section 11A of the Tribunals, Courts and Enforcement Act 2007 which came into force on 14 July 2022. Section 11A was introduced into the 2007 Act by section 2 of the Judicial Review and Courts Act 2022. For present purposes, section 11A provides as follows:

> "11A - Finality of decisions by Upper Tribunal about permission to appeal
>
> (1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal to refuse permission (or leave) to appeal further to an application under section 11(4)(b).
>
> (2) The decision is final, and not liable to be questioned or set aside in any other court.
>
> (3) In particular—
>
> > (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.
>
> (4) Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—
>
> > (a) the Upper Tribunal has or had a valid application before it under section 11(4)(b),
> >
> > (b) the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or
> >
> > (c) the Upper Tribunal is acting or has acted—
> >
> > > (i) in bad faith, or

> (ii) in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.
>
> (5) Subsections (2) and (3) do not apply so far as provision giving the First-tier Tribunal jurisdiction to make the first-instance decision could (if the Tribunal did not already have that jurisdiction) be made by—
>
> (a) an Act of the Scottish Parliament, or
>
> (b) an Act of the Northern Ireland Assembly the Bill for which would not require the consent of the Secretary of State.
>
> [...]
>
> (7) In this section—
>
> 'decision' includes any purported decision;
>
> 'first-instance decision' means the decision in relation to which permission (or leave) to appeal is being sought under section 11(4)(b);
>
> 'the supervisory jurisdiction' means the supervisory jurisdiction of—
>
> (a) the High Court, in England and Wales or Northern Ireland, or
>
> (b) the Court of Session, in Scotland"

[4] There is no dispute in the present case that the provisions of section 11A(2) and (3) are applicable. Accordingly, in these proceedings, essentially as a preliminary step, the petitioner seeks declarator that section 11A of the 2007 Act is unlawful and, separately, null and void. Thereafter, on the basis that it is competent, the petitioner seeks reduction of the Upper Tribunal's decision dated 5 September 2022.

[5] At the outset of the hearing before me, senior counsel for the respondent made clear that the petition was only contested on the question of competency. While the underlying merits of the petition were not conceded, no opposition to them was advanced by the respondent.

**Petitioner's submissions**

[6] The petitioner seeks declarator that section 11A of the 2007 Act is unlawful on two grounds:

- First, the power to regulate judicial review procedure in Scotland is a devolved matter.
- Second, in any event, the court ought not to give effect to section 11A of the 2007 Act on the grounds that it is not consistent with the rule of law. The rule of law requires judicial review. The courts have the constitutional function of determining and securing what the rule of law requires.

[7] Prior to and in the documents submitted in advance of the hearing, the petitioner also advanced an argument that the statutory instrument which brought section 11A into force – regulation 3(b) of the Criminal Justice Act 2003 (Commencement No 34) and Judicial Review and Courts Act 2022 (Commencement No 1) Regulations 2022 (SI 2022 No. 816) - was ultra vires, unlawful and null and void. However, in oral submissions before me, counsel for the petitioner advised that this argument was no longer insisted upon.

***The petitioner's first argument***

[8] The petitioner's first argument can be stated shortly. Judicial review was a devolved matter in Scotland on the basis that it was not reserved in terms of Schedule 5 of the Scotland Act 1998. Counsel recognised that paragraph B6 of Part II of Schedule 5 provided as follows:

> "B6. Immigration and nationality
>
> Nationality; immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens; free movement of persons within the European Economic Area; issue of travel documents."

However, he submitted that this provision did not encompass permission for the UK Parliament to restrict judicial review in the Court of Session. He also recognised that section 28 of the Scotland Act which empowered the Scottish Parliament to make laws, subject to the issues of legislative competence in section 29, provided in subsection (7):

> "(7) This section does not affect the power of the Parliament of the United Kingdom to make laws for Scotland."

But, as I understood it, the petitioner's position was that section 28(7) had to be read subject to the distinction between devolved and reserved matters. Counsel submitted, without reference to authority, that this section did not allow the UK Parliament to interfere with a devolved matter.

***The petitioner's second argument***

[9] The petitioner's second argument was much more wide ranging.

[10] The starting point for the petitioner was that the principle of Parliamentary sovereignty was constrained in two important respects: first, by the Treaty of Union; and, second, by the common law and by the principle of the rule of law itself. Counsel for the petitioner developed his argument in relation to each of these respects.

*The Treaty of Union argument*

[11] In relation to the Treaty of Union, the petitioner relied upon Article XIX. For present purposes, the material parts of Article XIX are as follows:

> "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;…"

[12] Counsel for the petitioner submitted that Article XIX was justiciable and qualified Parliamentary sovereignty. In support of this proposition he relied on what was said by Lord Hope in *R (Jackson)* v *Attorney General* [2006] 1 AC 262 at paragraph 106 where Lord Hope highlighted a series of cases in which the court had reserved its opinion on the effect of various articles of the Treaty of Union upon Parliamentary sovereignty (*MacCormick* v *Lord Advocate* 1953 SC 396 at 411, 412; *Gibson* v *Lord Advocate* 1975 SC 136 at 144; and *Pringle, petitioner* 1991 SLT 330). Counsel took me through this line of authority. He also drew my attention to what Lord Hope said, prior to *Jackson,* in *Lord Gray's Motion* [2002] 1 AC 124 which was a case before the House of Lords Committee for Privileges concerning the removal of the right of hereditary peers to sit and vote in the House of Lords. His Lordship again reserved his opinion on the issue of the justiciability of the Treaty of Union but did say that:

> "[…] the argument that the legislative powers of the new Parliament of Great Britain were subject to the restrictions expressed in the Union Agreement by which it was constituted cannot be dismissed as entirely fanciful." (at 139G-H)

[13] Counsel argued that what was said by the UK Supreme Court *In re Allister* [2023] 2 WLR 457 at paragraph 66, a case concerning the compatibility of the Withdrawal Agreement and the Northern Ireland Protocol fell to be distinguished.

> "66 The debate as to whether article VI created fundamental rights in relation to trade, whether the Acts of Union are statutes of a constitutional character, whether the 2018 and 2020 Acts are also statutes of a constitutional character, and as to the correct interpretative approach when considering such statutes or any fundamental rights, is academic. Even if it is engaged in this case, the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, 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, or more precisely the Crown in Parliament, is sovereign and that legislation enacted by Parliament is supreme. A clear answer has been expressly provided by Parliament in relation to any conflict between the Protocol and the rights in the trade limb of article VI. The answer to any conflict between the Protocol

> and any other enactment whenever passed or made is that those other enactments are to be read and have effect subject to the rights and obligations which are to be recognised and available in domestic law by virtue of section 7A(2)."

[14] *In re Allister* concerned different legislation and a different Union – Article VI of the Acts of Union of 1800. The line of cases dealing with Article XIX of the 1707 Treaty of Union had not been addressed by the court. The legislation introducing section 11A contained no express reference to an intention to override the 1707 Treaty.

[15] The petitioner's position was simply that the question of whether section 11A was truly for "the better Administration of Justice" in terms of Article XIX was a matter for the courts to determine. Counsel submitted that when the underlying basis for the introduction of section 11A was considered, it could not properly be said that it was for the better administration of justice.

[16] The UK Government had promoted the bill which became the 2022 Act only after an independent review (the Independent Review of Administrative Law or "IRAL") and subsequent consultation. The IRAL had recommended reform to the rule governing judicial review of decisions by the Upper Tribunal to refuse permission to appeal against decisions of a First-tier Tribunal, which rule was established for England and Wales in *R(Cart)* v *Upper Tribunal* [2012] 1 AC 663 (and subsequently, for Scotland, in *Eba* v *Advocate General* 2012 SC (UKSC) 1). The IRAL concluded that:

> "the continued expenditure of judicial resources on considering applications for a *Cart* JR cannot be defended, and that the practice of making and considering such applications should be discontinued" (IRAL at paragraph 3.46).

The IRAL had reached this conclusion having carried out an analysis of the comparative success rates of applications for judicial review (IRAL at paragraphs 3.41 to 3.45) which apparently showed, for England and Wales, that the success rate for *Cart* judicial reviews which had been subject to a *Cart* judicial review was very low at 0.22% (see IRAL at

paragraph 3.46). Subsequent analysis had shown that both the data and analysis relied upon by the IRAL was significantly flawed (see J Tomlinson and A Pickup *"Putting the* Cart *before the horse? The Confused Empirical Basis for Reform of* Cart *Judicial Reviews"*, UK Constitutional Law Association, 29 March 2021).

[17] Counsel also pointed out that the IRAL contained no equivalent comparative figures for Scotland. Accordingly, he submitted that no basis had been put forward for removing judicial review of second appeals which satisfied the test set down in section 27B of the Court of Session Act 1988.

[18] Counsel noted that, following the criticism of the data founded upon in the IRAL, the UK Government had accepted that the resulting figure for the success rate was too low (see *Judicial Review Reform Consultation: The Government Response* (CP477) at pages 37 to 38, paragraphs 4 and 5). Thereafter, following further investigation, the UK Government had concluded that the correct success rate figure for judicial reviews which had been subject to a *Cart* judicial review was, in fact, 3.4% (see CP477 at pages 14 and 37 to 42). In the Government Response document, this figure is contrasted with the success rate in other types of judicial review which is said to be between 40 to 50%. However, counsel noted that this analysis had, in turn, been the subject of academic criticism. He drew my attention to an article by Mikolaj Barczentewicz, an Associate Professor (Reader) in Law at the University of Surrey, entitled *"Cart Challenges, Empirical Methods and Effectiveness of Judicial Review"* Modern Law Review 2021 84(6) 1360 to 1384. The author highlighted what he considered were "manifest flaws" of the analysis contained in the UK Government's Response (at 1371). First, the author criticised the figures by the UK Government for other types of judicial review as being unsubstantiated. Second, the author criticised the analysis on the grounds

of its treatment of the settlement rate of *Cart* challenges (at 1371 -2). The author concluded as follows:

> "It is difficult to offer an apples-to-apples comparison of rates of success between *Cart* and non-*Cart* challenges, due to special characteristics of *Cart* cases. And even if we decided that it is appropriate to compare, for example, success rates in *Cart*-following Upper Tribunal appeals with success rates in non-*Cart* judicial reviews in the High Court, then we face the problem of lack of data on settlements. Ignoring settlements, the success rates are very close - 2.3 per cent (or 3.4 per cent according to the Government) for *Cart* challenges and 3.9 per cent for non-*Cart* cases in the same period. With settlements the comparison could be less favourable to *Cart* cases, but it cannot be simply assumed based on anecdotes that 30-50 per cent of non-*Cart* claims settle favourably to the claimant. This has never been shown and it would be a very significant advance in our understanding of judicial review to find that out."
> (at 1382-3)

[19] On this basis, counsel for the petitioner submitted that it was for the court to examine the evidence and consider whether or not it justified the conclusion contended for by the UK Government. He contended that the UK Government had not demonstrated that the introduction of section 11A resulted in the "better administration of justice" as required by Article XIX.

*The rule of law*

[20] The starting point for the second basis upon which the petitioner argued that Parliamentary sovereignty was constrained was again the speeches in *R (Jackson)* v *Attorney General* (as above at [12]) and, in particular, what was said by Lord Steyn (at paragraph 102) and Lord Hope (at paragraphs 104 and 107). Given their significance to the petitioner's argument, I consider that these passages are worthy of being quoted in full. First Lord Steyn:

> "102 […] This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second *Factortame decision* [1991] 1 AC 603 made that clear. The settlement contained in the

Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998 , created a new legal order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the *general* principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."

[21] Then Lord Hope:

"104. My Lords, I start where my learned friend, Lord Steyn, has just ended. Our constitution is dominated by the sovereignty of Parliament. But parliamentary sovereignty is no longer, if it ever was, absolute. It is not uncontrolled in the sense referred to by Lord Birkenhead LC in *McCawley v The King* [1920] AC 691, 720. It is no longer right to say that its freedom to legislate admits of no qualification whatever. Step by step, gradually but surely, the English principle of the absolute legislative sovereignty of Parliament which Dicey derived from Coke and Blackstone is being qualified.

…

107. Nor should we overlook the fact that one of the guiding principles that were identified by Dicey at p 35 was the universal rule or supremacy throughout the constitution of ordinary law. Owen Dixon, 'The Law and Constitution' (1935) 51 LQR 590, 596 was making the same point when he said that it is of the essence of supremacy of the law that the courts shall disregard as unauthorised and void the acts of any organ of government, whether legislative or administrative, which exceed the limits of the power that organ derives from the law. In its modern form, now reinforced by the European Convention on Human Rights and the enactment by Parliament of the Human Rights Act 1998, this principle protects the individual from arbitrary government. The rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based. The fact that your Lordships have been willing to hear this appeal and to give judgment upon it is another indication that the courts have a part to play in defining the limits of Parliament's legislative sovereignty."

[22] Counsel for the petitioner emphasised that these passages demonstrated that although Parliamentary sovereignty was fundamental, it was not absolute and unqualified. Furthermore, counsel also submitted that *Jackson* was authority for the fact that a challenge to primary legislation was justiciable at common law (see Lord Bingham at paragraph 10 and Lord Hope at paragraph 110). That view had been endorsed by McCloskey J in *Re JR 80's Application for Judicial Review* [2019] NIQB 1 at [17].

[23] Counsel also drew attention to what was said in *Axa General Insurance Company Limited* v *Lord Advocate* 2012 SC (UKSC) 122 in respect of the review of legislation passed by the Scottish Parliament (at paragraphs 49 to 51; see also Lord Mance at paragraph 97). What was said was consistent with the proposition that the courts must retain the power to insist that legislation, for example, to abolish judicial review or diminish the role of the courts in protecting the interests of the individual is not law which the courts will recognise.

[24] From this starting point, the petitioner essentially founded this part of his argument on the judgment of Lord Carnwarth in *R (Privacy International)* v *Investigatory Powers Tribunal* [2020] AC 491. This case concerned a judicial review brought of a decision of the Investigatory Powers Tribunal. The competency of such review was challenged in terms of section 67(8) of the Investigatory Powers Act 2000 which provided that, except to such extent as the Secretary of State might otherwise provide, determinations, awards, orders and other decisions of the Investigatory Power Tribunal, including decisions as to whether it had jurisdiction, should not be subject to appeal or be liable to be questioned in any court. Ultimately, the UK Supreme Court decided, by a majority, that, properly construed, section 67(8) did not exclude the High Court's judicial review jurisdiction. However, Lord Carnwarth also opined, obiter, that:

> "144. […] I see a strong case for holding that, consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law. In all cases, regardless of the words used, it should remain ultimately a matter for the court to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law."

Both Lady Hale and Lord Kerr agreed with Lord Carnwarth. However, Lord Sumption, Lord Reed and Lord Wilson all dissented. Lord Lloyd-Jones agreed with Lord Carnwarth on the question of the construction of section 67(8) and in how to dispose of the appeal but expressed no view on the argument on which Lord Carnwarth was commenting at paragraph 144.

[25] Counsel for the petitioner's argument was that, following Lord Carnwarth, it was a matter for the court to determine whether the ouster represented by section 11A should be upheld having regard to the robust criteria he identified, namely: its purpose, statutory context, and the nature and importance of the legal issue in question.

[26] Dealing with purpose and statutory context, counsel drew support for his position from the approach of the UK Supreme Court in *Cart* (as above at [16]). In that case, in determining the correct scope of judicial review of Upper Tribunal permission decisions, the court had rejected what was described as being the "exceptional circumstances" approach. In other words, where review was restricted to cases involving an excess of jurisdiction, the denial of fundamental justice or some other exceptional circumstance (see paragraph 38 per Lady Hale). Lord Dyson had observed that it was difficult to see any principled basis for holding that only jurisdictional errors of law should be reviewable. In practical terms, the classification of the error made no difference to those affected by it. His Lordship's opinion was that such a distinction did not promote the rule of law (at paragraph 110). Counsel

submitted that this approach was consistent with the judgment of Lord Carnwarth in *Privacy International* (see paragraphs 128 to 134).

[27] Counsel submitted that the key point was that section 11A significantly reduced the ability of citizens to access the remedy of judicial review. Section 11A only provided for the remedy to be available in extremely limited circumstances. As such, the approach taken by the UK Government in relation to section 11A ran contrary to that endorsed by the UK Supreme Court in both *Cart* and *Eba* (as at [16] above). Counsel drew my attention to what was said by Lord Hope delivering the judgement of the court in *Eba* at paragraphs 44 and 45.

[28] In relation to the other criteria identified by Lord Carnwarth, namely, the nature and importance of the legal issue in question, counsel submitted that section 11A would have the result of making the Upper Tribunal the final arbiter of matters even where there had been a serious error of law on an important point of principle. The UK Supreme Court in *Cart* had disapproved of such an approach (see *Cart* at paragraphs 43 and 57 per Lady Hale; 112 per Lord Brown; and 130 to 131 per Lord Dyson). In this regard, reference was also made to what Lord Carnwarth had said about the risk of the law being developed in isolation in *Privacy International* at paragraph 139. This result was, so it was said, neither proportionate nor consistent with the rule of law. This position was particularly acute in the field of asylum and immigration where the serious consequences of errors had been recognised by the courts (see *R(G)* v *Immigration Appeal Tribunal* [2005] 1 WLR 1445 at paragraph 24 and *R (Sivasubramaniam)* v *Wandsworth County Council* [2003] 1 WLR 475 at paragraph 52).

[29] In this regard, counsel also referred to the criticisms of the comparative success rate analysis which was said to underpin the UK Government's argument that dealing with *Cart* judicial reviews represented a disproportionate use of resources, which he had made as part

of his argument in relation to Article XIX of the 1707 Treaty of Union (see above at [16] to [18]).

[30] Counsel for the petitioner also drew my attention to a series of articles which had been written surrounding a previous attempt to alter the scope of judicial review of immigration decisions: clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill 2003. As drafted, the subsection (3) of clause 11 was broader than section 11A and specifically excluded:

> "Subsections (1) and (2)- (a) prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) breach of natural justice, or (v) any other matter [...]"

This clause was intended to oust any jurisdiction of the courts to review the decisions of a newly proposed single tier Asylum and Immigration Tribunal. The proposal to introduce this clause provoked a very significant amount of comment and criticism: "*Three strikes and it's out? The UK Government's strategy to oust judicial review from immigration and asylum decision making"* A Le Sueur [2004] PL 225; "*The utility of the Human Rights Act: a reply to Keith Ewing"* Lord Lester QC (now KC) [2005] PL 249; and "*Common Law Illegality of Ousting Judicial Review"* Michael Fordham [2004] JR 86. In respect of this proposal, Lord Woolf, then Lord Chief Justice of England and Wales, remarked:

> "I am not over-dramatising the position if I indicate that, if this clause were to become law, it would be so inconsistent with the spirit of mutual respect between the different arms of government that it could be the catalyst for a campaign for a written constitution. Immigration and asylum involve basic human rights. What areas of government decision-making would be next to be removed from the scrutiny of the courts? What is the use of courts, if you cannot access them?" (see Lord Woolf CJ, *"The rule of law and a change in the constitution"* The Squire Centenary Lecture [2004] CLJ 317 at page 329)

The clause was eventually withdrawn by the Government.

[31] Counsel for the petitioner submitted that similar criticisms could be advanced in respect of clause 11A and urged me, by adopting the approach of Lord Carnwarth in *Privacy International*, to grant the declarator sought. Counsel recognised that *R (Oceana)* v *Secretary of State for the Home Department* [2023] EWHC 791 represented a decision, in England and Wales, in which the effectiveness of section 11A had been challenged on similar lines as those advanced before me and had been rejected by Mr Justice Saini (see paragraphs 44 to 54). However, he submitted that that case was not binding on me. He also highlighted the fact that the arguments he made in respect of the data put forward by the UK Government (see [16] to [18] above) did not appear to have been advanced by the claimant in *Oceana.*

**Respondent's submissions**

[32] The starting point for senior counsel for the respondent was that there were two key propositions which underlay the petitioner's argument: first, that the court can refuse to apply section 11A if it is contrary to the rule of law; and second, that because section 11A excludes the judicial review which the petitioner seeks to bring, the section is contrary to the rule of law. Both of these propositions had been advanced in *Oceana* and both had been rejected by Mr Justice Saini (at paragraphs 42 and 52). Senior counsel drew attention to three key points from *Oceana.* First, section 11A had been held to be both consistent with *Cart* and with the rule of law (at paragraphs 47 to 49). Second, in relation to ouster clauses more generally, the most fundamental rule of our constitutional law is that the Crown in Parliament is sovereign and legislation passed by both Houses of Parliament is supreme (at paragraph 52). Third, in reaching these conclusions, Mr Justice Saini had been aware of the judgements in *Privacy International* (see paragraph 51). Mr Justice Saini's decision had not

been appealed and senior counsel submitted that I should adopt the same approach in dismissing the petition.

***Parliamentary sovereignty***

[33] The respondent's position was, in short, that the principle of Parliamentary sovereignty defeated all of the arguments advanced on behalf of the petitioner. Senior counsel took me through a line of cases, four of which post-dated the decision in *Privacy International* on which the petitioner founded and submitted that these cases were authority for two headline propositions: first, properly analysed, no support could be found for the notion that a court could decline to apply an act of the UK Parliament; and, second, the line of authority affirmed that Parliamentary sovereignty was a fundamental principle of the UK constitution which applied as much to the courts as to anyone else.

[34] Starting with *Axa* (as above at [23]), senior counsel highlighted Lord Hope's view that "[a] sovereign Parliament is, according to the traditional view, immune from judicial scrutiny because it is protected by the principle of sovereignty" (at paragraph 49). Lord Hope contrasted this with the position of the devolved legislatures. Senior counsel noted that, in *Axa,* Lord Reed had recognised that this principle interacted with the principle of legality so "Parliament cannot itself override fundamental rights or the rule of law by general or ambiguous words" (at paragraph 152). In support of this proposition, Lord Reed quoted Lord Steyn in *R* v *Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 "Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law" (at page 591). Senior counsel sought to argue that Lord Reed in this passage should be taken as endorsing the view that Parliament can legislate contrary to the rule of law.

[35] Senior counsel then referred to *R (Miller)* v *Secretary of State of Exiting the European Union* [2018] AC 61 in which the majority of eight justices said the following on the issue of Parliamentary sovereignty (at paragraphs 42 and 43):

> "42. […] However, it is not open to judges to apply or develop the common law in a way which is inconsistent with the law as laid down in or under statutes, i.e. by Acts of Parliament.
>
> 43. This is because Parliamentary sovereignty is a fundamental principle of the UK constitution, as was conclusively established in the statutes referred to in para 41 above. It was famously summarised by Professor Dicey as meaning that Parliament has
>
> > 'the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'"

Senior counsel contrasted how Dicey's statement as to the sovereignty of Parliament was treated by the majority in *Miller* with the more qualified way in which it had been referred to by Lord Steyn and Lord Hope in *Jackson* (see above at [21]). In this regard, he also drew my attention to what the Inner House had described as the greatly exaggerated reports of its demise when referring to Dicey's description of Parliamentary sovereignty in *Keatings* v *Advocate General* 2021 SC 329 at paragraph 64.

[36] Senior counsel drew my attention to the fact that the statutes referred to by the majority in *Miller* included the Acts of Union 1706 (in England and Wales) and 1707 in Scotland (see paragraph 41). On this basis, he submitted that the Treaty of Union could not properly be seen as an exception to the principle of Parliamentary sovereignty. On the contrary, these acts were part of the legal landscape that established that principle.

[37] The third case referred to was *Cherry* v *Lord Advocate* 2020 SC (UKSC) 1. This was a unanimous decision of 11 justices concerning the prorogation of Parliament. Senior counsel referred to it simply to draw to my attention the statement of the court that:

> "Two fundamental principles of our constitutional law are relevant to the present case. The first is the principle of parliamentary sovereignty: that laws enacted by the Crown in Parliament are the supreme form of law in our legal system, with which everyone, including the government, must comply." (at paragraph 41)

[38] Senior counsel also referred to *Re JR 80's Application for Judicial Review* (as at [22] above). Counsel for the petitioner had referred to this case for the comments of Mr Justice McCloskey when dealing with an application to amend (see [22] above). The case concerned judicial review proceedings brought in Northern Ireland against the background of the breakdown in the devolved institutions. Senior counsel referred to the subsequent Court of Appeal decision in the same case ([2019] NICA 58). He drew my attention to what Lord Justice Stephens (as he then was), giving the judgment of the court, had said about how the judgments of Lord Steyn and Lord Hope in *Jackson* (above) should be approached:

> "[…] It can be seen that the issue in *Jackson* turned on the proper construction of section 2 of the 1911 Act which is a 'question of law which cannot, as such, be resolved by Parliament.' On that basis *Jackson* authoritatively defines one particular circumstance in which the courts will hear and give judgment upon the question as to whether an Act of Parliament is invalid. However on an obiter basis Lords Steyn and Hope raised questions as to whether there were other circumstances in which the courts could declare an Act of Parliament to be invalid. [...] It can be seen that *Jackson* did not decide that there was a common law exception to the principle that 'the courts in this country have no power to declare enacted law to be invalid' but even if there was such an exception the threshold for its operation is extraordinarily high." (paragraph 52)

[39] On this basis, the Court of Appeal concluded:

> "[110] The present arrangements are to be found in the 2018 and 2019 Acts passed by the Westminster Parliament. The sovereignty of the Westminster Parliament in constitutional law means that the courts in this country have no power to declare enacted law to be invalid. At paragraphs [52] and [53] we have summarised the obiter comments as to whether there is a limit to Parliamentary sovereignty at common law. There is no decided authority for such a limit. We do not consider that this court has any jurisdiction to declare the provisions to be invalid."

[40] Senior counsel then referred to the *UNCRC* case (2022 SC (UKSC) 1). He submitted that the judgment in this case, interpreting section 28(7) of the Scotland Act 1998, provided a

definitive answer to the petitioner's first argument. It was clear beyond argument that the powers of the Scottish Parliament did not affect the power of the UK Parliament also to make laws for Scotland (see paragraphs 7 and 8). Senior counsel also drew attention to one other aspect of the *UNCRC* judgment which was the emphasis which had been put by Lord Reed on legal certainty as an important aspect of the rule of law (see paragraph 76). He submitted that this was an important consideration pointing away from following the course contended for by the petitioner and granting the declarator sought. Such a course would inevitably give rise to uncertainty because Lord Carnwarth's "strong case" in *Privacy International* lacked robust criteria as to the circumstances in which provisions should not be upheld.

[41] Senior counsel finally made reference to *In re Allister* (as above at [13]). He did so for two reasons. First, because he drew attention to the fact that Lord Stephens had referred to the Parliamentary sovereignty as "the most fundamental rule of UK constitutional law" (at paragraph 66). The second point was to notice that in that case the UK Supreme Court had held that the UK Parliament could lawfully legislate contrary to the terms of the Acts of Union 1800.

***Section 11A***

[42] Senior counsel accepted that the effect of section 11A was to narrow the grounds of review that were available in respect of a particular set of Upper Tribunal decisions namely, decisions to refuse permission to appeal. As such, he submitted that section 11A did not touch upon the review of administrative action (*see R(G)* (as above at [28]) at paragraphs 12 and 13). In the case of immigration and asylum, the administrative decision of the Home Secretary was the subject of a full merits appeal to the First-tier Tribunal. Section 11A

concerned only decisions by the Upper Tribunal to refuse a further appeal to it from the First-tier Tribunal.

[43] He submitted that section 11A had to be seen in its institutional context. To start with, section 11A was not the first occasion on which the right to judicially review had been the subject of statutory intervention. Previously, following *Cart* and *Eba,* section 27B of the Court of Session Act 1988 containing the second appeals test had been introduced by way of an Act of the Scottish Parliament. Looking at the Upper Tribunal, it was a specialist tribunal providing a mechanism whereby the decision of the First-tier Tribunal could be subject to judicial review. To that extent, it was carrying out the role of the Outer House would have fulfilled were the First-tier Tribunal to be subject to judicial review (see *MM* v *Criminal Injuries Compensation Authority* 2018 SLT 843 at paragraph 8).

[44] Senior counsel also drew attention to the background which had led to section 11A and, in particular, the development of the second appeals test in *Cart*. He pointed out that, in *Cart*, the UK Supreme Court had been dealing with a situation in which the 2007 Act did not purport to oust or exclude judicial review of unappealable decisions of the Upper Tribunal (at paragraph 37 per Lady Hale). As Lord Dyson had put it, Parliament had refused to undertake a review of the scope of judicial review and so that task had to be performed by the courts (at paragraph 120). It was from that starting point that the court had adopted the second appeals test and rejected the "exceptional circumstances" approach which had been the result in both the Divisional Court (see paragraph 31) and the Court of Appeal (see paragraph 33). However, in reaching its conclusion that court had recognised the possibility that it was within the power of Parliament to provide, through legislation, that a tribunal of limited jurisdiction should be the ultimate interpreter of the law which it has to administer (see paragraph 40).

[45] Senior counsel submitted that the restriction introduced by section 11A was the statutory equivalent of the "exceptional circumstances" test. In other words, the judicial review of the Upper Tribunal's refusal of permission to appeal was restricted to cases involving jurisdictional error or serious procedural defect. This test had been the conclusion of both the Divisional and Appeal Courts in *Cart*. It was not an extreme position. In this regard, before leaving *Cart*, senior counsel reminded me of Lord Brown's observation:

> "The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff." (at paragraph 100).

[46] The approach in *Cart* had, of course, also been adopted in *Eba* for judicial review proceedings in Scotland. Senior counsel highlighted that Lord Hope, in giving the judgment of the court, recognised that what was in issue was not access to the remedy itself but rather how best to tailor the scope of the remedy according to the nature and expertise of the Upper Tribunal (at paragraph 44).

[47] Against this background, the UK Government had, pursuant to a manifesto commitment ahead of the 2019 UK General Election, established IRAL. IRAL had recommended removing the *Cart* second appeals test on the basis that it did not represent a proportionate use of judicial resources (see above at [16]). Following further consultation, the UK Government had then legislated in the form of the Judicial Review and Courts Act 2022 which, through section 2, introduced section 11A.

[48] Responding to the criticisms made by the petitioner in relation to the analysis of data which underlay both IRAL's conclusions and those of the UK Government, senior counsel made two points. First, he submitted that in its response document, the Government had recognised the flaws in the IRAL's approach and as a result had carried out further research. However, following that, the UK Government remained of the view that the success rate of

*Cart* appeals was low when compared with other types of judicial review (UK Government Response document CP477 at paragraph 35). Senior counsel recognised that criticisms had been made of the analysis contained in the Response document by Mr Barczentewicz (see [18] above) but no positive alternative position had been forward by the author.

[49] Secondly, and in any event, it was wrong to suggest that the comparative success rate was the sole basis for the decision to proceed with its proposed reform. This was only one of a number of factors which had been considered:

> "Given the high number of *Cart* Judicial Review claims (around 750 a year from 2016-2019), the very low success rate, and that the Upper Tribunal is a Superior Court of Record (which means it can set precedents and enforce its decisions) presided over by senior judges, which sits as the apex of a wider system of checks and balances for certain administrative decisions, the Government's conclusion is that *Cart* Judicial Reviews are a disproportionate use of valuable judicial resource." (CP477 at paragraph 36)

[50] However, more fundamentally, senior counsel submitted that the courts were not the appropriate forum for the merits of legislative choices to be debated. That was a matter for Parliament. He reminded me of what Lord Bingham had said in *R (Countryside Alliance)* v *Attorney General* [2008] 1 AC 719 about the democratic process being liable to be subverted if, on a question of political or moral judgment, opponents of legislation achieve through the courts what they could not achieve in Parliament (at paragraph 45). He submitted that respect for Parliament's constitutional function meant that the courts would exercise considerable caution before intervening in matters which fell within the ambit of policy (see *Bank Mellat* v *HM Treasury (No. 2)* [2014] AC 700 at paragraph 44 per Lord Sumption). In particular, when considering issues of proportionality, it was not a situation in which the court should seek to substitute judicial opinions for legislative ones (*Bank Mellat* at paragraph 75 per Lord Reed).

***Privacy International***

[51] Senior counsel made a series of points in relation to the petitioner's reliance on Lord Carnwarth's judgment in *Privacy International*. First, the passage relied upon by the petitioner was obiter. Second, there was no majority support for it among the justices of the UK Supreme Court (see [24] above). Third, Lord Carnwarth's view was not a concluded one; it was only that there was, in his view, a strong case. Fourth, even if the test posited by Lord Carnwarth were applied, it still required to be met by the petitioner. Lord Carnwarth himself had recognised that some forms of ouster clause would readily satisfy the test (at paragraph 133). It was important to appreciate that the particular clause which the court was considering in *Privacy International* was complete exclusion of review (at paragraph 136). That was not the position created by section 11A.

[52] Senior counsel submitted, further, that Lord Carnwarth's reasoning was unpersuasive. Too much weight had been placed on the judgments in *Cart* (see paragraph 131). As had already been submitted, that case dealt with a situation in which the statute was silent on the question and contained no ouster clause. As to the argument that restrictions on the grounds of review risked the development of "local law" (Lord Carnwarth at paragraph 139), this did not arise in the present case as the petitioner conceded that no point of importance arose in his case. In any event, senior counsel submitted that it was a matter for the legislature in formulating section 11A to consider the class of cases in respect of which further review would be excluded. Those cases would each have involved a decision by the Secretary of State, a full appeal on the merits before the First-tier Tribunal and then further consideration of the arguability of any grounds of appeal by the Upper Tribunal.

[53] It was important properly to consider the nature of Upper Tribunal's jurisdiction in respect of granting permission to appeal. That turned on an assessment as to whether the First-tier Tribunal had erred in law. As such, review of the Upper Tribunal's permission decision was, in effect, a further appeal against the First-tier Tribunal's decision on its merits. Viewed from this perspective, senior counsel submitted that a number of Lord Sumption's observations in *Privacy International* were applicable here (see paragraph 172). In the same way, Lord Sumption observes later in his judgment that the rule of law is concerned with the availability of judicial review rather than to protect the jurisdiction of the High Court from any "putative turf war" (at paragraph 199). In this regard, senior counsel also made reference to the observations of Lord Wilson (see paragraphs 239 to 244).

***Responses to petitioner's arguments***

[54] The respondent's primary response to all of the petitioner's arguments was that it was clear from the line of cases through which senior counsel had taken me that the courts could not disregard an act of the UK Parliament (see [34] to [41] above). The court did not need to address hypothetical situations which did not arise in the present case. For present purposes, the key point was that there was no authority which supported the proposition that there were in fact any actual limits at common law on Parliamentary sovereignty to legislate which could be exercised by the courts. In fact, the Court of Appeal in *JR 80* had gone as far as to say that it had no such power (see [39] above).

[55] In respect of the petitioner's first argument, the respondent's position was that this was entirely misconceived standing the terms of section 28(7) of the Scotland Act. That was

clear beyond argument standing the terms of the decision of the UK Supreme Court in *UNCRC* (as above at [40], paragraphs 7 and 8).

[56] In relation to the petitioner's argument based on Article XIX of the Treaty of Union, the respondent's primary position was that there was no conflict between this article and section 11A. That was because Article XIX was subject to the qualification that: "subject nevertheless to such Regulations for the better Administration of Justice, as shall be made by the Parliament of Great Britain". This was precisely what section 11A represented. Furthermore, senior counsel submitted that what was for the "better administration of justice" was not justiciable. He drew my attention to what was said by Lord Keith in *Gibson* (as above at [12]) concerning the justiciability of the words "but that no alteration may be made in laws which concern private right except for the evident utility of the subjects within Scotland" contained in Article XVIII of the Treaty.

> "I am, however, of opinion that the question whether a particular Act of the United Kingdom Parliament altering a particular aspect of Scots private law is or is not 'for the evident utility' of the subjects within Scotland is not a justiciable issue in this Court. The making of decisions upon what must essentially be 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." (at page 144).

Senior counsel submitted that Lord Keith's analysis in respect of "evident utility" in Article XVIII was strongly analogous with the "better administration of justice" in Article XIX. In neither case was there a clear legal standard to be applied. Both were questions about which reasonable people might disagree. They were both, it was submitted, questions for the legislature.

[57] The respondent's secondary position on this argument was that in the event that I was not persuaded by the respondent's first argument and considered that there was a conflict between Article XIX of the Treaty of Union and section 11A, then *In re Allister* made clear that Parliamentary sovereignty manifest in the form of legislation trumped provisions of union treaties (as above at [13], paragraph 66).

[58] Finally, the respondent's response to the petitioner's argument based on the common law and the rule of law was straightforward. The rule of law applied as much to the courts as everyone else. The courts could not refuse to uphold the will of Parliament expressed through legislation. This was consistent with the line of cases relied upon by the respondent (see [33] to [41] above). On the occasions when the courts had addressed this issue directly, they had declined to hold that there was any power to do so (see *JR 80* (Court of Appeal) at paragraph 110; *Oceana* at paragraph 52).

[59] The petitioner could point to no authority directly in support of its argument. The speeches in *Jackson* relied on by the petitioner had to be seen in the light of the subsequent cases relied upon by the respondent. The articles written in relation to clause 11 of the Asylum and Immigration (Treatment of Claimants etc) Bill 2003 clearly did not take account of the almost twenty years of cases which had been decided since then and, in any event, concerned a different provision. It was also notable that Lord Woolf did not suggest that the courts would have any power to refuse to enforce the provision in question, rather he saw it as a stimulus to campaign for a written constitution.

[60] Finally, for the reasons senior counsel had already outlined (at [51] to [53]), he submitted that I should not follow the course considered by Lord Carnwarth in his obiter comments in paragraph 144 of *Privacy International*. Even were I to consider that the test figured by Lord Carnwarth could be applied, it was not met in the case of section 11A.

The rule of law did not require every complaint of unlawfulness to be considered by a court (*Axa*, per Lord Reed at paragraph 170). The judgments in both *Cart* and *Eba* recognised that the remedy of judicial review was not contrary to the rule of law.

**Petitioner's reply**

[61] Having made a brief reply, counsel for the petitioner advanced submissions in respect of the merits of the petitioner's case.

**Decision**

[62] At the outset, I want to record that I am extremely grateful to counsel on both sides of the bar for the lengthy, detailed and extremely learned submissions, both orally and in writing, with which I have been favoured. Lest this dispute go further, I have endeavoured to record the arguments advanced before me. I mean no disrespect to those submissions when I say that, although many complex and constitutionally significant matters were raised in argument, I consider that the resolution of the issues before me is relatively straightforward.

[63] The petitioner seeks declarator that section 11A of the 2007 Act is unlawful, and separately, null and void. This is an essential preliminary step for the petitioner because it is accepted that, in the event section 11A is applied to his case, the decision of the Upper Tribunal refusing permission to appeal dated 5 September 2022 would be final and could not be questioned in this court (section 11A(2)).

[64] As I have set out above, the petitioner essentially advanced three arguments in support of his proposition that the section 11A is unlawful.

***The petitioner's first argument***

[65] The first argument was that because judicial review was a devolved matter, not being reserved in terms of Schedule 5 of the Scotland Act, this in some way prevented the UK Parliament from legislating to restrict judicial review in Scotland. Admittedly, this argument was only somewhat tepidly advanced by counsel. However, I consider that it is entirely unstateable. There is no basis for this argument within the Scotland Act. Section 28(7) of that Act makes clear that the UK Parliament's power to make laws for Scotland is unaffected by that Act. That position was made abundantly clear in the judgment of the UK Supreme Court in the *UNCRC* case (at paragraphs 7 and 8). Accordingly, I have no hesitation in rejecting this argument.

***The petitioner's second argument***

[66] The petitioner's second argument was that the court ought not to give effect to section 11A on the basis that parliamentary sovereignty was constrained in two ways: namely, first, by Article XIX of the 1707 Treaty of Union and, secondly, by the common law. I will deal with these in turn.

*Article XIX of the Treaty of Union*

[67] I consider that the first and principal problem with the petitioner's contentions based upon the Treaty of Union is whether and, if so, to what extent the requirement contained in Article XIX is justiciable by this court. There are two aspects to this question.

[68] The first aspect is whether, as a matter of generality, the court has jurisdiction to determine whether section 2 of the Judicial Review and Courts Act 2022, which introduced section 11A, is or is not compatible with Article XIX of the Treaty of Union and, if so, what

the consequences of such a determination would be. This is the issue on which Lord President Cooper expressly reserved his opinion in *MacCormick* (as at [12] above, at 412). Since then, no subsequent court has required to go further than Lord President Cooper beyond recognising the complexity and constitutional significance of the issue (see *Gibson* as at [12], at 143 to 144 per Lord Keith; *Pringle, petitioner* as at [12] at 333 per Lord Hope; *Jackson* at paragraph 106 per Lord Hope; *Scottish Parliamentary Corporate Body* v *Sovereign Indigenous Peoples of Scotland* 2016 SLT 761 at paragraphs 45 and 46 per Lord Turnbull; see also *Lord Gray's Motion* per Lord Hope at 136B to 139H).

[69] Neither the unprecedented nature nor the potential significance of the step urged by the petitioner would, in themselves, necessarily present an insuperable problem to the petitioner's argument. However, before embarking on the resolution of that issue, I turn first to the other aspect of the question of justiciability. That is whether, even assuming that the compatibility of section 2 of the 2022 Act with Article XIX is justiciable, the court can determine if section 11A, introduced by section 2, represents regulation for the better administration of justice.

[70] I consider that the resolution of this second, more specific, aspect of justiciability is more straightforward. The petitioner does not dispute that the purpose of the 2022 Act is the administration of justice. His position is, rather, that the administration of justice has not been made better by it. However, the question of whether the administration of justice will be "better" following the introduction of section 11A seems to me clearly to be a policy question. Just as Lord Keith found in *Gibson* that an inquiry into the "evident utility" or otherwise of a particular measure for the purposes of Article XVIII would be quite outside the competence of the court (at page 144), I consider that the same can be said of an inquiry into the better administration of justice for the purposes of Article XIX. As was apparent

from the lengthy process of reporting and consultation which led up to the passing of the 2022 Act (see [16] to [18] and [47] to [49] above), the assessment of whether and, if so, how judicial review ought to be reformed involved a complex and multi-faceted appraisal. Against this background, the petitioner had no meaningful answer as to by what process and as against what measure the court was to go about determining whether or not the 2022 Act was for the better administration of justice. As Lord Turnbull found in *Scottish Parliamentary Corporate Body* (at paragraph 48), I consider that this illustrates the force of Lord Keith's observation. In this regard, I did not consider that the reliance by the petitioner on the criticisms of the data and analysis of comparative success rates referred to by IRAL and the UK Government came close to meeting this point.

[71] Accordingly, as I do not consider the question of whether the 2022 Act is for the better administration of justice is justiciable, I reject the petitioner's arguments advanced on the basis of Article XIX of the Treaty of Union. Furthermore, having done so, and conscious of both the complexity and the constitutional significance of the point at issue, I will add my name to the illustrious list of those who, following Lord Cooper in *MacCormick*, have reserved judgment on the broader question of the justiciability of Article XIX.

*The common law and the rule of law*

[72] The other basis advanced by the petitioner for his second argument is that parliamentary sovereignty is constrained at common law and, in particular, by the requirements of the rule of law.

[73] There are two fundamental elements of this argument which I consider to be extremely problematic for the petitioner.

[74] The first difficulty is whether, as a matter of law, the courts have the power at common law to decline to give effect to statutory provision on the basis that the court considers it to be contrary to the rule of law. This is the proposition for which Lord Carnwarth (along with Lord Kerr and Lady Hale) considered, obiter, that there was a "strong case" in *Privacy International* (at paragraph 144). Equally, it is the proposition the advancement of which Lord Sumption (with whom Lord Reed agreed) considered, in the same case, would represent a "mountain to climb" which the appellant's counsel was wise not to attempt (at paragraph 209).

[75] As with his argument based upon the Treaty of Union, in advancing this argument counsel for the petitioner was in the position of urging the court to take an unprecedented and highly constitutionally significant step. In fact, on this limb of his argument, it was notable that on the two occasions on which courts were confronted directly by the question, they had each decided that they had no power, at common law, to declare enacted statute law to be invalid (*JR 80* (Court of Appeal) at paragraph 110; *Oceana* at paragraph 52).

[76] For his part, senior counsel for the respondent urged me to follow those precedents and to hold that the court has no such power. He urged me to find that the statements made by Lord Steyn and Lord Hope in *Jackson* (at paragraphs 103, 104 and 107) and Lord Carnwarth in *Privacy International* (at paragraph 144) were "out of date" and no longer represented an accurate statement of the law. I decline to follow the course proposed by senior counsel.

[77] I do so because I do not require to reach this determination in order to resolve the case before me. That is because I do not consider that section 11A comes close to either the "exceptional circumstances" posited by Lord Steyn or the wholesale exclusion of the

supervisory jurisdiction of the court referred to by Lord Carnwarth. This is the second difficulty with the petitioner's argument.

[78] As was recognised by Lady Hale in *Cart* (at paragraph 40) and Lord Carnwarth in *Privacy International* (at paragraph 133), there is nothing either inherently or necessarily inimical to the rule of law about a provision which restricts rights of appeal and review. I consider that, seen in its proper context, section 11A represents an attempt by the UK Parliament to address the issue identified by Lord Hope in *Eba* (at paragraph 44):

> "The key to our doing so lies in a recognition that the issue is not one about access to the remedy, which will remain available to the citizen as of right, or the purpose for which the supervisory jurisdiction may be exercised. It is an issue about how best to tailor the scope of the remedy according to the nature and the expertise of the Upper Tribunal and the subject-matter of the decisions that have been entrusted to it by Parliament."

In terms of section 11A, Parliament has chosen to strike the balance differently from the resting place selected by the UK Supreme Court in *Cart* and *Eba.* However, section 11A is not inconsistent with the rule of law. In this regard, I do consider that Lord Sumption's comments, made in relation to the Investigatory Powers Tribunal in *Privacy International* are applicable here:

> "The purpose of judicial review is to maintain the rule of law. But the rule of law is sufficiently vindicated by the judicial character of the Tribunal. It does not require a right of appeal from the decisions of a judicial body of this kind." (at paragraph 172)

As such, I agree with Mr Justice Saini's conclusion in *Oceana* (at paragraph 49):

> "[…] Parliament decided that a more stringent exclusion was necessary. In my judgment, the policy behind the change does not conflict with the rule of law in any sense and is consistent with the principle set out at [100] of Cart, namely that:
>
> 'The rule of law is weakened, not strengthened, if a disproportionate part of the courts' resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff'."

[79] Accordingly, I reject the petitioner's argument based on the common law on this basis and, as a result of my conclusions on this point, there is no requirement for me to engage with the broader question raised by senior counsel for the respondent. In this regard, I am reminded of what Lord Keith said in *Gibson*:

> "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." (at page 144).

Such an adjudication requires one to address and engage with the particular circumstances which arise in the case as opposed to venturing too far into a more general inquiry, particularly one as controversial and of such significance as the present.

**Order**

[80] In light of the above, having rejected each of the arguments advanced in support of the declarator, I will refuse the petitioner's first plea in law. Thereafter, the petition being incompetent in terms of section 11A of the 2007 Act, I will sustain the respondent's second plea in law and will refuse the petition. In these circumstances, section 11A(2) of the 2007 Act requires that I do not to consider the merits of the petition.

[81] I will reserve all questions of expenses in the meantime.