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LA was a lesbian Muslim from Albania. She had been threatened by her girlfriend's family. Fearing persecution, she came to the UK on the back of a lorry and claimed asylum. Her claim was denied by the Home Secretary. After a series of reconsiderations and delays, the case came before the First-tier Tribunal ("FTT"). By this time, LA had been detained and issued with removal directions. She was suffering from PTSD and depression. The FTT found she would not face a real risk of serious harm if returned to Albania. In March 2023 the Upper Tribunal ("UT") refused to give LA permission to appeal. She sought judicial review of the UT's refusal, arguing it was vitiated by errors of law. Sir Duncan Ouseley in the Administrative Court held the high court did not have jurisdiction to entertain the application. The question for the Court of Appeal in *R. (LA (Albania)) v Upper Tribunal* [2023] EWCA Civ 1337 was whether he was right.

Under section 11A of the Tribunals, Courts and Enforcement Act 2007, introduced in 2022, judicial review of permission-to-appeal decisions of the UT is limited. It is only available where the UT reaches the wrong conclusion as to the validity of the application before it, is improperly constituted, or acts in bad faith or "in such a procedurally defective way" that it commits "a fundamental breach of the principles of natural justice". All other review is expressly ousted by section 11A(2) which says the UT's permission-to-appeal decisions are "final, and not liable to be set aside or questioned in any court". The effect of section 11A is to reverse the Supreme Court's judgment in *R. (Cart) v Upper Tribunal* [2011] UKSC 28, [2012] 1 A.C. 663 which allowed review on the wider second-tier appeal criteria enumerated by section 55 of the Access to Justice Act 1999.

The alleged errors of law in the present case were not made by the UT at the threshold of its inquiry, as required by section 11A(4)(a). LA's application for judicial review instead related to what might be considered the merits of the decision: whether the FTT was right to conclude she had no grounds for asylum. This would ordinarily be unproblematic in judicial review. Ever since the decision of the House of Lords in *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 A.C. 147, jurisdiction has been interpreted broadly. Any error of law made by a decision maker not only at the beginning but during the course of his inquiry causes him to ask the wrong question. This deprives him of jurisdiction and makes his purported decision a nullity. Ouster clauses, like in *Anisminic* itself, have always been held not to protect nullities: they are not true "decisions" within the terms of the clause.

Unfortunately for LA, section 11A was drafted expressly to prevent such circumventions. According to section 11A(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." Section 11A(3)(b) provides that "the supervisory jurisdiction [of the high court] does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision"; and "'decision' includes any purported decision" (s. 11A(7)). It was in the face of such contra-*Anisminic* wording that Sir Duncan Ouseley had held the high court's supervisory jurisdiction was ousted.

LA was not the first time that section 11A fell for judicial consideration. Seven months earlier Saini J. had considered the effect of section 11A in *R. (Oceana) v Upper Tribunal* [2023] EWHC 791 (Admin). The claimant there had made what Saini J. described (at [46]) as an "ambitious submission" that courts have the power at common law to ignore clear statutory ousters of judicial review. He held that although the rule of law required courts to be the authoritative interpreters of all legislation, including ouster clauses, it also required the courts to yield to Parliament's clearly manifested will. "The most fundamental rule of our constitutional law," he said, "is that the Crown in Parliament is sovereign and that legislation enacted by the Crown with the consent of both Houses of Parliament is supreme" (at [52]). Because "the common law supervisory jurisdiction of the High Court enjoys no immunity from those principles when clear legislative language is used", section 11A was held to be an effective ouster of review.

In *LA*, the Court of Appeal was invited to overturn *Oceana*. The claimant was encouraged by the judgment of Lord Carnwath in *R. (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] A.C. 491 where it was suggested that "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" (at [144]). But Dingemans L.J., giving the main judgment in *LA*, did not feel inclined to follow this approach. It was accepted (at [31]) that section 11A was sufficiently clear to alter the scope of review from that set by the Supreme Court in *Cart* (note this is subtly different from Lord Carnwath's question in *Privacy International* as to whether a clause is sufficiently clear to rebut the common law presumption against the exclusion of review). But like Saini J. in *Oceana*, Dingemans L.J. did not treat Lord Carnwath's bolder dicta on the blanket disapplication of ouster clauses as applicable to the case at hand. For a start, it was "essential to note" that section 11A did not wholly exclude judicial review: review of the UT would still be available on limited grounds, including where it made a pre-*Anisminic* jurisdictional error (at [31]). Section 11A manifested Parliament's clear intention to return to the approach preferred by the lower courts in *Cart*, who could not be

said to have "failed to have regard to the importance of the supervisory jurisdiction of the High Court" (at [32]–[33]). Indeed, even the more generous approach favoured by the Supreme Court had "expressly contemplated that some errors of law would not be corrected" (at [33]). The clause could be accepted, in other words, because it merely limited the scope of review, and did not exclude it in its entirety. Such limitations of review were recognised as constitutionally palatable in the existing case law. At the same time, Dingemans L.J. noted that in section 11A(7) "the issue of nullity was tackled head on", leaving little opportunity for any other interpretation (at [35]). Faced with such an express ouster of review, he concluded "[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. The decision by Saini J. in *Oceana* was right" (at [36]). Underhill and Lewis L.JJ. gave short concurring judgments. And because LA could not show a genuinely disputable question that one of the exceptions in section 11A(4) was engaged, her claim was dismissed.

One reading of *LA* is as a vindication of constitutional orthodoxy and the supreme importance of parliamentary sovereignty in the British Constitution. This is against an increasingly vociferous common law constitutionalism which presents the rule of law as imposing substantive limits on Parliament's legislative competence. On this view, the legal-constitutionalist flight of fancy is, in *LA*, brought crashing back to earth. Faced with the prospect of holding an Act of Parliament "unconstitutional", senior judges balked.

But we should be wary of turning constitutional law into a game of Top Trumps whereby parliamentary sovereignty is played off against the rule of law with only one potential winner. For a start, the crux of *LA* is that Lord Carnwath's obiter dicta in *Privacy International* were not applicable because there was no total ouster of review. The courts will tolerate partial ousters, at least where they permit some jurisdictional review and apply to judicial as opposed to administrative bodies. This is connected, though, to a bolder argument that total ousters are, ultimately, constitutionally intolerable. This is not because the rule of law trumps parliamentary sovereignty, but because the internal logic of parliamentary sovereignty itself demands as much. Just as Parliament cannot limit its own sovereignty by binding itself, so might it be incapable from preventing the judicial policing of the jurisdictional limits Parliament itself has set. Without such review, a decision maker might arrogate to herself powers Parliament never conferred upon her. For Parliament's will to sound effectively as law, its promulgations must be mediated by some authoritative judicial source. Such a view was articulated by Laws L.J. in his seminal judgment in *Cart* [2009] EWHC 3052 (Admin), [2011] Q.B. 120 (Divisional Court), and warrants closer consideration.

LA might well be authority for the proposition that Parliament can oust much of the high court's supervisory jurisdiction. But the extent of this principle is not wholly clear. What if Parliament were to try to oust judicial review *in toto*? What if it were to proscribe review of purely administrative bodies? It is unlikely this judgment will be the final word.

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