• The vast majority of JR can and should be reconciled with Parliamentary intention – that is the only way to avoid challenging Parliamentary Sovereignty
• The challenge to that argument is because of the desire to recognise that the judge’s role is to uphold fundamental HR conceived in the common law (constitutional rights)
• Claims that the only methodology which can reconcile JR with Parliamentary Sovereignty is the ultra vires principle – the revised one
  o Recognises that Parliament should be taken (without express language to the contrary) to intend to abide by the rule of law, so the courts should be able to overrule any apparent contrary intent on that basis, if the language of it is not clear
  o It has been written that it is accepted that common-law fundamental rights can coexist with the supremacy of parliament – JR is merely a mechanism of upholding those rights
• JR has therefore become a tool for the judiciary to keep the executive in check
• Three issues determined in this case:
  o Broad interpretation of jurisdiction, so that an error is jurisdictional if the agency, for example, breaches the rules of natural justice (not intended by Parliament without express words) or conducting an unauthorised inquiry
  o This case limits the impact of the ouster clause – only precluded review in the particular ground of non-jurisdictional error of law on the face of the record
  o Case created the general rule that errors of law are jurisdictional but you have to cite Page as well
• However, there are qualifications to this general rule that all errors of law are jurisdictional
  o Ex Parte Page – when there is a special system of rules like for, in this case, a university, and the general rule has to yield for practical considerations
  o Re Racal Communications – nature of the decision-making body – where the intention of Parliament was to give the body the power to construe questions of law – here the body was a Tribunal (specialist, with statutory powers of review) – so they themselves were not subject to review of their decisions of law as much as a regular body, on the basis of Parliament’s intention
    ▪ Grey area as to whether this actually creates an exception, because it may or may not have been overruled in Page/Anisminic
  o Ex parte South Yorkshire Transport – the nature of the statutory provision – if it is a question of degree, then it was suggested that the decision-making body could decide upon where to place the definition of a word on the scale, so long as it is within a range acceptable to the courts (reasonable)
  o The main exception will be Cart v Upper Tribunal, where it was decided that where the decision-making body has expertise, then they are sufficiently suited to make decisions of law in that field – flexible and pragmatic approach – so the Administrative court will be far slower to interfere with decisions made by, as in this case the Upper Tribunal – they had specialist skill

Jurisdiction of the Court
• The following are, according to current common law or constitutional principles, outside of the court’s jurisdiction
  o Challenge the way in which internal procedures operate (eg parliamentary privilege)
  o Challenges on common law grounds to provisions of UK Acts of Parliament (PS)
  o Challenges to the High Court, CoA and Supreme Court – JR only extends to inferior courts and tribunals (not including the upper tribunal, which is not subject)
• Certain questions are not subject to JR, as they are non-justiciable, such as matters better decided by Parliament
  o Matters that are, in essence, matters of preference - Decisions which cannot be impugned on an objective standard as their resolution is a matter of preference
    ▪ In the Belmarsh detainees litigation, the basis of this view was less that it was a question which lay, constitutionally, with the executive, than it required a judgement which admitted of no objective challenge
  o Matters in relation to which the court lacks expertise
    ▪ R v SoS for Health – court was not equipped to decide issues of policy requiring expertise on the running of the NHS and the training of doctors
  o Matters that are polycentric eg allocating a scarce resource to competing claims
they are going through the ordinary process of rationality review before they can find whether there is an ‘error’ or not

- The practical implications are that if the second category (true errors) is to be kept distinct, it must surely be construed very narrowly otherwise the distinction would become blurred
  - Example of a woman not technically being 60 on her 60th birthday until the time of day that she was born – that would be so irrational as to be struck down as an ‘error’, but it should not fall into the second category
  - If the distinction is not maintained, then courts may start to use this category to substitute what is really their own opinion and not a ‘correct answer’

- Williams’ argued reforms
  - The term “jurisdictional” should no longer be a synonym for “reviewable”. In this sense there should be no distinction between “jurisdictional” and “non-jurisdictional errors”; all errors would be prima facie reviewable and the term “jurisdictional” should not be added when the court does intervene
  - Should dispense with the distinction between issues of fact and issues of law, i.e. between the meaning of a term in the abstract and its application or not to a particular set of facts. Any such distinction is impossible to draw in practice (one’s conception of the word “vehicle” cannot be totally divorced from the objects one thinks should be covered by that word) and arguably all such issues are in any case reviewable since E
  - Instead of these distinctions, three categories of case should be drawn
    - True errors where there is only one correct (objectively ascertainable) answer
    - Where the definition or application of a statutory term contains an element of discretion, either in the case itself (such as “illegal entrant” in Khawaja), or because it requires a prediction of future events (as in E itself), the court should interfere with the original decision only where the decision-maker’s conclusion on that meaning or application was irrational or aberrant
    - Where the focus is on the decision maker’s treatment of the evidence (process review) – within this, there would be further sub-categories which would essentially determine the intensity of review – but this should be automatically reviewable (as it essentially is as errors of law) in a similar way to true errors – where the middle category would have a more relaxed standard of review since it is more about substitution of opinions
The fixed milk prices were too low for some farmers, and they asked the Minister to refer their complaint to the committee - refused because he claimed to enjoy unfettered discretion – only obligation was to consider whether to make the referral

HOL held that the discretion conferred by the statute was given with the intention to promote the policy in the statute as a whole – there were also standards of fairness to be upheld – the complaint that the Board which fixed the prices was acting unfairly should have been investigated, so the minister was acting unlawfully – apparently a clear case of ultra vires

- **Propriety of purpose doctrine**: Before deciding whether a discretion has been exercised for good or bad reasons, the court must first construe the enactment by which the discretion was conferred. Some statutory discretions may be so wide that they can, for practical purposes, only be exercised irrationally or in bad faith. But if the purpose which the discretion is intended to serve is clear, the discretion can only be exercised validly for reasons relevant to the achievement of that purpose
  - Stems from the principle of legality – every act of a public body must be authorised in positive law
  - How do the courts decipher Parliamentary intention?
    - Have to adopt a contextual approach
    - Can also look at the legislative history
    - Again, you cannot look at Hansard (Spath Holme, note Pepper v Hart)
    - Tools are limited, but this is why the Padfield principle is so important
  - Express and implied purpose doctrine upholds sovereignty, and also the rule of law
    - Wheeler v Leicester City Council – local council decided to punish a football club with suspension because they had decided to send three of their players to apartheid South Africa, and they used that as a reason that they had acted to promote good relations between players of different races, but their statutory powers were not based on this purpose – the decision was struck
    - Porter v Magill – a council decided to use powers under the Housing Act to sell council houses, with the intention of increasing the potential number of Conservative voters in marginal areas – this constituted improper purpose
    - Ex parte Spath Holme was a case of implied Parliamentary intention – see above methods for deducing – the above two cases were both express intention, so were much easier – imputed from the socio-economic position in the UK at the time, considering that it involved social housing

- What if there is more than one motive for the decision-maker?
  - Courts must consider the true purpose, and the dominant purpose, for which the power was exercised, and whether either of these purposes were authorised by the statute (these combined are the most preferable of various possible tests)
  - Westminster Corp v LNWR – statute authorised the mayor to maintain public lavatories – designed some toilets so that they could only be accessed by creating a subway passage, and the claim was that the true motive was to provide a crossing under the roads and not the toilets – had to establish that the dominant purpose was ultra-vires – but they held that the subway was a merely incidental advantage contemplated by the body, and was intra-vires

*Where the PA has taken into account irrelevant considerations at the expense of relevant considerations*
Independence and Impartiality

Actual bias and presumptive bias

- Justice should be seen to be done – *ex p McCarthy*
  - Public confidence in the justice system and in govt
- Actual – just where a person allows an irrelevant consideration to prejudice their decision
- Presumptive - any direct financial or other interest in a case automatically disqualifies
  - Can automatic disqualification be justified?
    - In *Dimes*, the court was satisfied that there was no actual bias, and nobody could form the impression that there had been bias, so what was the point of disqualification? Underlying principle is that a direct interest will inevitably create the risk of bias
    - But it may be the case that public confidence is actually harmed rather than assisted by automatic disqualification – In Australia there is just a ‘reasonable suspicion’ test because automatic disqualification is draconian and disproportionate
  - However, the application of the principle is not as crude as it may first appear - there are certain financial interests which are considered too remote
- **Locabail v Bayfield Properties** - there was a remote financial interest which might conceivably affect a judge, but there was no problem with even the apprehension of bias
  - Judge was a senior partner in the firm which was representing one of the parties – interest in the general performance of the company, not on an individual scale
  - In this case, the judge fully disclosed the interest, and in such cases it will be open to the claimant to waive the right to object (held that was so in this case as she didn’t complain until she found out the judge was ruling against her)
  - Whereas cases had spoken of any small amount of financial interest, in this case they were prepared to adopt a de minimis approach, and since the amount in question was very small, it was not conceivable to the reasonable person that there was any possibility of bias, so the automatic disqualification principle did not apply
- **R v Bristol Betting an Gaming Licensing Committee ex p O’Callaghan** - Judge was the director of a company connected with one of the parties, and this was only discovered through an article in the newspaper – still held that the connection was not direct enough, so rejected despite lack of disclosure
- **Beyond financial interests:** *Pinochet* - automatic disqualification principle was clarified
  - **Ex parte Pinochet Ugarte** – request granted by the Spanish authorities to extradite a former dictator for trial – Hoffmann was involved actively as a manager with Amnesty International, which is a human rights related charity that got involved with giving evidence in this case (they were allowed to intervene), so the first decision in which he took part was set aside – no accusation of actual bias, but still violated the rule of presumptive bias, so he was automatically disqualified
  - So the idea of financial interest was simply extended to cover other interests – argument that this was not as significant as it was made out to be at the time
    - The original principle applies to all judges who have a financial, proprietary OR OTHER interest in the outcome
• **Home Sec v AF** – had to rule that insufficient information had been given to people subject to control orders - held that where Art 6 applies, fairness requires the disclosure of all the core evidence – must be given not just the gist of the case against, but sufficient information to actually refute (if possible) the case against
  o **Home Office v Tariq** – immigration officer dismissed after it was found that his relatives were terrorism suspects – excluded from the hearing on the basis on sensitive evidence and national security – the provision of special advocates was held to be sufficient in the circumstances, as the impact on T was lower than eg AF
  o Didn’t have to be given the gist of the allocations about him – one of the reasons was that he wasn’t being detained or anything, just losing his job

**Cross examination and legal representation**

• There are many cases on this topic turning on its own particular factual context

  • Cross-examination
    o **Ex p St Germain** – inmates charged with offences in prison given extended sentences without the chance to cross-examine the witnesses
      ▪ Court took a strict view of fairness requirements in this case, because of the impact on the liberty of the claimants
      ▪ Held that they should have been afforded the opportunity to cross-examine
    o Similar position exists under Art 6, which says that it is a requirement in all criminal proceedings (which includes extension of sentences of convicts)
    o However, it may not be required in cases of investigation rather than adjudication
      ▪ **Ex p Cottrell and Rothon** – involved in investigation and finding of racially discriminatory behaviour, with no opportunity to cross-examine witnesses – this was acceptable because it was merely investigatory rather than there being any particular consequence directly in consequence of the decision
    o **Bushell v SoS for the Environment** – motorways planned based on evidence from witnesses that traffic on the alternative roads would be too high in the near future – no opportunity for cross-examine that evidence
      ▪ Diplock came up with a kind of cost-benefit analysis – whether the likelihood that the cross-examination opportunity would give new insight into the facts against the delays and expenses of providing that opportunity
      ▪ Reduces to a purely utilitarian calculus which is entirely instrumental – should at least have aspects of non-instrumental approach

• Legal representation
  o Absence of this has the benefit of much reduced costs and higher speed, though there are situations in which strong policy reasons dictate that it be provided
    ▪ When a person is allowed but cannot (lack of intelligence or knowledge) speak for themselves, they should be given another to speak for them, and there is nobody better to do this than a trained lawyer
  o **R v Home Sec ex p Tarrant** – penalties imposed on prisoners who committed offences in jail – requests for legal representation was refused – they should have been given representation on consideration of the following factors:
    ▪ The seriousness of the charge and penalty – further deprivation of liberty
    ▪ Whether any points of law are likely to arise – so if it were a cut and dry assault on an officer, caught on camera, legal rep not required
    ▪ Capacity of the party to make and present their own case
If the UT holds that the decision was subject to an error of law, it may set aside the First-tier Tribunal decision and either take the decision itself or remit the case to the First-tier Tribunal for redetermination.

There is a further appeal on a point of law, subject to permission from the UT to the C/A, which may if it allows the appeal remit the matter back to the UT for re-decision, or re-make a decision itself.

- A decision of the UT to refuse permission to appeal against the FFT may be subject to JR, where the claim raises an important principle or practice, or there is some other compelling reason to hear it.

Virtues of the new review system
- Potentially permits rapid correction of its original decisions

Reforms to the tribunal structure
- The First Tier and Upper Tribunal
  - Functions
    - FTT – appeals from bureaucrats’ decisions and its own decisions
    - UT – appeals from FFT decisions (point of law only), and review of its own decisions
- Appeals from the UT can go to the CoA, if permission is given by the UT or the High Court, if it raises an important issue.

Deference to tribunal decisions?
- What degree of deference should be shown?
- Factors for:
  - Specialist expertise of tribunals
  - Awareness of policy objectives of legislation
  - Importance of an inquisitorial approach and fact-finding jurisdiction of tribunals
- Factors against
  - Courts need to retain their supervisory role to correct errors of law (and perhaps fact)
  - Tribunals should not become too insular

R (Cart) v Upper Tribunal
- Divisional Court holding: UT description in legislation as a superior court or record did not per se render it immune from judicial review, but the UT was so closely equivalent to the High Court as to amount to its ‘alter ego’, thus JR would not lie as a matter of common law.
- However, the CoA rejected the alter-ego analysis
  - Held that the UT stood in the shoes of the tribunals it replaces, and not of the High Court
  - But said that as a matter of judicial policy the courts ought not to entertain JR of the UT save in cases of pre-Anisminic excess of jurisdiction or procedural irregularity which denied the right to a fair hearing
- Two questions
  - What should the scope of JR for unappealable decisions of the UT
  - Should the position be the same throughout the UK
    - Separate judgment was issued for Scotland in the Eba case
- The Supreme Court held that the lack of an ouster clause excluding the possibility of JR was crucial and JR was very important in upholding the rule of law.

- If the UT holds that the decision was subject to an error of law, it may set aside the First-tier Tribunal decision and either take the decision itself or remit the case to the First-tier Tribunal for redetermination.
- There is a further appeal on a point of law, subject to permission from the UT to the C/A, which may if it allows the appeal remit the matter back to the UT for re-decision, or re-make a decision itself.
  - A decision of the UT to refuse permission to appeal against the FFT may be subject to JR, where the claim raises an important principle or practice, or there is some other compelling reason to hear it.

Virtues of the new review system
- Potentially permits rapid correction of its original decisions

Reforms to the tribunal structure
- The First Tier and Upper Tribunal
  - Functions
    - FTT – appeals from bureaucrats’ decisions and its own decisions
    - UT – appeals from FFT decisions (point of law only), and review of its own decisions
  - Appeals from the UT can go to the CoA, if permission is given by the UT or the High Court, if it raises an important issue.

Deference to tribunal decisions?
- What degree of deference should be shown?
- Factors for:
  - Specialist expertise of tribunals
  - Awareness of policy objectives of legislation
  - Importance of an inquisitorial approach and fact-finding jurisdiction of tribunals
- Factors against
  - Courts need to retain their supervisory role to correct errors of law (and perhaps fact)
  - Tribunals should not become too insular

R (Cart) v Upper Tribunal
- Divisional Court holding: UT description in legislation as a superior court or record did not per se render it immune from judicial review, but the UT was so closely equivalent to the High Court as to amount to its ‘alter ego’, thus JR would not lie as a matter of common law.
- However, the CoA rejected the alter-ego analysis
  - Held that the UT stood in the shoes of the tribunals it replaces, and not of the High Court
  - But said that as a matter of judicial policy the courts ought not to entertain JR of the UT save in cases of pre-Anisminic excess of jurisdiction or procedural irregularity which denied the right to a fair hearing
- Two questions
  - What should the scope of JR for unappealable decisions of the UT
  - Should the position be the same throughout the UK
    - Separate judgment was issued for Scotland in the Eba case
- The Supreme Court held that the lack of an ouster clause excluding the possibility of JR was crucial and JR was very important in upholding the rule of law.

- If the UT holds that the decision was subject to an error of law, it may set aside the First-tier Tribunal decision and either take the decision itself or remit the case to the First-tier Tribunal for redetermination.
- There is a further appeal on a point of law, subject to permission from the UT to the C/A, which may if it allows the appeal remit the matter back to the UT for re-decision, or re-make a decision itself.
  - A decision of the UT to refuse permission to appeal against the FFT may be subject to JR, where the claim raises an important principle or practice, or there is some other compelling reason to hear it.

Virtues of the new review system
- Potentially permits rapid correction of its original decisions

Reforms to the tribunal structure
- The First Tier and Upper Tribunal
  - Functions
    - FTT – appeals from bureaucrats’ decisions and its own decisions
    - UT – appeals from FFT decisions (point of law only), and review of its own decisions
  - Appeals from the UT can go to the CoA, if permission is given by the UT or the High Court, if it raises an important issue.

Deference to tribunal decisions?
- What degree of deference should be shown?
- Factors for:
  - Specialist expertise of tribunals
  - Awareness of policy objectives of legislation
  - Importance of an inquisitorial approach and fact-finding jurisdiction of tribunals
- Factors against
  - Courts need to retain their supervisory role to correct errors of law (and perhaps fact)
  - Tribunals should not become too insular

R (Cart) v Upper Tribunal
- Divisional Court holding: UT description in legislation as a superior court or record did not per se render it immune from judicial review, but the UT was so closely equivalent to the High Court as to amount to its ‘alter ego’, thus JR would not lie as a matter of common law.
- However, the CoA rejected the alter-ego analysis
  - Held that the UT stood in the shoes of the tribunals it replaces, and not of the High Court
  - But said that as a matter of judicial policy the courts ought not to entertain JR of the UT save in cases of pre-Anisminic excess of jurisdiction or procedural irregularity which denied the right to a fair hearing
- Two questions
  - What should the scope of JR for unappealable decisions of the UT
  - Should the position be the same throughout the UK
    - Separate judgment was issued for Scotland in the Eba case
- The Supreme Court held that the lack of an ouster clause excluding the possibility of JR was crucial and JR was very important in upholding the rule of law.
- Increase in executive power – need for additional protection against administrative arbitrariness
- Sometimes an advocacy function – enforcing rights as a public defender in Latin American countries

**Constitutional roles in the UK**
- To hold the executive to account
- To investigate complaints that individuals have been treated unfairly, particularly where other avenues of redress are not available
  - Designed to consider complaints that public bodies have caused individuals injustice by maladministration
- Independent and impartial from the govt

**Main public sector ombudsman**
- The Parliamentary Ombudsman
- The Health Service Ombudsman
- The Local Government Ombudsman

**Relationship to Parliament**
- Traditional role of MPs – weekly surgeries and forms of redress (PQs, letters etc)
- Parliamentary Ombudsman intended to complement MPs
  - Though they were initially unpopular – hence the ‘MP filter’
- Reports annually to Parliament considered by the Public Administration Select Committee
- Roles difficult to balance?
  - ‘grievance-chasing’, securing redress in individual case
  - Or identifying problems and recommending changes generally?
- Reflection – two basic roles
  - Redress and control
  - These can be difficult to separate

**Basis for complaint and jurisdiction**
- Commissioner may investigate any action taken by or on behalf of a govt dept or other authority to which the Parliamentary Commissioner Act ‘67 applies, being action taken in the exercise of administrative functions of that dept, in any case where
  - A written complaint is made to the HoC by an individual who claims injustice because of maladministration in connection with that action
  - The complaint is referred to the commissioner with the consent of the complainant by a member of the House with a request to conduct an investigation thereof
- Standing and amenability
  - Any individual or body can complain, but they cannot pursue their own initiative investigations
  - Complaints can be made against any govt dept or other authority to which the act applies
- Maladministration
  - The Crossman catalogue – bias, neglect, inattention, delay, incompetence, ineptitude, perversity, turpitude, arbitrariness etc
  - Statutory interpretation – was the behaviour within the scope of what the statute permits
- Injustice
- Enforcement through JR?
  - Bradley v SoS for Work and Pensions – question was whether the govt Minister’s decision to reject the findings of the Ombudsman was irrational – held that it was, because the findings were based on cogent reasons

JR of the ombudsman

- Dyer – ombudsman amenable to JR – rare to find fault though, because they have broad discretion
- Balchin – quashed the decision of the Parliamentary Ombudsman for failure to take into account the relevant considerations

Reform

- Not easy access – MP filter – no direct access to the Parliamentary Ombudsman
  - Calls to cut out MPs from the process – for the ombudsmen to be able to investigate of their own initiative
- Also for a unified Public Sector Ombudsman – merge all of the different types
  - Would accept complaints through a variety of channels – better access and organisation