2.8 Judicial Review and the Judiciary's Power Over Government

EDEXCEL 9PL0 · about 85 minutes · Write-in edition

Total Marks

Name: _____ Date: ____ / ____ / _____

Answer ALL questions. For levels-marked questions write well-structured, developed responses in full sentences and use accurate political knowledge. Time guidance: 75 minutes total; allocate about 30 minutes to each 30-mark question and the remainder to short and mid-length items.

1 Explain, in the context of UK judicial review, the requirement of standing or locus standi and why it matters.

(Total for Question 1 is 3 marks)

2 State five remedies a UK court can grant after a successful judicial review claim.

(Total for Question 2 is 5 marks)

3 Using the source extracts evaluate the claim that judges are rightly acting as a constitutional backstop to protect rights and Parliament.

(Total for Question 3 is 30 marks)

4 Evaluate the view that the judiciary has become too powerful in the UK.

(Total for Question 4 is 30 marks)

5 Explain briefly how the Human Rights Act 1998 has changed the role of UK courts when reviewing the actions of public authorities.

(Total for Question 5 is 6 marks)

6 Analyse the extent to which the UK Supreme Court's rulings in high-profile prerogative cases have limited executive power, using Miller-era litigation as the context.

(Total for Question 6 is 9 marks)

Mark scheme · 2.8 Judicial Review and the Judiciary's Power Over Government

Question 1

identifies that standing means the applicant must have a sufficient interest in the matter	**B1**
explains that not everyone can bring JR; the court screens claims to avoid being overwhelmed by purely academic challenges	**B1**
gives a brief consequence, e.g. public interest groups may be granted standing in some cases but the court retains discretion	**B1**

Answer: Standing means the applicant must show a sufficient interest in the issue; this prevents frivolous or purely academic claims and focuses judicial resources on parties genuinely affected. Courts may grant standing to public interest groups in appropriate cases but retain discretion to refuse unsuitable challengers.

Question 2

one remedy, e.g. quashing order	**B1**
second remedy, e.g. mandatory order	**B1**
third remedy, e.g. prohibiting order	**B1**
fourth remedy, e.g. declaration of rights	**B1**
fifth remedy, e.g. damages or a remedy linked to the Human Rights Act where appropriate	**B1**

Answer: Any five of: quashing order (voiding the decision); mandatory order (ordering the public body to take a specific action); prohibiting order (preventing an action); declaration (a statement of the parties rights); damages in appropriate HRA cases or another remedy linked to the Human Rights Act.

Question 3

Level 0 No relevant content.	**0**
Level 1 Basic, limited use of the source and limited knowledge of judicial review or the HRA. Analysis and evaluation are minimal and unsupported.	**1-6**
Level 2 Some accurate use of the source combined with relevant factual knowledge. Analysis addresses the claim but evaluation is uneven or descriptive rather than balanced.	**7-12**
Level 3 Clear and accurate use of both source extracts, combined with well-selected factual knowledge about judicial review and the HRA. Balanced analysis with developed lines of evaluation and some judgement.	**13-18**
Level 4 Thorough, well-integrated use of the source material and wide, accurate knowledge. Sustained, well-reasoned evaluation engaging multiple perspectives and reaching a supported judgement.	**19-24**
Level 5 Sophisticated evaluation that makes excellent use of both extracts and extensive, precise knowledge; develops balanced and original lines of argument and reaches a nuanced, well-substantiated conclusion.	**25-30**

Indicative content:

- Use Extract A to show the courts see themselves as protecting rights and the constitutional role of Parliament, with examples such as Miller I (Article 50) and Miller II (prorogation) that stopped executive acts affecting parliamentary sovereignty or citizens rights.
- Use Extract B to present the democratic legitimacy challenge, explaining that critics claim judicial review can displace political decision making and that judges are not directly accountable to voters.
- Discuss the Human Rights Act 1998's role in empowering courts to assess the compatibility of public authority acts with Convention rights and to apply proportionality, increasing substantive review.
- Consider counterarguments that judicial review is procedural and legal rather than policy making, and that remedies such as declarations of incompatibility respect parliamentary sovereignty by leaving primary law in place.
- Discuss practical safeguards limiting judicial power: standing rules, the high thresholds in Wednesbury review, and the remedial limits where Parliament can change the law after a declaration of incompatibility.
- Consider the political and legal interaction: courts protect Parliament's role in a system of parliamentary sovereignty, but Parliament can respond by legislating and thus reasserting political control.
- Evaluate whether courts are acting 'rightly' by balancing rule of law and rights protection against democratic principles, and reach a considered judgement acknowledging both necessary judicial oversight and the need for caution about judicial overreach.

Question 4

Level 0 No relevant content.	**0**
Level 1 Basic, fragmented knowledge about the judiciary and limited evaluation. Assertions about judicial power lack development or evidence.	**1-6**
Level 2 Some accurate knowledge and a straightforward argument either for or against the claim, with limited evaluation and few examples.	**7-12**
Level 3 Clear, accurate knowledge of judicial review, HRA and relevant cases. Balanced analysis considering both expansion and limits of judicial power, with some judgement.	**13-18**
Level 4 Detailed and wide-ranging knowledge used to construct a sustained evaluation. Multiple lines of balanced reasoning, well-chosen examples and a reasoned judgement that addresses counterarguments.	**19-24**
Level 5 Sophisticated, well-substantiated evaluation that integrates extensive legal and political knowledge, analyses interaction between law and politics, anticipates objections and reaches a nuanced final judgement.	**25-30**

Indicative content:

- Arguments that the judiciary has become too powerful: the HRA 1998 and proportionality have allowed courts to scrutinise the substance of executive decisions more intensively; declarations of incompatibility and human rights remedies can force political debate; high-profile rulings such as the Miller cases show courts willing to check the executive on constitutional matters.
- Democratic legitimacy critique: judges are unelected and life tenure limits direct accountability, so critics argue extensive judicial review risks substituting judicial judgement for political choices best made by elected representatives.
- Arguments limiting the claim: judicial review is constrained by standing rules, doctrines of deference such as Wednesbury, remedial limits like declarations that leave primary legislation intact, and the ability of Parliament to change the law in response to judicial rulings, preserving parliamentary sovereignty.
- Practical interaction: courts protect rights and legal limits where political processes have failed, acting as a legal backstop; but political branches can and do respond by legislating or changing procedures, showing judicial power operates within a political constitutional framework.
- Consideration of examples: Miller I required parliamentary authorisation for Article 50; Miller II checked prorogation; declarations of incompatibility under the HRA left room for Parliament to remedy incompatibilities; post-judgment political reactions such as legislative changes show checks on judicial influence.
- Balanced conclusion might argue that courts have increased their oversight in important areas and appropriately defended the rule of law and parliamentary sovereignty in specific cases, but they have not become omnipotent; their power is significant in specific legal domains yet circumscribed by legal doctrines and political remedies, so the claim that they have become too powerful is overstated unless one rejects key constitutional safeguards.

Question 5

states that the HRA 1998 requires UK public authorities to act compatibly with Convention rights	**B1**
identifies that courts apply proportionality as a central test in HRA cases	**B1**
explains that courts can issue declarations of incompatibility where primary legislation conflicts with Convention rights	**B1**
explains that a declaration of incompatibility does not strike down Parliament's statute but signals to Parliament the need to amend the law	**B1**
identifies that courts can use the HRA to read legislation compatibly where possible	**B1**
notes that HRA has increased judicial engagement with the substance of rights balancing and so expanded judicial review in rights-related fields	**B1**

Answer: The Human Rights Act 1998 requires public authorities to act compatibly with Convention rights and has made proportionality the central test in rights challenges. Courts can issue declarations of incompatibility when primary legislation breaches Convention rights, which does not disapply the statute but invites Parliament to amend it. Courts also seek to interpret legislation compatibly where possible. Overall the HRA has increased judicial involvement in balancing rights and assessing the substance of executive decisions.

Question 6

Level 0 No relevant content.	**0**
Level 1 Limited or general knowledge of the Miller litigation with little or no developed analysis of its impact on executive power.	**1-3**
Level 2 Clear, accurate knowledge of at least one Miller judgment and some developed analysis of how it constrained specific executive acts, though reasoning may be one sided.	**4-6**
Level 3 Detailed, accurate knowledge of both Miller judgments used to construct a sustained analysis of the extent to which the rulings limited executive prerogative power, reaching a supported judgement.	**7-9**

Indicative content:

- Miller I (2017) held that the government could not trigger withdrawal from the EU using prerogative power alone and required parliamentary authorisation, indicating courts will prevent the executive changing statutory rights via prerogative.
- Miller II/Cherry (2019) found the prorogation unlawful because it prevented Parliament from carrying out its constitutional functions without reasonable justification, showing courts can review even high constitutional exercises of prerogative.
- These rulings reinforced parliamentary sovereignty and established that prerogative powers are subject to judicial review where they affect rights or Parliament's role.
- Limitations of the constraint include that the rulings were narrowly reasoned and fact specific rather than creating a general prohibition on prerogative use, and Parliament or statute can change the legal framework governing prerogative.
- The subsequent repeal of the Fixed-term Parliaments Act and the passage of the Dissolution and Calling of Parliament Act 2022 show the political branches can respond to judicial checks by changing the law, which may restore executive flexibility in some areas.
- Balanced judgement: the Miller judgments marked a significant legal check on specific executive uses of prerogative, strengthening judicial oversight in key constitutional moments, but they did not remove the executive's wide prerogative powers in other domains and their practical effect depends on political and statutory responses.