Top public law cases of the year

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14 July 2016

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Procedure

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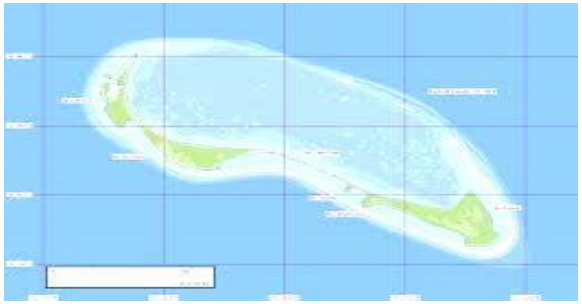
Reopening previous JR decisions

***R (Bancoult (No2)) v SSFCA* [2016]** UKSC 35



- SC inherent jurisdiction to set aside previous SC/HL where fresh evidence discovered after a judgment is rendered that is not susceptible to appeal
- Fresh evidence must demonstrate a real possibility of previous erroneous result
- Failure to disclose documents said to constitute important evidence – left open whether 'probability' of a different result should be used
- Egregiousness of a procedural breach and/or the some situations militate in favour of lower test – possibly as low as whether the breach 'may well have had' a decisive effect of the outcome of the previous decision
- Here, no probability, likelihood or prospect or any real possibility that undisclosed information could, would or should have caused SoS to doubt the general conclusions reached or which made it irrational or otherwise unjustifiable

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Proportionality and intensity of review

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Proportionality 2015/2016

- *R (Rotherham MBC) v SSBIS* [2015] UKSC 6
- *Gibraltar Betting and Gaming v SSCMS* [2015] 1 CMLR 28
- *Pham v SSHD* [2015] UKSC 19
- *Keyu v SSFCA* [2015] UKSC 69
- *R (Lumsdon) v Legal Services Board* [2015] UKSC 41
- *R (BASCA) v SSBIS* [2015] EWHC 1723
- ***R (BAT) v SSH* [2016] EWHC 1169**

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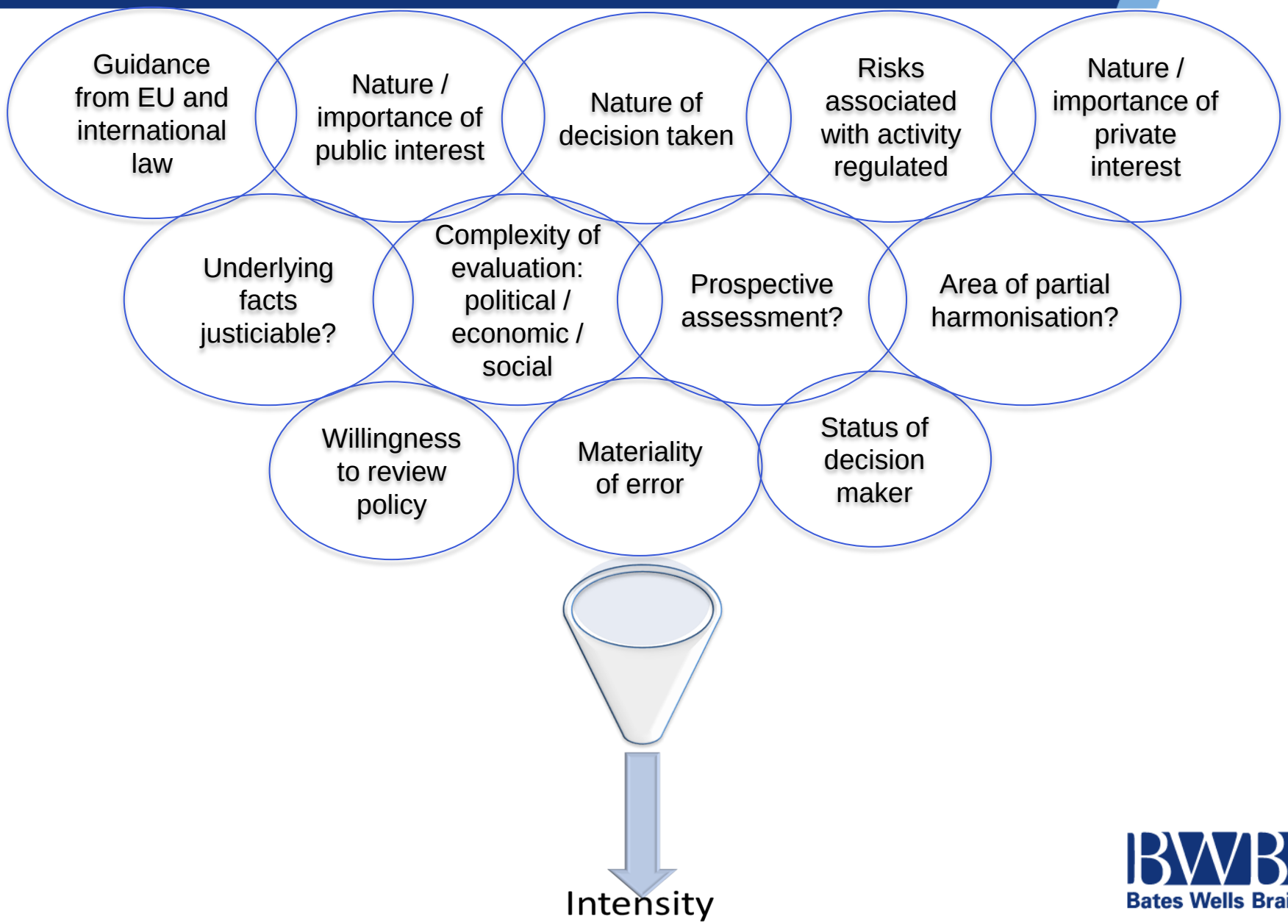

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Current position

- Exacting analysis of the facts at the time of judgment [*BAT* §29; 37; 408 - 423; 437; 442]

- Different proportionality tests under EU/ECHR (would require "*intellectual gymnastics*" if both apply) but same result [*BAT* §426]

- Sliding scale of intensity/deference, avoiding "*an excessively schematic approach*" - fact and context sensitive: [*BAT* §433-435; 438 – 472]

- Hints towards standalone English common law ground but new test not established: not "*Wednesbury*" reasonableness but a rationality challenge, the intensity of which is calibrated according to context, requiring detailed judicial engagement with the facts [*BAT* §420 – 421]

» ***Impact of Brexit?***

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Policies

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Policies

- ***Mandalia v SSHD* [2015]** UKSC 59: public bodies' adherence to its own policies is now a free-standing ground of JR in its own right

- ***R (Tigere) v SSBIS* [2015]** UKSC 57: "bright line"/blanket policies are permissible in principle but harder to justify that those that allow exceptions

- ***R (Richmond Pharmacology) v The Health Research Authority*** [2015] EWHC 2238 (Admin): policies do not have to be incorrect to be "misleading", they need only be less than expressly and explicitly clear

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Substantive legitimate expectation

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Substantive legitimate expectation

R(C) v Westminster City Council [2015]: substantive legitimate expectation found where:

- few individuals were affected by it;
- it did not have any wide-ranging issues;
- the importance of what was promised was significant; and
- it only led to financial consequences for the local authority.

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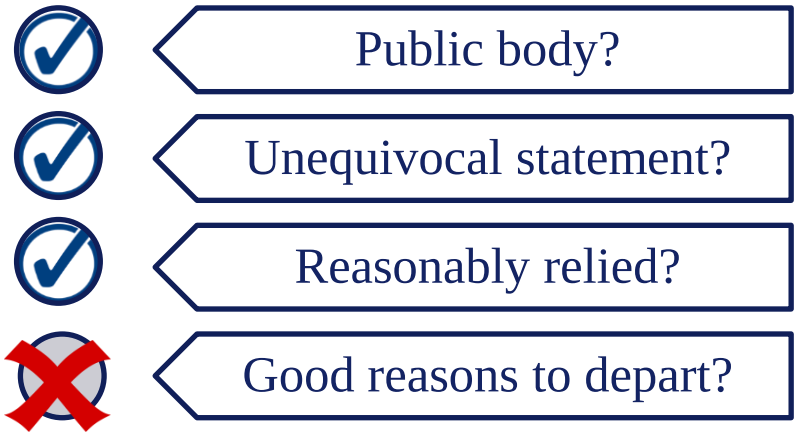
Substantive legitimate expectation

United Policyholders Group v Attorney General of Trinidad and Tobago [2016] UKPC 17:

- restates doctrine



- unlawful to resile unless it can show good reasons, judged by the court to be proportionate, taking into account any conflict with wider policy issues, particularly of a “macro-economic” or “macro-political” kind

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Substantive legitimate expectation

Nature of the statement or promise:

- ***R (Lahrie Mohamed) v HMRC*** [2016]: important that claimant *"put all his cards on the table"*

- ***R (Biffa Waste Services Ltd) v HMRC*** [2016] EWHC 1444 (Admin) at §77, 112 – established substantive legitimate expectation
  - "*Evaluating the fairness of the conduct of a public authority is not an exercise in semantics: it is necessary to ascertain, against the relevant legal and factual matrix, what the representation fairly and reasonably meant to those to whom it was made*".

  - "*a public authority … may not … put forward … an interpretation that is wholly inconsistent with what the public authority intended at the time of that representation in question.*"

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Remedies

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Remedies – general

- ***Watch Tower Bible & Tract Society of Britain v The Charity Commission*** [2016] EWCA Civ 154: Court often allows its judgment to speak for itself and does not grant relief in recognition that responsible public bodies will conscientiously comply with the terms of the judgment

- ***R (Hotak) v SSFCA and SSD*** [2016] EWCA Civ 438: declaratory relief; decision not quashed

- ***R (BASCA) v SSBIS*** **[2015]** EWHC 42041: quashed with only prospective effect

- ***R (ClientEarth) v SSEFRA*** [2015] UKSC 28: mandatory order

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Not substantially different

Section 31(2A) of the Senior Courts Act 1981

The High Court:

a) must refuse to grant relief on an application for judicial review, and

b) may not make an award [of damages] *on such an application,*

if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred

- ***R (Hawke) v SSJ*** [2015] EWHC 3599

- ***LB Enfield v SST*** *[2015]* EWHC 3758 (§102 – 106)

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Costs

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Protective Costs Orders

Begg v HM Treasury [2016] EWCA Civ 568

- Where a public body will rely on closed material, it would be unfair to refuse a PCO on the basis that the prospects cannot be assessed and any such order would be premature.

- It is no answer to say that, even if he is unsuccessful in the appeal, the court may in the exercise of its discretion decide not to order him to pay the Treasury's costs. The unfairness lies in the fact that the litigant is exposed to the risk of having to pay the Treasury's costs if he loses.

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Hotak (Appellant) v London Borough of Southwark (Respondent)
Kanu (Appellant) v London Borough of Southwark (Respondent)
Johnson (Appellant) v Solihull Metropolitan Borough Council (Respondent)
Crisis & Shelter, EHRC, SS for CLG interveners
[2015] UKSC 30

- meaning of vulnerability in s.189(1)(c) Housing Act 1996
  - The comparator - the “Pereira test” issue
  - Support
  - Public Sector Equality Duty

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78. …It is therefore appropriate to emphasise that the equality duty, in the context of an exercise such as a section 202 review, does require the reviewing officer to focus **very sharply** on (i) whether the applicant is under a disability (or has another relevant protected characteristic), (ii) the extent of such disability, (iii) the likely effect of the disability, when taken together with any other features, on the applicant if and when homeless, and (iv) whether the applicant is as a result "vulnerable".

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Smajlaj, R (on the application of) v London Borough of Waltham Forest [2016] EWHC 1240 (Admin)

- Duty under section 192 Housing Act 1996 – homeless, eligible, not in priority need and not intentionally homeless

Nzolameso (Appellant) v City of Westminster (Respondent) [2015] UKSC 22

- The Court's conclusion from s.206, s.208 and s.210 of the Housing Act 1996, paras. 16.7 and 17.41 of the Code of Guidance, Art 2 of the 2012 Suitability of Accommodation Order and the consultation exercise which preceded it is that there is a statutory duty to accommodate in borough, where reasonably practicable, failing which authorities are under a duty to try to place the household as close as possible to where they were previously living (para.19).

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Moore & Coates -v- Secretary of State for Communities and Local Government & London Borough of Bromley and Dartford Borough Council and Equality and Human Rights Commission [2015] EWHC 44 (Admin)

•172 I have found that the challenges based on breaches of the Equality Act 2010 and of Article 6 of the European Convention of Human Rights have succeeded. Both are part of the law of England and Wales. These are not to be dismissed as technical breaches. Although the issue of unlawful discrimination was put before the Minister by his officials, no attempt was made by the Minister to follow the steps required of him by statute, nor was the regard required of him by s 149 of the Equality Act 2010 had to the matters set out there.

•173. The Article 6 challenge has succeeded because substantial delays have occurred in dealing with the appeals of Mrs Moore and Ms Coates, and with many other cases. In the context of delay, Article 6 of the ECHR does no more than encapsulate the long standing principle of the common law that justice should not be unreasonably delayed, as it was and has been here. The Claimants were and are entitled to have their appeals determined within a reasonable time. The delays they have experienced have also affected those who oppose their appeals.

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R (Mulvenna and Smith) - v - Secretary of State for Communities and Local Government and Equality and Human Rights Commission [2015] EWHC 3494 (Admin), 4th December 2015

- From Moore 7 Coates – Mr Justice Gilbart at para 182 commented:

…There are, as the figures set out above demonstrate, many others whose appeals have been recovered and who must be experiencing delays, there are, as the figures set out above demonstrate, many others whose appeals have been recovered and who must be experiencing delays, as are those who oppose their appeals. If, as appears to be the case, the appeals were recovered not because of their merits but because they were cases of travellers' pitches in the Green Belt, then the effect of the judgment will be to call into question the legality of many other recoveries…

G and H v Upper Tribunal and SSHD [2016] EWHC 239 Admin) (CART JR)

- Mr Justice Walker found that the relevant test at the substantive stage is whether "an Upper Tribunal FTT permission refusal is vitiated because the Upper Tribunal misunderstood or misapplied the law when holding that the would-be appellant had identified no arguable ground of appeal." [122]

- On the facts of this particular case, Mr Justice Walker went so far as to find that "relevant parts of the grounds of appeal were not merely arguable, but were bound to succeed in law." [124]

R (On the Application Of Kiarie) v The Secretary of State for the Home Department [2015] EWCA Civ 1020

- "deport first, appeal later" provisions of the Immigration Act 2014

94B. Appeal from within the United Kingdom: certification of human rights claims made by persons liable to deportation

(1) This section applies where a human rights claim has been made by a person ('P') who is liable to deportation under –

(a) section 3(5)(a) of the Immigration Act 1971 (Secretary of State deeming deportation conducive to public good) …

…

(2) The Secretary of State may certify the claim if the Secretary of State considers that, despite the appeals process not having been begun or not having been exhausted, removal of P to the country or territory to which P is proposed to be removed, pending the outcome of an appeal in relation to P's claim, would not be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(3) The grounds upon which the Secretary of State may certify a claim under subsection (2) include (in particular) that P would not, before the appeals process is exhausted, face a real risk of serious irreversible harm if removed to the country or territory to which P is proposed to be removed.

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R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16, [2015] 1 WLR 1449, 18 March 2015

- Challenge to the "benefits cap"

- Conceded that the Regulations indirectly discriminate against women, since most lone parents are women, and that the benefits could amount to 'possessions' within Article 1 of Protocol No.1 to the ECHR (A1P1).

- The issue was justification - The Supreme Court held by a 3:2 majority that justification was made out.

- Lord Kerr: "it cannot be in the best interests of the children affected by the cap to deprive them of the means of having adequate food, clothing, warmth and housing" (269). Lady Hale noted that the children "suffer from a situation which is none of their making and which they themselves can do nothing about [227]."

The Director of Legal Aid Casework and Lord Chancellor v IS [2016] EWCA Civ 464.

- Collins J allowed his application for judicial review and granted declarations that (1) the ECF Scheme as operated is unlawful as giving rise "to an unacceptable risk that an individual will not be able to obtain legal aid where failure to provide it would be a breach of that individual's rights under the European Convention of Human Rights (to the extent applied by the Human Rights Act 1998) or under directly enforceable EU law", (2) the Civil Legal Aid (Merits Criteria) Regulations 2013 (the Merits Regulations) and (3) the Exceptional Case Funding Guidance (Non-Inquests) (the Guidance) are unlawful in the respects and to the extent set out in the judgment

- Merits test – back to 50%?

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R (Eastwood) – v – the Royal Borough of Windsor and Maidenhead [2016] EWCA Civ 437, 10 May 2016

- use of direct action powers under Town and Country Planning Act 1990 Section 178

- Article 8 and the requirement for the Court to conduct a proportionality assessment of a decision to take direct action

- The last independent proportionality review had been by a planning inspector in 2011 some 5 years earlier

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