PUBLIC LAW PROJECT ANNUAL CONFERENCE 2016

TOP PUBLIC LAW CASES OF THE YEAR

NUSRAT ZAR, HERBERT SMITH FREEHILLS

MONICA CARSS-FRISK QC, BLACKSTONE CHAMBERS

IAIN STEELE, BLACKSTONE CHAMBERS

Introduction

The number and diversity of JR cases is now such that a review of the year can only hope to cover a small sample of the Administrative Court's workload. The selection of cases below (from September 2015 to August 2016) necessarily reflects our personal choice, and no doubt there are many others that could have been included. We have each picked three cases. They are summarised below in chronological order.

Immigration rule requiring knowledge of English – Articles 8 and 14 ECHR

R (Bibi) v Secretary of State for the Home Department **[2015] UKSC 68, [2015] 1 WLR 5055**

1. This was a challenge to an immigration rule which required a foreign spouse or partner of a British citizen to produce prior to entry a certificate of knowledge of the English language to a prescribed standard, unless he was a national of one of a number of specified majority English-speaking countries or qualified for certain other exemptions based on age, physical or mental condition and exceptional circumstances.

2. The claimants, who were British citizens, each married a foreign national, resident in Pakistan and Yemen respectively, who did not speak English. Neither husband applied for entry clearance, each believing that he would be unable to satisfy the English language rule. The husband resident in Pakistan lived a large distance away from the nearest place of tuition, so requiring relocation during any period of study, which was not affordable. There was no test centre at all in Yemen. Published guidance on applying the rule stated that the expectation was that use of the "exceptional circumstances" exemption

would be rare, and that failure to obtain tuition or to take the test owing to financial hardship would not constitute exceptional circumstances.

3. The claimants sought judicial review of the Home Secretary's decision to adopt the English language rule on grounds that it interfered with her rights to respect for her family life under Article 8 ECHR or discriminated against her in her enjoyment of those rights contrary to Article 14. Beatson J dismissed the claims and the Court of Appeal upheld his decision. The Supreme Court unanimously dismissed the claimants' further appeal.

4. Lady Hale (with whom Lord Wilson agreed) gave the leading judgment. She began by noting that Article 8 includes a right for married couples to live together (§25), but that there is no general obligation to respect the choice by married couples of the country of their matrimonial residence or to accept non-national spouses for settlement (§26). However, any interference with the British-settled spouse's Article 8 right had to be proportionate, applying the familiar four-stage *Huang* test (§29). First, the English language rule pursued a legitimate aim of assisting the incoming spouse's integration into British society at an early stage (§§30-45). Secondly, there was a rational connection between the rule and the aim it sought to achieve (§46). Thirdly, as to the issue of less intrusive means, there was some benefit to integration and cohesion in requiring a very basic level of English language at the outset (§48). Fourthly, as to whether a fair balance had been struck, the lack of systematic information made it difficult to work out the extent of the interference with the Article 8 right at a global level, although it seemed clear that there had been some effect (§49). At an individual level, the interference was substantial (§52) but the problem was not so much in the rule itself but in the applicable guidance on applying the rule, which offered little hope of the rule being disapplied by reference to "exceptional circumstances" (§53). There was likely to be a significant number of cases in which the present practice did not strike a fair balance as required by Article 8 (§54). However, this did not mean that the rule itself had to be struck down: the appropriate solution would be to recast the guidance to cater for those cases where it is simply impracticable for a person to learn English, or to take the test, in the country of origin, whether because the facilities are non-existent or inaccessible because of the distance and expense involved (§55).

5. As to Article 14, Lady Hale accepted that the rule was directly discriminatory on grounds of nationality but noted that even direct discrimination is capable of justification under Article 14 (§§56-57). Being a national of an Anglophone country was a reasonable proxy for a sufficient familiarity with the English language to be able to begin to integrate with the local community immediately on arrival, and this was a context in which a brightline rule made sense (§58). The discrimination argument added nothing to the Article 8 argument (§59).

6. As to relief, Lady Hale declined to strike down the rule or declare it invalid, since it will not be an unjustified interference with Article 8 rights in all cases and is capable of being operated in a manner compatible with Convention rights. However, she noted that there might be some benefit in declaring that the rule's application will be incompatible with the Convention rights of a UK citizen or person settled here in cases where it is impracticable without incurring unreasonable expense for his or her partner to gain access to the necessary tuition or to take the test. Since the Court had not received submissions on this remedy, she invited such submissions before deciding the appeal (§60).

7. Lord Neuberger gave a concurring judgment, holding that the rule was lawful but that the guidance was bound to result in Article 8 rights being infringed on a number of occasions (§77). He saw considerable attraction in granting declaratory relief to reflects the Court's concerns about the application of the guidance, but agreed that the parties should have the opportunity of making written submissions on the appropriateness of such a course and the terms of any potential declaration (§§103-104). Lord Hodge (with whom Lord Hughes agreed) also agreed that there was no basis for striking down the rule, but was not persuaded that the Court should issue the declaration proposed by Lady Hale and the range of her criticism of the guidance exceeded his concerns (§61). However, Lord Hodge was content with Lady Hale's proposal of inviting submissions before reaching a concluded view on the issue of relief (§76).

Duty to hold public inquiry into civilian deaths in British protected state – Article 2 ECHR

R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs **[2015] UKSC 69, [2015] 3 WLR 1665**

8. This was a judicial review of a decision not to hold a public inquiry into the death in 1948 of 24 civilians at the hands of a British Army Patrol at Batang Kali in the State of Selangor, a British protected state within the Federation of Malaya. The claim was brought by Malaysian citizens who were relatives of those who had been killed.

9. One of the issues was whether the claim concerned matters which fell within the jurisdiction of the United Kingdom for the purposes of Article 1 of the ECHR, so as to make the United Kingdom potentially responsible for breach of Article 2 of the ECHR. The Court rejected the argument of lack of jurisdiction. At the time of the deaths the deceased had been in the control of the British Army and within the jurisdiction of the United Kingdom. Following the coming into force of the ECHR and its extension to the Malayan Federation in 1953 the UK was potentially obliged to secure Article 2 rights to everyone within its jurisdiction, and such rights and obligations as passed on independence to the Federation did not include an obligation in respect of the deaths, so as to relive the UK of its own investigative obligation.

10. There was no dispute that in principle the killings fell within the 'separate and autonomous duty to carry out an effective investigation' under Article 2 ECHR. But the defendants denied that the duty applied in this case, because the deaths had taken place before the ECHR came into existence, and before the Human Rights Act came into force.

11. It was clear that the obligations under the ECHR do not generally bind a contracting party in relation to any act or fact which took place before the date of entry into force of the ECHR with respect to that party (the critical date). But in relation to the duty to investigate deaths, in respect of a death occurring before the critical date, a procedural obligation could come into effect as regards procedural acts and omissions in the period after the critical date, if there was a 'genuine connection' between the death as the triggering event and the critical date (§72).

12. In this case, there were relevant procedural acts and omissions in the period after the critical date, bearing in mind that prior to 1970 there had been no full or public investigation into the killings, and weighty and compelling evidence had come to light in that period to suggest that the killings were unlawful (§75).

13. As to the question of whether there was a 'genuine connection' between the death and the critical date, the Grand Chamber of the ECtHR in *Janowiec v Russia* (2013) 58 EHRR 792 had held that the lapse of time must be relatively short for there to be a genuine connection, and that it should not exceed ten years. This required resolution of the key issue of whether the 'critical date' was the date when the Convention came into force in the relevant territory, or the date when the state first recognised the right of individual petition to the Strasbourg Court (§77). This presented a choice between 1953 and 1966 for the critical date. If the critical date was in 1966, the claims would fail, as the deaths occurred considerably more than ten years before that date. The Court concluded that the critical date was the date when the UK first recognised the right of individual petition, which was said better to accord with Strasbourg jurisprudence and principle (including that one would expect the critical date to be linked to the date on which the Strasbourg Court's jurisdiction could be expected to be invoked (§87)).

14. The Court also noted that while the ECtHR had recognised that the 'genuine connection' criterion may be finessed where it is necessary to underpin 'the underlying values of the Convention' (§72), a contracting state could not be held responsible for not investigating even the most serious crimes under international law where they predated the Convention (§88).

15. The claim under Article 2 ECHR therefore failed: the Strasbourg Court would not hold that the claimants were entitled to an investigation into the deaths under Article 2. The Supreme Court did not think it appropriate, in those circumstances, to rule on the further argument by the defendant that the UK Court would not in any event have jurisdiction to entertain the claim under Article 2 because the Human Rights Act does not have retrospective effect (and thus declined to resolve the conflict between *In re McKerr* [2004] 1 WLR 807 and *In re McCaughey* [2012] 1 AC 725).

16. The Court further held that if an Article 2 claim had otherwise been open to the claimants, it would have failed as being out of time under either section 7(5) of the Human Rights Act or Article 35 of the ECHR. There were no events or revelations which could justify the argument that the right to an investigation could be pursued in 2009 (which is when the public inquiry was requested) (§108).

17. The claimants' argument that there was a duty to investigate the deaths under customary international law was also rejected, and it was in any event held that even if such a duty existed, it could not be implied into the common law, in circumstances where Parliament has made specific provision for investigating suspicious deaths (§§116 and 117).

18. As to the claimants' argument that the decision not to hold an inquiry was irrational at common law, this too failed: the defendants had considered the request for an inquiry seriously and had rejected it for reasons which were individually defensible and relevant (§129). An argument based on proportionality would lead to the same conclusion. However, it was not thought appropriate for a five justice panel of the Court to rule on the argument that proportionality should be recognised as a standard by which to judge public law decisions (§132). Such recognition "*would involve the court considering the merits of the decision at issue: in particular, it would require the courts to consider the balance which the decision-maker has struck between competing interests (often a public interest against a private interest) and the weight to be accorded to each such interest*…" (Lord Neuberger at §133). It was noted, however, that domestic law may already be moving away to some extent from the irrationality test in some cases, and that the answer to the question of whether the Court should apply proportionality rather than rationality as a test may depend on the nature of the issue.

19. On the issue of proportionality, Lord Kerr considered that the implications of changing from a test of irrationality to proportionality may have been overestimated in the past, and that "*the very notion that one must choose between proportionality and irrationality may be misplaced*" (§271). Having cited from a number of recent authorities touching on this issue, Lord Kerr identified a number of interesting issues which had to await a case where they could be more fully explored. These included whether irrationality and proportionality are forms of review which are bluntly opposed to each other and mutually exclusive; whether intensity of review operates on a sliding scale, dependent on the nature of the decision under challenge and that, in consequence, the debate about a 'choice' between proportionality and rationality is no longer relevant; whether there is any place in modern administrative law for a 'pure' irrationality ground of review ie one which poses the question, 'could any reasonable decision-maker, acting reasonably, have reached this conclusion'; and whether

proportionality provides a more structured and transparent means of review (§278).

20. Baroness Hale dissented, and concluded that the common law challenge ought to succeed. In her view, the Wednesbury test did have some meaning in a case such as this. The defendants had not taken into account all the possible purposes and benefits of an inquiry and reached a decision which was not one which a reasonable authority could reach (§313).

Terrorism stop and search powers – Article 10 ECHR

R (Miranda) v Secretary of State for the Home Department **[2016] EWCA Civ 6, [2016] 1 WLR 1505**

21. David Miranda travelled from Brazil to Germany on behalf of the journalist Glenn Greenwald to collect encrypted data that had been stolen by Edward Snowden from the US National Security Agency, which included UK intelligence material. On his return journey, Mr Miranda was stopped at Heathrow by the police, who had been asked by the Security Service to exercise their powers under Schedule 7 to the Terrorism Act 2000 to stop, question and detain him. Schedule 7 empowers a police officer to question a person at an airport for the purpose of determining whether he appears to be a person falling within section 40(1)(b), namely a person who is concerned in the commission, preparation or instigation of acts of "terrorism" as defined in section 1.

22. Mr Miranda sought judicial review of the action taken against him on the bases that (1) the use of the Schedule 7 powers had been for an improper purpose, the dominant purpose being to seize the material in his possession rather than to determine whether he appeared to be a person falling within section 40(1)(b); (2) the use of the powers was a disproportionate interference with his right to protection of journalistic expression; and (3) the Schedule 7 powers were incompatible with the requirement under Article 10 ECHR that any interference with the right to freedom of expression must be "prescribed by law". The Divisional Court dismissed the claim. The Court of Appeal allowed an appeal on point (3). Lord Dyson MR gave the only judgment, with which Richards and Floyd LJJ agreed.

23. On point (1), Lord Dyson held that the "true and dominant purpose" of the stop was to give effect to a Port Circulation Sheet completed by the Security Service, which was a sufficient basis for authorising an examining officer to question Mr Miranda for the purpose of determining whether he appeared to be a person falling within section 40(1)(b). There was nothing to suggest that the police decided to execute the stop for any other purpose. The fact that the exercise of the Schedule 7 power also promoted the Security Service's different (but overlapping) purpose did not mean that the power was not being exercised for the Schedule 7 purpose (§31). Further, the examining officers were not required to carry out their own assessment of the basis for a Schedule 7 stop; it was sufficient that their superior police officers did so (§36). The Divisional Court had adopted an overly broad literal interpretation of "terrorism" (§§51-56), but the police had not erred in law in their approach to that concept (§§57-58).

24. On point (2), Lord Dyson noted that the issue was whether the Divisional Court had adopted a flawed approach to the fourth limb of the proportionality test, i.e. whether a fair balance had been struck between Mr Miranda's Article 10 rights (derived from his involvement in journalistic activity) and the wider security interests of the community (§60). The court should accord a substantial degree of deference to the police's expertise in assessing the risk to national security and in weighing it against countervailing interests (§79). The defendants' evidence as to the risks of harm to the public or national security arising from Mr Miranda being in possession of the material in question was compelling (§82), and the compelling national security interests outweighed Mr Miranda's Article 10 rights on the facts of the case (§84). Further, while an order under Schedule 5 to the 2000 Act requiring Mr Miranda to produce the material to a constable for seizure and retention would have been less intrusive than the exercise of the Schedule 7 stop power, it would also have been less effective (§93).

25. On point (3), Lord Dyson held that the Strasbourg jurisprudence requires prior, or (in an urgent case) immediate post factum, judicial oversight of interferences with Article 10 rights where journalists are required to reveal their sources (§101). Further, there was no reason in principle for drawing a distinction between disclosure of journalistic material simpliciter and disclosure of journalistic material which may identify a source (§107). The Supreme Court in *Beghal v DPP* [2015] UKSC 49, [2016] AC 88 held that there were adequate safeguards on exercise of the Schedule 7 power to ensure that interference with

Article 5 and 8 rights were "in accordance with the law" (§108). However, although there is often an overlap between Articles 8 and 10, they are distinct, and the availability of judicial review after the event cannot cure a breach of Article 10 resulting from the disclosure of a confidential source or other confidential material (§110). The constraints on exercise of the Schedule 7 power do not afford effective protection of journalists' Article 10 rights (§113). The power was therefore declared incompatible with Article 10 in this regard (§119).

Legislation failing to extend civil partnership to heterosexual couples – Articles 8 and 14 ECHR

***Steinfeld v Secretary of State for Education* [2016] EWHC 128 (Admin), [2016] 4 WLR 41**

26. In this case the claimants argued that the failure to extend the right to enter into a civil partnership to heterosexual partners was incompatible with Articles 14 ECHR read with Article 8.

27. The Civil Partnership Act 2004 defines a 'civil partnership' as 'a relationship between two people of the same sex…when they register as civil partners of each other' (section 1). The claimants argued that once the United Kingdom had enabled same sex couples to marry, by enacting the Marriage (Same Sex Couples) Act 2013, the failure to extend to heterosexual couples the option of achieving legal recognition of their partnership other than through marriage was discriminatory and incompatible with Articles 14 and 8 ECHR. They therefore sought a declaration of incompatibility pursuant to section 4 of the Human Rights Act 1998 of the relevant provisions of the Civil Partnership Act 2004.

28. The claimants did not contend that there was any substantial difference between civil marriage and civil partnership in terms of the legal rights and responsibilities they accord or the process by which they can be entered into. Rather, the argued that they should not - in order for their partnership to be legally recognised – be forced into the institution of marriage against which they had deep-rooted and genuine ideological objections based on its historically patriarchal nature.

29. Andrews J held that the claim failed at the first hurdle, in that Articles 8 and 14 ECHR were not engaged. She concluded that the denial to heterosexual couples of a further means of formal recognition of a partnership which is open to same

sex couples did not amount to an unlawful interference with the claimants' right to respect for private and family life, any more than the denial of marriage to same sex couples did prior to the enactment of the 2013 Act. She observed (at §39): "*There is no lack of respect afforded to any specific aspect of the claimants' private or family life on account of their orientation as a heterosexual couple. Thus the statutory restrictions complained of do not impinge upon the core values under either limb of article 8 to the degree necessary to entitle the claimants to rely upon article 14. The link between the measures complained of, and their right to enjoy their family and private life, is a tenuous one.*"

30. In the alternative, Andrews J concluded that even if Articles 8 and 14ECHR were engaged, the difference in treatment was objectively justified. The government had held two consultations which had raised the issue of whether civil partnership should be extended to heterosexual couples, and the response had been inconclusive. The government had therefore decided to wait and see before taking any final decision about the future of civil partnerships. The Judge held that "*maintaining [the] difference in the short terms is objectively justified. By deciding to wait until it is in a better position to evaluate the impact of the 2013 Act on civil partnerships before taking any legislative steps, against a background where there is no consensus either domestically or within Europe as to the appropriate course to take, the government is acting well within the ambit of discretion afforded to it with regard to the regulation of social matters.*" (§86).

Amenability to judicial review of 'skilled person' appointed to report to the Financial Conduct Authority

***R (Holmcroft Properties Limited) v KPMG LLP and the Financial Conduct Authority* [2016] EWHC 323 (Admin)**

31. This was a claim for judicial review of KPMG LLP, having been appointed as a 'skilled person' under the Financial Services and Markets Act to report to it in connection with an agreed compensation scheme for the mis-selling of certain interest rate hedging products by Barclays and other banks. Barclays had agreed that KPMG should oversee the implementation and application of the scheme and that Barclays would make no offers of compensation save with the approval of KPMG. KPMG could only approve offers if it considered that they were appropriate, fair and reasonable.

32. The claimant argued that it was made an inadequate offer of compensation by Barclays, which did not include compensation for consequential loss, and that Barclays did not deal fairly with its application for such loss. It was alleged that KPMG acted in breach of public law principles by approving the offer made by Barclays. The issues before the Divisional Court (Elias LJ and Mitting J) were whether KPMG was amenable to judicial review and, if it was, whether it acted in breach of public law principles.

33. The Court reviewed the main authorities on amenability to judicial review and concluded that KPMG was not in the circumstances so amenable. The Court observed that it had not found the question easy to resolve (§38). Its reasoning was as follows:

(1) It was accepted that KPMG was 'woven into' the FCA's regulatory function. There was a clear public connection between KPMG's function and the regulatory duties carried out by the FCA. But this was not sufficient to render it amenable to judicial review. Notwithstanding these powerful pointers in favour of amenability, the public element was not sufficiently strong.

(2) Although the FCA had a number of more draconian powers it could have exercised, it nevertheless chose to adopt an essentially voluntary scheme of redress.

(3) The fact that KPMG's powers were conferred by contract was important, albeit not determinative, and in that context it was relevant that KPMG had no relationship with the customers at all. KPMG was not appointed by the FCA to do anything at all.

(4) The fact that private arrangements are used to secure public law objectives does not bring those arrangements into the public domain sufficient to attract public law principles.

(5) The FCA had no regulatory obligation to carry out the role which KPMG played had there been no willing skilled advisor.

(6) The FCA was not disqualified by the arrangements from taking a more active role in particular cases.

(7) In short, there was no direct public law element in KPMG's role, and although it played an important part in the redress scheme, that of itself was also voluntarily undertaken albeit under threat of potentially more onerous statutory sanctions.

34. In any event, even if KPMG had been amenable to judicial review, it was clearly not subject to the range of public law duties originally proposed by the claimant. Public law could not impose duties which undermined the basis of the private contractual arrangements.

Alternative Remedy

***R (Watch Tower Bible & Tract Society of Britain) v Charity Commission* [2016] EWCA Civ 154, [2016] 1 WLR 2625**

35. The claimants were a charity regulated by the respondent, the Charity Commission (the "Commission"). The Commission initiated a statutory inquiry to investigate concerns about the claimants' safeguarding of vulnerable beneficiaries. The Commission also issued a Production Order requiring the claimant to produce certain documents. The claimants sought judicial review of both decisions. The High Court refused permission on the basis that the appellants should have exercised a statutory right of appeal to the First-tier Tribunal ("**FTT**") rather than bringing judicial review proceedings.

36. The Court of Appeal dismissed the appeal in relation to establishing the inquiry and allowed it in relation to the Production Order. The applicable principles were not in dispute: if other means of redress were "conveniently and effectively" available to a party, they ought ordinarily to be used before resort to judicial review.

37. In relation to the decision to initiate the inquiry, the statutory scheme provided a right of appeal to the FTT which could either dismiss the application or direct the Commission to end the inquiry. The substance of the claimants' complaint was against the vagueness and the lack of definition of the scope of the inquiry initiated by the Commission. They said the FTT would not have jurisdiction to grant relief in relation to that complaint by, of example, identifying how the scope of it should be varied of clarified. The High Court rejected that argument,

saying that if the FTT accepted the claimants' substantive arguments, it could direct the Commission to end the inquiry, providing reasons which would allow the Commission to open a new inquiry consistent with those reasons. The Court of Appeal agreed. It also rejected the claimants' argument that the risk of further controversy about whether any re-established inquiry was compliant with the FTT's reasons meant that it was less convenient or effective than judicial review, since the same risk arose following a court judgment.

38. In relation to the challenge to the Production Order, the question was whether the FTT had jurisdiction to deal with the complaint that it was disproportionate, in breach of the Data Protection Act 1998 and/or in breach of article 8 of the European Convention on Human Rights. The statutory scheme provided that on an appeal against a production order the FTT had to consider whether the information or documents sought (a) relates to a charity; or (b) is relevant to the discharge of the functions of the Commission, and could only allow an appeal if it was satisfied that the information or documents did not fall within (a) or (b).

39. The defendant advanced the arguments (amongst others) that considering whether an order was "relevant to the discharge" of the Commission's functions would include consideration of whether it was *lawful*, which was sufficiently broad to include challenges alleging breaches of the European Convention on Human Rights and/or the Data Protection Act 1998. Alternatively, section 3(1) of the Human Rights Act 1998 required the statutory scheme to be construed compatibly with the European Convention on Human Rights to include a challenge on Convention grounds. By parity of reasoning, the same must apply to a DPA challenge since the DPA implemented an EU Directive, the object of which was to protect the fundamental rights and freedoms of natural persons.

40. A majority of the Court of Appeal (the Master of the Rolls; Richards LJ agreeing) rejected these arguments, finding that "relevant to" the discharge of the Commission's functions simply meant "connected with", "bearing upon" or "pertinent to" its functions. If Parliament had intended a broader right of appeal to the FTT it would have provided for one. Since the statutory right of appeal against the Production Order was not broad enough to encompass the European Convention on Human Rights and DPA grounds raised by the claimant, the correct mode of challenge was via judicial review. McCombe LJ remained uncertain about the precise scope of the statutory appeal against a production

order, but agreed the appeal on this ground should be allowed either because the majority was correct or, given the uncertainty, attempting a statutory appeal was not "convenient and effective". The claimants therefore succeeded in this ground of their appeal.

Claimants' duty of candour in judicial review

***R (Khan) v Secretary of State for the Home Department* [2016] EWCA Civ 416**

41. The appellant, Mr Khan, sought to challenge the respondent's decision to refuse him leave to remain in the United Kingdom under the 14 year long residence rule then found in Rule 276B(i)(b) of the Immigration Rules and Article 8 of the European Convention on Human Rights. The substantive issue concerned the lawfulness of the respondent's policy of accepting only "official" documentation in such cases, which by the time of the hearing the respondent had conceded could not be defended.

42. However, by majority the Court of Appeal (Beatson and Ryder LJJ; Longmore LJ dissenting) granted the Respondent's application to set aside permission to appeal due to a lack of candour on the part of the claimant that fundamentally undermined his case. All members of the court agreed that had the appeal gone ahead, it would nevertheless have been dismissed on its merits.

43. The duty of candour issue arose because the application for leave to remain before the court was based on Mr Khan having lived continuously in the United Kingdom for over 14 years. It was his case that he entered the United Kingdom illegally on 1 January 1998 and had been here ever since. However, this claim was fatally undermined by a separate application for a work permit made in September 2002 which included a statement that Mr Khan had worked as a Tandoori Chef at a Hotel in Pakistan from 5 February 1998 to 27 June 2001.

44. The Court of Appeal accepted that the significance of this statement had been missed by those acting for Mr Khan and for the Secretary of State until counsel for the Secretary of State was reviewing the papers after permission to appeal had been granted. Upon appreciating the significance of the inconsistency, enquiries were made on behalf of the Secretary of State of the hotel in Pakistan. The Secretary of State's evidence was that the hotel had initially confirmed Mr

Khan had worked there as a chef over a four year period but later recanted, suggesting there had been a misunderstanding. The Secretary of State invited the claimant to discontinue the appeal but his solicitors refused to do so, and the Secretary of State then applied to set aside leave to appeal.

45. In granting the application to set aside leave to appeal, Beatson LJ (Ryder LJ agreeing) noted that the duty to disclose all material facts known to a claimant in judicial review proceedings, including those that are adverse to his case, was well-established. The fact that a respondent is required to file an acknowledgment and summary grounds of defence did not weaken this obligation. The duty to ensure the court has the full picture may require more than merely *disclosing* all relevant documents as part of a "pile of undigested documents", particularly in a document heavy case or where the claimant has knowledge which enables him to explain the full significance of a document. In the present case, the inconsistency called for an explanation from Mr Khan but there was no witness statement or affidavit providing this.

46. While applications to set aside permission to appeal should be discouraged except in the clearest of cases, Mr Khan's failure to explain this discrepancy once he had been invited to do so by the Secretary of State amount to a "compelling reason" to set aside permission to appeal (as required by now CPR 52.18(2)).

Irrationality and expert evidence; A1P1 proportionality

***R (Mott) v Environment Agency* [2016] EWCA Civ 564**

47. The claimant was the holder of a right to fish for salmon at Lydney in the Severn estuary. From 2012, the respondent, the Environment Agency ("**EA**"), imposed an annual limit on the number of salmon caught using a particular method which had the effect of reducing the claimant's permissible catch by about 95%. The conditions were imposed by the EA because it considered that the Severn estuary fisheries exploited a mixed stock; the salmon caught there included those originating in the River Wye and would otherwise spawn in that river; and the Wye was at risk of not achieving its spawning targets and becoming unsustainable. The EA's decision was based in large part on an expert report by three researchers at the University of Exeter's College of Life and Environmental

Sciences (the "**Exeter Report**") which involved genetic analysis of DNA samples from fish in relevant rivers and statistical analysis.

48. The claimant challenged the conditions imposed in the 2012, 2013 and 2014 seasons on the basis that they were irrational in the *Wednesbury* sense due to flaws in the Exeter Report and amounted to an unlawful interference with his enjoyment of his possessions in breach of Article 1 of the First Protocol of the European Convention on Human Rights ("**A1P1**"), entitling him to damages under section 8 of the Human Rights Act 1998. The claimant was successful on both grounds at first instance, but on appeal the Court of Appeal overturned the decision on irrationality but upheld the A1P1 damages claim.

49. In allowing the irrationality claim, the High Court accepted detailed criticisms of the Exeter Report made by the claimant (a layperson) which the judge considered did not require any knowledge of the technical issues relating to the genetic or statistical analysis. While the Court of Appeal was critical of the EA's failure to provide an "enlightening explanation" of the technical issues involved in the case to the judge below, it ultimately found that the judge erred by inappropriately entering into an analysis of the reliability of the scientific evidence and the models used and undertaking calculations of his own. In doing so, he strayed beyond what was proper for a reviewing judge dealing with complex scientific material.

50. The Court of Appeal emphasised that a reviewing court should be very slow to conclude that an expert and experienced decision-maker has reached a perverse scientific conclusion. In engaging in a detailed technical critique, the judge below had made some errors of his own which underlined why a judge conducting a judicial review of a scientific topic should not engage in a detailed examination of the merits of an approach and the accuracy of calculations based on models.

51. Nevertheless, the Court of Appeal found that while the imposition of limits by the EA was not irrational, given the significant impact on the claimant's fishing rights it amounted to a disproportionate interference with his possessions in breach of A1P1 due to the failure to offer compensation.

Legal aid "residence test" in secondary legislation – whether ultra vires the primary legislation

***R (Public Law Project) v Lord Chancellor* [2016] UKSC 39, [2016] 3 WLR 387**

52. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") gave effect to controversial cuts to civil legal aid. This case concerned a further change which the Lord Chancellor ("LC") sought to make using powers conferred by LASPO. By sections 1 and 9, the LC is obliged to make legal aid available for civil legal aid services described in Part 1 of Schedule 1 to the Act. The cases set out therein were not ones in which the UK is obliged by EU law or the ECHR to provide legal assistance, which are provided for by section 10. Purporting to exercise his power under section 9(2)(b) (supplemented by section 41) to omit services described in Part 1, the LC proposed to amend Schedule 1 by statutory instrument so as to provide that those who failed a residence test would, subject to limited exceptions, be removed from the scope of Part 1. PLP sought judicial review of the proposal. The Divisional Court held that the draft order was both *ultra vires* and unlawfully discriminatory. The Court of Appeal allowed the LC's appeal. The Supreme Court allowed PLP's further appeal on the *ultra vires* issue and did not need to decide the discrimination issue.

53. Lord Neuberger gave the sole judgment on behalf of a seven-judge Court. He began by explaining the *ultra vires* principle in the present context. Unlike statutes, the lawfulness of statutory instruments (like other subordinate legislation) can be challenged in court. Subordinate legislation will be held to be invalid if it has an effect, or is made for a purpose, which is *ultra vires*, i.e. outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive (§23).

54. The court must first determine the scope of the statutorily conferred power to make subordinate legislation. Where a statute permits subordinate legislation to amend the statute concerned (or even another statute) by addition, deletion or variation – a "Henry VIII power" – the court's role in upholding Parliamentary supremacy is particularly striking, as the statutory instrument will be purporting to vary primary legislation passed into law by Parliament (§25). When construing a Henry VIII power, the more general the words used by Parliament to delegate a power, the more likely it is that an exercise within the literal meaning of the words will nevertheless be outside the legislature's

contemplation (§26). If there is any doubt about the scope of a power conferred upon the Executive, it should be resolved by a restrictive approach (§27).

55. Applying this approach, Lord Neuberger accepted PLP's submission that the draft order was *ultra vires* the powers granted to the LC by LASPO. The essence of the argument was that the exclusion of a specific group of people from the right to receive civil legal aid services in relation to an issue, on the ground of personal circumstances or characteristics (namely those not lawfully resident in the UK, Crown Dependencies or British Overseas Territories) which have nothing to do with the nature of the issue or services involved or the individual's need, or ability to pay, for the services, was simply not within the scope of the power accorded to the LC by section 9(2)(b) of LASPO, and nothing in section 41 undermined that contention (§29). As a matter of ordinary language, the relevant parts of the draft order did not seek to "vary or omit services" (as per section 9(2)(b)), but rather to reduce the class of individuals who are entitled to receive those services by reference to a personal characteristic or circumstance unrelated to the services (§30).

56. The wider statutory context supported that conclusion (§§31-35). Further, whilst section 41(2)(b) permits any order made under section 9(2)(b) to "make provision by reference to … services provided for a particular class of individual", this did not mean that the power to make orders under section 9(2)(b) was thereby extended to exclude a whole class of individuals from the scope of Part 1 of LASPO by reference to their residence. Section 41 was intended to grant ancillary powers to those powers primarily granted by provisions such as section 9, not to permit an alteration in the nature, or a substantive extension, of those powers (§36).

57. Finally, whilst one of the broad aims of LASPO was to direct legal aid to what are believed to be the individuals who, and types of claim which, are most deserving of public support – an aim shared by the draft order – this was far too general an expression of the aim of the legislation to justify rejecting PLP's case. The exclusion of individuals from the scope of most areas of civil legal aid on the ground that they do not satisfy the residence test involved a wholly different sort of criterion from those embodied in LASPO and articulated in the Government paper which set out proposals given effect by LASPO (§37).