PUBLIC LAW AND JUDICIAL REVIEW NORTH 2012

A year in Judicial Review: Important cases of the last 12 months

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1. Julian Assange v Swedish Prosecution Authority [2012] 2 WLR 1275

This is not just a headline-grabbing case, bound up with allegations of sexual predation on the one hand and the intrigues of the CIA trying to facilitate extradition on the other, but raise some really important and interesting legal issues.

Mr Assange is of course the leading light in Wikileaks which has caused so much trouble particularly for US 'intelligence' efforts. On a trip to Sweden he is alleged to have committed sexual offences against two women which allegations are hotly disputed. Initially he remained in the country and cooperated with the inquiry. He then travelled to the UK ignorant of the fact that the Swedish authorities were seeking his arrest. They issued an European Arrest Warrant (EAW), and his extradition was sought pursuant to **Part 1** of the **Extradition Act 2003**.

The **EA 2003** was enacted partly to implement the Framework Decision of the EU which established the EAW system, which itself was to facilitate and fast-track extradition within what is termed the 'Common area of justice', because of the principle of mutual recognition of judicial decisions and judgments within the EU area.

The EAW system has been roundly criticised by civil liberties groups and various MPs because it largely removes judicial scrutiny of the surrender of citizens to foreign states under the fiction that there is a level playing field for criminal justice across Europe.

Unsurprisingly, Mr Assange challenged the extradition, firstly in the Magistrates Court, then the Divisional Court and the Supreme Court. Although it was strictly an appeal, it was a public law challenge akin to a JR.

He took various points, some better than others. Primarily the issue boiled down to whether the SPA was a 'judicial authority' as required by the Act.

The facts are important here. Mr Assange has not been charged with anything. He is to be extradited for questioning about the allegations. The Swedish Courts have only been peripherally involved, and the extradition warrant is signed by the Public Prosecutor not a judge. In this country the prosecuting authority is very much a part of the executive, but in some other EU countries, including Sweden, the prosecuting authority has judicial functions.

The Supreme Court has therefore held that a prosecuting authority can be a 'judicial authority' under the **EA** even though it would not be if it was the CPS.

The postscript to this was that the SC determined the issue partly on the basis of a principle of interpretation under the **Vienna Convention** which was not properly argued. After the decision was handed-down, counsel for Mr Assange rather bravely sought to re-open the issue on this basis, but was roundly rebuffed by the Court. This is somewhat unfortunate as there has been academic criticism of the decision of the SC on this point. It is to be assumed that Mr Assange will take the matter to the ECtHR on this basis, possibly posting his application from Ecuador.

2. R (Omar) v SoS for Foreign Affairs [2012] EWHC 1737 (Admin)

This is a recent and unusual case which involved an application in JR proceedings for disclosure of material held by the Foreign and Commonwealth Office for potential use in a case in Uganda under *Norwich Pharmacal* principles.

The Claimants are under arrest in Uganda charged with bombing outrages and potentially face the death penalty. They are trying to mount an abuse argument on the basis of illegal rendition, and their legal team had some grounds to suggest that UK intelligence officers were present or involved in the alleged renditions. The stakes are high. In two earlier Guantanamo cases; **R (Mohamed) v SoS for Foreign and Commonwealth Affairs (No 1) [2009] 1 WLR 2579** (the Binyam Mohamed (No 1) case) and **Shaker Aamer v Foreign Secretary [2009] EWHC 3316 (Admin)** the Court had made disclosure orders.

The basic principles can be seen from **Aamer** at **[39-40]**;

> 39. Although these proceedings were commenced as an application for judicial review, the relief sought is essentially disclosure of information under the principle

established in ***Norwich Pharmacal Co. v Customs and Excise Commissioner*** [1974] AC 133. The classic formulation of that principle is in the speech of Lord Reid:

"[I]f through no fault of his own a person gets mixed in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration." (at p. 175).

40. In ***Binyam Mohamed 1*** the Divisional Court applied the principle in novel circumstances which, while they resemble the circumstances of the present case, are certainly not identical. There the Divisional Court concluded that the ***Norwich Pharmacal***jurisdiction could be exercised for the purpose of ordering disclosure to a detainee at Guantanamo Bay facing possible criminal proceedings, of information capable of supporting his claim that confessions on which the prosecution intended to rely had been obtained by torture. That decision is not strictly binding on this court. However, neither party has sought to persuade us that the approach adopted in ***Binyam Mohamed 1*** was wrong in law or should not be followed.

However, in Omar the Court determined the issue against the Claimants on all grounds, but particularly finding that *Norwich Pharmacal* did not apply at all because of the exclusivity of the statutory scheme for the disclosure of evidence for use in foreign proceedings under the **Crime (International Co-operation) Act 2003**, which requires foreign States to request the material.

As it is inconceivable that the Ugandan authorities, who hotly deny that the Claimants were illegally rendered, will ask the UK authorities for disclosure which might disprove their case, the Claimants are left in an invidious position, and the FCO *may* have information which could save them from the gallows. Kafka would be proud.

As this case effectively doubts the earlier Guantanamo cases it will surely be appealed.

3. **R (Tinizaray) v SSHD [2011] EWHC 1850 (Admin)**

The Claimant JR'd the decision of the SSHD to refuse her, her mother and her child indefinite leave to remain in the UK. The child was born in the UK. In quashing the decisions the Court dealt with the SSHD's responsibilities and obligations when assessing the 'best interests' of children affected by immigration decisions. In 2011, **ZH (Tanzania) v Secretary of State for the Home Department [2011] 2 AC 166**,established that the best interests of children were to be a primary consideration. Pursuant to **s55, Borders, Citizenship and Immigration Act 2009** the decision maker had to balance the reason for refusal against the interests of the child. The decision maker had to consider the rights of each applicant under **Article 8** and seek further information if necessary.

The decision maker needed to be properly informed of the child's own views her social context in the UK including schooling, and the prospects in the proposed destination country.

Little weight appeared to have been given to the fact that the child was as close as it was possible to be without being a British citizen.

4. **R (RMC and FJ) v Commissioner of Police for the Metropolis [2012] EWHC 1681 (Admin)**

The Court ruled that the automatic retention by police of photographs of suspects for at least 6 years, even where there were no charges, was incompatible with **Article 8**, and ruled the relevant policy unlawful.

It was perhaps surprising that the issue had to come before the Court at all given the fact that the Supreme Court had dealt with related issues already.

In; **R (GC) v Commissioner of Police of the Metropolis [2011] UKSC 21, [2011] 1 WLR 1230**, the claims related to the indefinite retention of fingerprints and DNA samples pursuant to s.64 of the Police and Criminal Evidence Act 1984 ("PACE") and guidelines issued by the Association of Chief Police Officers ("ACPO"). The Supreme Court, applying the decision of the European Court of Human Rights in **S v United Kingdom (2009) 48 EHRR 50** (at p.1169), held that the indefinite retention of the claimants' data was an

unjustified interference with their rights under art.8 ECHR and granted a declaration that the ACPO guidelines were unlawful.

5. Judges, politics, and public sector cuts

R (on the application of JM and NT) v Isle of Wight Council [2011] EWHC 2911 (Admin)

This case involved the impact of the disability equality duty (s49A DDA 1995 – see now s149 EA 2010) on the council's decision to change its eligibility criteria for community care services. The claimants were both severely disabled persons who stood to receive significantly less in the way of services under the revised criteria. The council's principal motivation was to reduce its expenditure – this being a part of a broad programme of cost cutting.

The significance of the High Court's decision (which was that the decision was unlawful council had not given the necessary 'due regard' to the matters set out in s49A principally because it did not gather the information required to do so properly) is less the actual outcome itself, but more the argument it provoked about the proper role of judges in public law decision making.

The recently promoted member of the Supreme Court, Lord Sumption gave a well publicised lecture last November, called 'Judicial and Political Decision-Making: The Uncertain Boundary'[1]. In it he criticised the judiciary for failing to keep out of the political arena. He felt that the tendency of the courts to intervene in the making of "macro-policy" has become more pronounced (and disapproved of that development).
In December 2011 (after the decision had been handed down in the Isle of Wight case) Lord Judge LCJ was giving a press conference and a journalist asked: 'The new member of the Supreme Court, Mr Sumption, has made it clear that he believes that judges, using mainly processes of judicial review and human rights, have delved too far into the everyday decision-making in politics – my examples being the recent cases involving Sefton and the Isle of Wight, and the High Court has told local councils what cuts they may or may not make. Do you agree with Mr Sumption?'

He responded 'I am very sympathetic with Mr Sumption and the views he has expressed.'

[1] http://www.guardian.co.uk/law/interactive/2011/nov/09/jonathan-sumption-speech-politicisation-judges

Both Lord Sumption's speech and Lord Judge's apparent agreement with it prompted a rejoinder from Sir Stephen Sedley in the London Review of Books[2]. Chief amongst the points he made about the Isle of Wight case was that it "required a complicated analysis of the parliamentary legislation and statutory guidance governing the duty of local authorities to provide care for severely disabled adults. Mrs Justice Lang's careful decision, holding that the council had not gone about this lawfully was clearly correct and has not been appealed. Such cases may well – in fact frequently do – arise from an honest error in a pressured and under-resourced area of administrative law. But one asks what the critics of such decisions want. That local authorities should be able to break the law without redress? That courts whose job it is to apply the law should abdicate? That councillors or officials should be allowed to dispense with the law if they think fit?"

6. Costs in JR

M v London Borough of Croydon [2012] EWCA Civ 595

This was an age assessment case, which was settled prior to trial in the claimant's favour. The issue was whether or not the council had to pay his costs – the high court judge said there should be no order between the parties. The CA reviewed the principles and gave general guidance for awarding costs in settled claims for JR, and what they had to say ought to be of interest to all public lawyers given the funding squeeze being felt by both claimants and defendants.

The guidance given by Lord Neuberger was that

> *60. Thus, in Administrative Court cases, just as in other civil litigation, particularly where a claim has been settled, there is, in my view, a sharp difference between (i) a case where a claimant has been wholly successful whether following a contested hearing or pursuant to a settlement, and (ii) a case where he has only succeeded in part following a contested hearing, or pursuant to a settlement, and (iii) a case where there has been some compromise which does not actually reflect the claimant's claims. While in every case, the allocation of costs will depend on the specific facts, there are some points which can be made about these different types of case.*
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> *61. In case (i), it is hard to see why the claimant should not recover all his costs, unless there is some good reason to the contrary. Whether pursuant to judgment following a contested hearing, or by virtue of a settlement, the claimant can, at*

[2] http://www.lrb.co.uk/v34/n04/stephen-sedley/judicial-politics

least absent special circumstances, say that he has been vindicated, and, as the successful party, that he should recover his costs. In the latter case, the defendants can no doubt say that they were realistic in settling, and should not be penalised in costs, but the answer to that point is that the defendants should, on that basis, have settled before the proceedings were issued: that is one of the main points of the pre-action protocols. Ultimately, it seems to me that Bahta was decided on this basis.

62. In case (ii), when deciding how to allocate liability for costs after a trial, the court will normally determine questions such as how reasonable the claimant was in pursuing the unsuccessful claim, how important it was compared with the successful claim, and how much the costs were increased as a result of the claimant pursuing the unsuccessful claim. Given that there will have been a hearing, the court will be in a reasonably good position to make findings on such questions. However, where there has been a settlement, the court will, at least normally, be in a significantly worse position to make findings on such issues than where the case has been fought out. In many such cases, the court will be able to form a view as to the appropriate costs order based on such issues; in other cases, it will be much more difficult. I would accept the argument that, where the parties have settled the claimant's substantive claims on the basis that he succeeds in part, but only in part, there is often much to be said for concluding that there is no order for costs. That I think was the approach adopted in Scott. However, where there is not a clear winner, so much would depend on the particular facts. In some such cases, it may help to consider who would have won if the matter had proceeded to trial, as, if it is tolerably clear, it may, for instance support or undermine the contention that one of the two claims was stronger than the other. Boxall appears to have been such case.

63. In case (iii), the court is often unable to gauge whether there is a successful party in any respect, and, if so, who it is. In such cases, therefore, there is an even more powerful argument that the default position should be no order for costs. However, in some such cases, it may well be sensible to look at the underlying claims and inquire whether it was tolerably clear who would have won if the matter had not settled. If it is, then that may well strongly support the contention that the party who would have won did better out of the settlement, and therefore did win.

The CA urged parties to JR claims to try to agree provisions for costs wherever possible rather than simply agreeing an outcome and leaving costs to the court to decide (see paras 75-77).

Overall, the decision makes it clear that the contentions regularly made by defendants in JR (this was a pragmatic solution not an acceptance we got it wrong, its not clear C would have won, etc etc) will not normally be sufficient to result in no order as to costs.

The usual principles of civil litigation costs will apply – ie costs follow the event.

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