PUBLIC LAW PROJECT TRIBUNALS CONFERENCE, 4 JUNE 2013

PUBLIC LAW AND THE TRIBUNALS

THE MOST IMPORTANT TRIBUNAL CASES OF THE YEAR

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1. In his article, "Tribunal Justice – a new start" [2009] Public Law 48, Carnwath LJ, then Senior President of Tribunals (now Lord Carnwath) predicted a bright future for the new unified tribunal structure established by the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), composed of the First Tier and Upper Tribunals, separated into different chambers. He predicted in particular that the Upper Tribunal, building on the pre-existing practice of disparate appellate tribunals such as the Social Security Commissioners, the Asylum and Immigration Tribunal, and the Lands Tribunal, would be able to break new ground in establishing guidance, and new legal principles, in the areas of administrative law coming within its purview.

2. Carnwath LJ described the creation of the Upper Tribunal as "one of the most significant innovations" of the new system, which would allow "the development, by a system of binding precedents, a coherent approach to the law", and predicted possible innovations in a number of distinct areas, including (a) the development of a role which "goes beyond the traditional limits of judicial review, as practised by the courts", (b) an expansion of the existing role of appellate tribunals in establishing "guidance cases" (for example, country guidance in the asylum field), (c) the development of a more flexible approach to the classification between "law" and "fact", and a clarification of the role of proportionality in human rights adjudication.

3. Carnwath LJ concluded as follows:

> *Tribunals have come to play a central part in the UK civil justice system, particularly in relation to administrative law. Their principal distinguishing features, as compared to the courts, are flexibility, specialisation, and accessibility. The present system is the result of piecemeal and incoherent development over many decades. The TCEA provides the statutory framework for a radical restructuring of the existing tribunal jurisdictions into a coherent two-tier model. The establishment of the Upper Tribunal will bring procedural advantages, in the welcome rationalisation of the confused and illogical network of appeal routes which tribunal claimants have to negotiate under the present law. It will also present an opportunity for the development of a more coherent approach to tribunal justice. Recent House of Lords case law points the way for the Upper Tribunal to assert the leading role in laying down guidelines on law, principle and practice, on issues peculiar to the specialist jurisdictions under its care. There is scope for rethinking the traditional allocation, as between courts and tribunals, of responsibilities for definitive interpretation of substantive law, including human rights law, in specialist fields.*

4. The case law of the Upper Tribunal over the last year or so strongly suggests that, in its various divisions, it has seized the possibilities offered by its new status with some enthusiasm. While by their nature some of the suggested innovations will only be established by case by case development over a number of years, there are signs that the first steps have been taken along the lines suggested by Carnwath LJ. Alongside this, the tribunals, principally the Upper Tribunal, has had an increasingly significant role in developing procedural and substantive law in a way that now rivals the role of the ordinary courts.

5. Rather than attempt a whistle stop tour of ten or so of the most important cases, I want to spend the rest of this talk looking at two areas of case law which seem to me to be of particular significance as illustrating the legal, and indeed constitutional, significance of the Upper Tribunal's work.

ARTICLE 8 AND THE "NEW" IMMIGRATION RULES

6. The Upper Tribunal (IAC) has decided three cases, between 18 September 2012 and this year, which seem to me to be of genuinely constitutional significance, not so much for the legal ruling (which was unsurprising), but because they exemplify the confidence and robustness of the new tribunal system. The cases are *MF (Article 8 – new rules) Nigeria* [2012] UKUT 00393 (IAC), *Ogundimu (Article 8- new rules) Nigeria* [2013] UKUT 00060 (IAC), and *Izuazu (Article 8 – new rules)* [2013] UKUT 00045 (IAC).

7. The cases all arise from changes to the Immigration Rules made by the Secretary of State for the Home Department, so as to come into effect on 9 July 2012, by which the Secretary of State sought to give guidance as to the meaning and effect of Article 8 of the European Convention on Human Rights ("ECHR"). All three cases hold that the new rules have no, or at any rate very limited, effect. What is striking is the confidence with which the tribunal was willing to make this ruling.

8. The changes to the Rules fall into 2 broad categories, namely (a) changes to the way in which Article 8 would henceforth be considered in deportation cases (found in new rules A362 *et seq*), and (b) changes to the approach to Article 8 fell to be considered in other immigration context such as unlawful overstayers and settlement (found principally in Appendix FM to the new rules).

9. Various statements of the purpose of the new rules, as prepared by the SSHD, are cited by the Tribunal in *MF*. Thus, in a "Statement of Intent: Family Migration", June 2012, it was said:

> *The intention is that the Rules will state how the balance should be struck between the public interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the Rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with A8.*

10. In an Explanatory Memorandum accompanying the new rules, the following was said:

> *7.2 The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirements of the rules to be removed from the UK.*

11. The substantive criteria in the new rules for addressing Article 8 claims are too lengthy and varied to set out fully here. One example will suffice for present purposes, taken from that part of the new rules dealing with deportation:

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 ...

...

(c) ... the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

12. On the face of it, the reintroduction of an "exceptional circumstances" approach to Article 8 ECHR runs directly contrary to the House of Lords decision in *Huang v SSHD* [2007] 2 AC 167.

13. It does not take an expert in constitutional law to see that these rules are problematic in their consequences. Indeed, it is difficult to see how the SSHD could have been advised that they were or any real legal effect. I have already pointed out that the new rules appear to attempt to reverse *Huang*, and other aspects of the rules attempt to reverse a wide range of different aspects of recent case law on Article 8 from Strasbourg and the higher courts. The basic problem was explained by the Tribunal in *MF (new rules)* as follows:

32. It might be thought that one could deduce from the proposition that immigration rules very often have the force of law the position that insofar as the new rules regulate how Article 8 claims are to be assessed, judges must apply them in the same way as primary decision-makers, so that the old two-stage assessment (rules; Article 8) is for most purposes collapsed into a one-stage assessment (rules). But that would be wrong. The rules do not and cannot replace the law that is binding upon us. Our duties under primary legislation are no less than they were before. We are still required by s.6 of the HRA not to act contrary to a person's Convention rights and by s.2 to take account of Strasbourg jurisprudence. We are still bound to reach decisions on specific human rights grounds of appeal under s.84 of the 2002 Act and s.33 of the UK Borders Act 2007. We are still required to consider not just whether (where applicable) a decision is in accordance with the immigration rules but also whether to allow an appeal under s.84(1)(c),(g) or indeed s.84(1)(e) of the 2002 Act: see s.86(2). For this reason our method of assessment must ordinarily remain a two-stage one (rules; Article 8).

14. Earlier, the Tribunal had pointed out (at para 34) that "the fact that ... the rules ... incorporate some of the vocabulary of Article 8 makes no difference".

15. The Tribunal's conclusions in *MF* can be taken from the headnote:

(iii) Whenever the new rules have application judges are obliged to consider whether an appellant can show he meets the relevant requirements (s.86(3)(a) of the Nationality, Immigration and Asylum Act 2002). Where the new rules afford some related discretion, judges are obliged to consider whether that discretion should have been exercised differently (s. 86(3)(6)). However, what judges are doing when they are conducting this exercise is simply applying the rules: the rules are the rules: see paragraph 10 Mahad [2009] UKSC 16. The fact that these rules in part refer expressly

to Article 8 or to certain Article 8 concepts is incidental. The fact that as a result of these changes the rules are longer and incorporate some of the vocabulary of Article 8 makes no difference.

(iv) Because for most purposes the immigration rules must be given legal effect (see Odelola [2009] UKHL 25), their requirements for applicants making an Article 8 claim to show "exceptional circumstances" or "insurmountable obstacles" are to be understood as legal requirements in the same way as any other mandatory requirements of the rules.

(v) However, the new rules only cover Article 8 claims brought under some, not all, Parts of the Rules and only accommodate certain types of Article 8 claims.

(vi) Even if a decision to refuse an Article 8 claim under the new rules is found to be correct, judges must still consider whether the decision is in compliance with a person's human rights under s.6 of the Human Rights Act (see s.84(1)(c), (g) and (e) and s.86(2) and (3) of the 2002 Act) and, in automatic deportation cases, whether removal would breach a person's Convention rights (s.33(2) UK Borders Act 2007). Thus in the context of deportation and removal cases the need for a 2 stage approach in most Article 8 cases remains imperative because the new rules do not encapsulate the guidance given in Maslov v Austria App no.1683/03 [2008] ECHR 546, which has been endorsed by the higher courts.

(vii) When considering Article 8 in the context of an appellant who fails under the new rules, it will remain the case, as before, that "exceptional circumstances" is not to be regarded as a legal test and "insurmountable obstacles" is to be regarded as an incorrect criterion.

(viii) However, as a result of the introduction of the new rules, consideration by judges of Article 8 outside the rules must be informed by the greater specificity which they give to the importance the Secretary of State attaches to the public interest. For example, the new rules set out thresholds of criminality by reference to terms of imprisonment so that Article 8 private life claims can only succeed if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds.

16. In essence, then, the new rules would have effect only to the limited extent explained in point (viii), above, and even that was minimal (see para 44, the "degree to which the new rules change our understanding of the "public interest" should not be exaggerated") and arguably could only be *beneficial* to claimants.

17. *MF* was affirmed by a panel chaired by Blake J in *Ogundimu*. It was also considered in more depth, again by a panel chaired by Blake J (sitting with Judge Storey, who sat in *MF* itself) in *Izuazu*. It essentially endorsed the conclusions in *MF*. It rejected, in particular, an argument that the new rules represented Parliament's considered statutory assessment of the balance between the relevant competing interests:

(i) Lord Bingham's answer to the point remains a good one:

"the Immigration Rules and supplementary instructions are not the product of active debate in Parliament where non-nationals seeking leave to remain are in any event represented"

(ii) Only the Parliamentary process for primary legislation permits a clause by clause discussion of the measures, with opportunity for amendments and revision.

(iii) By comparison, we accept the claimant's contention that the procedure adopted here provided a weak form of Parliamentary scrutiny: see R (Stellato) v SSHD [2007] UKHL 5, [2007] 2 AC 70 at [12].

(iv) There may have been more active debate of the new rules in the House of Commons than is often the case under the negative procedure resolution, but the House of Commons is not Parliament and it has long been the law that a resolution of the House of Commons is not given supremacy akin to primary legislation by the court: see Stockdale v Hansard (1839) 9 A and E 1. The position has been succinctly summarised by A.W.Bradley and K D Ewing Constitutional and Administrative Law (15th Edition 2011 p.54):

> *"An Act of Parliament has legal force which the courts are not willing to ascribe to other instruments which for one reason or another fall short of that pre-eminent status. Thus the following instruments do not enjoy legislative supremacy and the courts will if necessary decide whether or not they have legal effect: a) a resolution of the House of Commons"*

(v) Just as in the case of Huang, Parliament has not altered the legal duty of the judge determining appeals in both Chambers, to decide on proportionality for him or herself.

(vi) A claimant who relies on Article 8 will by definition have failed to succeed under the rules but may succeed under the law on Article 8 grounds despite the provisions of the rules. A failure to comply with the rules thus remains the starting point of the Article 8 inquiry and not its conclusion.

(vii) There is a significant difference between broad issues of social policy and individual immigration decisions where there is private and/or family life to be respected. This is not a situation where Parliament has chosen to interfere with the rights of property holders by enabling tenants to enfranchise see (James v United Kingdom [1986] 8 EHRR 123, or when a court is able to prolong residence as a home beyond legal entitlement (Kay v Lambeth London Borough Council [2006] 2 AC 465).

(xiii) We note, in any event, that as the Article 8 case law has developed Pinnock v Manchester Corporation [2011] UKSC 6 and after, there are more grounds to suggest that greater weight must be given to individualised consideration than was suggested to be the case in Kay.

18. The tribunal also gave further consideration to point (viii) of the headnote in *MF*, to the effect that the new rules might affect the approach to the public interest in Article 8 cases. The following passage seems to be significant:

> *43.The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the rules will depend both on the particular facts found by the judge in the case in hand and the extent that the rules themselves reflect criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom.*
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> *44. For example, paragraph 399 of the Immigration Rules deals with family life claims by people who are liable to deportation. Paragraph 398 provides that those who have received a sentence of between one and four years imprisonment or have received a sentence of less than twelve months imprisonment but are persistent offenders can expect that the public interest in deportation will normally outweigh respect for family life unless paragraph 399 applies. This paragraph applies where the child is a British citizen, has lived continuously for at least seven years immediately preceding the immigration decision, and it would not be reasonable to expect the child to leave the UK. However in addition there must be "no other family member who is able to care for the child in the United Kingdom". Focusing simply on the last requirement, it is very difficult to see how any weight could be given to this requirement in an Article 8 evaluation under the law as it is clear that the child's best interests are a primary consideration to be taken into account, and a child's best interests would normally require the maintenance of a genuine and effective care by both parents rather than a default position of the absence of any family member to care for the child. On the other*

hand the identification of seven years residence in the United Kingdom, may be a helpful starting point for the assessment of when it would be reasonable to expect a child of whatever nationality to have the company of a caring parent in the United Kingdom.

19. These decisions of the Tribunal were subsequently endorsed by Sales J in *R (Nagre) v SSHD* [2013] EWHC 720 (Admin), although query to what extent a decision of the specialist UT, chaired by a High Court Judge, now needs the endorsement of another high court judge. In the meantime they attracted considerable criticism from the Home Secretary, Theresa May, writing personally in the Mail on Sunday[1]. What is now proposed is that there will be *primary* legislation, subject to full Parliamentary debate, to achieve the effect which had been sought to be achieved by the Rules.

20. Whether this will work any better than the last attempt remains to be seen, if Parliament can be persuaded to pass such legislation. For an discussion of the effects of such legislation, I cannot do better than quote from a blog piece[2] by Dr Mark Elliott, Reader in Public Law at Cambridge. Either such legislation would be interpreted so as to be Article 8 compliant, or, if clearly enough drafted, it would explicitly require a departure from Article 8, thus in effect partially repealing the HRA 1998. But even if that were to happen, that would not prevent a finding of a breach in Strasbourg. Dr Elliott's concluding comments seem to me to contain an important warning for those who are concerned about the status of the HRA 1998 in UK law:

So why bother, if the writing is already on the wall? The answer to that question is hard to fathom—unless the real agenda is to provoke a showdown with Strasbourg that would be grist to the mill of those agitating for withdrawal from the Convention. Had someone suggested that interpretation of events to me two or three years ago, I would have thought them guilty of unjustified cynicism. But now, I am not so sure. It has been suggested elsewhere that the Government is waging a "war on law". Whether or not that rhetoric is apposite, developments not only in relation to human rights, but also in the areas of judicial review, legal aid, and open justice, make it hard to dismiss the notion that the Government increasingly sees law and judges as an unwelcome irritant.

[1] "It MY job to deport foreigners who commit serious crime – and I'll fight any judge who stands in my way, says the Home Secretary", 17 February 2013. http://www.dailymail.co.uk/debate/article-2279828/Its-MY-job-deport-foreigners-commit-crime--Ill-fight-judge-stands-way-says-Home-Secretary.html.

[2] http://publiclawforeveryone.wordpress.com/2013/05/09/the-queens-speech-the-immigration-bill-and-article-8-echr/.

21. So the decisions of the Upper Tribunal in these three cases may simply represent the first skirmish in a still more fundamental constitutional battle.

MM and DM v SSWP: JUDIICIAL REVIEW, REASONABLE ADJUSTMENTS AND DISABILITY DISCRMINATION, EMPLOYMENT SUPPORT ALLOWANCE

22. The other case which I want to talk about is the recent decision of the UT (AAC) in *R (MM and DM) v SSWP* [2013] UKUT 0259, 0260, AAC.

23. The case concerned the process by which the SSWP assesses entitlement to Employment and Support Allowance, and the use which he makes of medical evidence to carry out that assessment.

24. The Claimants' argument was that that process was unlawfully discriminatory, contrary to the Equality Act 2010 ("the 2010 Act") by reason of a failure to make reasonable adjustments so as to address the "substantial disadvantage" faced by certain classes of disabled applicant, namely persons with mental health problems ("MHPs", defined so as to include behavioural and cognitive impairments as well as classic mental illness).

25. The Tribunal held that the Claimant succeeded in the first part of their argument, namely that such persons did indeed face a substantial disadvantage in the process of ESA assessment. It adjourned the second part of the argument, as to whether, and what, reasonable adjustments the Secretary of State was required to make to address that disadvantage, to a later hearing. The Tribunal however expressed its *prima facie* view that the Secretary of State should be required to adopt a practice of seeking medical evidence much more proactively, in line with a recommendation by Professor Harrington, the independent statutory reviewer of the ESA scheme.

26. The case is of wide significance for a range of different reasons:

    (i) One of the first cases in which the Administrative court has *voluntarily* transferred a claim for judicial review to the Upper Tribunal which it had jurisdiction to hear for itself. The decision of the Administrative court ordering transfer is [2012] EWHC 2106 (Admin), and the reasoning in

terms reflects the aspirations and observations of Carnwath LJ in his article in public law, as to the specialist role of the Upper Tribunal.

(ii) The substantive judgments rely in terms on the specialist knowledge of the Upper Tribunal as relevant to the function it performs on a claim for judicial review (see paras 1 and 36(ii), and 140), thus giving effect to Carnwath LJ's prediction that the specialist knowledge of the Upper Tribunal would allow it to go beyond the traditional role of the courts in judicial review.

(iii) This is the first case in which the reasonable adjustments duty under the 2010 Act has been used as a basis to attack a wide ranging policy or practice of a government body. The tribunal rejected an argument by the Secretary of State that such "generic" claims were prohibited by the wording of the Act.

(iv) The judgment contains a number of significant rulings on legal questions as to the approach to reasonable adjustments claims, including (a) as to the appropriate "comparator" in a case where all persons undergoing the EIA process are disabled, and (b) as to what is meant by a "substantial disadvantage" in a case where the public function in question involves the conferment of a benefit on the person affected.

FUTURE CASES

27. I want to finish by mentioning two cases of the Upper Tribunal which are pending, and which I think will be, in their different ways, of major significance.

28. First, in JR/3126/2011 *R (LR) v FtT (HESC) and Hertfordshire CC*, a panel of the Upper Tribunal chaired by the Senior President, Sullivan LJ (sitting with Judge Ockleton of the IAC and Judge Ward of the AAC) heard argument on the approach to be taken to costs in judicial review claims in the Upper Tribunal, in circumstances where the procedure rules are, for the time being at least, silent. Judgment is awaited.

29. I will also take this opportunity to endorse an approach suggested by the report "Costs in Tribunals Report by the Costs Review Group to the Senior President of Tribunals", which suggested an opt-in approach whereby claimants could choose

at the outset whether a costs shifting approach would be applied i.e. either they could elect a regime whereby they would be able to recover costs if they won, but at the price of being at risk of paying costs if they lose, or an approach whereby no costs would be payable.

30. Secondly, at some point, probably in the latter part of 2013, the Upper Tribunal (IAC) will hear the remitted claim for judicial review in the case of *R (NB (Algeria)) v SSHD* (CA [2013] 1 WLR 31), where one of the issues will be the approach of the tribunal to fresh claim judicial review cases in the immigration field. The question is as to what extent the tribunal stands in the shoes of the decision maker when hearing a fresh claim JR, or whether it is limited to considering whether the decision of the SSHD was flawed by public law error (see, for the most recent prior consideration of this vexed question, *R (MN (Tanzania)) v SSHD* [2011] 1 WLR 3200). The case will engage closely with the themes raised by Carnwath LJ's article of 2009, including in particular whether the specialist nature of the Tribunal makes it more readily able to consider the "merits" of a decision rather than the traditional public law grounds of review.

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3 June 2013