PLP JUDICIAL REVIEW TRENDS AND FORECASTS 2016

Judicial Review of the Regulators

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The following definitions are used throughout:

"**A1P1**"	ECHR Protocol 1, Article 1
"C"	Claimant
"**CMA**"	Competition and Markets Authority
"**CPR**"	Civil Procedure Rules
"D"	Defendant
"**ECHR**"	European Convention of Human Rights
"**GMC**"	General Medical Council
"**HMRC**"	Her Majesty's Revenue & Customs
"HRA"	Human Rights Act 1998
"**SOS**"	Secretary of State
"SRA"	Solicitors Regulation Authority

AMENABILITY

1. R (on the application of Holmcroft Properties Ltd) (Claimant) v KPMG LLP (Defendant) & (1) Financial Conduct Authority (2) Barclays Bank Plc (Interested Parties) [2016] EWHC 323 (Admin)

C, which had been miss-sold interest hedging products by a bank was unsuccessful in seeking judicial review of the independent reviewer's approval of the bank's offer of redress. As part of a review and redress scheme agreed with the regulator, the bank had appointed and entered into a contract with D to independently review any settlement offers it made to its customers to consider whether they were "appropriate, fair and reasonable." C asserted that the bank's offer of compensation was not sufficient as it did not provide any redress for consequential loss or sufficient information pertaining to how it reached its decision that no consequential loss had been suffered. By extension, it submitted that D was in breach of its public law duties in approving the offer. Elias LJ and Mitting J held that while D's relationship with the bank flowed from its contract, this did not necessarily mean that D could not be subject to public law principles. However, the focus should be on the function being exercised. In this case D's duties stemmed from a voluntary arrangement with the bank and were not sufficiently public in nature for D to be amenable to judicial review.

JUSTICIABILITY

2. (1) Guernsey (2) Stephen Fallaize v (1) Secretary of State for Environment, Food & Rural Affairs (2) Marine Management Organisation [2016] EWHC 1847 (Admin)

The island of Guernsey and a fisherman challenged the Department for Environment, Food & Rural Affairs' (DEFRA) decision to suspend the Fisheries Management Agreement between itself and Guernsey and a decision to suspend certain UK fishing vessel licenses. Jay J considered issues of justiciability, irrationality and the fisherman's A1P1 rights. DEFRA's submission that the case was

inappropriate for judicial review since Guernsey was not part of the UK, meaning this was essentially a political matter between two sovereign states, was not successful. This was not an area the court was not equipped to consider - it had a sound understanding of the statutory scheme and fisheries policy and was as competent as any other entity to deal with the instant case. The decisions were not irrational and the suspension was justified on the basis that the Agreement had fundamentally broken down. Furthermore, although the fishing licence was a "possession," the interference was justified as being proportionate.

ILLEGALITY

3. R (Napp Pharmaceuticals v The Secretary of State for Health acting as the Licensing Authority) [2016] EWHC 1982

A pharmaceutical company applied for judicial review of a regulatory agency's decision to grant marketing authorisations to a party (S) in relation to its drug product. Directive 2001/83 article10 (3) governed the marketing of products following applications for authorisation accompanied by clinical trial results. Products of the same composition and form as earlier "reference medicinal products" (generic medicinal products) did not require an application provided it was eight years since it had been authorised. The procedure for variants of drugs previously authorised was contained in article 10(3) and required "bridging data" to be provided, specifically the results of "appropriate pre-clinical tests or clinical trials". C argued that article 10(3) did not allow S to rely on someone else's bridging data in relation to another product. However, Whipple J concluded that article 10(3) did not specify who had to produce the data. The overriding consideration was to demonstrate the safety and effectiveness of the product and where bridging data had already been provided to support the application of an earlier product, the application need not be repeated provided the later product was the same or materially identical to the earlier one.

4. National Aids Trust (Claimant) v National Health Service Commissioning Board (NHS England) (Defendant) & (1) Secretary of State for Health (2) Local Government Association (Interested Parties) [2016] EWHC 2005 (Admin)

NHS England refused to commission an anti-retroviral drug which could be used on a preventative basis for persons at risk of contracting HIV (PrEP). It argued that, although it had a duty to "secure improvement… in the prevention, diagnosis and treatment of physical and mental illness" under s.1(1) of the National Health Service Act 2006, the duty did not extend to parts of the health service provided "in pursuance of the public health functions of the SOS or local authorities" under s.1H(2) of the Act. Because local authorities had been given the duty to provide preventative sexual health services (under the Local Authorities (Public Health Functions and Entry to Premises by Local Healthwatch Representatives) Regulations 2013), NHS England argued that NHS England's duty under s.1 did not extend to providing preventative sexual health services. This argument was rejected. Green J held that the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 conferred upon Natural England the jurisdiction to commission treatments for HIV on a preventative basis. While the scope of the exception was ambiguous, following NHS England's interpretation of the exception would lead to depriving it of all powers to commission preventative treatment, an approach which was inconsistent with the Act as a whole. NHS England has announced that it intends to appeal.

IRRATIONALITY

5. Speed Medical Examination Services Ltd v Secretary of State for Justice [2015] EWHC 3585 (Admin)

C challenged the legality of part of the government's reforms to the process for handling soft tissue whiplash claims on the grounds that it was irrational and incompatible with national and European competition law. The reforms included a requirement for personal injury solicitors to identify and

instruct experts via an online portal. C argued that the government's decision introduced a number of systemic design flaws into the system which meant that it was irrational and limited competition in the market in which C operates. Cranston J refused the application for judicial review and stated that as the government held extensive consultation with those likely to be affected and the government received support for its proposals from the major representative bodies, the threshold for a rationality challenge was even harder to surmount in this case.

6. R (on the application of McMorn) v Natural England [2015] EWHC 3297 (Admin)

C was a gamekeeper who challenged D's refusal to grant him a licence to kill buzzards. He had a licence to kill other species of birds. C alleged that an irrational and inconsistent position had been taken as between different species of birds. Ouseley J commented that this was a case where a more intensive level of scrutiny was required. He allowed the application and found that, on the evidence, there was indeed an undisclosed policy to treat buzzards differently from other species, requiring more evidence than for other species. If there was to be a policy then lawful decision making required it to be made public. D had also taken into account the irrelevant consideration of public opinion. Ouseley J also confirmed that this was an environmental case within the Aarhus Convention for the purposes of costs protection under CPR 45. He rejected D's argument that, because the challenge was to a refusal of the licence, its decision could not give rise to an Aarhus claim as such a challenge sought to cause harm to the environment (rather than to protect it). There was nothing in the language of the CPR or the definition of "environmental" to support that distinction.

HUMAN RIGHTS

7. Bank Mellat v HM Treasury [2016] EWCA Civ 452

The Treasury appealed the court's decision on preliminary issues regarding an Iranian Bank which was entitled to damages under s.8 HRA following the Treasury's introduction of an Order which prevented the bank from benefiting from its goodwill in the UK and therefore constituted a breach of the bank's A1P1 rights. The Iranian Bank also claimed loss of future income and loss of earnings as a majority shareholder of a UK bank (B2). The Court of Appeal concluded that it was the company and not the shareholders who had standing as a victim and therefore B2 was entitled to seek its own relief with victim status under the HRA. The court had been correct not to consider the issue of future loss. The Court of Appeal sought to distance itself from comments made by the High Court judge which could be interpreted as suggesting that future income may be recoverable.

8. Old Co-operative Day Nursery Ltd v HM Chief Inspector of Education, Children's Services & Skills [2016] EWHC 1126 (Admin)

C applied for judicial review in respect of an inspection report of its nursery which stated that children's safety was at risk. It also claimed damages in respect of the consequential reputational harm it suffered under ECHR article 8. The report found that C's supervision was not suitable and was accompanied with a notice to improve. A further inspection concluded that the notice to improve had been complied with and the nursery rating was re-evaluated from 'inadequate' to 'outstanding'. Coulson J concluded that D had exceeded its powers; its conclusions were flawed, failed to take into account C's report history and should not have been published on its website. However, C was not entitled to damages pursuant to ECHR article 8. It is unclear whether a company is able to claim for damage to its reputation under article 8, but the court did not consider it necessary to determine that point. No evidence of damage to its reputation as a result of the website publication existed. A certain level of seriousness resulting in prejudice to personal enjoyment of the right to respect for private and family life was necessary for article 8 to be engaged, which had not been demonstrated in the present case.

9. R (on the application of British American Tobacco and others) v Secretary of State for Health [2016] EWHC 1169 (Admin)

A group of tobacco companies sought judicial review of the Standardised Packaging of Tobacco Products Regulations 2015 on 17 grounds of challenge covering UK, EU and international law. Green J dismissed all grounds. In particular he noted that the relevant EU Directive was not itself unlawful under either EU or international law. The Regulations were a justified and proportionate means of achieving legitimate public health aims and were in the public interest. Broadly he preferred the evidence of SOS to that put forward by the tobacco companies. It was therefore not unlawful for SOS to give it only limited weight. Nor were the Regulations contrary to the principles protecting property rights in either A1P1, the EU Charter or under common law. Interferences with the right to free trade, free movement of goods and intellectual property rights were justified and lawful. The consultation process leading up to the adoption of the Regulations was not unfair or unlawful. Green J also commented on the approach to be taken when a court is faced with complex evidential questions of proportionality. An appeal to the Court of Appeal is outstanding.

INCONSISTENCY

10. R (on the application of Blue Bio Pharmaceuticals Limited) v Secretary of State for Health (acting by his executive agency Medicines and Healthcare Products Regulatory Authority) [2016] EWCA Civ 554

C, pharmaceutical companies, appealed a decision as to the lawfulness of the classification by the MHPRA of certain products as medicinal for the purposes of a particular EU Directive. In particular the Cs contended that as a result of the classification they faced much greater regulation of their products compared to others who were marketing similar products as vitamin supplements. The Court of Appeal overturned the decision of the High Court, finding that MHRPA had not properly considered the evidence presented as to the widespread use of this particular product. Consistency of treatment was important, so that products containing the same characteristics should be given the same classification unless there were specific reasons not to do so. The challenge on Wednesbury grounds therefore succeeded.

MARGIN OF DISCRETION

11. Société Coopérative de Production SeaFrance SA v CMA and another [2015] UKSC 75

The question at issue on this appeal was whether there was a "relevant merger situation" when Groupe Eurotunnel SE acquired SeaFrance which granted the CMA jurisdiction to investigate the impact of the transaction on competition. The Supreme Court allowed the appeal on the grounds that the CMA's decision that there was a "relevant merger situation" was not irrational or flawed. The Supreme Court reiterated the caution which is required before an appellate court can be justified in overturning the economic judgments of an expert tribunal such as the CMA.

12. R (on the application of Hudson Contract Services Ltd) (Claimant) v Secretary of State for Business, Innovation & Skills (Defendant) & Construction Industry Training Board (Interested Party) [2016] EWHC 844 (Admin)

C applied for a declaration that the Industrial Training Levy Order 2015 article 7(2) (which governed levy payments for training) was unlawful. Article 7(2) stipulated a method of calculating the amount of levy payable and resulted in C being subject to a 20% deduction in his pay on the basis that he was "net paid." Sub-contractors registered with HMRC as "gross paid" were not subject to the same rule. C argued that this was unlawful as it depended on a random factor which had nothing to do with the nature of the levy (whether a sub-contractor was "net paid" or "gross paid") and also allowed a levy to be paid for work on which a separate levy was also chargeable to a different employer. Kerr J concluded that although the levy resulted in an element of double recovery, it did

not result in any individual paying the levy twice for the same work. He also noted that this was a "polycentric" decision in an area in which the court had no special expertise, which made it more cautious. This, together with the factors of proper consultation, industry support and the lifting of administrative burdens led to the conclusion that the Order was neither ultra vires nor unlawful.

13. R (on the application of DHL International (UK) Ltd) v Office of Communications [2016] EWHC 938 (Admin)

C applied for a declaration that an information request from OFCOM was unlawful and disproportionate. C's business was predominately in the carriage of parcels by air. In preparation for a new postal services regime, D had requested information regarding C's business on the basis that C fell within the meaning of a "postal operator" under the Postal Services Act 2011. Soole J considered the meaning of "by post" and adopted a broad approach when concluding that C was a postal operator within the meaning of the Act. C's proportionality argument failed on the grounds that the inconvenience caused to C was outweighed by the reasons D had for gathering the information as part of its regulatory functions. D's request was reasonable and legitimate and the application was refused.

14. R (on the application of Nigel Mott) (Claimant) v Environment Agency (Defendant) & David Merrett (Interested Party) [2016] EWCA Civ 564

The Environment Agency appealed a decision that its imposition of a catch limit on a leaseholder's fishery licence was unlawful. The limit imposed reduced the leaseholder's catch by 95%. The issues to consider were whether the judge had erred in his conclusions pertaining to a report conducted in relation to the salmon in the estuary and whether the leaseholder's A1P1 rights had been breached necessitating compensation. It was concluded that the agency's decision to impose catch limits was not irrational. The wide discretion given to decision makers who are expert in particular complex technical fields must be even greater when the decision involves educated predictions for the future. It is inappropriate for a judicial review court to seek to substitute its own view for that of a tenable expert in matters which are in the field of scientific judgment rather than legal analysis. However, the catch limit amounted to a deprivation and breach of the leaseholder's A1P1 rights which should be compensated.

15. EE Ltd v Office of Communications [2016] EWHC 2134 (Admin)

C challenged a decision of OFCOM (included in regulations) giving effect to a direction by the SOS for Culture Media and Sport to revise the annual licence fees payable for certain frequencies so that they reflected the full market value of the frequencies in those bands. This increased the annual licence fee payable in C's case from £25m to £75 m pa. C challenged the methodology adopted by OFCOM, arguing that it should have used evidence from cost modelling to assist it in determining the market value of the spectrum, rather than only using auction benchmark data. Cranston J noted that cost modelling was used widely and internally, and there were advantages for its use, but ultimately found that this decision was "a decision on methodology on a complex issue, by an expert regulator". C also challenged OFCOM's interpretation of the SOS's direction. OFCOM had interpreted the requirement to set licence fees which "reflected" market value as excluding any consideration of other factors, a number of which C believed were relevant. Cranston J agreed with OFCOM, holding that to have allowed other factors to intrude into the analysis would have resulted in licence fees which did not reflect market value.

LEGITIMATE EXPECTATION

16. R (on the application of London Borough of Enfield) (Appellant) v Secretary of State for Transport (Respondent) & (1) Abellio East Anglia Ltd (2) First Group East Anglia Ltd (3) National Express East Anglia Trains Ltd (Interested Parties) [2016] EWCA Civ 480

C appealed a decision relating to SOS for transport's decision to issue an invitation to tender for a rail network franchise which contained no minimum requirement of service to a specific station. C contended that email assurances from D constituted a legitimate expectation that C could at least make further representations regarding the need for a minimum level of service; D had breached the rules of natural justice when failing to give an opportunity to make further representations and that the failure to take into account relevant factors was irrational. The court concluded that the relevant emails indicating that there would be a minimum service requirement did not constitute a legitimate expectation since C was committed to the regeneration having invested £70 million and had acted on a calculated risk basis rather than reliance on the emails from D. In any event even if there had been a legitimate expectation, D would have been justified in departing from it. The decision did not breach any legitimate expectation and was not irrational.

17. (1) Solar Century Holdings Ltd (2) Lark Energy Ltd (3) TGC Renewables Ltd (4) ORTA Solar Farms Ltd v Secretary of State for Energy and Climate Change [2016] EWCA Civ 117

Companies involved in the installation of solar farms unsuccessfully appealed against the dismissal of their application for judicial review of SOS' decision to bring forward the termination of a government scheme supporting the use of renewable electricity sources by two years subject to a grace period. This was justified by concerns that the financial cap on government support for the scheme would be exceeded. C argued that the government's clear and unequivocal representations that the scheme would not close until 2017 had created a legitimate expectation and the grace period was contrary to binding pre-legislative statements. The Court of Appeal concluded that there had been no unequivocal or binding assurance that the scheme would not be closed prior to 2017 and that where there were rational reasons for doing so, the government was entitled to reframe policies unless it constituted an abuse of power. Consequently the closure of the scheme did not breach any legitimate expectations and was considered procedurally fair.

18. R (Drax and Infinis) v (1) H M Treasury (2) Revenue and Customs Commissioners [2016] EWHC 228 (Admin)

C were energy companies who challenged changes made to the Climate Change Levy (CCL). Only 24 days' notice was given by the government for the withdrawal of one of the exemptions to the CCL. C argued that they had a legitimate expectation that there would be a longer lead time before the removal of any exemptions and that the sudden nature of the removal and the impact on their businesses was unlawful under both general principles of proportionality, foreseeability and certainty under EU law and their rights under A1P1. Jay J found that there had been no legitimate expectation of a longer lead time promoted by the government. He also considered the decision to have been proportionate and commented that the A1P1 ground did not add anything. An appeal to the Court of Appeal is outstanding.

19. R (Biffa Waste Management Services Ltd) v the Commissioners for Her Majesty's Revenue and Customs [2016] EWHC 1444 (Admin)

C waste disposal services company challenged a decision by HMRC to revoke its previous ruling on B's tax treatment to impose tax retrospectively on the basis of a new tax regime. Sir Kenneth Parker, sitting as judge of the High Court, considered the scope of the initial ruling and concluded that a clear and unambiguous statement by a public authority such as HMRC on the interpretation of a new regulation may be construed as general policy guidance capable of establishing a legitimate expectation. Such guidance may be relied upon in regard to other materially identical situations. He also considered whether C had disclosed to HMRC all the relevant facts prior to the initial ruling being made, such that it would be unfair for HMRC to revoke the ruling with retrospective effect, and concluded that there had been no material non-disclosure and C was entitled to rely upon the previous ruling in regard to its tax treatment.

20. (1) R (on the application of Veolia Es Landfill Ltd (2) Veolia Es Cleanaway (UK) Ltd) v Revenue & Customs Commissioner: R (on the application of Viridor Waste Management Ltd & 5 Ors v Revenue & Customs Commissioners [2016] EWHC 1880 (Admin)

Two landfill site operators applied for judicial review of HMRC's reversal of its decision to make repayments of landfill tax in respect of "fluff" layers of landfill. Disposal of waste usually attracted landfill tax liability. However HMRC had issued a brief which gave examples of non-taxable use of waste in the landfill context. The taxpayers claimed a tax repayment on "base" and "side" fluff, which HMRC approved in correspondence and made substantial repayments to the second taxpayer. Following claims received for "top" fluff, which HMRC did not consider legitimate, it made the decision to also resist further repayments for base and side fluff claims. The taxpayers submitted that they had a legitimate expectation to repayment. Nugee J held that there was no clear and unambiguous representation in relation to the fluff not being taxable in the brief, but HMRC's letters to the taxpayers constituted acceptance that they would make repayments in relation to base and side fluff and therefore founded a legitimate expectation. He went on to consider whether HMRC's conduct was "conspicuously unfair" and determined that it was not unfair in relation to the second taxpayer who had received substantial repayments. Although there was unfairness in respect of the first taxpayer who had not received any repayments, its detrimental reliance was not significant enough. In making its decision, HMRC was demonstrating to the industry that it would not accept "boundary-pushing behaviour" and this was a legitimate aim.

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

Residents of Trinidad and Tobago who held policies issued by an insurance company (IC) appealed against a dismissal of their application for relief in respect of their claim against the government. The government had made assurances of support to IC around the time of the banking crisis in 2009 which the appellants argued created a legitimate expectation which the new government following elections in 2010 failed to honour. The Privy Council identified that where a representation which is "clear, unambiguous and devoid of relevant qualification" has been given to a public authority and that authority has acted to its detriment, the representation should be honoured unless sufficient reasons to depart from it which the court deem proportionate are in existence. In the instant case, wider policy issues including those of a macro-economic and macro-political nature justified a departure from the rule and the government had given appropriate attention to the existence and effect of the assurances before abandoning them. Accordingly, the appeal was dismissed. The Privy Council commented that the trend of both judicial and academic authority favoured a narrow interpretation of the doctrine of legitimate expectations.

DISCIPLINARY

22. R. (on the application of AM) v General Medical Council [2015] EWHC 2096 (Admin)

C applied for judicial review of the GMC's guidance on assisted suicide which stated that doctors who assisted suicide may have disciplinary proceedings taken against them even though the Director of Public Prosecution (DPP) is unlikely to prosecute them. C contended that the guidance breached his rights under ECHR article 8 and that the guidance was Wednesbury unreasonable. Elias LJ refused the application and held that whilst article 8 is engaged, it was not contrary to article 8 for the GMC to take as its starting point the principle that a doctor has a duty to obey the law, and to structure its guidance accordingly. Neither was the guidance Wednesbury unreasonable as the purposes and objectives of the criminal and professional bodies are different; there is no reason to assume that the DPP's analysis of the public interest when deciding whether or not to prosecute should dictate how the GMC should determine what is required properly to protect the reputation of the profession. An appeal to the Court of Appeal is outstanding.

23. Alan Blacker v Law Society [2016] EWHC 947 (QB)

A solicitor claimed interim relief against the Law Society to prevent disclosure of files held by the SRA in relation to information about himself and the activities of a charity to which he provided legal services. The Law Society had implemented a code of practice with rights similar to those within the Freedom of Information Act 2000 and provided that it would accept decisions of an adjudicator who would apply the public interest test when determining disclosure. In the instant case there was only limited disclosure of correspondence relating to regulatory issues for which the SRA was responsible and this was justified by the public interest in regulators keeping files on those they regulated. The solicitor could not claim damages on the basis that he did not agree with the code and there could be no proprietary claim pursuant to A1P1 as the files belonged to the SRA. Any human rights arguments which may have engaged ECHR article 6 (right to a fair trial) failed as there were no civil or criminal proceedings in relation to the files and there was no private information in the files to constitute an interference of the solicitors' ECHR article 8 rights (respect for private life). Applying the principles of American Cyanamid Fraser J considered there was no serious issue to be tried and the claim was struck out.

24. Solicitors Regulation Authority v Richard Spector [2016] EWHC 37 (Admin)

The SRA appealed against an anonymity order made by the Solicitors Disciplinary Tribunal in respect of a respondent who had been found guilty of one of seven offences. The tribunal considered that offence to be a low level, minor offence and therefore imposed no sanction, did not make an adverse costs order and granted an application for anonymity. Nicol J held that the tribunal had erred, and emphasised the importance of the principle of open justice. The tribunal had not justified the departure from the starting position of open justice and there was no reason why the respondent should not have been identified. Nicol J was of the view that the order inhibited the performance of the SRA's statutory duty to ensure transparency in its regulatory activities.

25. Michalak v The General Medical Council & Ors [2016] EWCA Civ 172

A doctor appealed against a decision by the Employment Appeal Tribunal that an employment tribunal lacked jurisdiction to consider her complaint arising from her dismissal by an NHS trust due to the Equality Act s.120(7). The court concluded that judicial review was a remedy of final resort and the jurisdiction of the Administrative Court was not appropriate for a claim in relation to unlawful discrimination. Section 120(7) existed to ensure that complaints were heard by the most specialist body and in the instant case the employment tribunal was the most appropriate. The employment tribunal had the benefit of specific processes to deal with discrimination and related issues and also better positioned to deal with disputes of fact since it could call evidence from witnesses. The purpose of judicial review was to consider procedural unfairness and the lawfulness of a decision.

26. R (Prescott) v General Council of the Bar [2015] EWHC 1919 (Admin)

C was a law student training to become a barrister. He had failed a particular module of the relevant professional training course and challenged by way of judicial review the refusal of D to allow him to re-take only that module rather than having to re-take the whole course. C alleged, inter alia, that this decision was a disproportionate interference with his article 8 rights. Hickinbottom J noted that D had carefully exercised its professional and academic judgement and that standards and training was a matter for D and not for the court. Although article 8 could extend to professional or business activities, it did not give a right to work in a particular profession and was not engaged in relation to the setting of standards for entry into a profession. Even if article 8 had been engaged, the decision was proportionate in view of the need to maintain standards and competence at the Bar.

27. Taher Moosavi v Law Society (Solicitors Regulation Authority) [2016] EWHC 1821 (Admin)

A sole practitioner appealed a decision by the SRA to impose conditions on his solicitor's practising certificate following an investigation into his firm. The conditions prevented the appellant from acting as a compliance officer for legal practice or as sole practitioner, manager or owner of any authorised body and dealing with its finance and administration. The appellant argued that the SRA had misapplied previous case law and it had not considered the necessity, reasonableness or proportionality of the conditions in light of the fact that he had closed down his firm. Whipple J noted that the SRA derived its power to impose conditions targeted at a specific risk on the appellant's practising certificate under the Solicitors Act 1974 s.13A(1) and it was a specialist tribunal whose views must be given appropriate weight. The delay in imposing the conditions did not affect their validity and the conditions were deemed reasonable and proportionate. The decision was not procedurally unfair and had taken into account all material considerations. Accordingly, the appeal was dismissed.

TAX

28. R (on the application of (1) Telefonica Europe Plc (2) Telefonica UK Plc v Revenue & Customs Commissioners [2016] UKUT 173 (TCC)

Two telecommunication companies were unsuccessful in their application for judicial review of HMRC's decision to change their calculation method of VAT payable for services their customers used when visiting non-EU countries. C contended that (1) HMRC's "usage methodology" was unlawful and contrary to the relevant EU Directive; (2) the decision breached their legitimate expectation based on a letter from HMRC in 2008 stating that C could use the "revenue methodology" of calculation unless there was "a material change in the law or in [its] business;" and (3) since they were being deprived of the advantage of using this methodology HMRC had a common law duty to consult. It was held that HMRC's methodology was not unlawful. There had been no legitimate expectation as a result of HMRC's letter nor any unfairness or abuse of power as a result of the decision to change the methods of VAT adjustment. HMRC had discharged its duty to consult by giving C sufficient opportunity to make representations.

29. Walapu v Revenue & Customs Commissioners [2016] EWHC 658 (Admin)

A taxpayer was unsuccessful in his application for judicial review of HMRC's power to issue an accelerated payment notice under the Finance Act 2014 Part 1 Chapter 3. Following an inquiry by HMRC and notice requiring payment on account of the taxpayer's unassessed tax liability, C argued that his legitimate expectations had been frustrated and his ECHR article 6 and A1P1 rights violated. Green J held that Article 6 was not engaged as this was not a "civil dispute" and also that a tax dispute was not a possession protected by A1P1. There was never any promise that a notice would only be issued following assessment so the legitimate expectation ground could not be made out. Although the application of the rules was retroactive, this was justified by legitimate policy concerns.

30. HT & Co (Drinks) Ltd and Malcolm Cowen (Drinks) Ltd v Commissioners for Her Majesty's Revenue and Customs FTT (11 January 2016)

There were two separate sets of proceedings – a judicial review of the Commissioners' decision to suspend the authorisations of the appellant drinks producers to hold and move goods under duty suspension in the UK and tax tribunal proceedings. HMRC sought a stay of the tax proceedings pending the judicial review. It was not in dispute that the removal of the authorisations had a profound effect on the businesses concerned. C accepted that there was partial overlap between their tribunal appeal and their judicial review grounds, but some of the judicial review grounds were outside the tribunal's jurisdiction and in respect of those there was therefore no overlap. The tribunal noted that the judicial review proceedings were narrow and while there was some overlap there were a number of issues which were exclusively to be dealt with in the tribunal proceedings. The degree of overlap was not therefore such as to require a stay of the tribunal proceedings. In addition, while it was possible to conceive of an outcome by which the tribunal proceedings would

be moot, there was at present uncertainty as to which proceedings would ultimately be determinative of the dispute. The application for a stay was therefore refused.

31. R (Derrin Brothers Properties Ltd) v First Tier Tax Tribunal and Revenue and Customs Commissioners [2016] EWCA Civ 15

C had been the subject of third party information notices issued by HMRC in connection with an investigation into a taxpayer, but alleged that the notices were ultra vires and in breach of Articles 6 (right to a fair hearing) and 8 (right to privacy), with insufficient reasoning being given to C and insufficient time to make representations. C had been unsuccessful in the High Court and now appealed to the Court of Appeal. The Court of Appeal considered that the relevant legislative provisions had not been applied unfairly, and Parliament had not imposed any requirement for third parties to be given any further information. C had been informed of the nature of the allegations. In respect of the human rights claims, Parliament had provided a scheme which balanced private interests against the wider public interest and that, combined with the availability of judicial review to ensure compliance with the legislation and due process, was sufficient.

32. R v Harvey [2015] UKSC 73

The Appellant appealed against a confiscation order which included VAT in assessing the amount of the benefit obtained by the offender. This appeal raised the question of whether when assessing the amount of the benefit obtained by a company for the purpose of a confiscation order, any VAT accounted for to HMRC should be subtracted from the turnover figure prior to any final calculation of the benefit. The Supreme Court allowed the appeal on the grounds that including VAT in the assessment for a confiscation order was disproportionate and in breach of A1P1.

COMPETITION

33. British Telecommunications Plc (Appellant) v Office of Communications (Respondent) & (1) Sky UK Ltd (2) TalkTalk Telecom Group Plc (Interveners) [2016] CAT 3

C challenged a decision by OFCOM relating to price controls in the superfast broadband industry. C argued that OFCOM was wrong to decide that additional regulation limiting C's significant market power (SMP) was necessary and had erred in law by not giving sufficient weight to C's undertaking to operate on fair, reasonable and non-discriminatory terms. It was held that the legislative provisions surrounding SMP powers should not be interpreted narrowly. No error of law had been made out. OFCOM's position was reasonable, logical and one that it was entitled to take in the exercise of its regulatory judgment. Accordingly it was entitled to impose additional regulations to control the margin on C's provision of access so that competitors could profitably match it.

34. British Telecommunications PLC v Office of Communications, Case 1238/3/3/15, TalkTalk Telecom Group plc v Office of Communications, Case 1237/3/3/15

Two telecom providers appealed a decision by OFCOM to impose various price control conditions to maintain a minimum margin between the providers' wholesale prices and their retail prices. Certain specified price control matters were referred to the CMA. The grounds of appeal were that OFCOM was not justified in imposing any price control as it failed to demonstrate a "relevant risk of adverse effects arising from price distortion," its market analysis was insufficient and it was wrong to consider that any additional regulation was required beyond that already existing. In its final determination, the CMA ruled that OFCOM had acted reasonably and had not erred in the exercise of its discretion when determining the necessary assessment it needed to make to fulfil its objective.

35. Gallaher Group and Somerfield Stores v Competition & Markets Authority [2016] EWCA Civ 719

Gallaher and Somerfield appealed against a decision of the High Court where they alleged that the OFT had breached the requirements of fairness and equal treatment by giving assurances to only one party (TM Retail) that it would have the fine under its early resolution agreement repaid in the event of any successful third party appeal. The High Court found that the OFT had wrongly given the assurances but, in this case, the difference in treatment was justified by the principle that, as a general rule, a mistake should not be replicated where public funds are involved. The Court of Appeal found that the OFT's refusal to pay the appellants on the same basis as TM Retail was a plain breach of the principle of equal treatment and was unfair. There was no objective justification for according to TM Retail the substantial benefit that the OFT failed to accord to the appellants (and the others who were in materially comparable positions).

36. Federation of Independent Practitioner Organisations v Competition & Markets Authority [2016] EWCA Civ 777

The appellant appealed against the Competition Appeal Tribunal's refusal of its application under the Enterprise Act 2002, s.179 challenging the findings of a market investigation report into the provision of private healthcare. A majority of the tribunal found that the authority's report was not unlawful and refused to forward the matter to the Competition & Markets Authority for reconsideration. The appellant contended that there were clear restrictions on competition and that the majority of the tribunal failed to give sufficient reasons for why they differed in opinion to the dissenting minority. The Court of Appeal found that although the report had identified the potential for competition to be distorted, the CMA was entitled to reach its conclusion that competition had not been distorted in reality. This decision could not be said to be irrational. Furthermore, the majority of the tribunal was under no obligation to explain its reasoning for disagreeing with the dissenting minority and the appeal was dismissed.

STANDING

37. R (Project Management Institute) v (1) Minister for the Cabinet Office; (2) Privy Council Office; (3) Attorney General [2016] EWCA Civ 21

C applied for judicial review of a Privy Council (PC) committee's decision to recommend the grant of a Royal Charter to a UK charity which regulated and developed the project management profession even though the PC's criteria had not been fully met. C submitted that the decision was irrational and contrary to the PC's published policy. The High Court held that the PC's decision was not amenable to judicial review but the Court of Appeal reversed this aspect of the decision, since C was a competitor and therefore had a "sufficient interest" in the matter. The Court of Appeal emphasised the PC's wide discretion under the policy, and the need to refrain from treating a policy as if it were a statute or a contract. The Court of Appeal also dismissed C's allegation of bias/predetermination by the government. The application had been subjected to independent assessment. There had been a history of links between the charity and the government in the development of qualifications, but those were not relevant to the decision made in respect of this particular application.

PROCEDURE

38. Breyer Group & Ors v Department of Energy and Climate Change [2016] EWHC 763 (Comm)

C companies made a claim in the Queen's Bench Division against D alleging breaches of their rights under A1P1. C submitted that determination of the substantive issues in the case (including what contracts existed and were enforceable, whether their rights had been breached and if any loss had been suffered,) would be more suitable for consideration by Commercial Court judges.

Teare J held that the test to be applied in considering such a transfer is whether the issues involved would significantly benefit from the expertise of judges in the Commercial Court and this should be balanced against the disruption and cost of transfer. It was also held that claims transferred to the Commercial Court must arise out of the transaction of trade and commerce. However, although in the instant case some of the substantive issues contained a commercial element, as a dispute against a government department the case was classified as a public law claim. Accordingly, the case was not transferred to the Commercial Court.

39. Bank Mellat v HM Treasury [2015] EWCA Civ 1052

In ongoing proceedings concerning financial restrictions on C, an appeal was made against interlocutory decisions concerning disclosure of closed material. Central questions for decision by the court in the course of the procedure were whether to give permission for closed material to be withheld from C and C's legal representatives and, if so, whether to direct the service of a summary (or gist) of that material on them. The court allowed the appeal in part and held that in the circumstances of the present case, in view of the serious effect of the restrictions on C, article 6 required sufficient disclosure to allow C to give effective instructions to refute the allegations against it.

40. R (on the application of SSP HEALTH LTD) v Care Quality Commission [2016] EWHC 2086 (Admin)

C healthcare provider challenged the CQC's decision not to correct factual errors in a draft assessment report. The CQC was responsible for assessing and rating service providers under the Health and Social Care Act 2008. The procedure as set out in its "provider handbook" was that providers would be able to challenge factual inaccuracies before the publication of the report. After the publication of the report, it could only be challenged on the basis that the procedure set out in the handbook had not been followed. In this case, the CQC had followed its procedure and refused to accept a number of factual corrections to the report at the first stage, and refused to consider the question again at the second stage, as this was only designed to consider procedural matters. Andrews J considered what kind of redress should be available to a party if a report "proposes to make adverse fact findings that could be demonstrated by objective evidence to be incorrect, misleading or unfair, but the regulator refuses to change the draft when the errors are point out to it", and there is no formal appeal process. She found that in this case, procedural fairness required the QCQ to provide a means to challenge the refusal to accept the factual changes, by way of review by someone independent of the inspectors.

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