

Challenges to regulators: practical issues

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- JR vs. Statutory appeal
 - Too early or too late?
 - Key features:
 - Disclosure and documentary evidences
 - Intensity of review

Judicial review
or
Statutory appeal?

The differences between JR and statutory appeals

- Admin Court vs. statutory tribunal.
- No test for “permission” for statutory appeals.
- Different time limits.
- A different intensity of review (?)

The remedy of last resort

R(Sibrasubramaniam) v Wandsworth CC [2003] 1 WLR 475: “judicial review is customarily refused as an exercise of judicial discretion where an alternative remedy is available.”

Eg: *R(Davies) v FSA* [2004] 1 WLR 185: must not “bypass the comprehensive statutory scheme” in the absence of “exceptional circumstances”.

When to challenge

Too early or too late?

JR lies against a “decision”

- “Generally” a substantive event creating a new right or restriction: *Shrewsbury & Atcham BC v Secretary of State for Communities and Local Government* [2008]3 All ER 548.
- Can challenge preliminary decision not affecting legal rights if part of a prescribed process: *R(Burkett) v Hammersmith and Fulham LBC* [2002] 1 WLR 1593, HL.

Challenge to intermediate steps

- *R(Crest Nicholson) v OFT* [2009] EWHC 1875 Admin: “contrary to the ethos in which civil litigation should be conducted to decide at this point that the resolution of the matter should be postponed to the CAT”.
- Judicial review may not be sufficient: *Primagaz v France* (29613/08).

Unclear whether statutory remedy?

- Bring protective proceedings, and seek a stay: *T-mobile v Ofcom* [2009] 1 WLR 1565; CA asked for JR to be listed before Barling J.
- Doctrine of procedural exclusivity now flexible: *Dennis Rye* (1998) 1 WLR 840
- Stay within strictest time limit.

What are the time limits?

C-406/08 *Uniplex*, 28 Jan 2010:

Procurement challenge must be brought:

- promptly and in any event within 3 months of when grounds for bringing proceedings first arose,
- unless good reason to extend time.

Uniplex ECJ:

- time runs from when A knew or ought to have known of breach;
- “promptness” is too uncertain to comply with Directive requirement of effective review;
- National court must use its discretion to extend time to ensure time runs from date when A knew.

Uniplex applied

- *SITA v Greater Manchester Waste Disposal* [2011] EWCA Civ 156: Three month rule not affected by *Uniplex*, but “promptness” requirement disapplied.
- *R(Macrae) v Herts DC*, 8 Sept 11: “promptly” remains applicable where no EU law dimension.
- *R(Buglife) v Medway* [2011] EWHC 746 (Admin): *Uniplex* applies to all Directives.
- *R(Berky) v Newport CC* [2012] EWCA Civ 378: differing views in CA as to whether *Uniplex* only applies to EU grounds, not domestic, and whether it applies to exercise of discretion to refuse relief on grounds of delay.

Standard of review

Context

- Commercial regulation frequently complex
- Any challenge must be sensitive to standard of review:
 - Will the reviewing body be willing to engage in the detail?
 - Can the challenge be framed to manage / avoid the complexity?

Statutory appeal may be more intensive

- Financial services: “consider the matter afresh in light of all the evidence made available to us”
Panesar v FSA, 21 Oct 2010.
- Communications Act 2003: appeal “on the merits”. Not a rehearing, but requires “profound and rigorous scrutiny” – *Vodafone v Ofcom* [2008] CAT 22.

The judicial review standard

- Unreasonableness.
- Natural justice: fair process.
- Proportionality?
 - Yes in EU law / ECHR contexts
 - *R(Sinclair Collis) v SofS* [2011] EWCA Civ 437
- Error of fact?
- JR now flexible, and can investigate the merits if necessary: *T-mobile v Ofcom* [2009] 1 WLR 1565

Statutory JR in the CAT

- *BSkyB v CC* [2010] EWCA Civ 10 – CAT should apply same standard as the High Court
- In practice, however, CAT's scrutiny much more intensive than High Court

Standard of review in practice

- Highly context dependent.
- Easier to persuade expert tribunal to intervene than High Court.
- Nature of decision will affect willingness to intervene – infringement finding cf. policy decision
- Nature of decision-maker affects the intensity of review: *R(Sinclair Collis) v SofS* [2011] EWCA Civ 437.

Disclosure and regulatory challenges

- Standard disclosure not automatic in judicial review.
- Not routinely ordered by statutory tribunals.
- Should Claimants seek it?

Duty of candour

Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd [2002] EWCA Civ 1409 at 50:

“... there is no general duty of disclosure in judicial review. However, there is - of course - a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide”.

Tweed v Parades Commission of Northern Ireland [2007] 1 AC 650

- disclosure usually “unnecessary” in JR, but:
- where the “precise facts are significant”, it can be ordered;
- more likely where ECHR in issue, because of need for careful analysis of fact-specific issues on proportionality;
- test is whether necessary to resolve the matter fairly and justly”.

Tweed II: exhibits

- Where a public authority relies on a document as significant, good practice to exhibit it.
- where the witness summarizes the effect of a document it is not necessary to suggest some inaccuracy or incompleteness in the summary in order to obtain it.

Cross-examination

R(Al-Sweady) v SofS [2009] EWHC Admin 2387:

- If factual disputes, the court is ordinarily obliged to resolve them in favour of the Defendant.
- Cross examination more likely on “hard edged” questions of fact , particularly in relation to the ECHR.
- “Vital” for effective cross-examination to have had full disclosure.

Al-Sweady: process

- When outcome might depend on factual questions, urgent consideration should be given to ordering disclosure and cross-examination.
- Clear obligation on both parties to consider at all times whether a crucial hard edged issue.
- Courts should not be reluctant to make such orders in suitable cases.

Treasury Solicitor Guidance on duty of candour in judicial review

- “Best practice” is to give disclosure in accordance with CPR Pt 31 in JR “exceptional cases” involving inquiry into issues of fact.
- Case handler should prepare a disclosure statement using CPR format.

Freedom of Information Act 2000

- 20 working days
- No test of relevance
- cost limits.

Thank You

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