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JUSTICE
59 Carter Lane
London
EC4V 5AQ
(020) 7329 5100
www.justice.org.uk

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UK Supreme Court rebuffs government over restrictions to judicial review

Delivering its judgment in three cases, the UK Supreme Court this morning ruled that decisions of the Upper Tribunal are not immune from judicial review by the High Court in England or the Court of Session in Scotland. It also unanimously rejected the government's argument that judicial review should only be available in 'exceptional cases'.

Instead, the Supreme Court held that judicial review of Upper Tribunal decisions should be allowed where the case either (i) raises some important point of principle or practice or (ii) there is some other compelling reason to grant leave for judicial review.

The judgments have reaffirmed the longstanding common law power of the courts to judicially review the decisions of statutory bodies, including administrative tribunals. The government had originally argued that the Upper Tribunal, the main administrative appeal body, should be immune from judicial review because of the provisions of the Tribunals, Courts and Enforcement Act in 2007. However, that argument was rejected by both the High Court, the Court of Appeal and the Court of Session and abandoned by the government before the Supreme Court. As Lord Phillips, the President of the Supreme Court, said:

> [T]he power of judicial review is a valuable safeguard of the rule of law. It is one which the judges guard jealously [para 71]

In *Eba v Lord Advocate*, the Supreme Court unanimously upheld the decision of the Scottish Court of Session. However, it also ruled that Scots law on the availability of judicial review should be brought into line with that of England and Wales. The ruling is expected to cause further outcry from the Scottish government which has recently criticised the Supreme Court's rulings in Scottish cases such as *Cadder* and *Fraser*.

Eric Metcalfe, JUSTICE's director of human rights policy, said:

> **Despite the government's best efforts to restrict its scope, the Supreme Court has reaffirmed the importance of judicial review as an essential part of the rule of law.**
>
> **This is a measured and workable decision that we hope will win support on both sides of the border. With any luck, the Supreme Court's ruling will also end parliamentary attempts to immunise the decisions of administrative tribunals from further review.**

For further comment, please contact Eric Metcalfe, JUSTICE's human rights policy director, on 020 7762 6414 (direct line), 07939 119 369 (mobile) or emetcalfe@justice.org.uk.

Notes for editors

1. JUSTICE was granted leave to intervene before the Supreme Court in both *Cart* and *Eba* by way of both written and oral submissions. An electronic copy of the written submissions is available on request. JUSTICE was represented pro bono by Alex Bailin QC, Aidan O'Neill QC, Iain Steele and Freshfields Bruckhaus Deringer LLP.

2. The current two-tier system of administrative tribunals was established by the Tribunals, Courts and Enforcement Act in 2007, following the recommendations of the 2001 Leggatt Report. The aim was to introduce a unified structure of administrative appeals to replace the previous patchwork system.

3. *Eba* is the second Scottish case which JUSTICE has intervened in before the UK Supreme Court, the first being *Cadder* in 2010. JUSTICE has a Scottish advisory group which assists its work on Scots law and it recently responded to the Carloway review on Scottish criminal procedure.

KEY EXTRACTS FROM THE SUPREME COURT JUDGMENT IN *CART V UPPER TRIBUNAL*

Baroness Hale said:

> [T]he scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament's bidding. But we all make mistakes. No-one is infallible.[para 37]
>
> There must be some risk that the amalgamation of very different jurisdictions in the new chambers [of the unified tribunal service] will dilute rather than enhance the specialist expertise of their judges and members. Mental health and special educational needs, for example, are similar in some ways but very different in others. It would be difficult to say that bringing them together has reduced the capacity for error although of course we all hope that it has not been increased. [para 54]

Lord Phillips, President of the Supreme Court said:

> These three … appeals raise a single issue. This is the extent to which decisions of the Upper Tribunal are properly subject to judicial review by the Administrative Court in England and Wales and the Court of Session in Scotland. That issue calls for a review of the roles of the legislature, the executive and the judiciary in maintaining the rule of law in this country. *The rule of law requires that the laws enacted by Parliament, together with the principles of common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive.* [para 64, emphasis added]
>
> The administration of justice and upholding of the rule of law involves a partnership between Parliament and the judges. Parliament has to provide the resources needed for the administration of justice. The size and the jurisdiction of the judiciary is determined by statute. Parliament has not sought to oust or fetter the common law powers of judicial review of the judges of the High Court and I hope that Parliament will never do so. [para 89]
>
> My initial inclination was to treat the new two tier tribunal system as wholly self-sufficient. [But] …. I have been persuaded that there is, at least until we have experience of how the new tribunal system is working in practice, the need for some overall judicial supervision of the decisions of the Upper Tribunal, particularly in relation to refusals of permission to appeal to it, in order to guard against the risk that errors of law of real significance slip through the system. [paras 91-92]

Lord Clarke said:

> [T]here is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection afforded by judicial review. But the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law. [para 100]

KEY EXTRACTS FROM THE SUPREME COURT JUDGMENT IN *EBA V LORD ADVOCATE:*

Lord Hope said:

> There is no doubt that a decision by this Court to endorse [the approach of the English Court of Appeal] with regard to unappealable decisions of the Upper Tribunal in England and Wales would have presented a very real problem in Scotland. To extend it to Scotland would have created a rift between the broad and flexible approach that is taken to the supervisory jurisdiction in Scotland generally, which is available as of right to everyone, and the very limited opportunity for review which it would have provided in the case only of that class of unappealable decisions [para 43]
>
> As it is, the decision of this court in *Cart* and *MR* not to endorse that approach has removed that objection. It has made it much easier for the Scots approach to the supervisory jurisdiction in relation to unappealable decisions of the Upper Tribunal in Scotland to find common ground with that which must now be taken in England and Wales. [para 44]
>
> [T]here is no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review provides further support for the argument that there should be no difference between them as to the scope for the judicial review of unappealable decisions of the Upper Tribunal on either side of the Border …. It would not, therefore, be a very large step for the Scots approach to unappealable decisions of the Upper Tribunal to align itself with that which has now been decided should be taken in England and Wales. [para 46]