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Judicial Review update. The new judicial review provisions. Proportionality and common law

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Criminal Courts and Justice Act 2015

Provisions in force from 13 April 2015

- New defence – no substantial difference (CJCA section 84, amending section 31 SCA 1981)
- Applies at permission stage and final hearing stage

- Limitation on the power to make a costs order in favour of an intervenor
- Obligation to make a costs order against an intervenor in specified circumstances
- (CJCA section 87)

- New legal aid regulations on judicial review claims – post *Ben Hoare Bell and ors*

Criminal Courts and Justice Act 2015

Provisions not yet in force

- Requirement for claimants to provide financial information as a condition of obtaining leave to apply for judicial review. (CJCA section 85, amending section 31 SCA 1981)
- Court required to have regard to this information when exercising its power to makes costs orders. (CJCA section 86(1))

- Court required to consider making costs orders against non-parties if the non-party is providing financial support for the purposes of the proceedings. Applies at the permission stage, and following the substantive hearing. (CJCA section 86(3))

- Costs capping orders. (CJCA sections 88 – 90).

No substantial difference defence
Permission stage

Senior Courts Act 1981, section 31 as amended

(3B) When considering whether to grant leave to make an application for judicial review, the High Court -

(a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and

(b) must consider that question if the defendant asks it to do so.

(3C) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave

(3D) The court may disregard the requirement in subsection (3C) if it considers that it is appropriate to do so for reasons of exceptional public interest (and must in such cases certify it has done so: (3E))

No substantial difference defence
Final hearing

Senior Courts Act 1981, section 31 as amended

(2A) The High Court -
(a) must refuse to grant relief on an application for judicial review, and
(b) may not make an award under subsection (4) [damages] on such an application,
if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

(2B) The court may disregard the requirement in subsection (2A)(a) and (b) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(2C) If the court grants relief or makes an award in reliance on subsection (2B), the court must certify that the condition in subsection (2B) is satisfied.

No substantial difference defence Consequential matters

Amendments to the CPR

- CPR 54.8(4) amended to provide that AoS must set out summary grounds for not substantially defence if intending to rely on it to contest the grant of permission

- New CPR 54.11A applies where court wishes to hear submissions on—
- (a) whether it is highly likely that the outcome for the claimant would not have been substantially different if the conduct complained of had not occurred; and if so
- (b) whether there are reasons of exceptional public interest which make it nevertheless appropriate to give permission.

- Court may direct a hearing to determine whether to give permission -
- C, D and any other person who has filed an AoS must be given at least 2 days' notice of the hearing date.

Upper Tribunal - judicial review jurisdiction

- amendments to the Tribunals Courts and Enforcement Act 2007 to correspond to the amendments top the Senior Courts Act 1981. (see CJCA section 84(4) – (6)

- Corresponding amendments to the Upper Tribunal Rules applicable to judicial review claims

No substantial difference defence

Effect of the new defence …

- Requires courts to ignore unlawful conduct?
- After the event justification – undermining JR or practical reality?
- Removal of judicial discretion?
- What does 'highly likely' mean?
- Relevance on focus of outcome 'for the applicant'?
- What is a 'not substantially different' outcome?
- What are reasons of 'exceptional public interest'?
- Difficulties for claimants
- Potential tactical issues for defendants

Interveners and costs
Who is an intervener?

Section 87 CJCA 2015

- Interveners are persons: (a)who are not parties to proceedings and (b) are not directly affected by the proceedings and have not been served with the claim form (section 87(10))

- Someone who initially intervenes may become a party (and therefore not subject to these rules) if the Court directs (section 87(11))

- An intervener must be granted permission to file evidence or make representations in judicial review proceedings (section 87(1))

Costs orders in favour of interveners
Interveners and costs

Parties may not be ordered to pay intervener's costs in connection with the proceedings unless there are *"exceptional circumstances that make it appropriate to do so"* (section 87(3) and (4))

Costs orders against interveners

The court must order intervener to pay party's costs if

- the intervener has acted, in substance, as the sole or principal applicant, defendant, appellant or respondent;
- the intervener's evidence and representations, taken as a whole, have not been of significant assistance to the court;
- a significant part of the intervener's evidence and representations relates to matters that it is not necessary for the court to consider in order to resolve the issues;
- the intervener has behaved unreasonably

See, section 87(5) and (6).

Costs orders against interveners

- Any order is only to the extent that the court considers that the party has incurred costs by reason of the intervener's involvement. (section 87(5)
- The court is not required to make an order if it considers that there are exceptional circumstances that make it inappropriate to do so (section 87(7)).
- In determining whether there are exceptional circumstances that are relevant for the purposes of subsection (4) or (7), the court must have regard to criteria specified in rules of court (section 87(8)). No criteria yet specified

New legal aid regulations

R (Ben Hoare Bell & Ors) v the Lord Chancellor [2015] EWHC 523 (Admin)

- Successful challenge to amendments to the 2013 Civil Remuneration Regulations as they applied to judicial review claims. The amendment removed payment of legal aid until after the permission stage

The Civil Legal Aid (Remuneration) (Amendment) Regulations 2015

- Amend the 2013 Regulations
- New regulation 5A. Payment for work on an application for judicial review is not allowed unless either (a) the: court gives permission to bring judicial review proceedings; or (b) the court neither gives nor refuses permission, but the Legal Aid Agency (LAA) considers payment is reasonable in the circumstances.

New legal aid regulations

Payment for work on a permission application is not allowed unless ...

- The defendant withdraws the decision to which the application for judicial review relates and the withdrawal results in the court either (a) refusing permission to bring judicial review proceedings, or (b) neither refusing nor giving permission

or

- The court orders an oral hearing to consider whether to give permission to bring judicial review proceedings or a relevant appeal

or

- The court orders a rolled-up hearing

New legal aid regulations

When considering whether or not to make a discretionary payment under regulation 5A the LAA must consider ...

- the reason why the provider did not obtain a costs order or costs agreement in favour of the legally aided person
- the extent to which, and the reason why, the legally aided person obtained the outcome sought in the proceedings, and
- the strength of the application for permission at the time it was filed, based on the law and on the facts which the provider knew or ought to have known at that time

Claimant's obligation to provide financial information (not yet in force)

Prospective amendment to section 31(3) of the SCA 1981

No grant of permission to apply for judicial review unless the claimant has provided the court with such information about how the claim is financed as is required in the CPR

The information that must be provided is yet to be specified

Section 31(3A) provides that the information that may be required can include (but is not necessarily limited to)

- information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application; and
- if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

The Rules may also contain a threshold requirement, and if the support is below the threshold, the Rules may state that details of it need not be provided. See section 31(3B). Save for this, no anonymity for funders.

Costs and non-parties (not yet in force)

Section 86 CJCA 2015

- The court must consider whether to order costs to be paid by a person, other than a party to the proceedings, who is identified in the section 31(3) information as someone who is providing financial support for the purposes of the proceedings or likely to be able to do s (section 86(3))

- When considering what costs order to make the Court must have regard to the financial information provided by the claimant (and any supplement provided subsequently in accordance with rules of course or Tribunal Procedure Rules) (section 86(1) and (2))

Costs capping orders (not yet in force). Summary.

- Protective Costs Orders are currently made pursuant to the Court's powers under CPR Part 44
- Governing principles: *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600
- New rules in sections 88-90 of the 2015 Act will replace protective costs orders with *"costs capping orders"*

Note

- CPR 3.19 also includes a power to make a costs capping order. CPR 3 CCOs will continue to exist side by side with CJCA CCOs
- It is somewhat confusing that there are now two species of CCO (and each can do substantially the same thing). However, each serves a different purpose. The defining characteristic of the CJCA power to make a CCO is whether or not the proceedings are *"public interest proceedings"*.

The present - protective costs orders

***Corner House*. PCO may be made on such conditions as the Court thinks fit, provided that the Court is satisfied that:**

- the issues raised are of general public importance;
- the public interest requires that those issues should be resolved;
- the applicant has no private interest in the outcome of the case;
- having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the Order; and
- if the Order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

The future - costs capping orders (not yet in force)

- A CJCA CCO is defined as an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings (section 88(2))

- A CCO that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant, must also limit or remove the liability of the other party to pay the applicant's costs if it is (section 89(2))

Costs capping orders (not yet in force)

The section 88 CJCA 2015 power to make a CCO applies only where permission to apply for judicial review has been granted. (To this extent, the new power is a self-contained code and will overtake *Corner House* principles.)

CCOs may only be made on the application of the claimant. The relevant court rules have not yet been made

Court may make a costs capping order only if it is satisfied that ...

- the proceedings are public interest proceedings
- in the absence of the order, the claimant would withdraw the application for judicial review or cease to participate in the proceedings, and
- it would be reasonable for the claimant to do so.

See section 88(6)

Costs capping orders (not yet in force)

Proceedings are "public interest proceedings" only if

- issue in the proceedings is of general public importance,
- public interest requires the issue to be resolved, and
- the proceedings are likely to provide an appropriate means of resolving it.

See section 88(7).

Matters to which the court must have regard when deciding whether the proceedings are public interest proceedings include

- the number of people likely to be directly affected if relief is granted to the applicant for judicial review,
- how significant the effect on those people is likely to be, and
- whether the proceedings involve consideration of a point of law of general public importance.

See section 88(8)

Costs capping orders (not yet in force)

Matters to which the court must have regard when deciding whether to make a CCO include (section 89(1))

- The financial resources of the parties, including financial resources of any person who provides/may provide financial support to the parties.
- The extent to which the applicant for the order is likely to benefit if claim succeeds.
- The extent to which any person who has provided/may provide the applicant with financial support is likely to benefit if claim succeeds.
- Whether lawyers are acting free of charge.
- Whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

Common law proportionality?

Lord Mance in ...
Kennedy v Charity Commission; Pham v Home Secretary

- *Wednesbury* reasonableness was not restricted only to rigid irrationality. The intensity of review depended on the nature of the decision under challenge
- The language of proportionality should be acquired by the common law because it is language that provides a structure to enable the court to review decisions
- Applying proportionality would expand the reach of the common law beyond rationality-based review, and in certain cases allow the court to assess the relative weight of competing considerations arising from the decision under challenge
- Adopting the language of proportionality did not mean that common law judicial review would become merits review

What's wrong with the common law; what's right about proportionality?

- A perception that *Wednesbury* principles are too rigid and this could only be addressed by incorporating elements of a proportionality approach
- *Wednesbury* principles are insufficiently sensitive; they provide tools which are insufficiently precise
- Applying proportionality removes arbitrary distinctions between common law claims and other claims

What could common law proportionality look like?

- No obvious new principle of substantive evaluation.
- EU law-type, general proportionality.
- Proportionality in the sense that the public authority's use of power should be proportionate to the objective being pursued (Lord Reed in *Pham* at §113)
- Perhaps not too different from where the common law is now.

EU law proportionality
Lumsdon v Legal Services Board

Lord Reed and Lord Toulson at §§23 – 82

- Not the same as HRA/ECHR proportionality (*Bank Mellat,* 4 stage justification does not apply)
- Two basic questions: (1) is the measure suitable to achieve the objective pursued; (2) could it be obtained by a less onerous method?
- The overall concern is for a form of balance between private interests and the public interest that the measure under challenge is meant to promote.

Human Rights Act proportionality

Four-stage test: *Bank Mellat v HM Treasury*

"… an exacting analysis of the factual case advanced in defence of the measure in order to determine …"

1. Is the objective sufficiently important to justify the limitation of a fundamental right
2. Is the measure rationally connected to the objective
3. Could a less intrusive measure have been used
4. Has a fair balance been struck between the individual's rights and the interests of the community (taking account of the consequences of the measure for the individual).

EU law proportionality

- It embraces other aspects of the *Wednesbury* principles. (The EU notion of "sound administration".)

- It is nuanced and fact-sensitive; it depends on context such that the principle is expressed by the Court in different ways in different contexts.

- Intensity of review is always an important matter (must be appropriate to context; no schematic approach).

Proportionality and the level of scrutiny

- Where the decision depends on matters of sensitive political, social or economic choice, the level of scrutiny is "manifestly [=obviously] inappropriate".
- Is the choice beyond the range reasonably available.
- The "less onerous method" test almost vanishes for all practical purposes.
- Nevertheless, there may be in depth consideration of the factual basis of the decision and the reasoning that underlies it.

Proportionality and the level of scrutiny

- Applies most strictly to measures which interfere with protected interests (e.g. fundamental rights, and the EU fundamental freedoms).
- Justification must be based on a reason permitted under the Treaty (e.g. public policy, public security, public health).
- The measure must be non-discriminatory (compare *Rotherham MBC v Business Secretary*).
- The measure must be suitable to obtain the objective.
- The derogation from the protected interest by reason of the measure must be no more than necessary.

No new premise for scrutiny

Rotherham v Business Secretary, per Lord Sumption at §47

"The claimants advance an alternative case based on proportionality, which I can deal with quite shortly ... The claimants say that the effect of the Secretary of State's decision was to impose on them a disproportionate burden. The problem about this submission is that it fails to answer the question: disproportionate to what? Proportionality is a test for assessing the lawfulness of a decision-maker's choice between some legal norm and a competing public interest. Baldly stated, the principle is that where the act of a public authority derogates from some legal standard in pursuit of a recognised but inconsistent public interest, the question arises whether the derogation is worth it. In this case the only legal standard by which the treatment of Merseyside and South Yorkshire can be regarded as disproportionately onerous to them is provided by the terms of the 2013 Regulation and the principle of equality. The two regions have no entitlement to support from the Structural Funds except what they can derive from these two sources. If the Secretary of State's decisions are consistent with both, as I consider them to have been, their treatment cannot be regarded as disproportionate."

Proportionality and the level of scrutiny

The principle of least intrusion
(There should be no other less onerous option.)

- Not applied mechanistically
- No requirement to prove no other conceivable less intrusive option
- A margin of appreciation is applied

- The court does expect explanation of the relevant factual and policy context

Will using the language of proportionality affect outcomes?

Rotherham v Business Secretary, Lord Neuberger at §65

"None the less, a court should be very slow about interfering with a high level decision as to how to distribute a large sum of money between regions of the UK. But the degree of restraint which a court should show must depend on the purpose of the allocation, the legal framework pursuant to which the resources are allocated, and the grounds put forward to justify the allocation. The line between judicial over-activism and judicial timidity is sometimes a little hard to tread with confidence, but it is worth remembering that, while judicial bravery and independence are essential, the rule of law is not served by judges failing to accord appropriate respect to the primary policy-making and decision-making powers of the executive."

What sort of cases may be affected?

- "derogation" cases – fundamental common law rights; important statutory rights
- "hard cases" – of all types

What are the practical consequences?

If the principle is that public power should be used in a way which is proportionate to what is to be achieved ...

A more positive/assertive approach is required.

- *In evidence*
- The evidence needs to address the fair balance issue in specifics (the individual interest vs. the general interest)

- *In submissions*
- For example, as to the specific reasons for broad margins – the reasons why, in the context of the case in hand, significant weight to the decision-maker's judgements

Proportionality ... those recent cases ...

Bank Mellat v HM Treasury [2014] AC 700
Kennedy v Charity Commission [2014] 2 WLR 808
R(Lord Carlile) v Home Secretary [2014] 3 WLR 1404
R(Miranda) v Home Secretary [2014] 1 WLR 3140

Pham v Home Secretary [2015] 1 WLR 1591
R(Rotherham MBC) v Business Secretary [2015] PTSR 322
R(Lumsdon) v Legal Services Board [2015] UKSC 41

Jonathan Swift QC is a highly experienced public lawyer. He was First Treasury Counsel from 2007 – 2014. Chambers and Partners 2015 recommends him in the Human Rights and Civil Liberties, Public law and Administrative law, EU law, and Data Protection categories.

"Jonathan is excellent - a very compelling advocate and a brilliant legal mind"
"A very eminent and experienced barrister, who is at the top of his profession"

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