JUSTICE

REVIEW OF THE YEAR

JONATHAN SWIFT QC,
11 KINGS BENCH WALK

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Human Rights
Review of the year.

Jonathan Swift QC
14 October 2016

A year in human rights litigation

A year …

- of notable milestones – *R(Public Law Project) v Lord Chancellor* [2016] 3 WLR 387 – challenge to the proposed legal aid residence test
- when old friends re-appeared – *R(Bancoult No. 2) v Foreign Secretary* [2016] 3 WLR 157 – Chagos Islanders attempt to re-open the 2008 House of Lords judgment on the basis of a material non-disclosure
- when (perhaps) a long-running saga came to an end – *McDonald v McDonald* [2016] 3 WLR 45 – article 8 defences to actions for possession under the Housing Acts

Straw poll

- The triumph of article 8 over article 10
- A rebirth of judicial activism via article 14
- Proportionality (yes, again)

Article 8/ Article 10

Re-balancing privacy and freedom of expression

PJS v News Group Newspapers [2016] 2 WLR 1253

R(C) v Justice Secretary [2016] 1 WLR 444

PJS v News Group Newspapers

- Celebrity injunction; application to restrain a newspaper publishing a story about *"extra-marital sexual activities"* (per the Law Reports); or (per newspapers) *"Gag celeb couple … had ... threesome"*
- Injunction granted by Court of Appeal
- Story (including identity) published in foreign (and Scottish) newspapers; on the internet; and on social media
- Injunction discharged by the Court of Appeal as it had ceased to serve any useful purpose

PJS v News Group Newspapers

- Privacy not synonymous with confidentiality; the right to privacy also protects against unwanted intrusion into private life.
- The repetition of known facts can comprise interference with private life.
- Different types of publication can be qualitatively different; different media can give rise to qualitatively different impacts on private life.
- Article 10 is not inherently stronger than article 8
- Where the rights conflict, comparative importance is to be measured in specifics
- The media's *"entitlement to criticise"*, no warrant for invasion of privacy, in the absence of genuine public interest
- Reporting of the allegations in issue might not fall within article 10 at all; if it did it was *"expression … at the bottom end"*

R(C) v Justice Secretary

- Anonymity of claimant (a *"notorious criminal"*) challenging legality of a refusal to discharge him from a secure hospital.
- Order refused by both trial judge and Court of Appeal
- No presumption of anonymity; public interest in knowing what goes on in court; and in reassurance that sensible decisions are made in sensitive cases; interests of victims; legitimate media interest in reporting not just the proceedings but also the identity of the subject of the proceedings.
- Compare, risk of harm to patient's well-being (in terms of treatment, safety on release, reintegration if released).
- Anonymity granted.
- How likely is any different outcome in any other case? (Not very)

Saved/doomed by surrounding circumstances

Saved!
Roberts v Commissioner of Police [2016] 1 WLR 210

- Generic challenge to section 60 Criminal Justice and Public Order Act 1994
- Power to authorise, for specified period in specified area, use of "*suspicionless*" power to stop and search for "*offensive weapons or dangerous instruments*"
- Generic power justified taking into account limitations arising from other relevant legislation (PACE and HRA), and statutory guidance, as these matters provide a context in which the justification of specific searches can be assessed.

Saved/doomed by surrounding circumstances

Doomed!
Christian Institute v Lord Advocate 2016 SLT 805

- Challenge to the information sharing powers provided in connection with "*Named Person Service*" in the Children and Young People (Scotland) Act 2014.
- Powers not available if information would be disclosed contrary to any "enactment" – most obviously, the Data Protection Act
- 2014 Act powers not "*in accordance with the law*" as the possible interplay between them and the DPA was too complex to be sufficiently foreseeable

Discrimination
Activism and immobility

R(Rutherford) v Secretary of State for Work and Pensions [2016] EWCA Civ 29
R(Hurley) v Secretary of State for Work and Pensions [2016] PTSR 636

- *Bank Mellat v HM Treasury* [2014] AC 700
- *Burnip v Birmingham City Council* [2013] PTSR 117
- *R(MA) v Secretary of State for Work and Pensions* [2014] PTSR 584

Onu v Akiwiwu [2016] ICR 756
R(Bibi) v Secretary of State for the Home Department [2015] 1 WLR 5055

Activism. Article 14 claims

- Housing Benefit: maximum payment (eligible rent) calculated by reference to whether the number of bedrooms exceeds the permitted number
- Regulation B13(5) lists the categories of person entitled to a bedroom.
- A reduction in Housing Benefit might be offset by Discretionary Housing Payments
- One of a series of challenges: *Burnip* (adult requiring overnight care; severely disabled child); *MA* (disabled adults; mentally ill; parent with shared care responsibility for disabled child); *Rutherford* (person in the "Sanctuary Scheme", i.e. at risk of violence from ex-spouse; respite provision for grandparents caring for disabled child)
- Article 14 challenges

Reasoning in *Rutherford*

- There were *prima facie* cases of discrimination.
- The class identified was small; the administrative burden if the class were recognised within regulation B13(5) would be small (membership of the class was likely to be stable); given the nature of the class, the risk of abuse (false claims) was small.
- This was not an *MA* situation (where the class could not be readily defined)
- The Secretary of State's generic justification was not good enough. The availability of the discretionary payments scheme was not sufficient to justify discrimination against a *"narrow class"*.

Why activism?

- Generic decisions; not simply by reference to the circumstances of single applicants.
- Directed towards a matter of social/economic judgement (i.e. the policy on Housing Benefit reduction); but *de facto* close scrutiny via a discrimination challenge
- The court did have a choice; the list of "narrow classes" is probably far from closed
- This is not so isolated a case – *Bank Mellat* (discrimination and foreign policy)
- And the approach has been applied to cases which are not "narrow class" situations – *R(Hurley) v Secretary of State for Work and Pensions*

Immobility

R(Bibi) v Secretary of State for the Home Department

- English language tests for foreign spouses who wished to enter the UK
- Exceptions for specified classes
- Claim alleged disproportionate impact on spouses from India, Pakistan and Bangladesh
- The Court recognised that the matter was a *"sensitive social issue"*, and afforded a *"wide measure of discretion when deciding on the likely value of [the] policy ..."*
- Baroness Hale on the article 14 challenge: *"This is a context in which a brightline rule makes sense. If the discrimination were not held justifiable ... The choice of cure can either be to level up or level down ..."*.

Immobility

Onu v Akiwiwu

- Migrant worker, right to remain in the UK dependent on continued employment; ill-treated by employer
- Employment Tribunal discrimination claims. Claims rejected by the Supreme Court
- Outside the scope of protection under the Equality Act; no protection on grounds of immigration status
- Ill-treatment afforded by reason of the claimants precarious migration status; not race/nationality direct discrimination because not all non-British nationals shared the same vulnerability. Immigration status is a function of nationality, but it is not nationality
- For the same reason, no indirect discrimination, as no criterion etc. that would have been applied by the employer to all employees.
- If the claim could have been brought under the HRA it probably would have succeeded – foreign residence is *"other status"* for article 14 purposes

Proportionality: coming storm, or king's new clothes?

Previously ...

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

Lumsdon

- EU law-type, general proportionality.
- Not *Bank Mellat*, 4 stage proportionality
- Rather, a less prescriptive approach: that the public authority's use of power should be proportionate to the objective being pursued.
- 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.
- Two basic questions: (1) is the measure suitable to achieve the objective pursued; (2) could it be obtained by a less onerous method?

R(Keyu) v Foreign Secretary [2015] 3 WLR 1665

Lord Neuberger (§§131 – 134)

- Something to be addressed by a future "grand chamber"
- Consideration of the merits, but not a move to merits review
- Proportionality might suit some issues but not others

R(Keyu) v Foreign Secretary

Lord Kerr, §278

Final conclusions on a number of interesting issues that arise in this area must await a case where they can be more fully explored. These include whether irrationality and proportionality are forms of review which are bluntly opposed to each other and mutually exclusive; whether intensity of review operates on a sliding scale, dependent on the nature of the decision under challenge and that, in consequence, the debate about a "choice" between proportionality and rationality is no longer relevant; whether there is any place in modern administrative law for a "pure" irrationality ground of review i.e. one which poses the question, "could any reasonable decision-maker, acting reasonably, have reached this conclusion"; and whether proportionality provides a more structured and transparent means of review.

R(Keyu) v Foreign Secretary

Lord Kerr (§§271 – 283)

- Proportionality review does not assume a single "right" answer; the reviewer does not substitute his opinion for the decision-maker's
- *Wednesbury* is less austere than sometimes painted
- On the general application of HRA-type proportionality testing: *"I question its feasibility"*
- Proportionality as a general ground of review is not the same as proportionality review of interference with protected rights
- It should focus on consideration of *"suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages"*

R(Keyu) v Foreign Secretary

Lord Kerr, §283

"In the present case, such a proportionality challenge would require the court to assess whether the government has struck the right balance between two incommensurate values: protecting the public purse from the substantial expenditure that would inevitably be involved, with (from its perspective) little tangible or practical benefit, as opposed to exposing historic crimes by the British forces, with the associated vindication of the appellants' long-fought and undeniably worthy campaign. I have been reluctantly driven to the conclusion that, without an identifiable fundamental right in play, it is difficult to say that the decision not to hold an inquiry is disproportionate."

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Jonathan Swift QC is a highly experienced public lawyer. He was First Treasury Counsel from 2007 – 2014. Chambers and Partners 2016 and Legal 500 2016 recommend him in the Human Rights and Civil Liberties, Public law and Administrative law, Education Law, EU law, and Data Protection categories.

"An absolutely first-class lawyer. One of the cleverest people I've ever worked with ... He knows his stuff and has a very good courtroom presence."
"He is brilliant; fantastically clever and very persuasive. He gets to the point, tells them the answer and presses it home."

Please get in touch with our team to discuss what you need:
Joint Senior Clerks – Lucy Barbet & Mark Dann
Director of Business Development – Andrea Kennedy
Tel: +44 (0) 20 7632 8500
Email: clerksteam@11kbw.com
Address: 11 King's Bench Walk, London EC4Y 7EQ
Web: www.11kbw.com