

RECENT DEVELOPMENTS IN PUBLIC LAW

Tom Hickman

The foundations and reach of judicial review

1. Recent cases in England and Scotland have raised foundational questions about the nature of judicial review. In the first of these, Cart [2009] EWHC 3052, 1 December 2009, the Divisional Court (Laws LJ and Owen J) considered "whether by force of the common law the jurisdiction [of judicial review] will run to SIAC and the Upper Tribunal, or not at all, or only to an attenuated extent." (para 42) It held that SIAC *is* subject to JR but that--irrespective of its statutory designation as a "superior court of record"--the UT is the "alter ego" (a new legal term of art, it seems) of the High Court with equivalent "status and authority". As such, the UT is *not* subject to judicial review, save for excess of jurisdiction in the narrow sense or cases of manifest procedural unfairness apt to corrupt the judicial process; thus rendering judicial review of the UT "grossly improbable" and "theoretical":

"98. ... the rule of law does not require that the UT be reviewable for excess of jurisdiction in the [wide] sense of the term as I have described it (where, acting within its proper field, the court perpetrates a legal error): quite the contrary". (Laws LJ)

2. In Eba [2010] CSOH 45 Lord Glennie in the Outer House, although purporting to accept the reasoning in Cart, thought it too cut and dried, and inserted an important caveat:

"75-76. To adopt the language of Cart [to the Scottish context], does the UT enjoy a status equivalent to that of the Court of Session? ... On this question, subject to one caveat, I am in broad agreement with the decision of the Divisional Court in Cart..."

87 [However, cf. Cart] ... there does not need to be a single answer to the question whether decisions of the Upper Tribunal are susceptible of judicial review. Previously a decision of a Social Security Commissioner refusing leave to appeal to himself was subject to review for *intra vires* error of law. I have no doubt that in such cases the scope of judicial review should now be restricted in the manner contended for, though issues will no doubt arise as to the precise formulation of when judicial review is permitted. Put short, in such cases having regard to the nature and status of the Upper Tribunal, the generic nature of the issues involved does not lead to the conclusion that a further right of challenge should be available save in exceptional circumstances. Equally, however, I would not think it right at this stage to suggest that the scope of judicial review in matters concerning, for example, the right to life and the right to live free from torture, all matters over which the Upper Tribunal now has power, having subsumed the functions of the IAT, should be similarly restricted."

3. Also following Cart, in Wiles [2010] EWCA Civ 258, a case under the pre-TCEA 2007 law, Treasury Council sought to establish that judicial review of decisions of the Social Security Appeals Tribunal refusing leave to appeal are--contrary to the practice over the past 30 years--circumscribed to cases of excess of jurisdiction in the narrow sense or cases of manifest procedural unfairness apt to corrupt the judicial process. The Court of Appeal rejected this submission, but held that absent past practice--which it felt compelled to uphold--it would have limited the availability of judicial review (as a matter of discretion rather than, as in Cart and Eba, jurisdiction) to cases raising an important point of principle or practice or where there was some other compelling reason to hear the application ('the second appeals test').

4. Dyson LJ (as he was) also recognised that Asylum cases calling for "anxious scrutiny", in which a fuller judicial review of the IAT was well-established, are not unique in terms of their impact on human rights: "a social security case may well involve the right to a claimant to subsistence income and so directly affect their access to the most fundamental necessities of life." (para 46) This truism exposes the troubling formalism of Cart in particular, and the difficulty in holding that the *reviewability* of the UT is limited as a matter of the High Court's *jurisdiction*; rather than that the *availability* of judicial review is attenuated as a matter of *discretion*. The English CA is due to hear the appeal from Cart at the end of this month.

Disclosure, candour and Public Interest Immunity

5. The long-running dispute in Binyam Mohamed v SSFCA about disclosure pursuant to Norwich Pharmacal principles and, latterly, PII (Crown Privilege) finally concluded this year. The issue on appeal was whether 7 redacted passages of the Divisional Ct's judgment on the Norwich Pharmacal claim should be redacted. It was common ground that PII principles should be applied to determine this issue. In R (Binyam Mohamed) v SSFCA [2009] EWHC 152 (Admin) (BM No 4), 4 February 2009 the Div Ct had recognised the importance of the disclosure of its full reasons notwithstanding their irrelevance to ability of Mr

Mohamed to pursue his claim (since he had, by then, won) which is the usual basis on which disclosure is ordered against a claim of PII:

18. The issue which arises here is not the balance between the public interest and fairness to a litigant by making material available to him to enable a fair trial to take place (as has been the position in most cases - see for example *Secretary of State for the Home Department v MB* <http://www.bailii.org/uk/cases/UKHL/2007/46.html>[2007] UKHL 46 (<http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/2007/46.html>[2008] 1 AC 440)). It is a novel issue which requires balancing the public interest in national security and the public interest in open justice, the rule of law and democratic accountability. Furthermore what is in issue is not a temporary withholding from the public of that information as often occurs in the course of an investigation. It will be permanent, unless the United States Government changes its position. We are therefore very grateful to all for the very helpful submissions on this important issue.

40. Although the general rationale for hearings being in public is as a safeguard against inappropriate judicial behaviour and to ensure that there is public confidence in the system of the administration of justice through judges being seen to conduct hearings fairly and impartially, there are two further reasons for justice to be done in public and decisions made public.

41. First, it must be and is the duty of a judge in upholding the rule of law to ensure that not only is a particular dispute between parties decided openly, but that matters that come to the attention of the court during the course of a hearing of the proceedings which *prima facie* constitute an infringement of the rule of law are dealt with openly. That principle applies the more strongly the more serious is the alleged infringement of the rule of law. As Lord Griffiths observed in *R v Horseferry Road Magistrates' Court ex parte Bennett* <http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKHL/1993/10.html>[1994] 1 AC 42 at pp 61-2:

"...the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

It is the upholding of the rule of law in this way that is a factor of the greatest public interest in this case, given the allegations against officials of the United States Government and the role of officials of the Government of the United Kingdom in facilitating what is alleged.

42. Second, facts relating to issues of public interest which would not otherwise emerge are brought into the public domain. The public sittings of the courts and their public decisions are one of the means through which, in a democratic society information enters into the public domain. Such information can be important in a democracy as forming the basis of free speech that promotes political debate or as a means by which the government can be held to account.

6. The Div Ct initially held that the paragraphs should remain redacted but subsequently re-opened and reversed this decision on the basis that it had been misled (however innocently) by the Govt about the attitude of the Obama

administration to the information about the abuse of Mr Mohamed contained therein (BM No 5: [2009] EWHC 2549 (Admin)).¹

7. In *R (Binyam Mohamed) v SSFCA* [2010] EWCA Civ 65, 10/02/2010 the Court of Appeal had (possibly by 2-1 majority) reluctantly concluded that it should reverse the Div Ct, essentially on the basis that the Div Ct had allowed itself to be influenced by a break-down of confidence in the Government and that there was in fact—but only just—an evidential foundation for the Govt's concerns about damage to national security if the 7 paragraphs were published. However before handing down its judgment, the Court of Appeal itself lost patience after it was informed by the Govt that a US Federal Court had found that Mr Mohamed's claims to have been tortured were true (the US Govt did not dispute Mr Mohamed's version of events). The President of the QBD, Sir Anthony May said that "angels are now dancing on the head of a pin". The Court unanimously ordered disclosure.

8. In the course of his judgment, Judge LCJ stated:

"38. In litigation, particularly litigation between the executive and any of its manifestations and the citizen, the principle of open justice represents an element of democratic accountability, and the vigorous manifestation of the principle of freedom of expression. Ultimately it supports the rule of law itself. Where the court is satisfied that the executive has misconducted itself, or acted so as to facilitate misconduct by others, all these strands, democratic accountability, freedom of expression, and the rule of law are closely engaged."

9. As is now notorious, it became necessary for the Court of Appeal to give a further judgment (the 8th in the case) on the supposedly provisional decision of the Master of the Rolls to excise most of paragraph 168 of his judgment, at the invitation of the Secretary of State, before handing down a final judgment. In its second judgment the Court of Appeal restored the paragraph with a few tweaks. It is set out below, with the vital point of principle, which had been excised, underlined [2010] EWCA Civ 158, 26/02/2010. The MR reasoned that there were "very real and substantial grounds for sharing the scepticism of the Divisional

¹ In a yet further judgment (BM No 6) the Court held that passages of the fifth judgment could not be disclosed following objections from the Security Service, since they gave away parts of the 7 paragraphs: [2009] EWHC 2973 (Admin). All but one of these paragraphs was subsequently disclosed on the first day of the Court of Appeal hearing.

Court, in the fourth and fifth judgments, as to the actual possibility of harm to national security" if the redacted paragraphs were published. His fourth reason for holding this view was:

"168. Fourthly, it is also germane that the Security Services had made it clear in March 2005, through a report from the Intelligence and Security Committee, that "they operated a culture that respected human rights and that coercive interrogation techniques were alien to the Services' general ethics, methodology and training" (paragraph 9 of the first judgment), indeed they "denied that [they] knew of any ill-treatment of detainees interviewed by them whilst detained by or on behalf of the [US] Government" (paragraph 44(ii) of the fourth judgment). Yet, in this case, that does not seem to have been true: as the evidence showed, some Security Services officials appear to have a dubious record relating to actual involvement, and frankness about any such involvement, with the mistreatment of Mr Mohamed when he was held at the behest of US officials. I have in mind in particular witness B, but the evidence in this case suggests that it is likely that there were others. The good faith of the Foreign Secretary is not in question, but he prepared the certificates partly, possibly largely, on the basis of information and advice provided by Security Services personnel. Regrettably, but inevitably, this must raise the question whether any statement in the certificates on an issue concerning the mistreatment of Mr Mohamed can be relied on, especially when the issue is whether contemporaneous communications to the Security Services about such mistreatment should be revealed publicly. Not only is there some reason for distrusting such a statement, given that it is based on Security Services' advice and information, because of previous, albeit general, assurances in 2005, but also the Security Services have an interest in the suppression of such information."

10. A second important case in which PII and disclosure issues led to the Court's trust in the Govt being shaken was *Al-Sweady v SSD*. It was contended that the UK had to hold an inquiry into allegations of murder and abuse of Iraqi detainees following the "battle of Danny Boy" in May 2004, the Royal Military Police investigation having been partial and flawed, in order to comply with its adjectival obligations under Articles 2, 3 and 5 of the ECHR. On 10 July 2009 the Court delivered a scathing judgment on PII issues after it came to light that documents over which PII had been claimed had been disclosed in Court Martial proceedings ([2009] 1687 (Admin)):

2. .. this case has disclosed disturbing failures by the Ministry of Defence in its handling of the process for putting Ministerial PII Certificates and Schedules before the Court.

13.... As Laws LJ made clear at paragraph 50 of the judgement in *R (Quark Fishing) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 , there is a very high duty on central government to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide. To state the obvious, the systems for dealing with PII claims in the Courts of England and Wales depend, if a Ministerial Certificate and Schedule are advanced in support

of a claim, upon the scrupulous accuracy of the whole of the content of those documents. The more so if the content of the Schedule is sensitive (as is invariably the case), and cannot therefore be disclosed to the party seeking disclosure of the underlying material, who thus cannot contest its content. Especially so, if (as here) that Schedule deals with issues of national security, in relation to which (in accordance with well-established principles) the Court must accord the Minister's assertions considerable weight in the balancing exercise.

14 The Courts necessarily proceed upon the basis that Ministerial Certificates and Schedules are the product of a scrupulous process of preparation and checking, designed to ensure the complete accuracy of their whole content. Indeed, one member of the Court has experience over many years, as a practitioner, of participation in that process mostly in relation to other Ministries. Clearly, something went badly wrong in this case...

11. The Court concluded that there had been "systemic and individual failures within the MOD on a substantial scale" (para 23).

12. Things went from bad to worse for the MOD and the Treasury Solicitor. Since there were intractable factual disputes between the parties which the Court needed to resolve (or at least establish if there was an arguable basis for), it agreed to cross-examination of the Secretary of State's witnesses. The Court noted, "We envisage that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the ECHR and the engagement of its Articles." (2009] EWHC 2378 (Admin), para 19). It then ordered disclosure to ensure that the cross-examination could be effective. In a third judgment delivered on 2 October 2009, the Div Ct catalogued serious disclosure failings on the part of the MOD, as well as the misleading nature of RMP evidence about the investigation which had taken place ([2009] EWHC 2378 (Admin) (DC) Scott Baker LJ, Silber J and Sweeney J):

13. As we will explain, we are forced to the conclusion that the approach of the Secretary of State to disclosure in this case was lamentable and indeed this led to an interim order of costs being made against him and in favour of the claimants with these interim costs assessed at £1,000,000 against an itemised bill in excess of £2,000,000.

30. Both before and during the hearing of this judicial review application, the claimants' solicitors were compelled to make numerous applications for disclosure of relevant documents. It was only when such applications were made that the Secretary of State actually gave some disclosure which the court was then wrongly assured was adequate. Rather than give every instance when this problem arose, we will merely focus on two important areas where we have concluded that there have been serious breaches committed by the Secretary of State's advisers of the duty to

make proper disclosure in this case. The first deals with electronic communications between the Military Facilities in Iraq and United Kingdom command centres relating both to the death of Mr Al-Sweady and also to the treatment of the detained defendants while the second relates to disclosure of material concerning the investigations carried out by the RMP, and in particular by Colonel Dudley Giles, who was the Secretary of State's principal witness in this case on the issue of the investigation of the claims.

42.....It must not be forgotten that Salmon J explained in *Woods v Martins Bank* [1959] 1 QB 55 at page 60 that "it cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their client's [list]". This duty requires a solicitor to take steps to ensure that their client knows what documents have to be disclosed.

13. The MOD conceded the case and costs were awarded on an indemnity basis.
14. It should also be noted that a serious failure to conform to the duty of candour was also exposed at an early stage of the *Binyam Mohamed* proceedings. The JR claim had initially been defended on the basis that the claim for disclosure of documents to Mr Mohamed's US defence team was misconceived without alerting the Court to the fact that the UK Govt did in fact hold documents that corroborated Mr Mohamed's defence that any admissions made by him were the product of torture. In the course of scathing criticism, recorded on the transcript (and deployed subsequently in other cases), Sullivan LJ pointed out that a Judge deciding permission on the papers must be told such a material fact if the Secretary of State is putting his cards face upwards on the table, as he is required to do, pursuant to his duty of candour:

"[to Counsel for the Secretary of State] the obvious worry about this is, and I am sure I say this not to you so much as to those sitting behind you, you know as well as I do that the court is invited to refuse permission to grant judicial review on the papers, so all the court has in a normal case is the papers, the summary grounds of resistance. What I find very, very disturbing is that the defendant, the defendant's lawyers, the defendant's counsel, you are telling me knew perfectly well that there was indeed the material referred to in 6th June letter, they did have material, but they were considering whether or not as a matter of discretion that material could properly be disclosed, and the existence of that material and the fact that it was being considering whether or not as a matter of discretion it should be disclosed, was not referred to in the defendant's summary ground, so that had I been considering this application on the papers, considering whether or not to grant judicial review, I might have refused permission to apply for judicial review, not knowing that there was material because there would be a "no comment" effectively, neither confirm nor denying the summary grounds. I do not regard that as at all satisfactory, and I am very surprised that you do and the Treasury Solicitor does. ...

You can consider with the Treasury Solicitor whether you think that that is being economical with the truth or not in a response to the High Court, that is meant to be given with the utmost candour, as you know, given the function of summary

grounds of resistance in judicial review proceedings, and the duty of a public authority to disclose matters which obviously are only within its own knowledge, and they apply particularly to matters of this kind."

15. Against these cases in the Div Ct and CA, may be set the comments of the Privy Council in *Marshall v Deputy Governor of Bermuda* [2010] UKPC 9, challenging the law on conscription in Bermuda. It was argued that reasonable steps to avoid conscription had not been taken because the size of the force could have been reduced or further steps could have been taken to recruit volunteers. The Governor refused to supply any evidence that such things had been considered and the PC was invited to infer that they had not been, on the basis that there had been a breach of the duty of candour. The PC could probably have reasoned simply that such an inference would not get the appellant home in any event, however in the course of the opinion, Lord Phillips, after referring to Lord Donaldson's remarks on the duty of candour in *Ex p Huddleston* [1986] 2 All ER 941 and *Ex p Cunningham* [1992] ICR 816 (i.e. playing with cards face upwards on the table, etc.), stated:

"29. Each of the cases in which Lord Donaldson made these statements involved a decision taken by a public authority that related to and adversely affected an individual. Care must be taken when applying Lord Donaldson's statements to judicial review proceedings in relation to acts of public authorities that do not involve any exercise of discretion. Furthermore those statements apply to the situation where it is not possible for the court to assess the merits of an issue that has been raised unless the public authority against whom the claim is brought furnishes the court with information which it alone is in a position to provide. They should not be relied upon to transfer to the respondent the onus of proving matters which a claimant is under a duty and in a position to prove."

16. Query how easy it is to square such comments with cases such as *Al-Sweady* which were not only not concerned with discretion, but which required disclosure in order for the claimants to make good their claims.
17. Following the *Binyam Mohamed* and *Al-Sweady* cases, the Govt has published, "Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review", Treasury Solicitor's Dept January 2010, emphasising especially the role of Govt solicitor in searching for and deciding the relevance of documentation. It also emphasises the duty of candour at all stages of the litigation. The content of this document is sure to figure prominently in pre-trial correspondence by savvy claimant solicitors.

Other notable cases

18. There have been other significant developments over the past year, most of which might be thought to be at the margins of public law, but as with Cart, Eba, Binyam Mohamed, and Al-Sweady, they raise fundamental questions about the relationship between the courts and the executive which radiate across public law as a whole: these are the frontiers of public law:

18.1. **Extra-statutory use of "closed" procedure:** Al-Rawi and Ors v Security Services [2010] EWCA Civ 482 -the High Court has no jurisdiction to use closed procedure in damages claims / bipartite proceedings absent (possibly) consent of both parties.

"11. We have concluded that we should allow this appeal, and that we should say firmly and unambiguously that it is not open to a court in England and Wales, in the absence of statutory power to do so or (arguably) agreement between the parties that the action should proceed on such a basis, to order a closed material procedure [involving withholding material from one party and use of special advocates] in relation to the trial of an ordinary civil claim, such as a claim for damages for tort or breach of statutory duty.

12. The primary reason for our conclusion is that, by acceding to the defendants' argument, the court, while purportedly developing the common law, would in fact be undermining one of its most fundamental principles. In addition, even if it would otherwise be a legitimate development of the common law, it would be neither permissible in the light of the Civil Procedure Rules ("CPR") nor practical, in terms of effective case management or costs management, to adopt the defendants' proposals."

18.2. **Application of minimum conditions of natural justice** (where "closed" procedure is used): AF (No 3) [2009] UKHL 28 (right to know case against you in control order proceedings: *"If the rule of law is to mean anything, it is in cases such as these that the court must stand by principle. It must insist that the person affected be told what is alleged against him."* (Lord Hope para 84)); Mellat v HM Treasury [2010] EWHC 483 Tariq v SSHD [2010] EWCA Civ 462 (AF (No 3) applied to assert freezing and employment discrimination claims respectively).

18.3. **Common law rights:** *Ahmed v HM Treasury* [2010] UKSC 2 –overriding fundamental rights by asset freezing orders requires express Parliamentary approval: “If the rule of law is to mean anything, decisions as to what is necessary or expedient in this context cannot be left to the uncontrolled judgment of the executive.” (Lord Hope para 45)

18.4. **Discrimination law:** *R (E) v JFS* [2009] UKSC 15 (review of discrimination law + finding that a test of matrilineal descent applied in the admissions policy of the Jewish Free School, whereby a child was only regarded as Jewish if his mother was Jewish by either birth or conversion, was a test of ethnic origin; and that, accordingly, the school's policy constituted direct discrimination on racial grounds).

19. Other notable cases include:

19.1. **Fairness in consultation:** *Easyjet v CAA* [2009] EWCA Civ 1361 – provides a salutary reminder of the importance of *protesting* about unfairness at the time it occurs: the failure to do so was fatal to this claim when the unfairness was subsequently resurrected to challenge a consultation process.

19.2. **Apparent bias:** *BAA Ltd v Comp Commission* [2009] CAT 35 -- review of authorities on bias; held (remarkably) that a 2yr Competition Commission investigation and report on BAA was vitiated because an expert member of investigation Group had links to BAA's competitors.

19.3. **Proportionality:** *R (F) and Thompson v SSHD* [2010] UKSC 17 (held that the absence of review of need for notification by sexual offenders of location to police disproportionate); *R (N) v SS for Health* [2009] EWCA Civ 795 (complete ban on smoking proportionate); *R (E) v JFS* [2009] UKSC 15 (in alternative, failure to give consideration to alternatives rendered admissions policy disproportionate).

TOM HICKMAN

Blackstone Chambers

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