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PUBLIC & REGULATORY LAW UPDATE



IN BRIEF

Regulatory bodies cannot call on the defence of absolute privilege when publishing decisions that may, potentially, be defamatory.

Rupert Earle looks at the options available to them. Page 4

Recent steps taken by the Office of Fair Trading and the Competition Commission confirm that competition law continues to be a key element of government policy, even in the downturn, says **Edward Pitt**. Page 6

After a recent Court of Appeal decision held that a housing trust was a public authority, **Selman Ansari** reports on the implications of being deemed to be a 'public authority' and thus subject to public and human rights law. Page 8

The Tribunals Service brings together a number of different tribunals under a two-tier structure and aims to establish a unified administration for the whole tribunals system. **Dinah Tuck** summarises the changes. Page 10

Melanie Carter and **Viral Kataria** discuss the possibility of suing a public authority for damages in negligence or for breach of statutory duties. Page 12

Rupert Earle and **Selman Ansari** look at the options for grant-aided organisations threatened with a cut to their funding. Page 14

The Public Procurement Remedies Directive may give unsuccessful bidders for public procurement contracts new powers to challenge unfair awards, says **Philippa Hart**. Page 16

The Freedom of Information Act continues to have a significant impact on public administration, with a number of important issues arising in the past year, reports **Rupert Earle**. Page 18

The recent *Al-Sweady* case has raised very important issues about the rules governing disclosure and the cross-examination of witnesses in judicial review cases. **Christopher Hook** outlines the key issues. Page 21

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PUBLIC & REGULATORY LAW

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Front Cover: Central London

Public and Regulatory law is a surprisingly wide, interesting and relevant field of law, not only for those directly involved in government or regulation but also for the many people and organisations affected directly or indirectly.

Our department has grown again over the last year; the addition of Edward Pitt has been particularly significant. Edward has very considerable experience in the public law world and is particularly well known for his work in telecommunications and in the field of competition law. Competition law is not just a matter of vast companies fighting esoteric battles – it has a much wider relevance, as you will see from Edward’s article page 6.

This update covers various important subjects and I hope you will find it interesting and helpful. The difficulty with updates of this sort is that there is always so much more that could be usefully included.

I hope you will find the selection we have made stimulating.



John Trotter
Head of Public & Regulatory Law



REGULATORS – BEWARE OF DEFAMATION

Regulatory bodies that publish decisions that may risk a claim of defamation should be aware that, in the absence of absolute privilege, there are a number of defences available to them.

Rupert Earle looks at the defences available to regulators and outlines recent significant case law in this area



Rupert Earle

Partner
Rupert is an acknowledged defamation and privacy law expert. He acts for media organisations, campaigning groups, businesses and individuals, including applying for injunctions and conducting complaints under PCC and Ofcom codes.

‘There appears to be a difference of judicial opinion on the degree to which the duty/interest qualified privilege should protect regulatory decisions published widely by email or on a website...’

Regulatory bodies frequently wish to publish decisions that are defamatory of regulated persons or third parties. The courts will not generally intervene to prevent publication of such reports (see, for example, *Debt Free Direct plc v Advertising Standards Authority* (2007)). But regulators may still face a claim of defamation after publication. What defences are available to regulators, given that their pronouncements, unlike those of judges, will not generally be protected by absolute privilege?

- Truth in substance. Always the best defence, but unintended meanings may be difficult to defend.
- Honest expression of opinion, on a matter of public interest, clearly based on fact. The defence can be defeated if the claimant can prove malice, or a lack of belief in the opinion expressed.
- Offer of amends. An offer to publish a suitable correction and sufficient apology and pay such compensation (if any) and costs as may be agreed, or determined by the court, in default of agreement.
- Express statutory protection, giving absolute privilege to a statutory regulator discharging specified functions, even if inaccurate and published recklessly (e.g. the Competition Act 1998 and Financial Services and Markets Act 2000, in respect of certain reports, advice, guidance notes or directions issued by the OFT; or the Children Act 2004, in respect of certain statements made by

the Children’s Commissioner). Note that reports venturing beyond such functions will not be protected. In 2008 the OFT had to pay £100,000 to supermarket chain Morrisons, in respect of an allegation in a press release, issued at an interim stage in an inquiry, that Morrisons had colluded with other supermarkets and dairy producers to push up the price of butter and cheese. Regulation by press release is not a good idea.

- Qualified privilege (i.e. in the absence of ‘malice’), either
 - (i) where the regulator has a legal, social or moral duty to communicate the information to those with a legal, social or moral interest in receiving it (the range of recipients can be large – in *Kearns v General Council of the Bar* (2003) it was publication of unverified mistaken information in guidance to 10,000 barristers); or
 - (ii) if publication is to the world at large (i.e. on the internet), where the subject matter is of genuine public interest and the report is responsible (i.e. based on a fair and careful investigation, taking into account the position of the regulated party) (following *Reynolds v Times Newspapers* 2001 HL and *Seaga v Harper* 2008 PC). Note that the media may have qualified privilege under the Defamation Act 1996 when reporting regulatory decisions, but that will not usually assist the regulator.

The qualified privilege defence is particularly useful in that it may allow the court simply to examine the

circumstances of publication (rather than the underlying facts and allegations) and strike out a defamation claim against a regulator long before trial. However, there appears to be a difference of judicial opinion on the degree to which the duty/interest qualified privilege should protect regulatory decisions published widely by email or on a website, rather than to the regulated membership or others with an identifiable interest in receiving the material. In *Seray-Wurie v the Charity Commission* (2008) Eady J held that the publication of a report on the Commission's inquiry into alleged fraud by a trustee of the East End Citizens Advice Bureau on the Charity Commission's website for six months was protected by qualified privilege. The Commissioner was under a statutory duty to investigate alleged misconduct and mismanagement in the administration of charities, had a statutory power to publish reports, and had the object of increasing public trust and confidence in charities and accountability of charities to the general public.

But in *Clift v Slough Borough Council* (2009), Tugendhat J held that where a public authority publishes defamatory information about an individual, which also engages that individual's right of privacy (including reputation) under Article 8 of the European Convention of Human Rights, the public authority (being subject to the Convention by virtue of the Human Rights Act 1998) and thus the court must consider whether publication of the information is necessary and proportionate in pursuit of a legitimate aim.

In this case, council officials and employees had gone too far in circulating relatively widely internally – and to some outside the council (partly for

administrative reasons) – the fact that Ms Clift had been placed on the Violent Persons Register of the council, as a result of a threat to one of the council's staff. The council could not show that she represented any threat to council staff who worked in departments that she was unlikely to approach. The trial jury awarded Ms Clift £12,000 in damages. The judgment may be subject to appeal.

Finally, another consequence of increased use of the internet is that regulatory decisions remain easily accessible for much longer, as part of an online archive. The limitation period for defamation is one year, but as a result of the 'multiple publication' rule, each hit on a web page creates a new publication, even if this is several years after the regulatory decision was originally published.

The Ministry of Justice has recently ended its consultation on whether the multiple publication rule should be replaced by a single publication rule (as in the US), or modified such that statutory qualified privilege is automatically available for online archives after the expiry of one year. In the meantime, regulators maintaining online archives of decisions would be well advised to append a warning note to publications that are the subject of a defamation claim, to the effect that truth is disputed (a practice approved by the European Court of Human Rights in *Times Newspapers v UK*, ECHR (2009)).

FIND OUT MORE

You can find out more information from the Ministry of Justice website at: <http://www.justice.gov.uk/consultations/defamation-internet-consultation-paper.htm>

'Another consequence of increased use of the internet is that regulatory decisions remain easily accessible for much longer, as part of an online archive...'

RECENT TRENDS IN ENFORCEMENT OF COMPETITION LAW

Competition (anti-trust) law is a key element of government economic policy. Recent steps taken by the Office of Fair Trading (OFT), supported by the Competition Commission (CC), confirm its importance.

Edward Pitt summarises the key aspects of competition law



Edward Pitt

Consultant

Edward joined BWB at the beginning of 2009. He has over 30 years' experience as a competition lawyer in private practice in Brussels and in London. He has also handled international trade cases (anti-dumping and origin investigations) and advised third-country governments on the impact of the EC trade rules. A fuller description of his experience can be found at www.bwbllp.com.

Edward's special interests are acting for regulatory bodies and trade associations, advising on telecoms and other utility regulation and acting for smaller companies who have been harmed by breaches of the competition rules. He also sits as an arbitrator in international telecoms disputes.

Tough enforcement of the law against cartels, even in a tough economic climate

It is now widely accepted that the suspension during the Great Depression of anti-trust enforcement by the US authorities contributed to the depth and duration of that crisis. Accordingly, economic thinking is different today. Both the EU Commission, responsible for the enforcement of EC competition law (Articles 81/82, EC Treaty), the Competition Commission and the OFT have made this clear in coordinated public statements. The consistent message from each of these bodies is that an economic downturn is not a time to moderate competition enforcement policy.

One example of this tough enforcement is the very heavy fines imposed recently (September 2009) by the OFT on construction companies. The fines, totalling £130 million on some 103 companies, were imposed because of a form of bid-rigging known as 'cover pricing' – submitting inflated bids in cases where the construction company was not interested in going after the particular tender, having been given an indication of the price to bid by a competitor. The largest fine was £17.9 million, imposed on Kier Group. This year the OFT has also imposed fines on Umbro (£5.3 million) and JJB Sports (£6.3 million) for collusion in the pricing of replica kits. Historically, BA was fined

£121.5 million for collusion with Virgin Airlines in agreeing fuel surcharges.

Personal liability of directors and managers for breaches of competition law

If an undertaking breaches the Competition Act, then it is the company, or the corporate group to which it belongs, which is in the firing line for a fine and claims for damages. The fines can be large (as above).

However, it is a mistake to think that only the company in breach of competition law will suffer the consequences. Directors and company executives risk heavy personal loss if they have been involved:

- In many companies it is common for an employment contract to include, as a term, dismissal without compensation if an employee is the cause of, or involved in, a breach of the competition rules;
- If a company is involved in a very serious or 'hard core' breach of the Competition Act (e.g. price fixing or sharing of customers between competitors), individuals involved in the breach may also have committed a criminal offence under the Enterprise Act 2002. Punishment for such criminal offences can include imprisonment. In *R v Whittle and others* (2008) EWCA Crim 2560, three executives were given custodial sentences (between 20 months and two and a half years) for involvement in a price fixing arrangement for the price of hoses used to move oil from oil fields;

- In any case involving any breach of the Competition Act (i.e. not limited to 'hard core' offences under the Enterprise Act) then, under the Disqualification of Directors Act 1986, a director can be disqualified from acting as a director where he/she knew of, or participated in, a breach of competition law. OFT research suggests that the fear of disqualification is an effective deterrent;
- Directors and senior managers should also not overlook their personal liability for breach of parallel competition laws in other countries outside the EU, especially in the United States. Imprisonment of directors in the States for complicity in breaches of the anti-trust rules by corporations is common, and, in recent years, sentences have increased considerably.

Greater government awareness of the effect of government behaviour on competition in markets

Government spending accounts for close on 40% of GDP. Central government is increasingly aware that, as a buyer, its purchasing decisions can have a huge impact on the structure of markets. As a supplier of some services, it can distort competition in relevant markets. Additionally, legislation itself can set up market structures that lead to competition not working as intended i.e. market failure.

In its paper of September 2009 entitled 'Government in Markets', the OFT sets out where it will concentrate its efforts to try to ensure that there are no distorting effects through government. Three themes of the OFT paper are:

- Governments can influence market structure when acting as a monopoly purchaser, e.g. the NHS, the military, etc. Therefore procurement bodies need to pay particular attention to ensuring

that they do not simply 'play safe' by selecting a traditional supplier, but that they actively encourage new entrants to the market;

- Central and local government is a supplier of some key commercial services, which can distort competition through their position as monopoly supplier – for example, through Trading Funds such as Ordnance Survey, the Met Office and Companies House. The BBC is often subject to attack for, allegedly, unfairly cross-subsidising programme production, which would otherwise be carried out by the private sector;
- Legislation/regulation should only be passed when government has fully thought through the effect on competition, even if it is designed to pursue some wider social objective. Thus, the OFT continues to object (for example) to floor prices being agreed between alcohol producers, despite increasing public demand for active steps to reduce the consumption of alcohol in public. The OFT says the distortion to competition in such a move outweighs any benefit in reduced drinking.

Practical help for small companies and end consumers to enforce their rights against large companies in breach of competition law

One of the difficulties of effective enforcement of the competition rules is that small companies and the end consumer have little practical redress. In competition law disputes, the companies involved – acquirer and target in a merger, the alleged monopolist in a market investigation and companies harmed – are well represented. The end consumer is, however, poorly represented. Enforcement of competition law by the High Court or OFT is, in practice, selective – driven by the deep pockets of large companies

'The consistent message from the EU Commission, the Competition Commission and the OFT is that an economic downturn is not a time to moderate competition enforcement policy'

FIND OUT MORE

BWB is a founding member of a pioneering collaboration, known as the 'Anti-Trust Alliance', between expert European competition law firms, reflecting the degree to which this is properly a European law subject.

Our competition law specialists can advise you on any issues relating to competition law.

<http://www.bwbllp.com/Departments/CompetitionLaw.html>

bringing claims against each other. The OFT is aware of the problem and has taken steps to make it easier for small companies and the end consumer to bring claims before the Courts or before the OFT, for example:

- We are now beginning to see the outcome of so-called 'super-complaints' i.e. complaints to the OFT by bodies such as the Consumers' Association, which the OFT must deal with within fixed timescales;
- Steps have been taken to make it easier for companies that have suffered loss as a result of breaches of the competition laws to make so-called 'follow-on' claims. Where the OFT has made an adverse enforcement decision, a company, or individual who has suffered loss, now only needs to quantify that loss and does not have to prove the breach of competition law in fresh proceedings;
- The OFT has now taken more proactive

steps to ensure that consumers have redress where a company is found to be in breach of the competition laws (for example repayment by Virgin and BA to passengers who overpaid).

In Summary

- Do not assume that the EU Commission or the OFT have 'gone soft' on competition law enforcement in the current economic downturn;
- Be aware, as an individual corporate employee, that you personally can suffer severe consequences for involvement in breach of the competition rules; it is not just a risk for a corporate entity;
- Think of using competition law to get the government itself to shift or change its current purchasing or regulatory practice; be alive to the improvements in process that enable consumer groups or small companies to take advantage of the competition rules; it is not just a battle between 'big guns'.

ARE YOU A PUBLIC BODY?

A recent Court of Appeal decision held that a housing trust was a public authority – and thus subject to public and human rights law.

A recent Court of Appeal ruling (*London & Quadrant Housing Trust v R otao Weaver*) has considered whether a Registered Social Landlord was a public authority. The case contains some guidance for other third-sector organisations on this difficult area of law.

Public authorities are subject to public and human rights law. Their actions can be judicially reviewed by the courts and must be in keeping with the Human Rights Act. This gives individuals dealing with public authorities greater rights than otherwise available. It is, therefore,

important for organisations to know whether they will be considered public authorities.

Private bodies can also take decisions that are of a public nature, which will then be subject to public and human rights law. Such bodies are known as 'hybrid bodies'.

The law on who is a public authority is complex and has been a matter of a great deal of judicial consideration. This is often because the functions of the state are devolved or contracted out. There is a balance to be struck: between ensuring

Selman Ansari reports on the implications for other organisations



Selman Ansari

Of Counsel
Selman is a public, administrative, regulatory and competition law specialist

that human and public law rights are not lost as a result of such devolution or contracting out; and ensuring that private bodies are not lumbered with obligations that were properly meant for the state to carry.

In *Quadrant*, by a majority of two to one, the Court of Appeal held that LQHT was a public authority. However, this decision was, as was the law that preceded it on the matter, nuanced and extremely fact-sensitive. Their lordships all took an approach that considered a number of factors applying to LQHT. All stated that each case would be different and that every case would have to be considered on its own merits. The act complained of would also have to be analysed to consider whether it was a public one or not.

In *Quadrant*, the court took the following points to be particularly relevant:

- the significant reliance by LQHT on public finance, which was not paid for specific services;
- its close connection with local authorities to deliver local government housing objectives; and
- the public service nature of its operations (which were not done for commercial purposes or on a commercial basis). It should be noted that the public service nature of LQHT's operations was one of a number of factors considered. In this case, the charitable nature of LQHT was relevant. In other cases it might not be.

It should be noted that leave to appeal has been refused in this case.

Practical points

It is unlikely that an independent charity will, simply by being a charity, become a public authority. Therefore, its actions need to be analysed to determine whether they are public acts that make the charity susceptible to human rights and public law.

Key considerations in determining the charity's status will be the nature and extent of public funding and the type of functions and/or actions it undertakes. This will often involve considering a number of different issues and may require legal advice. However, almost all public functions will involve the use of public funds.

Public funds are generally obtained either through a procurement process, or, by way of a grant. Public funds are obtained by procurement when public authorities procure services on a commercial basis, following an open tender. Such services are unlikely to (although in some circumstances they may) become public functions. However, where public funds are made available by way of a grant, consideration should be given in the grant or contract documentation to the consequences of the recipient of funds being found to be a public authority.

It may be necessary for charities to consider obtaining indemnities from public authority funders to cover any funding for carrying out a public function and the costs that may consequently arise from any added, extra-contractual obligations.

Even where a body is found to be susceptible to public and human rights law, it must be shown that its actions have actually breached that law. Public

authorities or hybrid bodies that have complied with their obligations have nothing to fear. Public and human rights obligations may not be incompatible with what a charity may wish to deliver in the services it provides and may, in fact, represent a standard of best practice.

Finally, the *Quadrant* case only considered the designation of 'public authority' for the purposes of the Human Rights Act and not under data protection or freedom of information law. 'Public authority' is defined in the Freedom of Information Act (FOIA) as any body appearing in Schedule 1 of the FOIA or in an Order made by the Secretary of State. Any body that is a public authority for the purposes of the FOIA must provide information that is requested under its terms. The list of public authorities cannot be extended by the courts, only by the Secretary of State. If a body is a public authority for the purposes of FOIA this does not automatically make it a public authority under the Human Rights Act or for the purposes of public law. The Data Protection Act applies to any person processing data and there is no restriction of its obligations to public authorities of any description.

FIND OUT MORE

There is information on the *Quadrant Housing Trust* ruling and its implications for housing trusts on the National Housing Federation website at <http://www.housing.org.uk/default.aspx?tabid=289&mid=2076&ctl=Details&ArticleID=2226>

You may also be interested in an article by Luke Fletcher, from our Charity department, on the differences between grants and contracts www.bwbllp.com/Articles/Detail.aspx?ArticleID=299

Dinah Tuck reports that the process of abolishing various existing tribunals and bringing them within the new system is now well under way



Dinah Tuck

Partner

Dinah has specialised in public and regulatory law for 15 years, with a background in general dispute resolution

‘The new structure involves a First-tier Tribunal and an Upper Tribunal. Both of these tribunals are divided into Chambers, grouping together jurisdictions that are, in most cases, either broadly similar themselves or require broadly similar expertise in determining cases’

THE NEW TRIBUNALS SYSTEM

The Tribunals Service was created in 2006 to bring together a myriad of different tribunals under one roof and to establish a unified administration for the tribunals system as a whole.

In outline, the new structure involves a First-tier Tribunal and an Upper Tribunal. Both of these tribunals are divided into Chambers, grouping together jurisdictions that are, in most cases, either broadly similar themselves or require broadly similar expertise in determining cases (although, as set out below, the General Regulatory Chamber seems to be a bit of a regulatory assortment).

The First-tier Tribunal is now, or will become, the first-instance Tribunal for most jurisdictions, for example, many matters previously dealt with by the Care Standards Tribunal are now within the new First-tier Tribunal.

The function of the Upper Tribunal is mainly to review and decide appeals from the First-tier Tribunal. It can also deal with some judicial review cases.

There is an appeal from the Upper Tribunal to the Court of Appeal on a point of law.

The Employment Tribunal and Employment Appeals Tribunal stand alone as separate Tribunals within the system, but not part of the two tier structure.

First-tier Tribunal Chambers

There are, or will be, seven First-tier Chambers, into which existing tribunals have been, or will be transferred:

1. Social Entitlement Chamber (estbd Nov 2008), including:
 - Social Security and Child Support appeals

- Asylum Support Tribunal
- Criminal Injuries Compensation Appeals Panels

2. Health, Education and Social Care Chamber (estbd Nov 2008), including:
 - Mental Health Review Tribunal
 - Special Educational Needs and Disability Tribunal
 - Care Standards Tribunal

3. War Pensions and Armed Forces Compensation (estbd Nov 2008), including:
 - Pensions Appeals Tribunal

4. Taxation Chamber (estbd April 2009), including:
 - General Commissioners and Special Commissioners
 - VAT and Duties Tribunal
 - Section 706 Tribunal

- From January 2010, also:
- Financial Services and Markets Tribunal

5. General Regulatory Chamber (estbd September 2009), including:
 - Charity Tribunal
 - Consumer Credit Appeals Tribunal
 - Estate Agents Appeals Panel
 - Transport Tribunal (Driving Standards Agency Appeals)

- From January 2010, also:
- Information Tribunal
 - Claims Management Tribunal
 - Gambling Appeals Tribunal
 - Immigration Services Tribunal
 - Adjudication Panel for England

6. Asylum and Immigration Chamber (to be estbd after Feb 2010)

7. Land, Property and Housing Chamber (to be estbd), to include:

- Adjudicator to HM Land Registry
- Residential Property Panel
- Agricultural Lands Tribunal
- Leasehold Valuation Tribunal

There are separate Tribunal Procedure Rules for each First-tier Tribunal Chamber, which will apply to all cases brought (and in some cases ongoing) after the date an existing Tribunal has transferred into the new system.

For example, cases previously under the Charity Tribunal Rules are now dealt with under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009.

The same Procedural Rules apply to all cases within a Chamber, no matter what the individual jurisdiction, although there are certain provisions within the rules that apply only to specific jurisdictions. For example, there are currently some specific provisions relating to charities cases in the General Regulatory Chamber Rules. These general rules will also be amended shortly to introduce certain rules specific to the jurisdictions joining in January 2010, including the Information Tribunal and the Adjudication Panel for England.

The rules specific to the Information Tribunal will, among other things, set out various categories of the most serious information rights appeals cases that will bypass the First-tier Tribunal and go automatically to the Upper Tribunal.

Upper Tribunal Chambers

There are, or will be, four Upper Tribunal Chambers:

1. Administrative Appeals Chamber (estbd Nov 2008), to hear appeals from the following First-tier Tribunal Chambers:
 - War Pensions and Armed Forces

Compensation

- Social Entitlement
- Health, Education and Social Care
- General Regulatory

The Administrative Appeals Chamber will also:

- Hear first appeals from a number of bodies that are outside the First-tier Tribunal system, for example, appeals against barring decisions of the Independent Safeguarding Authority, and;
- Deal with judicial review cases:
 - Where there is a procedural decision of a First-tier Tribunal which has no right of appeal;
 - In Criminal Injuries Compensation Appeals decided by the First-tier Tribunal;
 - Other cases which may be transferred from the High Court.

2. Finance and Tax Chamber (estbd April 2009), to hear appeals from the First-tier Taxation Chamber and in some cases from the First-tier General Regulatory Chamber.

3. Asylum and Immigration Chamber (to be estbd), to hear appeals from the First-tier Asylum and Immigration Chamber.

4. Lands Chamber (estbd June 2009), to hear appeals from the Lands Tribunal.

There is one set of rules that apply to all proceedings in the Upper Tribunal, whatever the Chamber – The Tribunal Procedure (Upper Tribunal) Rules 2008. Within these Rules, there are some specific provisions relating to judicial review cases, which broadly mirror provisions in the existing Administrative Court’s rules for judicial review.

Do the new provisions make any difference?

In some respects, there is not much real change. For example, cases within a

‘The most serious information rights appeal cases... will bypass the First-tier Tribunal and go automatically to the Upper Tribunal’

FIND OUT MORE

Information on the Tribunals Services from their website at: <http://www.tribunals.gov.uk/>

If you want any advice on representation before a tribunal, please call your BWB contact.

particular jurisdiction will often still be heard by the same judges and other members who sat on the relevant Tribunal. But there are also some important differences, for example, the new right for a First-tier Tribunal to review its own decision, instead of the case being appealed to the Upper Tribunal. And there are likely to be some benefits too: for some jurisdictions the procedural rules will, no doubt, be clarified and improved, and there is the promise of a more streamlined and consistent global Tribunal Service.

One area where we think that differences are particularly likely to be noticed, is in judicial review. Although it is currently only certain types of asylum judicial review cases that are being transferred from the High Court to the Upper Tribunal, one of the striking differences in the Upper Tribunal is in relation to costs. Unlike judicial review proceedings in the Administrative Court, costs can only be ordered in the Upper Tribunal where a

party's representative has 'wasted' costs or where the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.

This is clearly meant to enable more litigants in person to obtain access to justice, without fear of having to foot the other side's legal bills. In theory, that is to be welcomed. But, on the other hand, those who feel they need legal representation in what is after all a superior court of record, may be put off where there is little prospect of recovering their own costs in successful proceedings.

It is early days for the new system and, of course, as a body of case law builds up for both the First-tier and the Upper Tribunal, the application of the procedural rules will become clearer and more certain. We shall report again on the changes in more detail, and on interesting new developments in our next update.

NEGLIGENCE OR BREACH OF STATUTORY DUTY CLAIMS AGAINST PUBLIC AUTHORITIES

Melanie Carter and Viral Kataria write about the circumstances in which you can sue a public authority for damages in negligence or for breach of statutory duty.

Can a complainant sue a professional regulatory body for failing to get a registrant struck off? Can a care home owner sue where a local authority has inappropriately caused the home to shut? Can a fire authority be sued for failing to arrange for a fire engine to arrive in time to save a house?

These questions get asked from time to time and happily, for the public authority in question, the answer is usually 'no'. The rationale of course is that public

authorities have scarce resources and need to be left to get on with the business of their important public functions. The flip side to this however is that, from time to time, this gives rise to a grave injustice.

A classic example of this was the case of *Trent Strategic Health Authority v Jain & Jain* (2009) 1 All ER 957. In that case, the claimants owned and ran a nursing home for mentally ill or otherwise vulnerable adults. The authority's application for an emergency order to

close the home under the Registered Homes Act 1984 was 'seriously misleading' in some aspects and 'pure exaggeration' in others. There had been material non-disclosure. The hearing had been ex parte and it had taken months for it to come before the Registered Homes Tribunal. By the time the order was lifted, the business had entirely failed. The owners sued for damages for economic loss. The House of Lords (as it then was), applied the three tests as set out in the case of *Caparo Industries plc v Dickman* (1990) 1 All ER 568 namely, foreseeability of damage, proximity between claimants and defendant and whether it was fair, just and reasonable to impose a duty of care. Their Lordships held that the claim failed on the last limb. The key rationale was that where statutory powers are designed for the benefit or protection of a particular class of persons (the residents of the home in this case), a tortious duty of care will not be held to be owed to others whose interests may be adversely affected by the exercise of the statutory power (in this case the home owners).

Interestingly, Lord Scott and Baroness Hale were both outspoken in criticising the authority and laying down the path for the home owners to take their case to the European Court of Human Rights. Human rights could not operate in that case as it predated the introduction of the Human Rights Act. It remains to be seen, therefore, whether this area of law will be affected in future cases by our developing law on human rights.

As an alternative to an action for negligence, a claimant may try and argue a breach of statutory duty. The first consideration in advising whether this might arise is whether the statute in question has its own enforcement mechanism. If so, whilst not conclusive, it is likely no claim for breach of statutory duty will lie. In the House of Lords case

of *Gorringe v. Calderdale MBC* (2004) 1 WLR 1057 Lord Steyn said that the main question is whether the statute demonstrates an intention to create a private law remedy (at paragraph 3).

Generally, claims against public authorities for breach of statutory duty have been unsuccessful, except in areas where the legislation is specifically for the protection of health and safety or where civil liability has been expressly imposed.

For those working in the field of professional regulation, the most recent case on breach of statutory duty is that of *Merelie v General Dental Council* (2009) All ER (D) 172. In this case, a dental assistant complained to the GDC in relation to a dentist. The dentist counter complained and when that complaint was not referred to the Investigation Committee, he sued for breach of statutory duty. The claim was struck out by the court on the basis that the Dentist Act 1984 did not provide such a remedy. The dentist also sued in negligence but this failed on the basis that there was no duty of care imposed upon the GDC. It failed on the grounds of 'proximity' and that it would not have been 'fair, just and reasonable for a duty to be imposed on the [GDC's] fitness to practise functions'.

So for now civil law stands to one side when it comes to the exercise of public functions. Those advising claimants will already have in their armoury the various Ombudsmen, albeit the damages available are usually very low. The law still hangs back from imposing civil liability upon public authorities - something that the Law Commission is actively considering. Also, in suitable cases, damages under section 7 of the Human Rights Act might apply. The interesting space to watch however will be the influence of human rights in the law of negligence/breach of statutory duty itself.



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Melanie is a public and regulatory law expert and specialises in advising in corporate governance issues, judicial review and information law matters. She is well known for her work with local authorities and professional regulatory bodies.



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Viral is a trainee in the Dispute Resolution department where he assists in a range of work.

CHALLENGING FUNDING CUTS

For grant-aided organisations, challenging a decision by a public authority to cut funding is complex and difficult, but with resources increasingly scarce, it is worth considering.

Rupert Earle and Selman Ansari look at the options for a judicial review



Rupert Earle

Partner
Rupert advises on public and regulatory law issues, including advising on regulatory codes and procedures and judicial review challenges



Selman Ansari

Of Counsel
Selman provides advice and representation on all aspects of public and administrative law to organisations

It is difficult but nonetheless possible to successfully challenge in court decisions by public authorities to cut funding to grant-aided bodies or to individuals. Traditionally the courts have been slow to interfere in the area of allocation of resources, particularly where expert judgment is needed to make the relevant decisions, for example, in areas such as the health service. The court also recognises that public bodies, just like those in the private sector, need to be flexible with their resources and should be able to amend and review their policies.

Funding cuts can be challenged by way of an application for judicial review, usually on one of the following grounds:

- Illegality, where a decision maker misdirects itself on the law or acts outside of its powers;
- Irrationality, where a decision is so unreasonable that no reasonable authority could have properly made it, or where the decision maker took into account irrelevant matters or failed to consider relevant matters; or
- Procedural unfairness, including failure to observe the principles of natural justice or a flawed consultation process, or frustration of a legitimate expectation arising from a specific assurance given by the funding body, or from long established policy or practice which the claimant has reasonably relied on to their detriment.

A classic example of a flawed procedure was in the case of *R v North & East Devon Health Authority, ex parte Coughlan* (2001). The Court of Appeal held a decision to close a care home as unlawful. This was on the basis that a number of residents had been moved from a previous care home to the one in question with the express assurance that they would be able to live there for as long as they chose. This promise had been made in unqualified terms, and had been repeated and confirmed to reassure residents and had been relied on by them.

However, the difficulties of a such a claim can be seen in *Association of British Civilian Internees – Far East Region v Secretary of State for Defence* (2003): the Court of Appeal dismissed a challenge to the Ministry of Defence's refusal of payments of £10,000 each to ex-servicemen interred by the Japanese in World War II, on the basis that the MoD's announcement of the scheme had not been as unconditional as it might have appeared. Lord Justice Dyson said that 'it is clear that it will only be in an exceptional case that a claim (for legitimate expectation... will succeed in the absence of a clear and unequivocal representation.'

An interesting recent case is *R (Domb and others) v Hammersmith and Fulham LBC (the Equality and Human Rights Commission intervening)* (2009). Here the court was critical of a decision taken by

Hammersmith and Fulham LBC but found for the council. The council proposed to cut council tax by 3% but took the decision to charge for non-residential home care services. The decision to make this charge was challenged by three disabled service users who argued that the council had not paid due regard to its positive duty to promote disability equality, on the basis that it had only considered imposing charges or raising the eligibility threshold, and not forgoing the council tax reduction. During the appeal, the appellants were forced to concede that the council tax reduction was fixed, which only really left the council with the two options outlined above. All the members of the court voiced misgivings about how this matter had been approached, Sedley LJ in particular asking: ‘can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties?’

In *Hounslow Arts Trust Limited v Arts Council England* (2008), the Arts Trust was successful in reinstating some of its funding after issuing judicial review proceedings against the Arts Council England (‘ACE’). The charity, a leading venue in West London, had received funding from ACE for around 20 years. ACE had stated its intention not to renew funding from the start of the coming financial year.

In challenging this decision the charity alleged unfair process, on the basis that they had a legitimate expectation – based on ACE’s own published Guidance or on the principles of natural justice – that if ACE were to disinvest in the charity that a

number of procedural steps would have been taken, to which the charity could have responded. There appeared to be an inadequate evidence base for the Council’s decision (particularly regarding attendance figures), irrelevant matters were taken into account, inadequate reasons given and the needs of the area’s substantial Asian community were not taken into account (as required by the Race Relations Act 1976).

Upon the issuing of proceedings by Hounslow Arts Trust Ltd, ACE sought to compromise the action and agreed to continue with a large proportion of the funding. BWB acted for the charity.

Judicial review challenges of funding decisions are often hugely difficult. However, in a climate of scarce resources, recipients of funding should seek to ensure that any decision by a public body that affects their funding has been taken lawfully.

FIND OUT MORE

An article by Sean Egan, Partner in our Theatre and Arts department, deals with funding cuts for arts organisations specifically. The article – ‘ACE in breach of its own procedural guidelines’ – was first published in ArtsProfessional magazine and you can read it on our website here:
www.bwbllp.com/Articles/Detail.aspx?ArticleID=281

‘Traditionally the courts have been slow to interfere in the area of allocation of resources, particularly where expert judgment is needed to make the relevant decisions...’

PUBLIC PROCUREMENT REMEDIES DIRECTIVE

Unsuccessful bidders for public contracts are to gain new powers to challenge the award of contracts under new regulations due to come into force in December 2009.

The new Remedies Directive may deter authorities from awarding contracts unfairly, argues **Philippa Hart**



Philippa Hart

Solicitor
Philippa provides general company, commercial and charity law advice to charities, social enterprises and commercial organisations

The new public procurement Remedies Directive (2007/66) is being implemented in the UK by new Regulations coming into force on 20 December 2009. The aim of the new regime is to strengthen the remedies available to unsuccessful bidders for breaches of the procurement rules. Notably, the Regulations introduce the remedy of ineffectiveness, which enables a court to declare a contract ineffective.

Current problems

The main problem with the current regime is the pressure on unsuccessful bidders to start proceedings quickly because, if they are not commenced before the contract has been entered into (a mandatory period called the 'standstill period'), the only remedy available is damages. This is compounded by the insufficient information available to unsuccessful bidders during the standstill period, making it difficult to assess whether there has been a breach of the procurement rules.

Standstill Periods

The Regulations have not increased the standstill period. Furthermore, there are no substantial changes to the information available to unsuccessful bidders in the standstill period. However, a contracting authority must now release the reasons for the award decision at the beginning of the standstill period. Such information was previously only available on request; it must now be in the contract award notice.

The new Regulations do not apply the standstill period to Part B services such as health care and education services, to which the full EU advertising rules do not apply. Whilst there is case law to suggest that some Part B services should be subject to the standstill period there is still no statutory obligation. However, new remedies, put in place by the Directive and the legal actions are available to Part B services.

Automatic Injunctions

Currently, to prevent a contract from being entered into, an unsuccessful bidder must apply to the court for an interim injunction to prevent the contracting authority from concluding the contract. Under the new regime, if an action is brought for breach of the procurement rules before the contract has been entered into, the contract making is automatically suspended; in other words an automatic injunction is granted. There is provision in the Regulations for contracting authorities to apply to the court to overturn such a suspension.

Declaration of Ineffectiveness

A declaration of ineffectiveness is a new remedy available to unsuccessful bidders where the contract has already been entered into. It will have the effect of bringing the contract obligations yet to be performed to an end from the date of the declaration.

The court can make a declaration of ineffectiveness where:

- a. the contracting authority fails to issue a contract notice where required to under the Regulations; or
- b. the requirements for the standstill period have been breached; and:
 - i the unsuccessful bidder is deprived of the possibility of pursuing pre-contractual remedies;
 - ii there has been a breach of the main procurement regulations i.e. not a breach of the Regulations; and
 - iii the breach has affected the chances of the economic operator obtaining the contract; or
- c. the contract is based on a framework agreement or was awarded under a dynamic purchasing system and is awarded in breach of the agreement or system and exceeds the relevant thresholds.

Even if the court is satisfied that there is a breach of procurement law, it does not have to make a declaration if there are overriding reasons in the general interest to maintain the contract.

Time limits

The time limits for seeking a declaration of ineffectiveness are 30 days from the date the unsuccessful bidders are notified or, if they are not notified, six months from the date the contract was made. This gives disgruntled bidders more time to put a case together and gather further information from the contracting authority by way of a Freedom of Information Act request.

Alternative remedies

If a court makes a declaration of ineffectiveness it must also order the contracting authority to pay a penalty fine. Unfortunately for the unsuccessful bidder, the fine is payable to the Treasury. While the fine is mandatory the court has discretion as to whether it provides damages to the unsuccessful bidder.

Where a court finds that the procurement laws have been breached and it does not make a declaration of ineffectiveness (either because it is solely a breach of the Regulations, e.g. non-compliance with the standstill period, or because of overriding reasons in the general interest) then the court must order the contract to be shortened and/or the contracting authority to pay a fine.

Conclusion

The Remedies Directive is potentially an important step forward as it may deter contracting authorities from proceeding with contracts where they are aware of procurement law breaches. The fact that a contract can be declared ineffective means that unsuccessful bidders can take more time to build their case. However, the information available to unsuccessful bidders to build their case has not changed. The UK government has opted not to make the standstill period a statutory requirement for Part B services leaving doubt as to when it should be applied following the principles set out in case law.

‘Even if the court is satisfied that there is a breach of procurement law, it does not have to make a declaration if there are overriding reasons in the general interest to maintain the contract’

FIND OUT MORE

Public procurement regulations are covered in detail on the Office of Government Commerce website: www.ogc.gov.uk/

FREEDOM OF INFORMATION ACT UPDATE

The Freedom of Information Act (2000) (FOIA) continues to have an important impact on public administration.

Rupert Earle outlines some of the most important FOIA issues to arise in the past year



Rupert Earle

Partner

Rupert also specialises in freedom of information and data protection, including acting for Jonathan Ungoed-Thomas, *The Sunday Times* journalist, in action to obtain disclosure of details of MPs' expense claims.

Delay

Public authorities subject to FOIA are supposed to respond to requests for information within 20 working days. There is no 'freedom of information' if a decision on whether the information is even to be provided is long delayed. In *Student Loans Company v Information Commissioner* (2009), the Tribunal commented on a 22-month delay by the Information Commissioner's Office (ICO) in commencing an investigation of a refusal by the Student Loans Company to disclose information that 'if public authorities come to expect that a reference to the Commissioner may take several years to be dealt with, they may be tempted to withhold information that ought to be disclosed, in the hope that the requester or the public will have lost interest in the topic by the time it is finally prised out of them, or that any embarrassment that might have been caused by prompt disclosure will be diminished because of the passage of time. Such a situation would be wholly unacceptable.'

The problem is partly one of funding. The government has increased FOIA funding of the ICO to £5.5 million per annum and (as of 1 October 2009) the ICO is able to charge an increased notification fee to more substantial organisations notifying data processing under the Data Protection Act 1998.

Limited extension of FOIA

Also, partly on grounds of cost, the government has decided against any significant extension of FOIA (Response to Consultation, July 2009). The government is consulting academy schools, ACPO, the Financial Ombudsman Service and UCAS about designating them as subject to FOIA. The government leaves the door open to the utility companies and Network Rail being designated in due course. It has closed the door for the time being on designating contractors who carry out services on behalf of a public authority (e.g. refuse disposal, adult education services, prisons, foster care homes) and professional and voluntary regulators (e.g. Law Society, ASA, ICAEW, PCC, national anti-doping organisations), although it encourages them to be proactive in publishing information. It will also not be designating charities or private schools.

30-year rule review

The government is still sitting on a recommendation of the 30-Year Rule Review (January 2009) that the period after which public records are transferred to the National Archives and opened to inspection, without the need to invoke FOIA, should be reduced from 30 years to 15 years.

Bodies only partially subject to FOIA

The BBC is designated as subject to FOIA, but only for 'information held for purposes

other than those of journalism, literature or art'. In two cases (*BBC v ICO* and *BBC v Sugar and ICO* (2009)), the High Court held that the Information Commissioner, Tribunal and the BBC itself have been interpreting too narrowly the scope of the exclusion. Only information 'held for purposes apart from and not including journalism' would need to be disclosed, not material other than that held 'predominantly' for the purposes of journalism. So much BBC operational expenditure information relating to programming could be withheld.

Exemptions from disclosure

Section 32 of FOIA provides an absolute exemption for information 'held only' for the purpose of statutory inquiries. In *Dominic Kennedy v ICO and Charity Commission* (2009), the Tribunal found that the exemption covers information generated before an inquiry started, if it was transferred into the hands of the person conducting an inquiry, and information held long after the inquiry has finished, as long as it is only held because of the earlier inquiry. So the 10,000 pages of documents underlying the Charity Commission's finding in their two published Statements of Results of Inquiries (which totalled 8 pages), to the effect that George Galloway MP had received substantial sums, possibly knowingly, improperly diverted from the UN's Iraq Oil for Food Programme, would remain hidden for 30 years. Mr Kennedy, a journalist for *The Times*, is appealing the decision.

Section 44 FOIA provides an absolute exemption where 'disclosure is prohibited by or under any enactment'. The Financial Services Authority (FSA) regularly resists

disclosure under section 348 of the Financial Services and Markets Act 2000, which provides that information that relates to the business or other affairs of any person, and was received by the FSA for the purposes of or in discharge of its functions under FSMA, and is not already in the public domain or anonymised, must not be disclosed without the consent of the person who supplied it, or to whom it relates.

In *FSA v Information Commissioner* (2009) the High Court found that information that would inevitably lead to identification – of providers who had used inappropriate charges to set premiums, and of mortgage endowment policy firms investigated for failing adequately to explain equity release schemes ('inevitably', given that the FOIA request and documents referred to in it made it clear that the identity of these providers were already known to the requester) – was lawfully withheld, despite the FSA having publicised (on an anonymised basis) its enquiries in relation to these matters on its website and in a press release. The FSA had received the information from the providers/firms for the purposes of its FSMA functions, and it was caught by s.348. A more carefully drafted set of requests by different requesters might have had more success.

Many of the FOIA exemptions are qualified, in that the public interest in non-disclosure must outweigh the public interest in disclosure. In *The Office of Communications (Ofcom) v IC* (2009) the Court of Appeal held that a public authority, when considering disclosure of information in respect of which several qualified exemptions may apply, can aggregate the factors against disclosure in

'Many of the FOIA exemptions are qualified, in that the public interest in non-disclosure must outweigh the public interest in disclosure'

FIND OUT MORE

You may be interested in our article on balancing freedom of information and privacy rights, here:

www.bwbllp.com/Articles/Detail.aspx?ArticleID=269

General information on the Freedom of Information Act is on the Directgov site at: www.direct.gov.uk/en/Governmentcitizensandrights/Yourrightsandresponsibilities/DG_4003239

www.direct.gov.uk/en/Governmentcitizensandrights/Yourrightsandresponsibilities/DG_4003239

respect of each exemption to bolster its case for non-disclosure. The case, in fact, relates to information on mobile telephone masts under the Environmental Information Regulations 2004, but this contains the same wording as FOIA. The Information Commissioner has obtained permission to appeal to the Supreme Court what appears to be a rather unworkable application of FOIA.

Section 36(2) FOIA provides a qualified exemption for information the disclosure of which is likely to inhibit the free and frank provision of advice or exchange of views by civil servants. In *Home Office and MoJ v Information Commissioner* (2009), the High Court held that requests for meta-data – i.e. the way in which previous requests have been handled (for example to ascertain whether requests from journalists are handled differently to requests from members of the public) – should not be resisted by authorities on s.36 grounds, providing they are not vexatious.

There have been surprisingly few FOIA decisions on the degree to which contracts between public sector bodies and private enterprises are protected from disclosure by the confidentiality (section 41) and trade secrets/commercial interests (section 43) exemptions in FOIA. Contracting parties would be wise to assume that the law of confidence will provide protection only where the information has truly been obtained from a private enterprise as opposed to simply appearing in the contract. And demonstrating prejudice to commercial interests requires the contracting parties to show that the possibility of prejudice is a real one, including having regard to the time that has passed since the contract was made, and to any guidance on such contracts (e.g. that issued by the Office of

Government Commerce on civil procurement) – *Department of Health v Information Commissioner* (2008) IT.

Companies contracting with public bodies also need to recall that FOIA may not be the only route to disclosure. In *Veolia ES Nottinghamshire v Nottinghamshire CC* (2009) the High Court rejected Veolia's application for an injunction to prevent the Council disclosing to a local elector under Section 15(1) Audit Commission Act 1998 confidential annexes to Veolia's waste management contract with the Council. Section 15(1) provides that at each audit of a local authority any persons interested may, for a short period, inspect and make copies of 'the accounts to be audited and all books, deeds, contracts, bills, vouchers and receipts relating to them'. The Court noted that there was an exemption in the 1998 Act for personal data, but no exemption for commercially confidential information.

First exercise of ministerial veto

If the exemptions do not work, the executive can, under section 53 FOIA, exercise a ministerial veto to prevent disclosure. In February 2009, by giving the Information Commissioner a Certificate stating that he had on reasonable grounds formed the opinion that there had been no failure to comply with FOIA, Jack Straw issued such a veto to prevent disclosure (directed by a majority decision of the Information Tribunal) of redacted minutes of two cabinet meetings in 2003 at which the decision to go to war in Iraq was made, on grounds of preserving cabinet confidentiality. The Information Commissioner decided, having taken legal advice, not to challenge the veto by way of judicial review proceedings.

JUDICIAL REVIEW – EXCEPTIONS TO THE RULE

A recent case has raised very important issues around disclosure and the cross-examination of witnesses in judicial review cases.

R (Al-Sweady and Others) v Secretary of State for Defence (No 2) (2009) EWHC 2387 (Admin)

In *R (Al-Sweady and Others) v Secretary of State for Defence (2009) EWHC 2387 (Admin)* the High Court held that, where the outcome of a judicial review application could hinge on a dispute of fact, the court should give urgent consideration to ordering disclosure of documents and cross-examination of witnesses. This finding is particularly noteworthy because there is generally no formal disclosure process or oral evidence in judicial review procedure.

Key points

Where judicial review proceedings involve a dispute over 'hard-edged' questions of fact, the correct approach for the Court may be to order disclosure of documents and cross-examination of witnesses to ensure that the truth of the matter is established.

This approach is an important departure from the general rule that, in an application for judicial review, disputed facts are resolved (often in favour of the defendant) without use of oral evidence.

Disclosure and cross-examination are likely to be most relevant in human rights cases because of their often fact-specific nature and the importance of assessing alleged interference with such rights by reference to a careful evaluation of the relevant facts.

Although the circumstances of this case were unusual, it should remind defendants in judicial review cases of the importance of the duty of candour.

Background

Six Iraqi nationals brought judicial review proceedings against the Secretary of State for Defence for alleged breaches of their rights under the European Convention on Human Rights ('ECHR') by British troops stationed in Iraq in 2004. The first claimant (Al-Sweady) contended that, in breach of Article 2 ECHR, his nephew had been murdered while in detention. The second to sixth claimants contended that they had been mistreated while in detention, in breach of their rights under Article 3, and also that their continued detention breached Article 5. They further contended that there had been no proper investigation of their complaints.

The Court considered that there were five important factual issues in dispute. The determination of these factual disputes would be crucial in deciding which party was to succeed in the proceedings:

1. Did Mr Al-Sweady die on the battlefield (as the Secretary of State contended) or was he murdered while under British detention? Only if the latter was correct could the claimant invoke the ECHR.
2. Were the other claimants mistreated such that their rights under Article 3 were breached?

Christopher Hook outlines the key issues in this case that has implications for human rights cases in particular



Christopher Hook

Trainee Solicitor
Christopher is a trainee solicitor in the Dispute Resolution department, where he assists with a range of work.

'Al-Sweady provides circumstances in which there may be exceptions to the general rules against disclosure and cross-examination of witnesses in judicial review proceedings'

‘Ultimately, however, the court found in favour of the claimant, but declined to make any decision at that time about how to ensure that the Secretary of State complied with his obligations to carry out a proper investigation’

3. Was their detention unjustified and consequently a breach of Article 5?

4. Did the subsequent transfer of the claimants to the Iraqi authorities constitute a further breach of Article 3, in that there were substantial reasons for believing that the claimants would be subjected to mistreatment by those authorities?

5. Had the complaints been properly investigated?

By way of relief the claimants primarily sought an order that an adequate and independent investigation into the alleged violations of Articles 2 and 3 ECHR take place. The Secretary of State contended, however, that:

- there had been no breaches of human rights; and
- in any case there had been a proper investigation by the Royal Military Police, or alternatively the hearing of the judicial review application itself constituted such investigation.

Ultimately, however, the court found in favour of the claimant but declined to make any decision at that time about how to ensure that the Secretary of State complied with his obligations to carry out a proper investigation.

Determining factual disputes in judicial review

The Court noted that the importance of the factual issues in this case posed a difficulty, because in judicial review cases there is usually no oral evidence; and, insofar as there are factual disputes

between the parties, the court is ordinarily obliged to resolve them in favour of the defendant.

The Court noted, however, that if this approach had been taken in *Al-Sweady*, the Secretary of State would have succeeded. Furthermore, this would have had the more far-reaching effect that a defendant would always succeed if sued for an infringement of human rights that was disputed.

A different approach was needed in a case such as this where there were ‘hard-edged’ questions of fact in dispute. In such circumstances it was necessary to allow cross-examination of makers of witness statements on those questions of fact.

A consequence of the orders for cross-examination was that disclosure was needed for effective and proper cross-examination to take place. Otherwise the other side could not properly challenge the witnesses’ evidence.

This represented a further departure from the general rule in judicial review cases, where there is no formal disclosure process. In cases such as this, the court noted that the approach to disclosure should be similar to that in an ordinary Queen’s Bench action.

Human rights in judicial review cases

The court’s view that this approach to cross-examination and disclosure might increasingly occur in human rights-related judicial review cases echoes the House of Lords’ statement in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 that disclosure may be required

in human rights cases because any judgment on the proportionality of an interference with a Convention right is likely to call for a careful and accurate evaluation of the facts.

By contrast, most other judicial review applications typically raise issues of law, with the facts not being in dispute or only being relevant to explain the context in which the issue of law arose. In the case of *Al-Sweady*, however, the importance of cross-examination and disclosure was heightened because the allegations concerned some of the most important and basic rights under the ECHR.

Failure to disclose documents

In normal circumstances it is not necessary for the Court to order for disclosure in judicial review cases, mainly because public bodies are aware of their well-recognised duty to make disclosure.

In this case, however, the Court strongly criticised the Secretary of State's 'lamentable' approach to disclosure and found him to have failed in this duty. Consequently the Court made an award of indemnity costs against the Secretary of State to reflect his 'persistent and repeated' failures to comply with his duties of disclosure.

Comment

Al-Sweady provides circumstances in which there may be exceptions to the general rules against disclosure and cross-examination of witnesses in judicial review proceedings.

The court expressed the view that the parties and the court should always

scrutinise with care the stance of parties in judicial review claims, particularly those involving ECHR issues, to ascertain whether there is any critical factual issue that requires orders for cross-examination or disclosure.

Courts should also not be reluctant to make such orders in suitable cases, which are especially likely to arise in human rights-based claims. Following in the footsteps of the House of Lords' decision in *Tweed*, this decision is an important reminder that, in exercising its case management powers in judicial review cases, the Court has flexibility and should depart from the general procedure where this is necessary in order to resolve a case fairly and accurately.

FIND OUT MORE

Following these judicial review proceedings, the Ministry of Defence is to hold a public inquiry into the allegations relating to the unlawful killing and mistreatment of Iraqi detainees by British soldiers in 2004, to be chaired by Sir Thayne Forbes.

'In the case of *Al-Sweady*, the importance of cross-examination and disclosure was heightened because the allegations concerned some of the most important and basic rights under the ECHR'

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Comments

If you have any comments and suggestions, requests for other departmental updates, or would like to notify us of any changes to your contact details, please contact Mona Rahman at m.rahman@bwbllp.com

The information contained in this bulletin is necessarily of a general nature. Specific advice should be sought for specific situations.

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