LANDMARK CHAMBERS

Welcome to Landmark Chambers'

Public Law Update 2024 winter recap webinar

Thank you for joining us today.
We will begin shortly

Your speakers today will include…

Alex Goodman KC (Chair)

Miranda Butler

Charles Bishop

Public Law Update – Part 1

Miranda Butler

Introduction

1. Secret policies and duty of candour
2. Human rights
3. Transfers
4. Urgent claims

XY: secret policies, candour, human rights

XY v SSHD [2024] EWHC 81 (Admin)

Background: *KTT v EOG* [2023] QB 351 (17.3.22): CoA upheld judgment of Linden J that victims of trafficking with outstanding asylum claims should be given LTR pending resolution of those claims. No further appeal to UKSC.

D decided not to implement this decision, but did not disclose that fact (LTR decisions made but not served).

Therefore, cohort of vulnerable recognised victims who needed leave to remain did not receive it. Even when delay challenges brought, SSHD did not disclose what was happening, but instead granted them leave.

XY v SSHD: secret policies, candour, human rights

Lawfulness:

Any unpublished policy must not be inconsistent with published policy (cf *Lumba*).

Unless and until disturbed on appeal, the finding in *KTT* meant that SSHD's policy required the granting of LTR.

His unpublished policy contradicted his public policy and was unlawful.

- Possibility of bringing a JR did not remedy this – D's response to litigation just kept the policy secret.

XY v SSHD: secret policies, candour, human rights

Human Rights:

Art. 8 ECHR was engaged by the failure to grant the claimant LTR.

Noted the distressing and destabilising impact of not holding LTR, whereas LTR would make the claimant feel more secure and promote his recovery and psychological rehabilitation.

As the policy was unlawful, SSHD's actions could not be 'in accordance with the law' for the purposes of Art. 8(2).

XY v SSHD: secret policies, candour, human rights

Duty of candour:

SSHD breached his duty of candour in failing to disclose the existence of the unpublished policy at all until amended DGDs (which partially disclosed the policy), then in heavily redacted disclosure responding to a Part 18 request and re-amended DGDs.

The claimant "*has had laboriously to drag out of the defendant*" material which should have been disclosed at least by the first DGDs.

D's approach was on which "*at almost every stage, involved revealing as little as possible, and only then in response to specific requests from the other party. The defendant's approach in the present case is about as far from the requirement of "laying one's cards face up on the table" as could be imagined*."

XY v SSHD: secret policies, candour, human rights

Duty of candour:

On redactions on grounds of 'irrelevance':

"*The present case also discloses a serious misunderstanding on the part of the defendant as to what might qualify for redaction on the* ground of irrelevance*. In the context of the duty of candour,* particular care needs to be taken before material is withheld on this ground*. Unless disclosure would be* positively harmful *(e.g. to a third party) or would involve a* wholly disproportionate amount of disclosure*,* material should not, in general, be withheld on the claimed ground of irrelevance*. Otherwise, there is a risk that the duty of candour will be breached or, at the very least, that the other party may be led to assume something untoward lies behind the refusal to disclose*" (emphasis added)

IAB: redacting civil servants' names

IAB and ors v SSHD, SSLUHC [2024] EWCA Civ 66

Challenge to routine redaction of 'junior' civil servants' names. Powerfully rejected by CoA.

Re-emphasises the *"very high duty"* on public authority respondents to assist the court with full and accurate explanations of all relevant facts *(Quark)*

'Junior' civil servants are 98% of the Civil Service; argument is *"extraordinarily far-reaching"* – extensive redactions make it v. difficult to read documents.

Usually permissible to redact contact details.

Routine redactions are inconsistent with duty of candour, *"inimical to open government and unsupported by authority".*

TMX: Article 3 & 8 ECHR breaches in unsuitable accommodation

TMX v LB Croydon & SSHD [2024] EWHC 129 (Admin)

Court held that Croydon had breached severely disabled man's rights under Arts. 3 & 8 by failing to assess his accommodation need or provide suitable accommodation for him and his family under the Care Act 2014.

TMX accommodated by SSHD but LA liable as it had knowledge of his situation and chose to leave him in terrible conditions. LA should have ignored possibility of accommodation being provided by SSHD when assessing his needs.

High threshold of Art. 3 met as LA know its refusal was likely to and did cause serious suffering for a prolonged period

Transfers from London

R (Bale) v HMRC [2023] EWHC 3216 (Admin)

Challenge to a minded to transfer order from London to Manchester.

"*There is a general public interest that a judicial review claim should be heard in the court centre which is the Administrative Court venue for the region with which the claim is most closely connected.*"

Claims should not "default" to London and choice should not be driven by the convenience of lawyers.

Parties' wishes are "powerful features".

Any issue re venue should be flagged by C early on, which may assist D in their choice of (local) counsel.

Urgent claims

Swift J at recent Administrative Court User Group Meeting:

- Where C seeks an *abridgment of time* for the AOS (e.g. to 14 days), the application should be made on an N463, not within the claim form, as otherwise the request may not be looked at until 14 days before the AOS is due in any event.

- Where C seeks *expedition* of a final hearing, use of an N463 is not appropriate

Urgent claims

When to use an N463

Abridgment of time for AOS

Very urgent interim relief (irreparable consequences)

Very urgent directions

Exceptionally urgent case: consideration reasonably required within **7 days**

Not appropriate where there has been delay by claimant, or where issue is no longer 'live' for C: see *DVP v SSHD* [2021] EWHC 606 (Admin)

NB: duty of candour v. high in making urgent applications

Urgent claims

Not-so-urgent claims

Can make application without N463 in Claim Form (or on N244 if later in proceedings) – flag fact of urgent application in covering email to ACO *("write urgent all over it")*

If Court does not engage: Swift J advised in AC User Group Meeting that you can escalate to Senior Legal Managers Philip Shearer and Jyoti Gill

Public Law Update – Part 2

Charles Bishop

Introduction

1. Academic cases
2. Settling cases
3. Replies

Academic cases: a recap

See *R (Langton) v Secretary of State for the Environment, Food and Rural Affairs* [2022] EWCA Civ 1202 at §§12-13

- A claim is academic where there is no longer a “lis" or a case to be decided which will directly affect the rights and obligations of the parties, e.g. where a public authority has agreed to reconsider the decision.
- As a general rule, courts will not grant permission or hear substantive JRs in academic cases other than in exceptional circumstances where there is a good reason in the public interest in the mater being heard (deriving from the well-known case *R v Secretary of State for the Home Department ex parte Salem* [1999] 1 AC 450).
- Examples of good reasons include:
  - Deciding a short point of construction which raised issues of general interest, where the parties were ready to argue the point and where there was an ongoing relationship between the parties: *L, M and P v Devon County Council* [2021] EWCA Civ 358.
  - An academic matter raising issues with potentially wider implications: *R (Heathrow Hub Ltd) v Secretary of State for Transport* [2020] EWCA Civ 213 (paras 208 and 216)
  - Where there are a large number of similar cases, or at least some other similar cases, which exist or are anticipated.

Academic cases: a withdrawn decision is not one that exists for the court to quash

R (AA) v Sodexo Ltd [2023] EWHC 3215 (Admin)

- Claim brought by mother in prison against a "stage 1" deportation decision and decision to treat her as ineligible for Home Detention Curfew.
- She was granted permission, but then the SSHD made a "stage 2" deportation decision.
- Shortly afterwards, the SSHD withdrew both deportation decisions and attempts were made to find a suitable curfew address.
- Court had to determine if the claim was academic and, if so, whether it should proceed.
- Claimant argued that, as the Defendant did not accept the decision was unlawful but had merely withdrawn it, the issue remained.
- The court held that *"there is no decision remaining for the Court to decide upon...Considering remedies, a withdrawn decision is not one that exists for the Court to quash"* (para 47).

Academic cases: a withdrawn decision is not one that exists for the court to quash

R (AA) v Sodexo Ltd [2023] EWHC 3215 (Admin)

- Court referred to *R (Zoolife) v Secretary of State for the Environment, Food and Rural Affairs* [2007] EWHC 2995 (Admin) which suggested two conditions need be satisfied: 1. a large number of similar cases exist or anticipated or at least other similar cases exist or are anticipated; and 2. the decision in the academic case will not be fact-sensitive.
- There appeared to be confusion in this claim as to whether there is a two-stage process and the relationship between this and HDC eligibility.
- Claimant produced evidence as to other cases showing confusion, although this was not accepted in its entirety.
- The defendants argued there were no exceptional circumstances as all the cases were fact sensitive, and that damages etc claims could be pursued in the County Court.
- Court found there were exceptional circumstances as they relate to predominately young and vulnerable people who are being detained, with SSHD and individual prison governors confused and inconsistent.
- Consequently the claim was allowed to proceed, although no longer expedited. The claim was stayed against Sodexo and proceeded against the SSHD and SSJ only.

Academic cases: the usual approach

R (NS) v SSHD [2023] EWHC 2675 (Admin)

- Claim initially brought by an asylum seeker against the adequacy of his accommodation. He was granted asylum during the currency of the claim. Part of the claim included a challenge to the legality of the “Asylum seekers with care needs" guidance (Version 2, August 2018).
- On the day of the hearing the parties were not agreed the claim had become academic. The court heard full argument.
- Although the court thought there was force in the claimant's argument on the merits, the Claimant was no longer personally affected by the Guidance. The court said its resources should in general “be used in resolving disputes of immediate and actual concern to a litigant before it" (para 46).

Academic cases: the usual approach

R (NS) v SSHD [2023] EWHC 2675 (Admin)

- The court said it would not be “consistent with the Overriding Objective for resources to be spent on litigating this issue in proceedings which, insofar as they affect the Claimant, have come to an end", although recognising academic cases can proceed on occasion.
- Interestingly, the court said “The SSHD may however wish to reflect on whether the ASCN Guidance should be clarified or corrected".
- Separately to the guidance challenge, the court also heavily criticised the SSHD's failure to put in any evidence explaining how it had any evaluation decision-making in relation to the specific accommodation, and for seeking to defend the underlying decisions, stating at para 40:

  “The failure of the SSHD in this case to engage with the letters before claim, or often even to respond to correspondence concerning urgent accommodation needs, is sadly common in the experience of the Administrative Court."

Settling cases: a recap

See *Kirklees Council v SST* [2023] EWHC 2459 (Admin)

- Where parties agree a final order including a substantive order such as a quashing order or a declaration, the Court can make that order, on the papers without a hearing, "if satisfied that the order should be made" (PD54A para 16.2; PD54D para 4.50).
- The parties must file 3 copies of: (CPR PD54A para 16.1; PD54D para 4.49; Admin Court JR Guide 2023 para 24.4.1)
  - Agreed and signed terms of a draft final order
  - Agreed and signed statement of the matters relied on as justifying it
  - Any authorities or statutory provisions relied on
- Even if the outcome is not agreed, the parties can agree to the process of inviting a Judge substantively to determine the issues and make the appropriate substantive order, without a hearing (CPR r.54.18; PD54D para 4.48; JR Guide para 11.4.1).

Settling cases: the need for judicial determination

See *Kirklees Council v SST* [2023] EWHC 2459 (Admin)

- Orders which grant a remedy, e.g. a quashing order or declaration, will always require a judicial adjudication, even if all parties agree, reflecting the nature of judicial powers within the public law supervisory jurisdiction and the need for the Court to be satisfied that orders it makes can properly be given as a matter of law.

- Agreed costs orders are different and may not require a court order at all (JR guide para 25.5.51) and do not require an agreement statement of justification (PD54A para 16.4; PD54D para 4.52).

Settling cases: the role of interested parties

See *Kirklees Council v SST* [2023] EWHC 2459 (Admin)

- An interested party is a person directly affected by a claim: CPR r.51.1(f) and 54.23; JR Guide para 3.2.3.1.
- Once served with proceedings they are a "party" and have rights. They can, if they wish, participate in the proceedings [but note, although not mentioned in the judgment, they may be subject to the duty of candour, a point often missed: JR Guide para 7.5.1 and e.g. *R (Midcounties Co-operative Ltd) v Forest of Dean District Council* [2015] EWHC 1251 (Admin) para 150).
- They can appeal even if the defendant does not: see e.g. *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52.
- They can be the subject of costs orders.

Settling cases: the role of interested parties

See *Kirklees Council v SST* [2023] EWHC 2459 (Admin)

- If parties seek to agree a draft order and statement, this must be signed by all parties, including interested parties: para 6(iii).
- In this case, three out of four parties had agreed everything, including the quantum of costs. However, one of the interested parties had not signed it. An earlier email from that IP to the court had said it "disagreed with the claim" and criticised as "false" some of the claim documents (para 5).
- The judge directed a brief oral hearing to determine the claim as the matter was no entirely agreed, and gave directions for the IP to file an AOS.

Settling cases: the role of interested parties

See *Kirklees Council v SST* [2023] EWHC 2459 (Admin)

- The IP then made various requests and submissions in inter partes correspondence. It made no written submissions or responded to a request as to whether it would attend the hearing. It did not attend.
- Court approved the agreed order and gave a provisional view that costs of the hearing should be paid by the IP, but did not make that order as the parties had not given a clear and open warning of the potential for costs. Court gave IP time to respond.
- The IP did but the court nonetheless ordered costs against it: https://www.bailii.org/ew/cases/EWHC/Admin/2023/2825.html

Permission stage replies

- New amendments to the CPR introduce formal provision for judicial review claimants to file a reply to an acknowledgement of service from 6 April 2024.

- Until this provision comes into force, claimants wishing to file a permission-stage reply will need to make an application following the procedure set out in the Administrative Court Judicial Review Guide 2023 para 8.5.1, namely file an application and provide a document which is concise and confined to true reply points.

- New CPR r.54.8A will provide that the reply must be filed not more than 7 days after service of the acknowledgement of service. It will be subject to content and length restrictions to be set via Practice Direction 54A. The reply must be served on the defendant and any interested parties as soon as practicable and in any event not later than 7 days after it is filed. Notably, the parties will not be able to agree to extend any of the time limits in respect of the reply.

- Likely means decisions on whether to grant permission to bring the claim for judicial review will not be taken until the time limit for filing a reply has passed.

Permission stage replies

- New PD54A and PD54D will say, from 6 April 2024:

  “**7.1** (1) A Reply should be filed only if necessary for the purpose of the court's decision to grant permission to apply for judicial review, for example, where a discrete issue not addressed in the Claim Form is raised in the Acknowledgement of Service. A Reply is not the occasion to rehearse matters already referred to in the Claim Form.

  (2) A Reply shall be as concise as possible and shall not exceed 5 pages. The court may grant permission to exceed the 5-page limit.

  7.2 If a Reply is filed unnecessarily, the court may make any order it considers appropriate, whether as to costs or otherwise."

Evidence

- See recent blog post on witness evidence: https://www.landmarkchambers.co.uk/news-and-cases/some-recent-cases-on-witness-statements
  - Claimants having freestanding permission to file witness statements from other organisations without those organisations applying to be interveners: *R (Suez Recycling And Recovery UK Ltd) v Environment Agency* [2023] EWHC 3012 (Admin)
  - The approach to the absence of contemporaneous documents in defendants' evidence: *R (Elliott Associates LP) v The London Metal Exchange* [2023] EWHC 2969 (Admin)
  - The approach to expert evidence and a recent non-JR case in the Supreme Court: *TUI UK Ltd v Griffiths* [2023] UKSC 48

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Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you

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