Landmark Chambers

Welcome to Landmark Chambers'

'Public Law in 2023: Quarterly Re-cap' webinar

The recording may be accessed here.

Your speakers today are…

Landmark Chambers

Samantha Broadfoot KC

Miranda Butler

Charles Bishop

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Miranda Butler

Overview

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1. *ECPAT v Kent County Council:* Children in hotels, suspended quashing orders and rolling judicial review
2. *MXK v SSHD*: Unpublished policies
3. *Marouf v SSHD*: The public sector equality duty

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin); [2023] EWHC 2199 (Admin)

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- Unaccompanied asylum-seeking children
- 'Looked after' children for purposes of Children Act 1989. Almost all UAS children enter via Kent, placing significant burden on resources. Agreed Protocol w/ SSHD to accept a capped number of UAS children; SSHD responsible for rest pending reallocation within UK.
- SSHD placed them in adult asylum accommodation: not 'looked after'
- Hundreds missing; many believed to be trafficked

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin)

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- Key issues:
  - Kent CC in breach of CA 1989 duties by capping children it will receive?
  - Was it lawful for SSHD to place UAS children in hotels rather than LA care?
  - Was SSHD unlawfully failing to transfer children within 10 working days?
  - Did this frustrate ss. 69-73 Immigration Act 2016 / Children Act 1989?
  - Was the Protocol lawful?

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin)

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- Local authorities have primary duty to accommodate & care for UAS children
- Kent accepted in breach of s. 20 CA 1989 duty
- Protocol was unlawful: both Kent and SSHD acted unlawfully in agreeing it
  - NB: Illegal Migration Act 2023 allows SSHD to accommodate and support UAS children directly (not yet in force)

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin)

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- SSHD has no express power to accommodate UAS children in hotels
  - Children excluded from accommodation powers under s. 94 IAA 1999
  - Statutory bodies may only act if expressly authorised by positive law (*ex p Fewings*); but Crown powers different (*R (Hooper) v SSWP* [2005] UKHL 29)
    - Can exercise powers which a private individual could, as matter of common law
    - **Must** exercise power to avoid breach of Art 2/3 ECHR
      - » Possibly would have same result under s. 3(5) CA 1989.

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin)

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– **BUT:**

- The power may only be used *"over very short periods in true emergency situations, where stringent efforts are being made to enable the local authority promptly to resume the discharge of its duties. It cannot be used systematically or routinely in circumstances where it is intended, or functions in practice, as a substitute for local authority care* [as this would frustrate s. 20 CA 1989]*"*

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin)

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- Those limitations had plainly been exceeded here
  - Some cases of children placed in hotels for 2+ years
- Govt *"have a range of options open to ensure UAS children are accommodated and looked after"*
- May have to provide increased funding
  - However, despite these findings of unlawfulness, parties agreed that immediate cessation would prevent transfer of children to other LAs.

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin); [2023] EWHC 2199 (Admin)

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Home Office defies high court by placing 100 asylum-seeker children in hotels

Unlawful practice still used in Kent was condemned after more than 200 went missing from accommodation

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin); [2023] EWHC 2199 (Admin)

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- Relief judgment 1 September 2023
  - Quashed Protocol (and part of NTS Protocol) but **suspended quashing order** under **s. 29A(1)(a) Senior Courts Act 1989.**
- Effect of quashing order is that the unlawful act is upheld until the quashing takes effect and is to be treated *"as if its validity and force were, and always had been, unimpaired by the relevant defect"* (s. 29A(5)).
- *Once quashed*, act is void *ab initio* (including between the making and taking effect of the order) (s. 29A(6)).

R (ECPAT) and ors v Kent County Council and SSHD [2023] EWHC 1953 (Admin); [2023] EWHC 2199 (Admin)

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- Suspended Kent Protocol for three weeks to allow for renegotiation to allow Kent to discharge its statutory duty to all UAS children, which would take some time
- Held further hearing to check the conditions for suspension had been complied with. Granted declaratory relief and listed third hearing.
  - Grant of liberty to apply (*R (ClientEarth)* [2018] EWHC 398 (Admin))
  - Noted criticism of 'rolling' judicial review and LA's longstanding unlawful action
  - Particular feature of suspended quashing orders?

R (MXK and ors) v SSHD [2023] EWHC 1272 (Admin)

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– Claimants hold limited leave. Owed sums to NHS in respect of antenatal and maternity care.

– Repeatedly stopped and detained at border to investigate NHS debt.

– Unpublished policy incorrectly directed Border Force officials that NHS debt may be a basis for cancelling leave to enter or remain, and to detain them in order to investigate status of NHS debt.

- Policy withdrawn shortly before hearing.

R (MXK and ors) v SSHD [2023] EWHC 1272 (Admin)

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- Policy unlawful as contained positive statement of law that was wrong / incomplete (cf *R (A) v SSHD* [2021] UKSC 37)
  - NHS debt is a ground for refusing an application for entry or stay, but not ***cancelling*** it.
- Policy unlawful because unpublished (cf *R (Lumba) v SSHD* [2011] UKSC 12)
- SSHD in breach of PSED: no evidence of any consideration of duties.
- Chamberlain J also criticised SSHD's failure to provide evidence in support of her submissions about how her powers of examination and detention under Sch 2 IA 1971 were used.

R (Marouf) v SSHD [2023] UKSC 23

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- What is the territorial scope of the PSED?
- Context: should SSHD have considered Palestinian refugees living in Lebanon, having fled conflict in Syria, for eligibility under the Vulnerable Persons Resettlement Scheme
  - Only UNHCR can refer into the scheme
  - UNHCR has no mandate in Palestine, so could not refer

R (Marouf) v SSHD [2023] UKSC 23

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- Presumption against extraterritorial effect of legislation
- Nothing in s. 149(1)(b) Equality Act 2010 to override presumption against extraterritoriality.
  - 2010 Act seeks to eliminate discrimination within the UK, not in communities outside it.

– Procedural duty under s. 149(1)(a) Equality Act 2010 to have due regard to avoidance of unlawful discrimination not engaged.

- Would "confer rights on people all over the world to challenge the decision-making process of a public body exercising its functions, if the exercise of the public body's functions affected them".

Cases to watch in the new term

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- Rwanda in the Supreme Court: *AAA and ors v SSHD*
- *ECPAT* 3.0
- Unlawful systemic delays in conclusive grounds decisions: *FH v SSHD*
- Implementation of the Illegal Migration Act 2023

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Overview

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1. Judgment embargoes
2. Correct approach to factual disputes in JR
3. Redactions in defendants' evidence
4. Service

Judgment embargoes

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- ***World Uyghur Congress (2) v SSHD, HMRC and National Crime Agency* [2023] EWHC 912 (Admin)**
  - Judgment arose from JR of government's actions in respect of cotton produced in the Xinjiang Uyghur Autonomous Region in China.
  - Court handed down its substantive judgment on 20 January 2023 dismissing the claim: [2023] EWHC 88 (Admin).
  - Draft judgment had been circulated to counsel and solicitors on 18 January 2023 subject to the standard embargo on publication and to CPR PD 40E. Reference was also made to the *Counsel General v BEIS* [2022] EWCA Civ 181 case.
  - A policy officer at HMRC, to whom the draft had been shared by GLD, had written to individuals in the HO, the Dept for Intl Trade, the Cabinet Office and FCDO advising that the draft judgment had been received, the result was favourable to the defendants and it would be handed down at 10am on 20 January.
  - Once GLD became aware of this, it emailed the parties to notify that the email constituted a breach of the embargo which would be reported to the court.

Judgment embargoes

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- Court looked carefully at the email sent by GLD internally within the Civil Service disclosing the draft judgment. It noted the email:
  - Could not have been clearer about strict confidentiality of the decision within the HO, NCA and HMRC, and that other named departments including the Cabinet Office could not be told.
  - Clearly emphasised responsibility of retaining control over the decision and that a request needed to be made to GLD before sending the decision to anyone, even internally.
  - Stressed the strictness of the embargo and the potential for breach to give rise to proceedings for contempt of court either against the department or individuals.
  - Was accompanied by a brief document from GLD about embargoes generally.

Judgment embargoes

- Given this, court was even more concerned how the embargo had been breached, and asked for a witness statement from the official who had breached it.
- He said he had not “recognised or understood the full effect of the embargo”. He expressed his deep regret that he had not read the instructions properly and accepted responsibility for the breach. It also referred to an HMRC Practice Note about embargoed judgments.
- Court said there was “no doubt” this was a “significant breach of the requirements of confidentiality very clearly specified in the embargo”.
- However, court decided to take no further action beyond recording what has occurred.

Judgment embargoes

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- Court was influenced by following factors:
  - GLD had taken all reasonable steps to ensure the embargo was properly and accurately communicated, and the importance of abiding by it and the consequences of breach had been fully explained. Thus the court said there was no “form of systemic failure or error” and that in fact there was sensible and robust advice and guidance.
  - The GLD lawyers operated with efficiency and expedition to detect and close down the breach.
  - The breach as a failure of a single individual to read and observe the instructions, which has since been acknowledged honestly and openly and been apologised for.
- Court concluded by saying courts will require full explanations as to how breaches occur in the future. It also said the judgment “will also hopefully assist lawyers in reinforcing the importance of these embargoes and the consequences that can ensue if they are breached”
- Court ended by suggesting that if the GLD had not acted promptly and had comprehensive procedures in place, there may have been a contempt finding against the individual.

Correct approach to factual disputes in JR

- ***F v Surrey County Council* [2023] EWHC 980 (Admin)**
  - Claim for reimbursement from Surrey's drug and alcohol service provided by the Surrey and Borders Partnership NHS Foundation Trust for the provision of private medically assisted alcohol detox treatment.
  - It was claimed that this required resolution of some factual disputes. Chamberlain J outlined a number of the core principles on this.

Correct approach to factual disputes in JR

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- An invitation to resolve a dispute of fact “is sometimes an indicator” that the claimant has not been able to “identify a proper public law ground on which the challenged decision can be impugned”. However, sometimes facts do need to be resolved.
- He referred to the wider case law which refers to a principle that defendant’s written evidence is to be preferred unless exceptionally the court permits cross-examination or the evidence “cannot be correct” and noted there are “equally authoritative statements which put the principle more neutrally and do not refer to any presumption in favour of the defendant”.

Chamberlain J's summary at para 50

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1. Consider whether the pleaded ground really requires resolution of the dispute. In most cases, the answer will be it is for the decision-maker, not the court.
2. If resolution of the dispute is necessary, then usually the court proceeds on the basis of written evidence, especially if there has been no application for cross-examination before the start of the substantive hearing.
3. There is no absolute rule that the court must accept in full every part of the statement of a non-cross-examined witness (of the claimant or defendant). The court can reject evidence in a witness statement if it "cannot be correct", such as if it is contradicted by "undisputed objective evidence that cannot sensibly be explained away", or if it is, on balance, inconsistent with other written evidence.

Chamberlain J's summary at para 50

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4. If the court is not able to resolve a conflict of written evidence on a question of primary fact, then the court will proceed on the basis that the fact has not been proved, which will be to the disadvantage of whichever party asserts the fact. So the principle that the defendant's evidence is to be preferred, save where it "cannot be correct", arises because of the difficulty of satisfying the burden of proof where there is a conflict in written evidence, not because evidence adduced on behalf of a defendant is inherently more likely to be true than that adduced on behalf of a claimant.

Redactions in defendants' evidence

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- ***FMA v SSHD* [2023] EWHC 1579 (Admin)**
  - This was a case about the ARAP scheme arising from the case of a former interpreter for the British army.
  - Swift J made some comments about redactions in evidence at the end of his judgment.

Redactions in defendants' evidence

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"One further matter needs mention. The Home Secretary's initial open disclosure included documents redacted to remove the names of the civil servants who had written them, including redaction of the names of the officials who had prepared the March 2022 consideration minute and the January 2023 consideration minute. The redactions were said to be on the ground of 'relevance'. Documents were served in that form without the permission of the court. These redactions should not have been made. It is one thing for a document that genuinely deals with different matters, some relevant to the litigation others irrelevant, to be redacted on grounds of relevance. It is another matter entirely for a document that is relevant to be edited to remove information that goes to explain the document's provenance and context. One example which has recently become common is when emails are redacted to remove details such as the name of the sender, names of recipients, or the names of persons copied into the message."

Redactions in defendants' evidence

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"Such information should not be redacted on grounds of relevance. Such redactions, at the least, make the significance of documents more difficult to understand and, in some instances, they may obscure the significance of a document almost completely. ***If a party wishes to redact such information from disclosable documents, an application to the court should be made and the application should explain the reason for the proposed redaction, and when necessary set out supporting evidence.*** In this case, the names and job details of the civil servants who had assessed the information relevant to the not conducive to the public good question in the consideration minutes were redacted. That information was not irrelevant and ought not to have been redacted. ***If, to any extent, a practice is developing by which such information is routinely removed from documents that are disclosable in judicial review proceedings, that practice should cease."***

Service

- R (London Fluid System Technologies Ltd) v HMRC [2023] EWHC 2206 (Admin)
  - JR in the tax context. HMRC said they had not been properly served with proceedings.
  - JR had been served via email to the solicitor at HMRC who had been dealing with the claim at the pre-action stage.
  - HMRC's PAP response stated that it accepted service by electronic means where it was affected in accordance with guidance published online. That guidance, issued in response to COVID, had said: "New legal proceedings in England and Wales which are required to be served on the Solicitor for HMRC can be sent by email to newproceedings@hmrc.gov.uk." However, later on in the document it said "For all proceedings (including in the Supreme Court) an HMRC lawyer will be allocated the case and all subsequent service should be effected on their, or any nominated successor's, HMRC email address."

Service

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- Court found that the documents were not properly served. However, CPR r.6.15 applied so as to direct that good service took place:

> "(1) Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place.
>
> (2) On an application under this rule, the court may order that steps already taken to bring the claim form to the attention of the defendant by an alternative method or at an alternative place is good service."

Service

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- Important factors:
  - The Press Release was ambiguous and the court heavily criticised some of the drafting in relation to a policy which was mandatory in effect. It was noted that the claimant's solicitor was a "seasoned practitioner" and still misunderstood what it said. This acted as an impediment to good service.
  - While service of the claim form "requires the utmost diligence and care to ensure that the relevant procedural rules are properly complied with", the court said that equally "where instructions are purported to be given, especially new instructions, regarding an important litigation step, they must be clear, logical, unequivocal and readily understood".

Service

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- Important factors:
  - The claimant's solicitor had "compelling reasons" for interpreting the guidance as he did. It was not a "careless slip-up case" – he took care within the system which he understood to be operating. He reasonably believed he had effected service.
  - HMRC was aware of the contents of the claim form and the purposes of service had plainly been achieved.
  - The only prejudice faced by HMRC was the loss of a limitation defence.

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