

LexisNexis®

Judicial review (2020)

11th March 2020

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Judicial review (2020)


The law as stated during this webinar is up to date as of **26th February 2020**




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Introduction



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Judicial Review (2020)
A round-up of recent key
developments in judicial review

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Judicial Review (2020) - Agenda

- Speaker and subject introductions
- Key topics:
 - Duty to consult – consultation requirements
 - Human rights in action - using human rights in judicial review
 - Challenges to legislation - Article 1 to the First Protocol grounds
 - The interaction of private and public law - judicial review in relation to private contracts
 - Legitimate expectation – recent tax cases
 - Judicial review as an alternative means of appeal in a tax context
- Interactive quiz

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Duty to consult
Consultation requirements

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Consultation requirements – recent cases (1)

- **R (on the application of British Gas Trading Ltd) v Gas & Electricity Markets Authority and others [2019] EWHC 3048 (Admin)**
 - Failing to provide consultees with sufficient information in a consultation process will amount to a breach of the requirement of fairness.
 - The principle of mistake of fact is engaged if the decision maker forms a mistaken impression which plays a material part in its reasoning or acts upon a wrong assumption.
- Those required to consult must remember it is essential to communicate all relevant material information to consultation participants, in order for the participants to fully address the issue in question.
- Participants should be aware that sometimes it is not necessary for the party running the consultation to expressly request evidence that supports an assumption the decision-maker is relying on, so long as that assumption is evidence from the consultation papers.

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Consultation requirements – recent cases (2)

- **(1) Electronic Collar Manufacturers Association (2) Petsafe Ltd v Secretary of State for Environment, Food & Rural Affairs [2019] EWHC 2813 (Admin)**
 - Claimants were unsuccessful in arguing that the SoS had predetermined the merits of the decision prior to considering the consultation responses.
 - Court recognised weaknesses in the consultation document but the deficiencies did not mean the process was so unfair as to be unlawful.
 - The 4 elements of the duty of consultation as set out in **ex p Coughlan [2011] QB 213** were satisfied:
 - 1) Consultation must be undertaken at a time when proposals are still at a formative stage
 - 2) Must include sufficient reasons for proposals to allow consultees to give intelligent consideration and response
 - 3) Adequate time must be given for this purpose
 - 4) The product of the consultation must be conscientiously taken into account when the ultimate decision is taken

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Consultation requirements – recent cases (3)

- **R (British Blind and Shutter Association) v Secretary of State for Housing Communities and Local Government [2019]** EWHC 3162 (Admin)
 - Public bodies may need to take steps to identify those who might be affected by the proposals and inform them that a consultation is taking place.
 - Carrying out an open public consultation does not replace a duty to carry out targeted communications towards specific parties who will be substantially affected by the proposals in a consultation.
- Also links to the requirement to provide all relevant material. Even communications that notify potential participants of the consultation should provide sufficiently detailed information on the content of the consultation for the recipients to know that the proposals may be relevant to them.

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Human rights in action
Using human rights in judicial review

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Human rights in judicial review - the primacy of the HRA 1998

- **RR V Secretary Of State For Work And Pensions [2019]** UKSC 52
 - Reaffirms the primacy of Acts of Parliament, in particular the HRA 1998.
 - Sets out how public authorities and tribunals can deal with situations where secondary legislation is incompatible with rights under the European Convention on Human Rights.
- The principle reaffirmed by this case may be relevant when public authorities are applying statutory instruments created to regulate Britain's exit from the European Union.
 - Public bodies will need to have regard to whether new regulations produce outcomes that are incompatible with Convention rights and the HRA 1998.
 - They may need to disapply provisions of subordinate legislation if it will otherwise result in the public authority acting incompatibly with a Convention right.

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Human rights in judicial review - a balancing act...

- **Lee v Ashers Baking Co Ltd and others [2018] UKSC 49**
 - Claimant alleged direct discrimination on the grounds of sexual orientation, religious belief or political opinion in breach of his Article 9 and/or 10 rights under the European Convention on Human Rights, separately or together with Article 14.
 - Article 9 – Freedom of thought conscious and religion
 - Article 10 – Freedom of expression
 - Article 14 – Prohibition of discrimination
- Court took an expansive view of Articles 9 and 10 to include both positive and negative rights, ie. the right **not** to hold or express a belief.
- Balancing the claimant's and defendant's rights under Article 9 and 10, the Court ruled in favour of the bakery – the state could not require the bakery to express a particular political opinion or religious belief.

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Challenges to legislation
Article 1 to the First Protocol grounds

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Challenges to legislation

- Recently there has been an increase in judicial review challenges to tax legislation on A1P1 grounds.
- Typically where legislation has an element of retrospectivity.
- Argument is generally that money is a “possession” the peaceful enjoyment of which is interfered with in contravention of A1P1.
- A1P1 issues raised in *Rowe*.
- But failed:
 - APN regime was “entirely accessible clear and foreseeable in effect”.
 - Proportionate to seek to change the economics of marketed tax avoidance schemes.
 - CA left open question whether A1P1 was engaged at all (ie. whether money required to be paid was the taxpayer’s “possession”).

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Challenges to legislation – loan charge

- Loan charge was introduced to tax historic “disguised remuneration” arrangements – broadly paying remuneration via a third party by way of loans that were never expected to be repaid.
- As originally enacted, applied to all such loans made since 1999.
- Heavy criticism for retrospectivity / retroactivity (in many cases HMRC had not protected their position for relevant years).
- Challenges on A1P1 grounds.
- See **Cartref Care Home Limited and others [2019] EWHC 3382 (Admin)**.
- Challenge failed:
 - Legitimate public policy objective of discouraging tax avoidance.
 - At the time of the arrangements, a typical well-informed taxpayer should have realised that tax avoidance was likely to be challenged
 - Retrospective legislation acceptable for tax avoidance schemes.
 - Slight pause on extent of retrospectivity – but overall legislative approach not illegitimate or without reasonable foundation.
- Subsequently loan charge review – now only loans from 2010 onwards.
- Query impact this will have on other challenges?

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The interaction of private and public law
Judicial review in relation to private contracts

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Public law principles in the context of private contracts

- **Mauritius v CT Power Limited [2019] UKPC 27**
 - Reminder of the principles that arrangements with public bodies are still subject to public law principles even when they are operating under ostensibly private contracts.
 - Board of the Privy Council disagreed with the appellant state's argument that the decisions by the Ministers were matters of commercial judgment and of purely private nature. The decisions fell within the scope of public law and the court's judicial review jurisdiction:
 - Minister of Finance's decision that a condition in a regulatory instrument (the EIA licence) had not been met was made in the course of performing a function in the public interest.
 - Minister of Energy's decision whether or not a public authority should enter into a contract (the Implementation Agreement) was subject to the rules of public law.
 - A contract between a public authority and a private party cannot remove the judicial review jurisdiction of the court, which exists to safeguard the public interest.

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Legitimate expectation

Recent tax cases

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Legitimate expectation (background)

- In a tax context, claim for judicial review on grounds of a breach of legitimate expectation requires:
 - taxpayer has expectation of particular treatment from HMRC as a result of HMRC's words or conduct (e.g. published guidance or specific ruling);
 - that expectation is legitimate; and
 - it would be unjust for HMRC to frustrate the claimant's expectation.
- Typical JR situation involves HMRC seeking to assess tax contrary to their guidance or a ruling previously given to a taxpayer.
- Tension between taxpayer's expectation and general expectation to be taxed in accordance with the law (and overriding public interest in that).
- Focus is often on the nature of the statement – must be "clear, unambiguous and devoid of relevant qualification" (ex p **MFK Underwriting Agencies [1989] STC 873**).
- Where taxpayer requests a clearance/ruling, he must "*have put all his cards face upwards on the table*".

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Legitimate expectation – recent cases

- **Vacation Rentals v HMRC [2018] UKUT 383**
 - Taxpayer success.
 - HMRC held to terms of Business Brief about VAT treatment of credit/debit card handling fees.
- **Aozora GMAC Investment Ltd [2019] EWCA Civ 1643**
 - Taxpayer loss.
 - HMRC not bound by opinion on a point of law expressed in manual (in context of application of double tax treaty).
 - High degree of unfairness required.
 - Level of reliance (including specialist advice) relevant (but not determinative).
- **Cobalt Data Centre 2 LLP (and others) [2019] UKUT 342**
 - Taxpayer success.
 - HMRC representation to industry body as to practice in relation to enterprise zone allowances could be relied on by investors.

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Legitimate expectation – key takeaways

- High threshold to succeed in a tax context.
- But it is possible.
- Recent decisions hard to reconcile in some respects
- Requires a close analysis of:
 - Context in which representation is made (eg published guidance vs specific clearance).
 - Nature of representation – eg opinion on a point of law vs way in which HMRC interpret uncertain terms or will exercise their discretion.
 - Level of reliance on the statement
 - Extent to which specialist advice taken

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Judicial review as an alternative means of appeal - tax

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Judicial review as an alternative means of appeal

- Recent years have seen an increase in HMRC powers, often with draconian consequences, with no right of appeal.
- For example:
 - Accelerated payment notices (APNs / PPNS):-
 - Require taxpayers to pay disputed tax upfront for certain tax appeals (broadly marketed avoidance schemes).
 - Designed to shift the economic burden of such disputes.
 - Follower notices:-
 - Apply where there is already judicial ruling “relevant” to the case at hand.
 - If taxpayer continues with appeal and is unsuccessful, then potentially subject to additional financial penalty (up to 50% of the tax).

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Recent cases (1)

- **Rowe and others [2018] STC 462**
 - JR of HMRC decision to issue PPN to a member of an Ingenious partnership.
 - Challenge ultimately unsuccessful.
 - But court found that HMRC officer needed to be positively satisfied that the scheme was ineffective (rather than just be of the view there was a dispute).
 - Not wrong for HMRC to adopt a general policy for issuing APNs/PPNs, provided sufficient provision made for exceptions.
 - Fact that taxpayer entered into scheme before APN legislation introduced did not matter.

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Recent cases (2)

- **Haworth [2019] STC 1063**
 - JR of follower notice to participant in a "Round the World" scheme.
 - Follower notice was quashed.
 - HMRC need a substantial degree of confidence that the precedent ruling **would** apply to the taxpayer's facts (not just that it would be more likely than not to do so).
 - CA said only intended for a limited class of cases.
 - HMRC misdirected themselves by (i) overstating the conclusions in the precedent ruling and (ii) not having a sufficient degree of certainty as to the outcome.

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