

PUBLIC LAW AND HUMAN RIGHTS UPDATE 2011

2011 was an exciting year for Monckton Chambers' public law and human rights team. This newsletter brings together some of the wide ranging cases Members of Chambers have recently been involved in that may be of interest. For further information, please don't hesitate to contact us.

NEW MEMBER OF CHAMBERS



We are delighted to welcome Eric Metcalfe to Chambers. Eric joins from Justice, where for more than 8 years he was director of human rights policy. In that time he managed its interventions in many of the leading human rights cases of the last decade, including cases before the House of Lords, UK Supreme Court, and the European Court of Human Rights.

THREE NEW SILKS

Three Members of Monckton Chambers were awarded silk this year: Paul Harris, Tim Ward and Daniel Beard. All three practice public law.

RECENT CASES

Yukos Oil Company v Russia (ECtHR): tax enforcement proceedings and property rights

The European Court of Human Rights has found in favour of the Applicant in the largest commercial dispute ever litigated before that Court - a \$98 billion (£62 bn) claim for compensation by the former Russian oil company, Yukos. The claim relating to unfair trial, the imposition of substantial taxes, and their enforcement, was lodged in 2004, but Yukos was dissolved in Russia as insolvent in 2007.

The Russian Government argued that there was no longer an extant applicant, so that the claim must fail. The Court recognised that if companies' ECHR claims failed when they were dissolved, their rights under the Convention would be worthless. It therefore ruled that Yukos could maintain its claim. Although the taxes imposed were lawful, and a political attack on Yukos was not established, the Court held that the crux of the case was the speed and inflexibility

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with which enforcement was imposed on Yukos, without considering the implications for its survival. These factors caused a violation of Yukos' property rights protected by Article 1 Protocol No 1. Pleadings on compensation were reserved.

Piers Gardner acted for Yukos

R (Bailey & ors) v Brent London Borough Council [2011] EWCA Civ 1586: *library closures and the Equality Act 2010*

Bailey was the first of a series of claims challenging library closures. Campaigners challenged the closure of half of the twelve libraries in the London Borough of Brent. They argued that the Council's approach to assessing need for library services in its area was in breach of the statutory duty to provide a comprehensive and efficient library service and that the Council had failed to comply with the 'due regard' equality duties under s. 149 of the Equality Act 2010. Ouseley J. dismissed the claim, finding that the Council had on the facts discharged its duties.

The Claimants appealed to the Court of Appeal, arguing, in particular, that the overrepresentation of the Asian community among library users in Brent gave rise to a risk of indirect discrimination which should have been investigated before a decision was taken to close 50% of the libraries in the Borough. The Court of Appeal accepted that it was necessary for consideration of the equality duty properly to inform the decision-making process before the ultimate decision was made and that the Judge may have gone too far in suggesting that the production of an equality impact assessment late in the process would suffice. However, the appeal was dismissed, the Court finding that the appropriate 'pool' for the purpose of identifying a risk of indirect discrimination was 'library users in Brent' and not 'the population of Brent'. On that reasoning, the fact that Asians in Brent were more likely than non-Asians to use libraries was irrelevant to the question of whether closing libraries would particularly disadvantage that part of the community.

The Court of Appeal's judgment contains some important statements on the correct approach to indirect discrimination under section 19 of the 2010 Act.

Gerry Facenna acted for the Claimant/Appellant

R (on the Application of Tottenham Hotspur) v The Olympic Park Legacy Committee and Ors: Olympic legacy and State aid

In a battle over the legacy of the 2012 Olympics, Tottenham and Leyton Orient challenged the terms upon which Newham and West Ham were given first preference in securing the rights to use the Olympic stadium. Apart from salacious allegations of impropriety, affairs and newspapers' investigative techniques, the heated dispute raised issues about public law and EU State Aid: when can public funds be used to develop sports facilities which will benefit football clubs which are major private undertakings; can proposals of loans amount to State Aid? In the end, the OPLC decided to re-run its competition and the 2012 legacy is still to be resolved.

Daniel Beard QC acted for the OPLC, Paul Harris QC and Alan Bates acted for DCMS & DCLG

R (Cart) v Upper Tribunal [2011] UKSC 28: Upper Tribunal and judicial review

The judgment of the UK Supreme Court in *Cart* concerned the amenability of decisions of the Upper Tribunal to judicial review following section 13(8) of the Tribunal Courts and Enforcement Act 2007 which had removed appeal rights in respect of a range of decisions by the Tribunal. In a unanimous decision, the Supreme Court held that although judicial review of decisions of statutory tribunals was 'a valuable safeguard of the rule of law', it was 'rational and proportionate' for the courts to restrict its availability in respect of unappealable Tribunal decisions using the same criteria that applied to second-tier appeals on a point of law, i.e. those cases which either raised 'some important point of principle or practice' or where there was 'some other compelling reason' for the court to hear the application.

Eric Metcalfe acted for JUSTICE who intervened in the appeal.

R(BT) v Secretary of State for Business Innovation and Skills [2011] EWHC 1021 (Admin): file sharing and the Digital Economy Act

The High Court rejected a challenge by BT and Talktalk to the online copyright infringement provisions of the Digital Economy Act 2010. The aim of the legislation is to introduce obligations on ISPs to take measures against broadband subscribers who allow their internet connections to be used for file sharing of copyright protected material including music, film and games. BT and TalkTalk alleged that the Act was invalid and unenforceable by reason that it was incompatible with a number of EU Directives concerning e-commerce, data protection and privacy, and the authorisation of the provision of telecommunications services. They also alleged that the Act was unlawful because it represented a disproportionate interference with the freedom to provide services. The challenge to the Act was dismissed by Kenneth Parker J,

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although a statutory instrument designed to allocate the costs of the scheme was required to be amended. An appeal by BT and TalkTalk on all but the proportionality ground was heard by the Court of Appeal in January 2012. Judgment is awaited.

Robert Palmer and Alan Bates acted for the Secretary of State.

Brennan v Health Professions Council [2011] EWHC 41 (Admin): "Bloodgate" and sufficiency of reasoning

In September 2010 the Health Professions Council ("HPC") decided that "Bloodgate" physiotherapist Steph Brennan was unfit to practice due to his involvement in faking blood injuries during rugby games. His name was struck off the register. The High Court found that the HPC decision was not adequately reasoned because it did not enable the informed reader to know what view was taken of the important planks in Mr Brennan's case. Such lack of reasoning was all the less satisfactory where the maximum sanction had been applied but the sanctioned party could not see how the proportionality balancing exercise had been carried out. On remittal, the HPC was persuaded, including with the submission of new evidence, that a proportionate sanction was in fact a 5 year caution, thus reviving Mr Brennan's career.

Paul Harris QC acted for the Applicant

R. (on the application of Sinclair Collis Ltd) v Secretary of State for Health [2011] EWCA Civ 437; ban on cigarette vending machines

Legislation prohibiting the sale of tobacco from cigarette vending machines was challenged by a subsidiary of Imperial Tobacco on grounds of incompatibility with Article 1 of the ECHR and the free movement of goods provisions of EU law. The majority of the Court of Appeal (Laws LJ dissenting) held that the legislation fell within the broad margin of appreciation accorded in the field of public health and was proportionate. The judgments provide a valuable discussion of the principles of the margin of appreciation and proportionality. The Claimants applied for interim relief to stay the coming into force of the legislation but were unsuccessful. The Supreme Court refused permission to appeal.

Nicholas Paines QC and Ian Rogers were instructed by the Secretary of State and are also instructed in the challenge to the prohibition on the display of tobacco in shops, which is due to be heard in February 2012: *R(Imperial Tobacco, BAT, Philip Morris and Gallaher) v Secretary of State for Health*. Ian Rogers also appeared for the UK in the challenge to the Norwegian display prohibition in *Philip Morris v Norway* (Case E-16/10, EFTA Court).

Nada v Switzerland (ECtHR): implementation of UN sanctions

The applicant challenges the implementation of sanctions which the UN Security Council has required to be imposed on persons supposedly connected to Al-Qaeda. The effect of the sanctions has been to confine the applicant to an Italian enclave measuring 1.7 sq. km. within the Swiss canton of Ticino for almost six years, during which he was never provided with either any specific allegations regarding his links with Al-Qaeda or any form of hearing in which those allegations could be rebutted. The ruling of the European Court's Grand Chamber is expected to clarify the relationship of a state's obligation to implement Security Council resolutions with its obligations under human rights treaties and is expected before the end of the year.

Jeremy McBride acted for the Applicant whilst Eric Metcalfe intervened on behalf of Justice.

R(Shoemith) v Ofsted, London Borough of Haringey and Secretary of State [2011] EWCA Civ 642:

urgent inspection arising out of "Baby P" case and procedural fairness

The Appellant was the former Director of Children's Services at the London Borough of Haringey. At first instance, her challenged to the fairness of an urgent inspection into children's services in the Borough which had found them to be "inadequate", and her subsequent dismissal from statutory office and employment. The Court of Appeal rejected her appeal against Ofsted, holding that there was no breach of natural justice arising out of Ofsted's failure to show the report to her in draft before submitting it to the Secretary of State. The subsequent action of the Secretary of State and Local Authority, carried out in reliance upon that report was nevertheless held to be unlawful.

Tim Ward QC and Ben Lask acted for Ofsted