A failed attempt to resurrect Cart judicial reviews (R (Oceana) v Upper Tribunal (Immigration and Asylum Chamber))

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Public Law analysis: The claimant had sought permission to appeal against a First-tier Tribunal (FTT) decision refusing her claim for leave to remain in the UK. She maintained that the FTT had wrongly recorded her oral evidence. Both the FTT and Upper Tribunal (UT) refused her permission to appeal after having checked the recording of her evidence. She was granted permission to claim judicial review of the UT's refusal on the basis that the claim raised important points of practice. However, the parties and the court had overlooked section 11A of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007). TCEA 2007, s 11A had been inserted by section 2 of the Judicial Review and Courts Act 2022. It came into force on 14 July 2022. TCEA 2007, s 11A ousts the supervisory jurisdiction of the High Court in judicial review proceedings, subject to a number of specific exceptions. It provides that a decision of the UT to refuse permission to appeal further is, subject to exceptions, final and not liable to be questioned or set aside in any other court. It thereby reversed the Supreme Court's decision in Cart v Upper Tribunal. Rather than proceed to a full substantive hearing, a preliminary issue trial was conducted to determine whether the court had jurisdiction to determine the claim. Mr Justice Saini rejected the claimant's attempts to argue that the TCEA 2007, s 11A ouster was somehow ineffective. He also carefully construed the 'jurisdictional gateways' in TCEA 2007, s 11A(4), being four circumstances in which such a claim for judicial review could proceed, finding that the claimant had not established the 'a fundamental breach of the principles of natural justice' gateway. Written by Jonathan Lewis, counsel at Monckton Chambers.

R (on the application of Oceana) v Upper Tribunal (Immigration and Asylum Chamber) [2023] EWHC 791 (Admin)

What are the practical implications of this case?

Given the careful consultation and research conducted by the Independent Review of Administrative Law, it would have been surprising had the Administrative Court found that the carefully drafted ouster provisions were somehow ineffective to achieve their very focussed objective. This decision confirms that it will be very difficult indeed to argue that they are somehow ineffective. It also highlights that the general jurisdictional gateway in TCEA 2007, s 11(4) of establishing that the UT has acted 'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice' establishes a 'substantial hurdle' (at para [33]). Practitioners should take note that that hurdle will generally only be overcome where 'a failure in process which is so grave as to rob the process of any legitimacy' (at para [33]). One therefore seeks permission to judicially review a UT permission decision at one's peril.

What was the background?

The claimant, a Philippines national, came to the UK as a student in 2008. In 2015, the Home Office determined that she had fraudulently used a proxy to complete an oral English language test and curtailed her leave with immediate effect. She did not challenge this finding but remained in the UK as an overstayer. In 2019, she applied for leave to remain on grounds of her private life. Her application was refused by the Secretary of State for the Home Department (the Interested Party). She appealed this refusal to the FTT.

In April 2022, her appeal was dismissed by the FTT. The FTT did not find her evidence credible. In particular, it did not find her explanation as to why she had taken her language test at a centre so far from her home credible. In May 2022, she applied for permission to appeal partly on the basis that there was plausible reason why she had sat the test where she did, namely that it was close to her existing school, and that the FTT had made an error of fact in failing accurately to record her oral

evidence to that effect. The application came before FTT Judge Scott, who listened to a recording of the evidence to check what the claimant had said in response to cross-examination which confirmed that the FTT had not made an error. Permission was refused on the papers.
The claimant unsuccessfully renewed her application for permission to the UT without asking for disclosure of the record of proceedings. The claimant then sought judicial review of that UT decision, arguing that the parties ought to have been provided with a copy of the audio recording by the UT and their comments sought and that failure to do so amounted to a breach of natural justice.

What did the court decide?

Saini J noted that, on 17 May 2022, the Senior President of the Tribunal issued a Practice Direction in respect of the Immigration and Asylum Chamber FTT directing how copies of the record of proceedings could be obtained (at para [19]).

He recorded (at para [23]) that the terms of the judge's grant of permission reflected the old *Cart v Upper Tribunal* [2011] UKSC 28, [2012] 1 AC 663 principles. Those principles, as codified in CPR 54.7A, and summarised in the Administrative Court Guide 2022 (the 'Guide') at para [9.7.2.1] are that the court will only grant permission to apply for judicial review if it considers that: there is an arguable case which has a reasonable prospect of success that both the decision of the UT refusing permission to appeal and the decision of the FTT against which permission to appeal was sought are wrong in law and either the claim raises an important point of principle or practice or there is some other compelling reason to hear the claim.

As of 14 July 2022, as summarised at para [9.7.7.2] of the Guide, the High Court's judicial review jurisdiction is ousted except so far as the decision involves or gives rise to any question as to whether:

•the UT has or had a valid application before it under TCEA 2007, s 11(4)(b)

•the UT is or was properly constituted for the purpose of dealing with the application, or

•the UT is acting or has acted:

- in bad faith,
- or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice

Saini J explained the genesis of TCEA 2007, s 11A (at paras [27]–[28]), noting that it was intended to overturn *Cart*. He held that giving it its plain and ordinary meaning, its effect is to abolish the right to judicially review a refusal of permission by the UT, save in the specific circumstances set out in TCEA 2007, s 11A(4) (at para [29]). To retain jurisdiction, the Administrative Court must make an objective assessment as to whether one or more of the circumstances set out in TCEA 2007, s 11A(4) arguably arise on the facts of the case. The necessity for such an assessment stems from the words 'involves or gives rise to any question' in TCEA 2007, s 11A(4). If, on an objective analysis of the case by the court, no such issue or question arguably arises then the court must decline jurisdiction. Saini J suggested that this analysis will ordinarily be undertaken at the permission stage. Additionally, the judge will need to be satisfied that the complaint itself has sufficient merit to meet the traditional JR 'arguability' threshold (at para [30]).

Saini J emphasised how Parliament has taken care to require a 'fundamental breach' of natural justice before the exception comes into play, saying that that was an important qualification (at para [33]). A court will need to consider the entire process, as opposed to focussing on the discrete aspect which is the subject of the claim. The fairness of a process has to be assessed 'holistically' (at para [33]). This exception is concerned with failures of process and not with disappointing outcomes (at para[34]). Saini J explained that Parliament has decided that an outcome may in fact be shown to be wrong but has determined that this is not a basis for allowing a judicial review challenge to be made.

On the facts, Saini J found no arguable procedural error of such severity as to amount to a fundamental breach of the principles of natural justice or fairness (at para [38]) given that the claimant clearly had had a reasonable opportunity to present her case. He found that FTT's approach of

listening to the recording was ‘scrupulously fair’ and there was no need for the parties to be permitted to make submissions as to what was said on the recording (at [38]).

Saini J gave short shrift to arguments seeking to undermine the efficacy of the TCEA 2007, s 11A ouster (at para [44] onwards). He noted how, in *Cart*, the Supreme Court expressly acknowledged the right of Parliament to oust or exclude judicial review with the use of clear language and said this was achieved by way of TCEA 2007, s 11A. He also noted that given the exceptions in TCEA 2007, s 11A(4), that section was not a full but only a partial ouster (at para [47]). He recorded the findings of the analysis conducted prior to the introduction of TCEA 2007, s 11A and concluded that Parliament decided that a more stringent exclusion was necessary (at para [49]).

Dealing with ouster clauses more generally, Saini J set out the following principles (at para [52]). The courts must always be the authoritative interpreters of all legislation including ouster clauses. Effect must be given to Parliament’s will as expressed in legislation. The common law supervisory jurisdiction of the High Court enjoys no immunity from these principles when clear legislative language is used, and Parliament has expressly confronted the issue of exclusion of judicial review, as was the case with TCEA 2007, s 11A.

Saini J rejected the claimant’s attempts to rely upon the fact that the Human Rights Act 1998 conferred on the High Court (and above) the power to make a declaration of incompatibility (at para [53]). He pointed out that when such a declaration is made the court is using a power which Parliament has given to it.

Case details:

- Court: King's Bench Division, Administrative Court (London)
- Judges: Mr Justice Saini
- Date of judgment: 4 April 2023

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