

Public Law Newsletter

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VOLUME

#3

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Telephone

020 7242 2523

Email

enquiries@hardwicke.co.uk

Practice Director

Amanda Illing

Senior Practice Manager

Daniel Kemp

Practice Manager

Elizabeth Boucher

Welcome to the third edition of our Public Law Newsletter – the first after the summer break. We hope you enjoy our new look! In this edition we update you on chambers news and include several articles which may be of interest to you. If you have any comments or suggestions for future editions please contact Marketing Manager Louise Poppelwell by email on louise.poppelwell@hardwicke.co.uk Please take a few minutes to look at our new website at www.hardwicke.co.uk

Chambers news

Hardwicke welcomes Amanda Illing who joined Chambers in July as Practice Director. Amanda heads the Practice Management Team which includes Daniel Kemp as Senior Practice Manager. Amanda says:

“I am delighted to have joined Hardwicke at such an exciting time in its development. The Public Law Team goes from strength to strength, and members of the team are involved in some interesting challenges to local authority and central government decisions across a wide spectrum of areas including education, social housing, community care and mental health. I am also delighted that Daniel Kemp has been appointed as the Senior Practice Manager to run the team, and together we look forward to using our combined experience and expertise to put our clients’ needs at the heart of our service.”

Re-organising schools – where are we now?

Some of the most complex decisions concern school organisation. Each year that passes the issues get more difficult. Once there was little choice: pupils were allocated to schools based on exams and where they lived. The move away from selection to comprehensives led to some important cases in the development of public law (eg the Tameside case where the authority had reversed a decision to abolish selection, AC [1977] 1014). This piece looks at material considerations in school organisation issues now.

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The difficulties are perhaps more pronounced now. First, the government is getting rid of what it calls “bog standard comprehensives” but if each school is truly different it is much more important which sort is opened or closed. There is probably more awareness and choice about faith schools, exam results and co-educational/ single sex education than previously.

Secondly, there are lots and lots of empty places. A report in 2007 found ¾ million empty school places. This is 12% of primary places and 7% of secondary places on average but with huge local variations. For example, one authority in London has 18% empty secondary places, others have next to none. The situation also changes quickly because of parental preference and population movement.

The starting point is relatively easy. The authority needs to identify the relevant legal basis for any decision and who the decision maker is and carry out lots of consultation. In theory these are technical matters with “right” answers and cause limited problems.

The real difficulty comes when the officer sits down to write the report to members. This involves identifying the relevant considerations. Government guidance is not a lot of help with this. It invites the authority to consider school standards, “geographical and social factors”, journey times and the effect on families in the community, amongst other things.

On top of this objectors might rely on factors like the assessment of population change and vacant places, legitimate expectations based on previous policies or statements made in the consultation and failing to consider government guidance or other ways to support or save a school. Particularly where changes would leave an area with all single sex or co-educational schools or with only faith or with no faith schools there might be challenges under the Human Rights Act. The effect on SEN provision must always be considered (*R (ota DP) v. Hertfordshire County Council* [2008] EWHC 3379). The statutory equality duties are very often relevant considerations (to give one example, from community care, *R (ota Chavda) v. Harrow LBC* [2007] 100 BMLR 27). Finally, there are particular issues for rural schools.

Challenges to the Adjudicator relate to decisions about the organisation of schools which will continue to exist. Challenges there have tended to be more practical. One looked at the failure to consider other ways to achieve a goal (the *Watford Grammar School* case, [2004] ELR 40), another at a failure to consider the disadvantages of the proposed new arrangements (the *Drayton Manor* case, [2009] ELR 127).

The list of relevant factors is of course long and the process of advising decision-makers difficult. It may reassure authorities that a Court has confirmed it might not grant relief for some minor failings in decision making where the school to be closed met government advice to close schools with 25% surplus places, at least 30 empty places and where standards were low compared to the rest of the authority (*R (ota McDougal) v. Liverpool City Council* [2009] EWHC 1821).

David Lawson

Judicial Review – More or Less

When courts judicially review decisions, what should the test for the lawfulness of the decision be? At one extreme, there is review for correctness – in other words, the court itself decides whether the decision is right or wrong. This is akin to an appeal. At the other end of the spectrum, there is great deference to the decision-maker and the decision will only be ultra vires if it is a ‘lunatic’ decision. In other words, the test is the strictest application of *Wednesbury* unreasonableness – the decision must be so perverse that no reasonable decision-maker could have reached it.

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Over the years, the courts have said that the Wednesbury standard can be a variable one so that the intensity of judicial review depends on the context. At least where fundamental human rights are affected, the courts apply “anxious scrutiny” to the decision. So a claimant does not need to meet the ‘lunatic’ threshold to succeed.

But what does “anxious scrutiny” mean in practice? What types of decisions attract it? Is it the same thing as proportionality? And is it merits review – traditionally the great ‘no-no’ of judicial review?

A number of recent decisions have visited these questions. Most of these are immigration cases – but developments in this area often spread to all areas of judicial review. Remember that the doctrine of legitimate expectation had its genesis in a series of immigration cases.

In *SSHD v QY(China)* [2009] EWCA Civ 680, Sedley LJ suggests that in some cases, anxious scrutiny means that the court can reach its own decision about the lawfulness of the challenged decision. In other words, correctness review. More recently, in *AS (Sri Lanka) v. SSHD* [2009] EWHC 1763 (Admin), Carnwath LJ queried what the oft-repeated term “anxious scrutiny” meant and observed that it could entail the court reconsidering the weight placed by the decision-maker on particular matters when justifying the decision under challenge. On this approach, Wednesbury unreasonableness seems to be proportionality by another name.

These cases confirm that English administrative law is long overdue a reconsideration of its fundamentals. In particular, courts need to get away from a binary approach to judicial review – correctness review or excessive deference.

The idea that there are just three broad grounds of judicial review - illegality, irrationality and procedural impropriety - is long out of date (even if it was ever true). Equally, the view that the grounds for judicial review have the same universal meaning in every area is also a fiction.

What is needed is a more sophisticated doctrine of deference and an acceptance that all of the grounds for judicial review incorporate variable standards. It is never as simple as saying that in some cases correctness is the test while in others it is “pure review for unreasonableness”. Judicial review always depends on the context. The challenge is to articulate when more intense scrutiny is required and when a lighter touch is called for.

Denis Edwards

Denis appeared for the Secretary of State for the Home Department in *AS (Sri Lanka) v. SSHD*.

DOLS in action

By Article 5(4) a person who is deprived of his liberty has the entitlement to take proceedings by which the lawfulness of his detention shall be decided “speedily” by the court and by 5(5) every person who has been detained in contravention of Article 5 shall have an enforceable right to compensation. An application by a person deprived of their liberty is to the Court of Protection.

The DOLS provision of the Mental Capacity Act 2005, came into force on 1 April 2009, in an attempt to address the issues arising from the decision of the Strasbourg Court in *HL v U.K.* (2004). A primary finding in *HL* was the failure in domestic law to provide for a procedure for challenging a deprivation of liberty and the DOLS were intended to resolve this deficiency.

The first decision on the additional safeguards have recently been considered by the Courts in *W Primary Care Trust v (1) TB an Adult by her Litigation Friend, the Official Solicitor (2) V (3) S Metropolitan B.C. (4) C & W Partnership NHS Foundation Trust (5) W Metropolitan Council* EWHC 1737 (Fam) (2009) 17/7/09. The primary care trust and the Official Solicitor sought a declaration that T was eligible to be deprived of her liberty pursuant to s4A Mental Capacity Act 2005. T had

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suffered from an acquired brain injury with an associated psychiatric disorder and a series of psychiatric treatments had failed. She was admitted to a care home registered under the Care Standards Act 2000 and authority was sought to detain her because she had clearly stated she did not wish to remain at the care home.

The Court of Protection was asked to determine whether the detention could be authorised under s16 or Schedule 1A Mental Capacity Act 2005, if it were established that there was sufficient evidence that it was in her best interests to do so. It was held that as she was not a “mental health patient”, the conditions for ineligibility in Schedule 1A Mental Capacity Act were not met in that case. Permission was given to report that case, despite the fact that no relief was granted, (as a result of TB having committed suicide) because of the lack of authority on the point.

This case is likely to be the first of a series of cases considering the new safeguards. It remains to be seen whether DOLS does meet the breach of Article 5 identified in *HL v UK*; it is certainly arguable that certain people who are detained within care homes cannot rely upon the DOLS protection because DOLS is restricted to certain care homes, while others fall outside the scope of the provisions.

Another interesting issue will be the approach of the courts to damages. The general approach has been to award relatively modest sums, in cases determined prior to the introduction of DOLS, see *KB and others v Mental Health Review Tribunal and Secretary of State for Health* [2002] EWHC 193 (Admin) and *Kolanis v UK* (2005) EHRR 555. It remains to be seen whether this approach continues post DOLS.

Kerry Bretherton

Toddler Noise - a cautionary tale

A timely reminder to those practitioners who become involved in drafting the terms of undertaking or indeed injunctions. In the recent decision of *Circle 33 Housing Trust Ltd v Kathirkmanathan* [2009] EWCA Civ 921, the court reiterated the importance of ensuring that the behaviour complained of, and the party accused of so doing, is precisely reflected in the wording of the undertaking.

This case concerned with a family living in the Chingford area whose children, aged 2 and 3 respectively, were said to be responsible for causing excessive noise and nuisance to the residents of the property located immediately underneath. Possession proceedings were initiated but were ultimately compromised by way of undertakings given by the father of the children in the following terms:

“...not to, whether by himself or by instructing or encouraging any other person: engage or threaten to engage in conduct capable of causing a nuisance or annoyance...”

Almost immediately complaint was made of continuing noise nuisance leading to committal proceedings. HHJ Mitchell sitting at Central London County Court heard 2 days of evidence from a number of witnesses and notwithstanding the absence of direct evidence to support an allegation that the Defendant was personally culpable, found him in breach of the undertaking; in all 70 separate allegations were proved. The Defendant was sentenced to 8 weeks imprisonment. Justifying his finding the learned judge described the undertaking as ‘somewhat clumsily worded but in my judgement it makes it perfectly clear that, as a tenant for these premises, the Defendant is responsible for ensuring that he does not cause noise to his neighbours.’

On appeal the court held that the undertaking did not cover ‘allowing’ or ‘permitting’ the activity complained of. The court further held that the language of the undertaking was not sufficient to make

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George Pulman QC	1971 (1989)
John Friel	1974
Stephen Lennard	1976
Barbara Hewson	1985
Karl King	1985
Deborah Hay	1991
Kerry Bretherton	1992
Arthur Moore	1992
Emily Formby	1993
Maggie Bloom	1994
Clive Rawlings	1994
Brendan Mullee	1996
Fiona Scolding	1996
Alison Meacher	1998
Nicola Muir	1998
Alastair Redpath-Stevens	1998
Andrew Lane	1999
Sarah Malik	1999
John Mc Kendrick	1999
David Lawson	2000
Denis Edwards	2002
Dean Underwood	2002
Sarah Venn	2002
Morayo Fagborun-Bennett	2004
Ajmal Azam	2006
Robin Jacobs	2006
Laura Tweedy	2007

the Defendant responsible for the actions of his children and therefore the judge had misdirected himself as to the effect of the undertaking. Consequently the appeal was allowed. Jacob LJ, emphasised that where the liberty of the person is involved, 'one cannot go by some woolly spirit of intendment of the language of the undertaking or injunction by the precise language used.'

You have all been warned.

Brendan Mullee

Update on Detention of Liberty

By Article 5(4) a person who is deprived of his liberty has the entitlement to take proceedings by which the lawfulness of his detention shall be decided "speedily" by the court and by 5(5) every person who has been detained in contravention of Article 5 shall have an enforceable right to compensation. An application by a person deprived of their liberty is to the Court of Protection.

In the light of HL v U.K. (2004) App No. 00045508/99, the "Bournewood" Judgment, additional safeguards have been introduced with the intention of avoiding breaches of Article 5 of the Convention. The DOLS provision of the Mental Capacity Act 2005, came into force on 1 April 2009 and have recently been considered by the Courts in W Primary Care Trust v (1) TB an Adult by her Litigation Friend, the Official Solicitor (2) V (3) S Metropolitan B.C. (4) C & W Partnership NHS Foundation Trust (5) W Metropolitan Council EWHC 1737 (Fam) (2009) 17/7/09. It was held that the conditions for ineligibility in Schedule 1A Mental Capacity Act were not met in that case. Permission was given to report that case, despite the fact that no relief was granted, (as a result of TB having hanged) because of the lack of authority on the point.

However, it remains to be seen how the additional safeguards operate in practice and whether they are sufficient to avoid breach of Article 5. Accordingly, it appears inevitable that there will be further scrutiny by the courts. This issue will be considered in greater detail at the seminar being held at Hardwicke Building on 23 September 2009.

Kerry Bretherton

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Hardwicke Building, New Square,
Lincoln's Inn, London WC2A 3SB
Telephone 020 7242 2523
Facsimile 020 7691 1234
DX LDE 393
Email enquires@hardwicke.co.uk
www.hardwicke.co.uk