Chapter 19: Tribunals

Judicial review of Upper Tribunal—stage at which second-tier appeals criteria fall to be applied: R (HS) v Upper Tribunal [2012] EWHC 3126 (Admin)

The claimant had unsuccessfully sought to have her leave to remain in the UK extended. Her appeal against that administrative decision was refused by the First-tier Tribunal. The claimant then unsuccessfully sought permission from the Upper Tribunal to appeal to the Upper Tribunal against the First-tier Tribunal’s decision. In the absence of a right of appeal against the Upper Tribunal’s refusal to grant permission to appeal to itself, the claimant instead sought judicial review of that refusal.

A question then arose concerning the application of the Supreme Court’s decision in R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663 (on which see our September 2011 update). In Cart, the Supreme Court held that decisions by the Upper Tribunal in respect of which no right of appeal lies can be judicially reviewed, but only if (i) the case raises an important point of principle or practice or (ii) there is some other compelling reason for judicial review. These criteria are known as the ‘second-tier appeals criteria’ because they are the criteria that generally operate to determine whether a decision or judgment that has already been appealed against can be the subject of a further appeal to a higher court. The question that arose in HS concerned the stage at which the second-tier appeals criteria had to be shown to be satisfied. The issue was set out by Charles J in the following terms (at [17]):

When this case was first argued before me, I raised the point whether, having regard to the decision in Cart, I was being invited at this substantive hearing of the application for judicial review to apply the second-tier appeals test or some other test. Of course, the answer to this point is dictated by whether in Cart the Supreme Court decided that on an application for judicial review the Administrative Court in determining whether or not to grant permission had to:

a. apply the second-tier appeals criteria, or

b. determine whether it was arguable that the second-tier appeals criteria would be established at the substantive hearing of the application for judicial review.

And, if (a) is correct the question arises: What grounds, test or criteria are to be applied by the Court in determining the substantive application for judicial review?

Charles J (at [31]) concluded

that in Cart the Supreme Court has decided that:

a. at the permission stage, the Court is to decide whether the second-tier appeals criteria are satisfied and not whether it is arguable that they will be satisfied at the substantive hearing, and so

b. if permission is granted on that basis (as with a second-tier appeal) the permission test is spent and is no longer the test to be applied at the substantive hearing.

Charles J acknowledged that some passages in Cart could be read as supporting the contrary conclusion, but said (at [35]) that they

are to be read in the context of the point that the arguments that were rejected advanced rival substantive tests whereas the middle course accepted adopted criteria that in the context of:
a. appeals, clearly provide a permission or filter test, and

b. the earlier cases discussed relating to judicial review also addressed the permission stage, or as Dyson LJ described it in *Wiles v SSC & Anr* [2010] EWCA Civ 258 at paragraph 47 the opening of the door to judicial review.

And, when this is done it seems to me that the thrust of the reasoning and conclusion of the Supreme Court is that the second-tier appeals criteria should be adopted and applied as the permission test to provide a proportionate limit to the availability of judicial review of excluded and so unappealable decision of the UT.

It followed, said Charles J (at [42]), that once the second-tier appeals criteria had been judged to be satisfied at the permission stage, his task at the substantive hearing was

to consider whether the Decision of the UT refusing permission to appeal, or the decision making process relating to it, are flawed by applying the well established grounds for judicial review. In doing so, I accept the point raised by the [Secretary of State] that a factor to be taken into account is that a result of the legislative scheme is that the UT has specialist expertise in this jurisdiction.

In a postscript to his judgment, Charles J said:

[70] When this judgment was circulated in draft it was pointed out to me that the 59th Update to the Civil Procedure Rules which came into force on 1 October 2012 (and so after the hearings before me) introduce a procedure in respect of applications for judicial review of non-appealable decisions of the Upper Tribunal following Cart. Rule 54.7A(7) provides:

"(7) That the court will give permission to proceed only if it considers –

(a) that there is an arguable case, which has a reasonable prospect of success, that both the decision of the Upper Tribunal refusing permission to appeal and the decision of the First Tier Tribunal against which permission to appeal was sought are wrong in law; and

(b) that either -

(i) the claim raises an important point of principle or practice; or

(ii) there is some compelling reason to hear it."

[71] I am relieved that my interpretation of that rule is that it complies with the conclusions I have expressed above, because sub-rules (7) (a) and (b) are conjunctive, and (b) provides that the second-tier appeals criteria is to be applied at the permission stage to the arguable error(s) of law mentioned in (a).

[72] Further, in my view the language and effect of the rule supports the conclusion that, as with permission to appeal, once the second-tier appeals criteria have been satisfied at the permission stage, they and thus sub-rule (7)(b) are spent, and at the hearing for which permission has been given the judicial review court considers the arguable error(s) of law mentioned in (7)(a).

[73] So, for the future this rule renders much of my discussion triggered by the different approaches taken to Cart of only historic interest.

**Abolition of Administrative Justice and Tribunals Council**

We noted in our January 2012 update that the Administrative Justice and Tribunals Council (AJTC) was to be abolished under powers conferred upon Ministers by the Public Bodies Act 2011 as part of
the Government’s ‘bonfire of the quangos’. In December 2012, the Government laid before Parliament the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, the effect of which would be to abolish the AJTC. In a report published in January 2013 (Justice Committee, Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013 (HC 927 2012-13)) the House of Commons Justice Committee noted that:

6. The parliamentary procedure applicable to draft orders such as this one is set out in section 11 of the 2011 Act. The default procedure is that each House may approve such draft orders after the expiry of a 40-day period from their laying, and the orders may then be made by a Minister. However, within a 30-day period from laying either House may resolve, or a committee of either House charged with reporting on a draft order may recommend, that the 40-day period which must elapse before the order may be approved should be extended to 60 days.

7. We consider that the proposal to abolish the AJTC is a significant one and we wish to undertake further scrutiny of this draft order by putting certain questions to the Ministry and to other interested parties on matters which have been raised in the public and parliamentary discussion of the proposal. We would not be able to undertake this scrutiny effectively and report to the House before the expiry of the 40-day period after laying, and consider that the period should be extended. We therefore make the following recommendation:

That the procedure in subsections (6) to (9) of section 11 of the Public Bodies Act 2011 should apply to the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013, which was laid before this House on 18 December 2012.

The effect of that recommendation (subject to the possibility of its being overridden by a resolution of the House of Commons) is to extend to 60 days to period available for scrutiny. Following the making of that recommendation, in January 2013 the Justice Committee issued a call for evidence. It is seeking views on whether:

- The proposed arrangements for independent overview of the administrative justice and tribunals system, including the role and membership of the Administrative Justice Advisory Group, are satisfactory;
- Sufficient resources and expertise will be available within the Ministry of Justice to carry out continuing functions undertaken hitherto by the AJTC;
- The Government’s estimate of cost savings arising from closing the AJTC is likely to be accurate.