



22 June 2011

PRESS SUMMARY

R (on the application of Cart) (Appellant) v The Upper Tribunal (Respondent)

On appeal from the Court of Appeal (Civil Division) [2010] EWCA Civ 859

R (on the application of MR (Pakistan)) (FC) (Appellant) v The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department (Respondent)

On appeal from the High Court [2010] EWHC 3558 (Admin)

JUSTICES: Lord Phillips (President), Lord Hope (Deputy President), Lord Rodger, Lady Hale, Lord Brown, Lord Clarke and Lord Dyson

BACKGROUND TO THE APPEAL

This judgment deals with two English cases, while a separate judgment deals with the Scottish case *Eba v Advocate General for Scotland*. The issue common to all three is the scope for judicial review by the High Court or Court of Session of unappealable decisions of the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007 (the “2007 Act”). In all of them the claimant failed in an appeal to the First-tier Tribunal and was refused permission to appeal to the Upper Tribunal against that decision both by the First-tier Tribunal and by the Upper Tribunal. In all three the claimant seeks a judicial review of the refusal of permission to appeal by the Upper Tribunal.

The tribunal systems with which the three cases are concerned, both before and after their restructuring in the 2007 Act, are common to both parts of the United Kingdom, and in many contexts also to Northern Ireland. Part 1 of the 2007 Act established a new unified tribunal structure, which accommodates a diversity of jurisdictions. There is a right of appeal to the Court of Appeal, in England and Wales or Northern Ireland, or the Court of Session in Scotland, “on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision” (s 13(1), (2)). Excluded decisions include any decision of the Upper Tribunal on an application for permission or leave to appeal (s 13(8)(c)).

Mr Cart appealed to the Social Security and Child Support Tribunal (whose jurisdiction has since been taken over by the First-tier Tribunal) against the refusal of the Child Support Agency to revise a variation in the level of child maintenance to be paid to his ex-wife. His appeal was dismissed. He applied for permission to appeal to the Child Support Commissioners (whose functions were subsequently taken over by the Administrative Appeals Chamber of the Upper Tribunal). Commissioner Jacobs gave him permission to appeal on three grounds but refused him permission to appeal on a fourth. The Upper Tribunal dismissed his appeal on the first three grounds and declined permission to reopen the fourth. Mr Cart sought judicial review of the Upper Tribunal’s refusal of permission to appeal on the fourth point. Determining the amenability of the Upper Tribunal to judicial review as a preliminary issue, the Divisional Court dismissed his claim for judicial review, holding that this was only available in exceptional circumstances. The Court of Appeal dismissed his appeal, reaching the same result but by a different route.

MR is a native of Pakistan whose application for asylum was refused. His appeal to the Immigration and Asylum chamber of the First-tier Tribunal was dismissed. Both the First-tier Tribunal and then the

Upper Tribunal refused his application for permission to appeal to the Upper Tribunal. MR sought judicial review of the Upper Tribunal's refusal of permission to appeal. Sullivan LJ dismissed the judicial review claim in accordance with the decision of the Court of Appeal in *Cart*. He granted a certificate so that the appeal against his decision could "leap-frog" over the Court of Appeal and be heard by this Court together with the appeals in *Cart* and *Eba*.

JUDGMENT

The Supreme Court unanimously dismisses the appeals but on a different basis from that adopted in the Divisional Court and the Court of Appeal. It decides that permission for judicial review should only be granted where the criteria for a second-tier appeal apply, that is where there is an important point of principle or practice or some other compelling reason to review the case. Lady Hale gives the leading judgment.

REASONS FOR THE JUDGMENT

The scope of judicial review is an artefact of the common law whose object is to maintain the rule of law. The question is, what machinery is necessary and proportionate to keep mistakes of law to a minimum? What level of independent scrutiny outside the tribunal structure is required by the rule of law? [37], [51]

There are three possible approaches which the Court could take. First, that the scope of judicial review should be restricted to the exceptional circumstances identified in the Divisional Court and Court of Appeal, namely pre-*Anisminic* excess of jurisdiction and the denial of fundamental justice (and possibly other exceptional circumstances). Second, that unrestricted judicial review should be available. Third, that judicial review should be limited to the grounds upon which permission to make a second-tier appeal to the Court of Appeal would be granted, namely (a) the proposed appeal would raise some important point of principle or practice, or (b) there is some other compelling reason for the court to hear the appeal. [38]

While the introduction of the new system may justify a more restricted approach, the "exceptional circumstances" approach is too narrow, leaving the possibility that serious errors of law affecting large numbers of people will go uncorrected. As regards the second approach, it is well known that the High Court and Court of Appeal were overwhelmed with judicial review applications in immigration and asylum cases until the introduction of statutory reviews. The mere fact that something has been taken for granted without causing practical problems in the social security context until now does not mean that it should be taken for granted forever. [44], [47], [51]

The adoption of the second-tier appeals criteria would be a rational and proportionate restriction upon the availability of judicial review of the refusal by the Upper Tribunal of permission to appeal to itself. It would recognise that the new and in many ways enhanced tribunal structure deserves a more restrained approach to judicial review than has previously been the case, while ensuring that important errors can still be corrected. It is a test which the courts are now very used to applying. It is capable of encompassing both the important point of principle affecting large numbers of similar claims and the compelling reasons presented by the extremity of the consequences for the individual. There is clearly nothing in Mr *Cart* or MR's cases to bring them within the second-tier appeal criteria. [57], [59], [128], [130], [131], [133]

Per Lord Phillips. Where statute provides a structure under which a superior court or tribunal reviews decisions of an inferior court or tribunal, common law judicial review should be restricted so as to ensure, in the interest of making the best use of limited judicial resources, that this does not result in a duplication of judicial process that cannot be justified by the demands of the rule of law. [89]

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for that decision. The full opinion of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html