22 June 2011

PRESS SUMMARY

Eba (Respondent) v Advocate General for Scotland (Appellant) (Scotland) [2011] UKSC 29
On appeal from [2010] CSIH 78

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

BACKGROUND TO THE APPEALS

The issue in this appeal is the scope of the remedy of judicial review in the Court of Session of decisions of the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007 ('the 2007 Act').

Ms Eba's claim for disability living allowance was refused by the Department of Work and Pensions on 1 February 2008. Her appeal against this decision to the First Tier Social Entitlement Chamber was dismissed. She was refused permission to bring a further appeal to the Upper Tribunal by a judge of the Upper Tribunal. There was no right of appeal from that decision under the 2007 Act. Ms Eba therefore sought to bring proceedings for judicial review.

Her claim for judicial review was dismissed by the Lord Ordinary (Lord Glennie) on 31 March 2010. The First Division of the Court of Session, however, allowed a reclaiming motion, holding that the decision of the Upper Tribunal was amenable to judicial review under the supervisory jurisdiction of the Court of Session and that the grounds on which it would be reviewed were not subject to any limitation on policy or discretionary grounds.

The Advocate General for Scotland appealed to the Supreme Court. The appeal was heard with appeals in two English cases raising the same issue, *R (Cart) v Upper Tribunal* and *MR (Pakistan) v Upper Tribunal.*

JUDGMENT

The Supreme Court unanimously dismisses the appeal and affirms the interlocutor of the Inner House of the Court of Session, although for different reasons. It holds that unappealable decisions of the Upper Tribunal are amenable to judicial review in cases which raise some important point of principle or practice or some other compelling reason to be heard. Ms Eba's case should be remitted by the Inner House to the Lord Ordinary to examine the question of whether she has sufficient grounds for her claim, applying this approach. Lord Hope gives the judgment of the court.

REASONS FOR THE JUDGMENT

- The issue in the appeal lay at the heart of the relationship between the Court of Session and the new system for specialist tribunals created by the 2007 Act. On the one hand was the rule of law, which gave the Court of Session power to correct excesses or abuses of the power or jurisdiction conferred on a decision maker by the system of judicial review; on the other was the interest in achieving finality at the tribunal level in the delivery of administrative justice [**8**].

- Although there are differences in judicial control of administrative actions in Scotland, there is in principle no difference between the law of England and Wales and Scots law as to the substantive grounds on which a decision by a tribunal which acts within its jurisdiction may be open to review [**34**].

- The potential approaches in relation to unappealable decisions of the Upper Tribunal in England and Wales were examined in the judgments in the linked appeals in *Cart* and *MR(Pakistan)*. The Supreme Court in those appeals has held that the adoption of the criteria for the grant of permission to bring second-tier appeals provided by the 2007 Act would be a rational and proportionate restriction on the availability of judicial review while guarding against the risk that errors of law may slip through the system [**37**].

- The outcome of those appeals, by overturning the restrictive approach of the Court of Appeal in *Cart*, has made it much easier for the Scots approach to find common ground with that now being taken in England and Wales. The issue is not one about access to the remedy, which will remain available to the citizen as of right, or the purpose for which the supervising jurisdiction may be exercised, but one of how best to tailor the scope of the remedy according to the nature and expertise of the Upper Tribunal and the subject matter of the decisions that have been entrusted to it by Parliament [**44**].

- Two factors already established in Scots law support the conclusion that Scots law should now align itself with the position in English law. The first is that the court should be slow to interfere with decisions that lie within the expertise of the specialist tribunals. The second is the fact that the limitation on the scope for second appeals in the 2007 Act has been reproduced in the Rules of the Court of Session and it would be inconsistent with the intention behind that rule to provide a wider opportunity for the decisions of the Upper Tribunal to refuse permission to appeal to itself to be reconsidered by way of judicial review [**47**]. It will be for the Court of Session to give such further guidance as may be needed as to how this analogy with the second appeals criteria should be applied in practice, but ideally the Lord Ordinary should give consideration of whether the criteria are arguably met at the stage of the first order [**49**].

- There is no good reason to take a different approach in the application of the common law principle of restraint in cases relating to other Scottish tribunals outside the 2007 Act, although it does not arise for decision in the present appeal [**51**].

References in square brackets are to paragraphs in the judgment

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