Quashing a decision on the basis of material error of fact

In *R (March) v Secretary of State for Health* [2010] EWHC 765 (Admin), Mr Justice Holman in the High Court quashed on the grounds of material error of fact a decision by the Secretary of State concerning the level of *ex gratia* payments made to NHS patients treated with contaminated blood. The case is significant because it further demonstrates that material error of fact is now a distinct ground of challenge in judicial review proceedings and shows how this will be applied by the courts in appropriate circumstances to quash public authorities' decisions.

**Key points**

- The circumstances in which the courts could quash decisions by public authorities on the grounds of mistake of fact have historically been uncertain, and the instances in which they do so remain rare.

- In a 2004 decision, the Court of Appeal clarified the position by making clear that judicial intervention on the grounds of mistake of fact would be possible in principle in any type of case, subject to the satisfaction of certain clearly specified conditions (*E v Secretary of State for the Home Department* [2004] EWCA Civ 49 ("E")).

- The *March* decision demonstrates the courts' willingness to intervene on the grounds of mistake of fact in cases of any type, provided the relevant conditions are met, namely that:
  - there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter;
  - the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable;
  - the appellant (or his advisors) must not have been responsible for the mistake; and
  - the mistake must have played a material (though not necessarily decisive) part in the tribunal's reasoning.

**The Secretary of State for Health's decision**

The government established a scheme to provide payments to NHS patients who had become infected with HIV or hepatitis C from contaminated blood products. In February 2009, an independent, non-statutory inquiry issued a report recommending that payments under a compensation scheme for contaminated blood supplied to NHS patients be increased to match those made under the equivalent scheme in Ireland. Whilst the government Minister increased some payments to affected patients, it rejected the independent inquiry's recommendation that payments should be at least equivalent for all patients to...
those payable in Ireland. The Minister explained, first in response to a question in the House of Commons and then later in a debate in Westminster Hall, the reason for that decision on the basis that payments under the Irish scheme were set at a higher level to acknowledge the Irish blood transfusion service's culpability, whereas the British blood transfusion service had not been found to be at fault.

The High Court's review of the Secretary of State's decision

Mr Andrew March challenged this decision in the High Court. He submitted that the Minister had been mistaken in her belief that payments were greater in Ireland because the Irish blood transfusion service had been found to be at fault. In particular, the Claimant demonstrated that the decision in Ireland as to the level of payments predated when the first independent tribunal in Ireland had found failures of responsibility by the Irish government, and therefore that decision could not have been as a result of any finding of fault.

In E v Secretary of State for the Home Department [2004] EWCA the Court of Appeal set out criteria that must be satisfied to establish a mistake of fact (see Herbert Smith’s e-bulletin, "Challenging a decision for mistake of fact", 19 November 2009). Whilst the court did not refer to the decision or the test in E, it laid out a test which is very similar, namely that a public law decision may be quashed if the published reasons reveal a material error of fact and that in order to establish this, the claimant must demonstrate that

i. there is an error of fact; and
ii. it was material and that a different decision might have been made but for the error.

The Court also considered that different weight should be placed on Ministerial statements depending on the context. The first statement by the Minister was a spontaneous oral answer to an oral question and as such the Court declined to attach any significance to this. The second statement, however, was in a topic specific debate and the Minister could reasonably be expected to have been prepared and briefed for this.

In assessing whether the Minister's decision had in fact been based on a material error, the court reviewed evidence as to the timing of the decision in Ireland. Whilst it acknowledged that the evidence was "quite complex", the court held that certain key points emerged that showed that the Minister was mistaken in her understanding that payments made under the Irish scheme were greater due to findings of fault on the part of the Irish blood transfusion service by an independent inquiry. Accordingly, the court quashed the Secretary of State's decision on the ground of material mistake of fact.

Comments

Like the E and Connolly (see Herbert Smith's e-bulletin regarding Connolly & Havering LBC v Secretary of State for Communities & Local Government [2009] EWCA Civ 1059, "Challenging a decision for mistake of fact", 19 November 2009) decisions which preceded it, the March case illustrates how the courts will approach reviewing administrative decisions on grounds of material error, and demonstrates how this ground is now readily accepted as a separate ground for judicial review.

This decision does though highlight that the courts remain more willing to intervene in circumstances where the facts in question are clear-cut (even if they are quite complex in nature), like in March. Whilst the court in March did not expressly refer to the requirement set out in E that the error in question concern facts which are clearly defined and objectively ascertainable, the court clearly viewed the government's misunderstanding as demonstrably wrong. The courts will be less willing to quash decisions on the basis of material error in cases where the facts at issue are not clear.

Finally, the fact that only one reason was given by the government for its decision in this case made it more vulnerable to a successful challenge on the basis of material error of fact. This case therefore shows the importance for
public authorities, when providing reasons for their decisions, to ensure that these are as accurate and comprehensive as possible.

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