R (Cart) v Upper Tribunal - judicial review of the Upper Tribunal's unappealable decisions

Key Points

- The Supreme Court has recently given judgment on three joined cases which shared one important legal issue in common: the extent to which unappealable decisions of the Upper Tribunal (UT) (including a refusal of permission to appeal) could be challenged by way of judicial review by the High Court (in England) or Court of Session (in Scotland).

- The Supreme Court unanimously held that judicial review should be available only where a case raises an important point of practice or principle, or there is some other compelling reason why the judicial review should be heard.

- The Court of Appeal had been wrong to apply the stricter test: that judicial review of such decisions was only available where the UT decides a case that it had no authority to decide, or where the right to a fair hearing has been denied.

- This ruling is significant because it provides a definitive judicial answer to the availability of judicial review in this context.

Background

The way in which the case of R (Cart) v Upper Tribunal has proceeded through the courts was set out in our e-bulletin on the Court of Appeal’s judgment, which can be found here. On appeal to the Supreme Court the case was heard at a single hearing together with one other English case (brought by MR following the refusal of his asylum application) and a Scottish case (Eba, which like Cart was a social security case). This bulletin focuses on the position in England and Wales.

The three cases all raised the same issue: whether, and if so in what circumstances, a non-appealable decision of the UT (such as a refusal of permission to appeal to itself), could be challenged by way of judicial review. The reason why the issue focuses on unappealable decisions is that judicial review is a remedy of last resort, and will be refused where an alternative remedy (such as an appeal) is available.
The UT

The UT derives its powers from the Tribunals Courts and Enforcement Act 2007 (TCEA). The TCEA effected a major reorganisation of statutory tribunals in the United Kingdom by establishing a unified, two-tier tribunal system to replace a wide range of tribunals that existed prior to the TCEA coming into force. In its judgment the Supreme Court held that it would be "completely inconsistent" with the new tribunal structure established by TCEA to distinguish between the various tribunals now gathered within that structure when considering the scope of judicial review – one test was to apply to the UT as a whole.

No statutory ouster of judicial review

A key question for the Supreme Court concerned the status that Parliament intended the UT to have when it enacted the TCEA. The Court held that the UT was a statutory tribunal of limited jurisdiction, such that the High Court (whose jurisdiction is unlimited) can review its decisions when it makes an error of law. This follows the consistent approach taken by the courts that clear words are required to exclude judicial review. Since the TCEA contains no such clear expression of Parliament's intention to exclude judicial review, it is, in principle, available to protect the rule of law. However, it did not necessarily follow that judicial review was available in all circumstances. The Supreme Court had to decide what test was necessary and proportionate, such that errors of law could be kept to a minimum, whilst recognising the High Court's limited resources.

What test should apply?

Lady Hale, giving the leading judgment of the Supreme Court, set out the three possible answers, as follows:

1. that, following the Court of Appeal, judicial review should be available only in exceptional circumstances, or if a court has ruled outside of its jurisdiction;
2. that judicial review of unappealable UT decisions should be unrestricted;
3. that the second-tier appeal criteria should apply, whereby decisions can be amenable to judicial review if the case concerns an important point of practice or principle of law; or if there is some other compelling reason for the judicial review to be heard.

The decision: the second-tier appeal criteria to be applied

The second-tier appeal criteria was the Supreme Court's preferred option, representing a proportionate middle ground. The Court recognised the need for UT decisions to be scrutinised where necessary by the High Court, thereby protecting the rule of law. However, restricted judicial review was necessary and appropriate in view of the protections against legal errors that were built into the new tribunals structure, and considerations of proportionality and judicial resources.

Commentary

The Supreme Court rejected the "exceptional circumstances" test approved by the Court of Appeal on the basis that the TCEA did not establish the UT as the final arbiter of the law, and for that reason it should not be allowed to make serious errors of law within its jurisdiction. The fact that the UT was a superior court of record (empowered to set precedent) simply meant that such errors had the potential to affect large numbers of people if they were followed in subsequent cases. The re-introduction of artificial and overly technical legal distinctions into the test for when such decisions should be amenable to judicial review would do little to help ensure that such errors of law were corrected.
The Supreme Court also rejected the prospect of unrestricted judicial review. It recognised that the TCEA had not ousted the High Court's jurisdiction. It also recognised that courts have for a long time adopted policies of judicial restraint when deciding whether to review the decisions of specialist tribunals (for example the "anxious scrutiny" required in asylum cases), which could in theory be deployed to restrict unmeritorious judicial reviews.

However, it was accepted that the TCEA had brought about meaningful changes to the tribunal system which justified a reappraisal of the amenability of its non-appealable decisions to judicial review. The status, nature and role of the UT within the new statutory scheme for tribunals, together with its experienced and qualified membership, meant that unrestricted judicial review was not justified. Lord Phillips in particular was firmly of the view that even where the due administration of justice is at stake, supervision of statutory tribunals must be proportionate. Judicial resources are limited. The UT's refusal of permission will necessarily follow on from consideration of the case by the First-tier Tribunal (both in ruling on the case originally and again when deciding whether to grant permission for an appeal). This meant that unrestricted judicial review would result in a duplication of judicial process that cannot be justified by the demands of the rule of law.

The practical effect of the Supreme Court's judgment is illustrated by the fact that it has already been applied by the Court of Appeal in the case of R (Kuteh) v Upper Tribunal Administrative Appeals Chambers & Secretary of State for Education (QBD 8/7/2011).

**R (Cart) v Upper Tribunal (2011) UKSC 28**

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