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FTB Public Law Group

Public Law Webinar: policy-related litigation

Michael Rhimes

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4 May 2023

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Overview

- **The nuts and bolts of policy and policy challenges** (Michael Rhimes)

  - ***A.*** Policy: history and context
  - ***B.*** The targets of policy challenges
  - ***C.*** What makes a policy unlawful?

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A. Policy: some context

- Rise of administrative state/discretionary judgements for decision-makers.
- Flexibility in the decision-making process vs predictability *Ex p. Hamble Fisheries (Offshore) Ltd* [1995] 2 All E.R. 714 at 722 (Sedley J)
- Traditional 'wariness' of policy? *Tinkler* (1858) 27 LJ Ch. 342 (Tucker LJ):
  - "these Defendants [have] very extensive [statutory] powers" and "it is their bounden duty to keep strictly within those powers, and not to be guided by any fancied view of the spirit of the Act which confers them"
- Tends to recognize the value of policy, appropriately applied: *Alvi* [2012] UKSC 33*:* ¶111-112 "In recent decades there has been a marked tendency of government to favour predictability over flexibility"; ¶42

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A. Policy: some context

Policy may be required by statute:

- *Many decisions in similar area/assist in making representations* E.g. LGFA 1992, s. 13A (scheme for council tax reductions)
- *Assist decision-makers in new area of law*, E.g. Stalking Protection Act 2019, s. 12

- Indeed, policy can be required by "rule of law" or Human Rights Act 1998, Sch. 1: *WL* [2011] UKSC 12*,* ¶34, see e.g. *Purdy* [2010] 1 AC 345 (policy on prosecution for assisting suicide)

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B. the "targets" of JR

- Broad scope for challenges, not just formal statements of policy
  - (1) Circular/Letters: *British Pregnancy Advisory Service* [2020] EWCA Civ 355. ¶4 (meaning of '24 weeks')
  - (2) Practices: *Ex p. Shaw* [1987] Q.B. 640 (Magistrates' Listing practice)
  - (3) Oral instructions: "*GCHQ*" [1985] AC 375, 418CD
  - (4) Administrative practices *R (S)* [2016] 1 WLR 4733 (complex application form) (see *A [2021] UKSC 37* ¶71)

- Failure to publish guidance (*McMorn* [2015] EWHC 3297 (Admin), ¶150)
  - *K* [2023] EWHC 233 (Admin) (unlawful to fail to publish internal policy (which was an "important statement") on when to "waive"UC overpayments), ¶112

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B. Policy challenges

- Three general kinds:
  - (1) Fettering of discretion (i.e. DM too strict in application)
    - Not necessary for policy to state there may be exceptions: *West Berkshire* [2016] EWCA Civ 441, ¶¶17-21
    - See *Maher* [2023] EWHC 34 (Admin), ¶¶92-94 (FTT refusal to give reasons)
  - (2) Failure to apply policy (e.g. DM misunderstood/did not apply policy)
  - (3) Challenge to policy itself.

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C. When is a policy unlawful?

- Policy irrational/failed to take into account material consideration
  - COVID policy on transfer to care homes failed to consider possibility of asymptomatic transmission *Gardner* [2022] EWHC 967 (Admin), ¶293 (see ¶270 and ¶278)
  - But, typically, a broad margin of discretion.
- Policy *itself* is unlawful? *A* [2021] UKSC 37 and *BF* [2021] UKSC 38

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Policy itself as unlawful: *A* [2021] UKSC 37 (1)

- Child Sex Offender Disclosure Scheme ("CSOD").
- Divisional Court in 2012 held unlawful, no adequate provision for consultation.
- Guidance updated. Claimant challenged as there was significant risk of violation of Article 8 rights, as policy not sufficiently precise re consultation. ¶23
- Key point: *Gillick* sets out the test to be applied ¶38 (see also ¶54*ff*).

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Policy itself as unlawful: *A* [2021] UKSC 37 (2)

(1) How much detail needs to be given in the policy?

- In *Gillick* [1986] AC 112, the guidance recognised exceptional cases (determined by clinical judgement) to give contraception without informing a guardian. That was lawful even though not "like a textbook or a judgment" ¶32. *Gillick* sets out the test to be applied ¶38
- When a body adopts a policy, it may decide the extent of detail. Justified because of (i) risk of disincentive to public bodies adopting policies and (ii) courts drawn into hypothetical disputes ¶40

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Policy itself as unlawful: *A* [2021] UKSC 37 (3)

(2) What is the basis for intervention?

- Requires positive encouragement to break the law ¶33. "permit must in this context mean something like sanction, i.e. positively approve, not merely that a course of action is not forbidden" ¶34.
- The mere fact policy might lead to breach of law is not enough: ¶48. The purpose of policy is not to guide against all risk of illegality.
- On the facts, no breach. CSOD would not "inevitably operate incompatibly with the appellant's rights" ¶78 (and ¶42)

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Policy itself as unlawful: *A* [2021] UKSC 37 (4)

Three types of cases where a policy would be unlawful: ¶46

(1) Incorrect statement of law, induce a breach of legal duty (*Gillick,* but not unlawful);

(2) Duty to promulgate policy, but misstates the legal position;

(3) No duty to promulgate, but presents a misleading picture of the legal position (e.g. *Letts* [2015] 1 WLR 4497 policy did not identify a category of case where legal aid for inquest might be required)

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A: Some practical points

- (1) Compare (1) what does the law require and (2) what does the policy say a person should do. If they are inconsistent, the policy is unlawful: ¶41 (see *BF* ¶51). Not a question of statistical probability ¶65
- (2) No duty to go into full detail about how a discretion should be exercised in each case. Can simply identify broad categories of case which call for more detailed consideration, e.g. *Letts.*
- (3) Unlawful *treatment* vs unlawful *policy* ¶64. A policy may well be lawful, but lead to unlawful decisions. Proper course is to challenge that decision (not the policy).

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Duty to Follow Policy

Kate Olley

4th May 2023

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Policy Challenges: General Points

No power (statutory/common law/prerogative) now inherently unreviewable

Judicial reserve due to constitutional status-

- Separation of powers- social and economic policy for the legislature and executive- weighing of utilitarian calculations
- Some decisions not ideally justiciable/amenable
- Matters of preference vs objective criteria
- Matters in which court lacks expertise- specialist knowledge/risk assessment (eg national security)
- Where broad discretion- polycentric decisions (eg allocative decisions- scarce resources- pulling one thread → other compensating adjustments)- but representation of interests?

Interference with merits - parallel

But- despite reserve- able and obliged to require decisions to be within scope of legal power/duty, and observance of procedural fairness-

- Decisions must be reasoned and justified- scrutiny of quality of reasoning, justification of assertions

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Mandalia v Secretary of State for the Home Department [2015] UKSC 59

Instructions to caseworkers processing applications- evidential flexibility- benefit of the doubt in uncertainty- HOPO failed to draw to Tribunal judge's attention

Lord Wilson:

- "…the management of this type of immigration, in principle highly valuable for the UK, is a profound social challenge, of which the complexities are beyond the understanding of the courts; and, by not exercising its right to disapprove Part 6A of the rules, Parliament has indorsed the Secretary of State's considered opinion that a points-based system is the optimum mechanism for achieving management of it".

Interpretation of instructions- matter of law for court- not Secretary of State's own interpretation of their immigration policies- applicant should have been invited to repair deficit in evidence

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Mandalia (contd)

Legitimate expectation?- but applicant unaware of policy

Right to determination in accordance with policy- *Nadarajah* [2005]

- "68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public."

Lumba [2011]

- "35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute."
- "21 … it is a well established principle of public law that a policy should not be so rigid as to amount to a fetter on the discretion of decision-makers."
- "26 … a decision-maker must follow his published policy … unless there are good reasons for not doing so."

Lord Wilson- "33. Speaking for myself, I consider the Secretary of State's submission to be misplaced even at the high level of pedantry on which it has been set."- SoS splitting hairs to require 'pillars' book-ending the evidence supplied- should have noticed series missing

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R (Good Law Project) v Prime Minister [2022] EWCA Civ 1580, *R (All the Citizens)* [2022] EWHC 960

Duties owed in relation to public records (Public Records Act 1958- duty to make arrangements for selecting which records ought to be permanently preserved)- use of private emails etc for undertaking government business

Contrary to policy and guidance notes (13)- did the duty to preserve extend to pre-selection?

Declaration sought- guidance enforceable, public bodies required to comply without good reason not to

Policies take variety of forms in many different contexts- some inward facing, not concerning exercise of public powers

Policies directed to ministers and civil servants, not the public- some 'guidance' better described as 'arrangements', considerable discretion in the PRA- not about individual cases/rights of an individual

Relevant factor- did policy directly affect the public? Some form of dealing with the public necessary to engage the duty of compliance (*Mandalia, Nadarajah*)- broad requirement of good administration to deal straightforwardly and consistently with the public – 'guidance need not be slavishly followed'

Not for court to 'micro-manage' how the executive conducts its affairs in the selection and preservation of documents- no enforceable duty in public law to comply with the policies- formulated at different times and could not be read as a coherent whole- for Executive to decide whether a greater degree of consistency between them would be helpful

The Good Law Project's argument "seeks to derive from internal policies absolute duties not to use certain methods of communication and to preserve communications, which are not duties Parliament has imposed in the PRA or elsewhere."

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Good Law Project (contd)

64. There is, in our view, a real risk that, if policies such as the policies in issue in this appeal were regarded as legally enforceable, public authorities would be deterred from adopting them, notwithstanding the benefits that they can help to bring in terms of consistency, absence of arbitrariness and equal treatment. This risk is specifically identified in A v. SSHD.

65. In our view, the types of policy that are likely to attract a duty to comply are those that are the epitome of Government policy, as appears from Friends of the Earth at [105]- [107]. As noted above, some of the policies were expressed to be "guidance" and others might reasonably have been described as "arrangements" within the meaning of section 3(1). This strongly suggests that the eight policies, taken on their own or as a whole, are not the sort of policies which are or should be subject to a duty to comply enforceable by way of a claim for judicial review.

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R (AAA Syria) and others v SSHD (UNHCR intervening) [2022] EWHC 3230

Removal of asylum seekers to Rwanda- "the Rwanda policy"- 8 conjoined cases- JR of 47 decisions

Inadmissible claims (not sought asylum in first safe country) or arrived by 'dangerous' journey

Assessment of Rwanda as a safe third country- need for conclusion to be based on sufficient evidence and thorough assessment, need to lawfully conclude arrangements would not give rise to real risk of refoulement or ill-treatment contrary to Art 3 ECHR

Subject matter of the Rwanda policy suitable for inclusion in a policy statement and not something that s3(2) Immigration Act 1971 required to be included in the Immigration Rules and subject to Parliamentary approval (provisions on prioritisation and process, not rules)

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Lewis LJ and Swift J

5. "The government's proposal to relocate asylum seekers to Rwanda has been the subject of considerable public debate. It is, therefore, important to have the role of the court well in mind. In judicial review claims the court resolves questions of law. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the legal principles governing the exercise of their decision-making functions. In addition, Parliament requires that public bodies act consistently with the rights and freedoms guaranteed by the ECHR: see section 6 of the Human Rights Act 1998. The court is not responsible for making political, social or economic choices – for example to determine how best to respond to the challenges presented by asylum seekers seeking to cross the Channel in small boats or by other means. Those decisions, and those choices, are ones that Parliament has entrusted to ministers. The approach of ministers is a matter of legitimate public interest and debate and, in this instance, has stirred public controversy about whether the relocation of asylum seekers to a third country such as Rwanda is an appropriate response to the problems that the government has identified. But those matters are not for the court. The role of the court is only to ensure that the law is properly understood and observed, and that the rights guaranteed by Parliament are respected."

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Grounds

(1) SSHD conclusion Rwanda safe 3rd country flawed- Art 3 ECHR- not taken account of relevant matters, insufficient enquiry, material errors of fact, irrational

(2) Risk of refoulement lack of confidence MOU will be honoured

(3) Improper use of certification- should be *ad hoc*/individual, not in support of a general scheme

(4) Removal to Rwanda does not flow from failure to make an asylum claim in eg France en route to the UK- claim should not be inadmissible

(5) Inadmissibility Guidance unlawful- does not include guidance for DMs on how to exercise the discretion to treat a claim as inadmissible, and contains rules that should have been part of the Immigration Rules and put before Parliament

(6) Removal decisions contrary to retained EU law

(7) Contrary to Refugee Convention to relocate an asylum seeker to a 3rd country/penalty of a different order to Dublin cases

(8) Contrary to data protection and GDPR

(9) Inadmissibility Guidance promotes discrimination

(10) Decision to adopt it was irrational- should have sought Parliamentary approval

(11) Failure to comply with PSED when formulating the Rwanda policy

(12) Process by which inadmissibility decisions taken unfair- only 7 days for representations once notice of intent given

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Divisional Court decision

Claims not unlawful for any of the generic grounds of challenge or by reason of the general claims of procedural unfairness.

But the way in which the SSHD went about the implementation of her policy in some of the individual cases was flawed.

CA late April 2023

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Public law: Policy-related litigation

Recent case-law

4 May 2023

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Overview

1. *BF (Eritrea) v SSHD* [2021] UKSC 38
2. *MA v SSHD* [2022] EWCA Civ 1663
3. *Timson v SSWP* [2022] EWHC 2392 (Admin)
4. *Bailey v SSJ* [2023] EWHC 555 (Admin)
5. *UK Glass Eels v SSEFRA* [2023] EWHC 336 (Admin)
6. *TN (Vietnam) v SSHD* [2019] UKSC 46

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1. *BF (Eritrea) v SSHD* [2021] UKSC 38

- Immigration Act 1971 distinguishes between detention of asylum seekers who are unaccompanied children and those who are over 18. SSHD policy on assessing age of asylum seekers and treating them as over 18.
- Supreme Court rejected CoA's approach of 'real risk of unlawfulness' (see *Tabbakh* [2014] EWCA Civ 827 and *Refugee Legal Centre* [2004] EWCA Civ 1481).
- No duty for policy to eliminate all risk of unlawful application.

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2. *MA v SSHD* [2022] EWCA Civ 1663

- SSHD guidance relating to short-form age assessments conducted for asylum seekers in Kent. Guidance was accompanied by proforma report to complete which included tick-boxes that suggested certain elements of the age assessment procedures were optional.
- High Court had declared the guidance unlawful.
- Court of Appeal allowed the appeal. Applying *A* and *BF (Eritrea)*, the guidance was not required to comprehensively set out the applicable law. It cross-referred to case-law, and other policies and urged case officers to comply with their legal duties and ensure age assessments were fair and appropriate.
- The guidance was capable of being operated in a lawful way. The proforma was not part of the guidance and was not an instruction.

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3. ***Timson v SSWP*** [2022] EWHC 2392 (Admin)

- Guidance (made under Regulations) issued by the defendant Secretary of State for Work and Pensions in respect of deductions from benefits. Held to be unlawful in failing to make clear that benefit recipients should be offered an opportunity to make representations or provide information before a decision to make reductions was taken.
- Guidance did not entirely discount possibility that decision-makers might invite representations, but gave clear impression that it was not normally necessary: that meant a material and identifiable number of cases would be dealt with in an unlawful way.
- Appeal outstanding.

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4. ***Bailey v SSJ*** [2023] EWHC 555 (Admin)

- Parole Board. 2022 Rules issued prohibiting prison and probation service staff from including in their reports a view or recommendation on whether a prisoner is suitable for release or transfer to open conditions. Guidance was issued in July 2022 for staff training on this.
- Claimants obtained interim relief re Rules change. HMPPS revoked the July guidance and replaced it.
- Court held the 2022 Rules change was unlawful. The July guidance, although revoked, was not academic. It had had concrete effects and was relevant to other guidance. Declared unlawful.

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5. ***UK Glass Eels v SSEFRA*** **[2023] EWHC 336 (Admin)**

- Refusal of SSEFRA to permit Claimant to export glass eels to Hong Kong.
- Challenge to SSEFRA fettering discretion by operating an inflexible policy of refusing export permits to Asia in all circumstances.
- Reliance placed on public statements couched in absolute terms.
- Application of principle in *West Berkshire DC v SSCLG* [2016] EWCA Civ 441 – There must be a procedure for making exceptions, but a decision maker is entitled to express policy in unqualified terms.

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6. ***TN (Vietnam) v SSHD*** **[2019] UKSC 46**

- Decision to refuse asylum claim was taken using a fast track regime which the Court of Appeal had (in separate proceedings) held to be systematically unfair, in 2015.
- Did those deficiencies in the regime render decisions taken under it a nullity and of no effect?
- Supreme Court said no. Does not follow. It would be necessary to demonstrate a causal link between the risk of unfairness created by the regime and what happened in the particular case.
- Nullity is a relative, not absolute concept.

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Thank you for listening

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