Judicial review and foreign governments

What if the conduct of a foreign government is directly relevant to a judicial review claim which the English court has to decide? Denis Edwards examines the difficulties of working across borders

The jurisdiction of the English courts in judicial review obviously extends only to acts and decisions of English public authorities. But what if the conduct of a foreign government is directly relevant to a judicial review claim which the English court has to decide?

This problem has arisen a number of times in recent years, notably where claimants allege they will be tortured if removed from the UK to another country and in cases concerning Guantanamo Bay. One difficulty such cases present is how the UK court is to assess the lawfulness of a foreign government's actions and the extent to which it will comply with its international obligations.

Sensitive issues
Historically, the scope for judicial review of such matters was limited. It is too simplistic to say that foreign relations were off limits for judicial review (see The Philippine Admiral [1977] AC 373, 399 per Lord Cross).

However, justiciability considerations meant that the courts would hesitate to judge the lawfulness of a foreign government's actions. Those matters were tied up with the UK government's foreign relations and it was not appropriate for the courts to second guess the UK's government's assessment of the facts.

The development of judicial review during the last 30 years has increasingly led the courts into foreign relations matters. In addition, the impact of the Human Rights Act (HRA) has meant that some judicial review cases have concerned the relationship between the UK's human rights obligations and the conduct of a foreign government. Inevitably, such cases raise sensitive foreign relations issues. Few cases highlight this more than the Court of Appeal's recent decision in J1 v Secretary of State for the Home Department [2013] EWCA Civ 279.

The claimant was Ethiopian but had lived most of his life in the UK, where he had an indefinite leave to remain. He fell in with a group of Islamist extremists, some of whose members were involved in the July 2005 London bombings. The Secretary of State (“SSHD”) decided that the claimant was a person whose removal from the UK would be conducive to the public good and ordered his deportation to Ethiopia. The claimant appealed and, for reasons of national security, his appeal was heard by the Special Immigration Appeals Commission (SIAC).

There was evidence that the claimant's profile meant that he was at risk of being tortured if sent to Ethiopia. However, the UK and Ethiopian governments had reached an agreement in 2008 in which the Ethiopian government gave assurances that persons returned there from the UK would not be tortured or exposed to ill treatment. SSHD relied on the agreement.

Although SSHD accepted that organs of the Ethiopian government still had “work to do” in order to monitor compliance with their government's obligations and to root out human rights abuses, she provided an assurance to that the claimant would not be deported until she was satisfied that all of the work had been done.

Further, she would give the claimant five days notice of the deportation directions, so that he could challenge her future assessment of the situation in Ethiopia by judicial review.

Providing protection
SIAC dismissed the appeal, concluding that the Ethiopian government could be trusted to comply with its obligations. In so far as compliance on the ground went, if the claimant disagreed with the SSHD's future assessment of the situation in Ethiopia, a future judicial review claim was an adequate remedy.

The Court of Appeal disagreed. While respect had to be given to any assurance provided by SSHD, no assurance could cut down the legal rights of the claimant. SIAC had gone wrong by delegating to SSHD the decision on whether the Ethiopian state and its agencies were in fact capable of protecting the claimant from ill-treatment if returned there. That was a legal matter which the court was bound to determine in order to decide the present claim.

Further, the issue to be determined was the current position in Ethiopia, not what might be the case in the future, nor the SSHD's assessment of that. Moreover, a future judicial review claim against the SSHD's assessment was not an effective remedy. In particular, the claimant would not be able to challenge the merits of the SSHD's assessment, only whether it was lawful on public law principles.

The decision in this case confirms that where fundamental human rights are in issue, it is no answer to a claim that a treaty governs the matter and the two governments can be trusted to comply fully with their international obligations. Now that human rights are guaranteed in English law, they are legal rights which bind the UK, including in the conduct of foreign affairs. Where individual rights are relied on, the courts must decide the legal issues which are raised and not leave things to a ministerial assessment pursuant to an international agreement.

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