Written by Gowling WLG's team of experts, our case update offers a straightforward overview of six recent important cases in public law and regulation.

In this edition, our experts examine the following cases:

- **Tolerating unequal treatment while considering how best to eliminate it does not justify the discrimination** - R (on the application of Steinfeld and Keidan) v Secretary of State for International Development;
- **When human rights are a matter for Parliament, not the courts** - R (Conway) v Secretary of State for Justice;
- **The ongoing difficulties of challenging an expert regulator's judgment** - R (Peak Gen and Others) v Ofgem;
- **Evidence-based policy making as a legal requirement** - R (Law Centres Network) v The Lord Chancellor;
- **Relying on a claim of unfairness post-Gallahe**r - R (Page) v Darlington Borough Council;
- **Entitlements as possessions, and the unlawfulness of entrenching historic discrimination** - JT v First-tier Tribunal.

**Tolerating unequal treatment while considering**
how best to eliminate it does not justify the discrimination

R (on the application of Steinfeld and Keidan) v Secretary of State for International Development

In 2004, Parliament enacted the Civil Partnership Act (the CPA) which enables same-sex couples to obtain legal recognition of their relationship (at the time marriage was reserved for different-sex couples only) through a civil partnership. The CPA specifically prohibits two people that are not of the same sex from being eligible to enter into a civil partnership. Later, in 2013, Parliament enacted the Marriage (Same Sex Couples) Act which made marriage lawful for same-sex couples.

The appellants, a different-sex couple, wish to enter into a legally recognised relationship but (a) claim to have a conscientious objection to marriage, and (b) cannot enter into a civil partnership by virtue of the restriction in the CPA. The ensuing position, they argued, created inequality of treatment by giving same-sex couples a choice on whether to enter a civil partnership or to marry, but denying this choice to different-sex couples. It was therefore incompatible with Article 14 of the European Convention on Human Rights (ECHR) in respect of the rights provided under Article 8 of the ECHR.

Although initially arguing to the contrary, the government had, by the time the case reached the Supreme Court, conceded that Article 8 rights were engaged. It had also accepted that there was inequality of treatment but sought to defend its position by claiming that the unequal treatment was justified because it had a margin of discretion in determining when to make legislative changes and it was still investigating and evaluating the nature of the change that should be made (i.e. whether to preserve and extend civil partnerships or to abolish them). It argued that taking the time to carry out this exercise was a legitimate aim as changes to the law in such a sensitive area of social policy needed proper inquiry and consideration.

This argument had been accepted by the Court of Appeal but the Supreme Court rejected it. The Supreme Court found that any margin of discretion the government may have was very narrow, that it had made a conscious decision not to change the position when it introduced the 2013 Act, and that tolerating discrimination while deciding what to do about it could never amount to a legitimate reason or aim justifying the discrimination.

The government can resolve the discrimination by either extending civil partnerships to different-sex couples or bringing an end to them for same-sex couples. Either position would be lawful, and it remains to be seen what the government will do. It is clear, however, that adopting a 'wait
and evaluate' approach in cases where discrimination exists but options to rectify it are being assessed cannot amount to a justification for the discrimination being allowed to continue.

**When human rights are a matter for Parliament, not the courts**

**R (Conway) v Secretary of State for Justice**

Mr Conway suffers from a form of motor neurone disease. At the time of the hearing, the prognosis was that he had six months or less to live. In the face of this he wished to have the option of ending his own life, with medical assistance, at a time of his choosing. However, that assistance was prevented by section 2(1) of the Suicide Act 1961, which makes it a criminal offence to assist another person to commit suicide. Mr Conway sought a declaration that the blanket ban in section 2(1) infringed his right to respect for his private life under Article 8 of the European Convention on Human Rights.

As part of his argument that the blanket ban is disproportionate, Mr Conway put forward an alternative statutory scheme which would carve out an exception to the section 2(1) ban for persons who met certain criteria, including that the person to be assisted had been diagnosed with a terminal illness and given six months or less to live. The scheme also contained certain safeguards, including that the provision of assistance be authorised a High Court judge.

The scheme was similar to proposals that had been put before Parliament in various private members' bills in recent years, none of which had been passed into law.

At first instance, the Divisional Court held that section 2(1) did not infringe Mr Conway's Article 8 rights. Parliament had debated the issue several times in recent years and had clearly formed the view that the ban was necessary to protect the weak and the vulnerable, who might otherwise be subject to (real or imagined) pressure to end their lives. The Divisional Court considered there to be powerful constitutional reasons to respect the view of Parliament given its democratic mandate to make the type of finely balanced assessment of social and moral factors that this case involved. It was also unconvinced that the alternative scheme proposed by Mr Conway could provide sufficient protection in all cases.

Mr Conway appealed, including on the basis that the Divisional Court had -

- erred in its approach by giving 'overwhelming deference' to the position adopted by Parliament, effectively abdicating its responsibility under the Human Rights Act 1998 to make its own assessment of proportionality; and
- failed to properly assess his alternative scheme.
The Court of Appeal found no errors with the approach taken by the Divisional Court in either respect. It had considered all of the arguments and evidence before it and had not abdicated its responsibility by placing decisive weight on the views of Parliament. The Court of Appeal agreed that given the conflicting and highly contested views on the ethical and moral issues involved, Parliament was by far the better body to determine whether the law should be changed.

Mr Conway has indicated that he will appeal to the Supreme Court.

The ongoing difficulties of challenging an expert regulator's judgment

R (Peak Gen and Others) v Ofgem

In simple terms, the electricity network in GB is comprised of a high voltage transmission network and a number of low voltage regional distribution networks. Most large scale generators are connected to the transmission network which transports the electricity generated to the distribution networks. Electricity is then provided to customers through the distribution networks by suppliers. However, some small scale generators, such as the claimants in this case, are connected directly to the distribution network - they are known as 'embedded generators'.

Suppliers are required to pay charges for use of the transmission network. Currently these charges can be reduced through agreements with embedded generators - the idea being that where suppliers are using electricity produced on the distribution network they are not using the transmission network. Such agreements create additional revenue for embedded generators.

The energy regulator, Ofgem, became concerned that this situation led to distortions in the market and a higher burden for upkeep of the transmission network falling on other suppliers who could not take advantage of agreements with embedded generators. In its view, this ultimately led to an increase in customer bills. Ofgem therefore decided to adopt a proposal to change the charging system.

The claimants challenged that decision on the basis that it breached the EU principle of non-discrimination, and that Ofgem did not take into account all relevant factors.

The discrimination challenge had two limbs. Firstly, the decision treated embedded generators differently from providers of other services which - like embedded generation - reduced a supplier's net demand for electricity from the transmission network. Secondly, the decision treated embedded generators as equivalent to transmission-connected generators, when they are materially different. In both cases, the Court reviewed the similarities and differences and
was satisfied that no discrimination had taken place.

In relation to relevant considerations, the claimants contended that Ofgem did not truly take account of the cost savings for the transmission network which resulted from the use of embedded generators as it misunderstood the arguments made to it. But the Court was not persuaded that there was any such misunderstanding by Ofgem - in its view, Ofgem understood the relevant points and simply disagreed with them.

These conclusions follow a long line of case law. At the beginning of its discussion, the Court noted that Ofgem is the expert body charged with making decisions on complex, technical issues and that in line with precedent the Court should be slow to interfere with its judgments. It noted that, although the claimants disagreed with the decision, they did not argue that it was irrational.

Although the case adds little in terms of new law it is a further illustration of the difficulties faced by claimants when challenging a decision in which a specialist regulator has applied its expert judgment to a complex range of factors, and sought to balance a wide set of competing interests, in a context which falls squarely within the parameters of its regulatory discretion.

**Evidence-based policy making as a legal requirement**

*R (Law Centres Network) v The Lord Chancellor*

The Legal Aid Agency (LAA), acting on behalf of the Lord Chancellor, commissions and delivers legal aid services for England and Wales. One of these is the Housing Possession Court Duty Scheme (HPCD). In 2017 the LAA decided to reduce the number of scheme areas and to introduce price-competitive tendering for HPCD scheme contracts.

The Law Centres Network is a national network of Law Centres that provide free legal advice, assistance and advocacy, funded through sources such as legal aid, including HPCD contracts. It challenged the LAA’s decisions on the grounds that it (a) acted irrationally as it had failed to make sufficient enquiries to justify the basis for its decisions, and (b) had not given due regard to the public sector equality duty (PSED), as required by section 149 of the Equality Act 2010.

The Court agreed on both counts.

The duty to make sufficient enquiries (also referred to as the Tameside duty after the case of that name) is a duty on decision-makers to take reasonable steps to acquaint themselves with all relevant information for the purposes of making the decision.
The primary reason given by the LAA for moving to larger scheme areas (and effectively reducing the number of service providers) was that smaller HPCD schemes were not economically viable or sustainable. The Court held that this was not a conclusion that a reasonable decision-maker could have reached relying only on the evidence that the LAA had gathered. In particular, there was no data available which connected small schemes with lack of viability and there was no evidence that sustainability was an issue (especially in circumstances where 90% of the contracts, irrespective of size, were operating without any apparent difficulty).

In short, the LAA had adopted a policy position that, without making sufficient enquiries, lacked adequate supporting evidence. It was not enough for it to refer to its policy judgment. Failure to satisfy the Tameside duty rendered the decision irrational. This shows that in appropriate circumstances, evidence-based policy making is not merely a matter of good practice, but a requirement of law.

With regard to the PSED, the claimant successfully argued that the LAA had not considered the impact of the changes on persons using HPCD services through Law Centres (and similar bodies) holding the current contracts, including the impact with regard to access to 'wraparound' services provided by such service providers. These other 'wraparound' services could make a difference as to whether persons with protected characteristics using the HPCD services ended up homeless or destitute, yet the LAA had not considered these issues or drawn attention to them in the submission to Ministers.

**Relying on a claim of unfairness post-Gallaher**

**R (Page) v Darlington Borough Council**

Ms Page is a member of the Darlington Libraries Steering Group, a group formed of local residents to resist proposed library closures in Darlington. She brought a judicial review against the Council's decision to close a library and relocate its services to a different venue in order to reduce costs.

The challenge was brought on the grounds of unlawful consultation, legitimate expectation and, in the alternative to the latter, conspicuous unfairness.

The Council carried out two separate consultations before deciding to close the library. In relation to the first, Ms Page argued that the Steering Group had been provided with insufficient time to work up a full business case which would have allowed the library to stay open and that the Council had closed its mind to retaining the library. In relation to the second, she submitted that the consultation was deficient because it did not include options proposed by the Steering
Group in a draft business case that it had submitted in response to the first consultation, and because it misrepresented the potential savings available under some proposed options.

The Court rejected all of these arguments, finding that both consultations were lawful.

The Court also rejected the argument that the Council had created a legitimate expectation that the Steering Group could submit a business case in draft form and that the Council would then work with the Steering Group to develop its alternative proposals. There was no 'clear and unequivocal promise' as required to create a legitimate expectation under R v IRC ex p MFK Underwriting.

The Court's findings on these points are neither unexpected nor controversial. The real interest in the case lies in the fact that, as an alternative to its legitimate expectation argument, Ms Page submitted that the Council had acted in a manner which was conspicuously unfair. We believe that this is the first case to address the issue of substantive unfairness following the judgment of the Supreme Court in Gallaher Group v Competition and Markets Authority (we discussed this judgment in our Public Law Case Update for June 2018).

The Court noted that it was common ground between the parties, following Gallaher, that in order to succeed Ms Page had to establish that the Council's actions were so unfair as to be irrational. There was no middle ground where generalised allegations of unfairness, falling short of either breach of legitimate expectation or irrationality, could found a claim in public law. In this case, although Ms Page had pleaded unfairness, she had not gone so far as to say that the Council had acted irrationally. There was therefore no point for the Court to consider in this regard.

The case is therefore a reminder that freestanding arguments around unfairness must now be framed in terms of irrationality, with the higher threshold that this will entail.

**Entitlements as possessions, and the unlawfulness of entrenching historic discrimination**

**JT v First-tier Tribunal**

The Criminal Injuries Compensation Scheme (the Scheme) is a statutory scheme for compensating the victims of crime. It has developed, incrementally, over decades. Like many schemes of a similar nature, changes to it tend to be prospective - they are made only for new cases going forward, rather than in respect of historic incidents.

An earlier version of the Scheme included what was known as the 'same roof' rule - there was
no entitlement to compensation for injuries occurring at a time when the victim and assailant were living together as members of the same family. This restriction was removed as long ago as 1 October 1979. However, because changes were made only prospectively, the rule was preserved for injuries incurred before that date.

As a child, the claimant had been sexually abused by her stepfather. But all the offences took place prior to 1979. Consequently, the Criminal Injuries Compensation Authority applied the 'same roof' rule and refused an award of compensation. The First-tier Tribunal upheld this decision. The claimant appealed it.

In order to succeed, the claimant had to argue that the 'same roof' rule should be struck down for being incompatible with Article 14 of the European Convention on Human Rights (the ECHR).

Moreover, Article 14 is not a stand-alone right, but safeguards other ECHR rights by providing that the rights and freedoms set out within the ECHR (and also the UK's Human Rights Act) 'shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.

The claimant therefore had to establish three things - (i) that another ECHR right was engaged, to which Article 14 could attach (she argued that entitlement under the Scheme was protected under Article 1 of Protocol 1 of the ECHR - peaceful enjoyment of possessions); (ii) that the 'same roof' rule was discriminatory for the purposes of Article 14; and (iii) that the preservation of the historical rule did not justify discrimination.

The Court of Appeal agreed. In particular, it concluded that -

- compensation payments made by the state under the Scheme are the equivalent of welfare benefits, and since the Scheme has a statutory footing this establishes a proprietary interest for the purposes of Article 1 of Protocol 1; and
- living within a family is a 'status' as envisaged by Article 14, and since there was no objective and reasonable justification for the difference in treatment inherent in the application of the 'same roof' rule, that rule was discriminatory for the purposes of Article 14.

The Court offered some interesting observations on the prospective-only basis of changing the Scheme. That was a "legitimate policy choice", within the province of government to make. Moreover, the fact that changes were prospective-only was not discriminatory, merely because it led to different rules applying at different dates. However, the policy of making changes on a forward-looking basis could not justify the continuance of rules that are discriminatory under current law.
In other words, discrimination cannot be entrenched just because it is the usual (and otherwise valid) policy of government to change the rules of a Scheme only on a forward-looking basis - a position that is relevant far beyond the particular facts of this case.
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