2015 was a busy year for the courts on the public law front, with important judgments being handed down on a range of issues.

At the highest level, the Supreme Court continued its exploration of the concept of proportionality in a quartet of cases concerning the standard of review. These examined the way in which the appropriate proportionality test varies in different circumstances and its connection with the more traditional public law ground of reasonableness, as well as the degree of deference to be given to the decision-maker.

In relation to consultation, the Court of Appeal used 2015 to firmly re-establish the status quo after the initial upset caused by the Supreme Court’s decision in Moseley in 2014. The year also saw the introduction of some of the government’s controversial reforms in regard to judicial review procedure, with the Administrative Court having to consider the new statutory provisions concerning the circumstances in which relief must be withheld from an otherwise successful claimant.

In the list below we have provided our top 20 public law cases of 2015. The choice was a difficult one and there are many other cases that we could have included. For reasons of space we have confined the list to domestic cases, despite the fact that the year saw important decisions made in international courts - the prime example being the Schrems Safe Harbour case handed down by the Court of Justice of the EU (see our October 2015 analysis and November 2015 advice). We have also not included any of the interesting decisions produced by domestic tribunals.

Within these constraints we reflect a range of different issues which will be relevant to public bodies and those that deal with them, across a range of different courts - while
recognising the attention that the Supreme Court paid to public law issues in a stream of important decisions last year.

The Standard of review

1. *R (Rotherham Metropolitan Borough Council and Others) v Secretary of State for Business Innovation and Skills [2015] UKSC 6*

Rotherham was the first of four cases in 2015 in which the Supreme Court considered the standard of review that should be applied to public authority decision-making.

The case concerned the allocation within the UK of EU Structural Funds. These funds, distributed in seven-year cycles, support the most deprived regions of the EU. Because of the accession of several new member states, the total funds available to the UK for 2014-2020 fell in comparison with the previous period. The government then shared out the total pot unevenly, so that while some regions (Northern Ireland) received only a 5% reduction in support, others (Merseyside and South Yorkshire) were hit with a 61% funding cut.

This raised classic judicial review issues, including failure to treat like cases alike and having regard to irrelevant considerations. The court split 4:3 in favour of the government. There was agreement on the tests to be applied, but sharp differences on the appropriate intensity of review. For the majority, this exemplified the category of cases in which the courts should be cautious - complex, concerned with resource allocation, essentially political. For the minority, although the government had a wide margin of discretion, that did not prevent close scrutiny of the decision, which it could not withstand.

While the word is never once used in the judgments, the case is really about deference. It marks the majority of a divided Supreme Court (led by Lord Sumption) entering an essentially deferential phase, reflected in the outcome in all four cases.

2. *Pham v Secretary of State for the Home Department [2015] UKSC 19*

The immediate issue in Pham was whether the government could make an order depriving Mr Pham of citizenship and rendering him stateless. The Supreme Court declined to express a view on whether deprivation of his UK citizenship also deprived him of EU
citizenship and, if so, whether this brought the case within the ambit of EU law, meaning that the relevant standard for review was proportionality rather than Wednesbury reasonableness.

However, the court referred to its comments in Kennedy regarding the flexibility of judicial review, particularly where important rights are at stake. All four of the reasoned judgments questioned whether there would be any difference in outcome in many cases, whether the basis of the review was reasonableness or proportionality, and whether the latter was grounded in EU law or the European Convention on Human Rights. The case prefigured the fuller exploration of these issues in Lumsdon and Keyu (see below).

However, the judgments contain important observations regarding the availability of proportionality in common law, even absent human rights or EU law grounds. For Lord Mance, proportionality review would be 'available and valuable' at common law where a fundamental right was interfered with and an intense form of scrutiny was required on judicial review. In Lord Reed's view, legislation authorising significant interferences with important rights should be interpreted as requiring that any interference should be proportionate. Although obiter and leaving much to be clarified, these comments do signal a direction of travel that is important in an environment in which the government's commitment to the European Convention remains doubtful.

3. **R (Lumsdon and Others) v Legal Services Board**
   **[2015] UKSC 41**

The Supreme Court revisited the issue of proportionality in Lumsdon - a challenge brought by four criminal barristers to the Quality Assurance Scheme for Advocates ('QASA').

The question before the court was whether the decision to introduce the QASA was contrary to Regulation 14 of the Provisions of Services Regulations 2009, which implemented the Provision of Services Directive (2006/123/EC). Regulation 14 contains an express proportionality condition under which 'the need for an authorisation scheme' must be 'justified by an overriding reason relating to the public interest' where 'the objective pursued cannot be attained by means of a less restrictive measure'.

The court unanimously concluded that the decision was proportionate, but the interest in the case lies in the guidance it gave in relation to the test for proportionality. Lords Reed and Toulson outlined in detail how the test is multi-faceted, and will differ in subtle but important ways according to whether the challenge is brought under domestic law, EU law
or the European Convention on Human Rights. Their taxonomy outlining the appropriate
test in each of these contexts will become the default point of reference for
proportionality.

Whether the application of these different tests will produce differences in outcome must
be assessed in light of the court's comments in Pham on the possible academic nature of
such distinctions. It is interesting to note that in Lumsdon the Supreme Court agreed with
the outcome reached by the Court of Appeal, even though the latter had applied the wrong
test.

4. **Keyu and Others v Secretary of State for Foreign and Commonwealth Affairs and Another [2015] UKSC 69**

Some had hoped that the Supreme Court in Keyu would confine traditional Wednesbury
review to the history books and declare its replacement with the proportionality standard.
In the event, it declined to do so. Lord Neuberger remarked that, even if so minded, it
would need a nine-member court (not the standard five justices sitting in the case) to
make so major a change.

In practice, the case further demonstrated the potentially academic nature of the
distinction between the tests. It related to a decision by the government not to hold a
public inquiry into an atrocity carried out by British Forces in Malaya in 1947. Due to the
time at which these events took place, and other factors, the court was agreed that the
European Convention on Human Rights did not apply, so that the standard of review was
Wednesbury.

By a 4:1 majority, the court held that the decision was not only lawful on the Wednesbury
standard, but would have remained so even on the application of proportionality review.
By contrast, in a robust dissenting judgment, Lady Hale considered that the failure to hold
an inquiry was irrational even on a strict Wednesbury test.

Nothing better exemplifies the extent to which outcomes in judicial review cases often turn
less on the strict standard to be applied than on the degrees of intensity of review and
dereference which a court chooses to bring to its analysis. In this respect, the Supreme
Court ended the year in Keyu at the same place where it began in Rotherham.

5. **British Academy of Songwriters & Others v**
By way of counterbalance to the four Supreme Court cases mentioned above, the Songwriters case is a reminder of the intensity of review that the courts will apply in appropriate circumstances.

The claimants challenged a decision to amend primary legislation to create an exception to copyright law - so that a person legally acquiring certain content could copy a work for personal use without copyright infringement - without compensating copyright holders.

The court confirmed the general extent of the government's policy discretion. It said, however, that with regard to the evaluation of evidence, the discretion was a modest one because of: (i) the narrow question (the level of harm) to be decided, (ii) the policy content being at a micro (rather than macro) level, (iii) the nature of the decision under challenge, and (iv) the impact of the decision on a right that is protected under Article 1 of the First Protocol to the European Convention of Human Rights (and under the EU Charter of Fundamental Rights).

These factors indicated that the court should conduct a relatively intensive and thorough review of the government's fact finding and reasoning. Having done so, it allowed the claim and concluded that the decision was nowhere near to having been justified by the evidence, and that the inferences drawn in the impact assessment about the level of harm were not remotely supported by the facts.

Policy


Mandalia is concerned with whether a public authority is required to follow its own policies, including those which are produced purely for internal purposes.

The case related to a policy document that instructed UK Border Agency caseworkers to show some flexibility in relation to visa applications which had not been accompanied by the requisite evidence. In such instances, the caseworkers were required to invite applicants to remedy any deficiencies in the evidence submitted with their applications. That policy was not followed in respect of Mr Mandalia's application, which was subsequently refused.
The Supreme Court used the case as a vehicle to affirm the principles which the courts will apply when considering a claim that a relevant policy has not been followed.

The court highlighted the importance of a public body's adherence to its own policies and held that a person should be able to count upon the application of a relevant policy whether he or she knows of its existence or not.

This is now a freestanding ground of judicial review in its own right, arising directly from the principle of fairness, rather than being grounded, as previously, in the doctrine of legitimate expectation.

7. **R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57**

Is it acceptable for a public authority to adopt a 'blanket' (sometimes called 'bright line') policy which determines eligibility for a benefit without the possibility of exercising discretion in an individual case? This question lay at the heart of the Supreme Court's judgment in Tigere.

Ms Tigere wanted to obtain a student loan in order to go to university. She had lived in the UK since the age of six and was educated here. However, the eligibility rules for student loans effectively denied them to anyone who had only limited or discretionary leave to remain in the UK, as Ms Tigere had. She argued that this breached her right to education under Article 2, and discriminated against her contrary to Article 14, of the European Convention on Human Rights.

The court stopped short of saying that bright line rules were unlawful. Indeed, the majority recognised their value to good and efficient administration. There would necessarily be hard cases which seemed to fall on the wrong side of the line. But that did not mean they were arbitrary or inappropriate. Bright line rules, for instance, allow hundreds of thousands of student loan applications to be processed quickly. It would never be possible to apply discretionary judgment to each one.

However, a 3:2 majority in this case considered the bright line policy set by the government to have been disproportionate to the aim to be achieved. Lady Hale (and Lord Kerr) added that it would have been more likely to be proportionate if it had permitted discretion in exceptional cases.

So while bright line policies are permissible in principle, they may prove harder to justify
than those which allow for exceptions.

**Fairness**

8. *(1) R (Gallaher) v Competition and Markets Authority; (2) R (Somerfield) v Competition and Markets Authority [2015] EWHC 84 (Admin)*

The joined cases of Gallaher and Somerfield concerned whether it is unfair if the benefit of a promise mistakenly made to one person is not extended to others in a similar position.

The cases resulted from actions taken by the Office of Fair Trading (OFT) (now the Competition and Markets Authority (CMA)) following its investigation into alleged anti-competitive practices by several tobacco manufacturers and retailers. The OFT entered into 'early resolution agreements' with some companies (including the claimants) that (broadly) agreed to admit an infringement in return for discounted fines.

The OFT had also, by a failure to respond properly to correspondence, managed to assure one such company that it would benefit should infringement decisions be successfully appealed by others. No such promise need have been made. The infringement decision was successfully appealed by some companies and the OFT kept its promise. The claimants then also asked for their fines to be repaid but the OFT refused to do so.

In dismissing the claims, the court said it was clearly unfair, where there was no special reason, to offer one party an advantage that was unknown to others. But the assurance given was a mistake and, where public funds are involved, additional parties were not entitled to benefit from that mistake in the name of equal treatment. The court also endorsed the general rule that a non-appealing party is unable to benefit from third party appeals.

The cases are being appealed, but provide an important reminder for companies to be fully aware of the consequences of regulatory settlements reached prior to full conclusion of enforcement action.

9. *R (Roche Registration Ltd) v Secretary of State for Health [2015] EWCA Civ 1311*
In Roche, the Court of Appeal held that the size and relative sophistication of a business is relevant to what a public authority is required to do in order to ensure that the business is treated fairly.

The claim alleged that the Medicines and Healthcare Products Regulatory Agency (the MHRA) had acted unfairly when undertaking an investigation into Roche, a major pharmaceutical company. It was not in dispute that the MHRA had disclosed information it obtained during that investigation to the European Medicines Agency (the EMA) for use in separate enforcement proceedings against Roche.

The alleged unfairness was said to arise from the fact that the MHRA had failed to give adequate warning that it was going to share the information in this way. Had Roche known, it would have been on notice to approach the investigation in a more legalistic, and less candid, way.

The Court of Appeal dismissed the claim, finding that the duty of fairness did not require the MHRA to give an express warning. The court held that, from the regulatory regime in place and the background to the investigation, Roche knew (or reasonably ought to have known) that the MHRA might provide information to the EMA in the way it did. This was in part because it was a large, sophisticated and well-resourced business, acting through expert personnel.

By inference, it must follow that the requirements of fairness are greater when a public authority deals with much less sophisticated businesses.


Traveller Movement highlights differences in how the duty of fairness will apply between enforcement proceedings and other types of adjudication.

The claimant was a charity which complained to Ofcom about the portrayal of Traveller, Gypsy and Romany communities in two Channel 4 programmes (one being 'Big Fat Gypsy Weddings'). Part of the complaint was classified by Ofcom as a standards complaint and, in accordance with its normal procedure, it gave Channel 4 (but not the claimant) an opportunity to make representations on a draft of its decision. Ofcom rejected the complaint and the claimant challenged that decision on the basis that it was procedurally unfair; had it been invited to make representations, it said that it would have produced further evidence to alter Ofcom’s view.
The court dismissed the claim. The starting point was that it was not necessary in the interests of fairness for parties to see the provisional view of an adjudicating authority. Whether allowing only one party to do so will be fair depends upon the nature of the decision. Here, Ofcom was not determining a dispute between the parties, affecting the legal rights and obligations of both, but only considering possible enforcement action against Channel 4.

The court agreed with Ofcom that this context dictated what was required. Traveller Movement was merely a complainant that had triggered an investigation. It need not be allowed a 'second bite at the cherry' to submit more evidence.

Consultation

11. *R (on the application of Sumpter) v Secretary of State for Work and Pensions [2015] EWCA Civ 1033*

Towards the end of 2014, the decision of the Supreme Court in *Moseley* appeared to have reversed a long line of Court of Appeal authority allowing public bodies to consult on a single preferred option. Following *Moseley*, it was thought that public bodies might be required to consult on a range of options in every case, including ones they had already discarded.

*Sumpter* was the last of several cases heard during 2015 in which the lower courts sought to row back from this position, largely by doubting that *Moseley* had this effect, or seeking to confine it to its specific facts.

In *Sumpter*, the claimant challenged a consultation process undertaken by the government in relation to the replacement of the Disability Living Allowance. The first consultation had been misleading, and the second consultation was launched only after the relevant implementing Regulations had already been laid before Parliament. It was argued that this meant that the government had closed its mind to any alternative approach which might result from the second consultation.

The court dismissed the challenge, finding that, taken overall, the consultation process was fair. It followed its own earlier analysis in *Robson* in which it held that *Moseley* simply endorsed established principles in relation to consultation.

Interestingly, the claimant in *Sumpter* cited *Moseley* merely to highlight the benefits of consultation, and did not argue that the government should have consulted on a range of
options. This implies that, in the space of a little over a year, the potentially major ramifications of Moseley are already being discounted.

Reasons


There is no general public law duty to give reasons for decisions, but where they are given they must be adequate. Nzolameso is a judgment of the Supreme Court which adds to an understanding of what adequacy requires and suggests a general strengthening of the duty.

Ms Nzolameso and her children had been living in expensive accommodation in Westminster funded by housing benefit. Changes to the benefit system meant that this was no longer affordable, triggering the duty of the local authority under the Housing Act 1996 to find alternative accommodation. Given the cost of housing in central London, and its limited resources, the authority offered to accommodate her near Milton Keynes, an offer she rejected.

The reasons for this decision were limited and in standard form, referencing finances and saying that all relevant considerations had been taken into account. The court found them inadequate. Lady Hale said that it 'must be clear from the decision that proper consideration has been given to the relevant matters', including precisely how the relevant provisions of statute and departmental guidance had been taken into account.

The essence of the judgment is that the courts are not prepared to make assumptions in favour of a public authority, and to infer that good reasons exist, in the absence of evidence. To do so would 'immunise' decisions from judicial scrutiny. Statements of reasons need to explain decisions in a level of detail sufficient to demonstrate that the appropriate thought process has taken place.

Bias

13. *HCA International Ltd v Competition and Markets Authority* [2015] EWCA Civ 492

In HCA, the Court of Appeal considered the principles to be applied in determining whether a public authority must appoint new decision-makers where one of its decisions has been quashed by a court and remitted back to it to be retaken.
The background was that HCA had challenged the findings of the CMA after its investigation into private healthcare. The CMA conceded that the decisions should be quashed, but HCA challenged the ruling that they could be remitted back to the original decision-making panel.

The court held that remission should usually be to the same decision-makers unless doing so would cause reasonably perceived (public law) unfairness to the affected parties or would damage public confidence in the decision-making process.

The presence of actual bias, apparent bias or confirmation bias (bias linked with an inability to change one's mind) would make remission to the same decision makers undesirable. And the practicality of appointing new decision makers should not be taken into account in deciding whether there would be unfairness in failing to do so. However, bias could not be assumed from the mere fact of the earlier decision, and had to be demonstrated in the usual way.

In holding that the CMA decision-makers did not have to be replaced in this case, the court placed significant weight on the fact that they were experienced professionals with no personal interest, and from whom certain high standards of conduct could be expected.

**Statutory Interpretation**


The Natural Environment and Rural Communities Act 2006 provided that unrecorded vehicular rights of way would be extinguished unless applications to register them were made by a specified date. Applications were required to include a map showing the right of way 'drawn to the prescribed scale' and regulations prescribed that the map 'shall be on a scale of not less than 1:25,000'. The applications in this case included maps produced using a computer program to a scale of at least 1:25,000, but derived from maps to a scale of 1:50,000. The applications were rejected as including non-compliant maps.

In the Supreme Court, Lords Neuberger and Sumption held that the purpose of the legislation must have been to ensure that the map could be expected to show a particular level of detail. Taking account this purpose (and the specific wording), the maps did not comply with the statutory requirements. However, they were in the minority.
The majority (Lords Clarke, Toulson and Carnwath) held that the rejection of the applications had been unlawful. A map was compliant if it was on a scale of at least 1:25,000, regardless of how it had been prepared. If a particular level of detail were intended to be required, the legislation could have stated this.

There is arguably a growing trend toward the purposive interpretation of legislation (not least because of its prominence in construing EU law). This case goes against that trend, showing that the courts may still opt for a more literal interpretation.

Public Sector Equality Duty

15. *Hotak & others v Southwark LBC & another [2015] UKSC 30*

Hotak is notable for being the first consideration by the Supreme Court of the public sector equality duty (PSED) contained in section 149 of the Equality Act 2010.

One of the claimants argued that, in making decisions under the Housing Act 1996 in relation to his priority need for housing, Southwark had failed to comply with the PSED because it gave insufficient critical scrutiny to his disability. Lord Neuberger's leading judgment endorsed current Court of Appeal and High Court authority in relation to the PSED and its predecessor provisions (in particular *Baker, Pieretti, Bracking* and *Hurley*).

Beyond this, Lord Neuberger said that it was difficult to be prescriptive about what the PSED required, given that the weight and extent of the duty are highly fact-sensitive and depend on individual judgment.

However, in finding that Southwark had complied with the PSED on the evidence, he noted that the fact it had specifically mentioned the PSED in its decision did not add significant weight to this conclusion. What was important was that it had been complied with in substance elsewhere.

Constitutional


Evans, the most publicised public law case of 2015, concerned the Guardian newspaper's attempts to secure release under the Freedom of Information Act (FOIA) and the Environmental Information Regulations of correspondence between Prince Charles and
various government departments.

That attempt was partially successful before the Upper Tribunal. However, the Attorney General used section 53 of FOIA to issue a certificate preventing disclosure on the basis that he considered 'on reasonable grounds' that there had been no failure to comply with the obligation to disclose. He claimed that disclosure would undermine public confidence in Prince Charles as future monarch by leading people to question his political neutrality.

FOIA has now been amended so as to render communications with the heir to the throne absolutely exempt from disclosure. However, the case's enduring interest lies in the constitutional issues raised by the way in which the Supreme Court approached a grant of executive power to override a judicial order.

Lords Neuberger, Kerr and Reed chose to construe that power narrowly, holding that the Attorney General could not effectively overturn a decision of the Upper Tribunal merely because he would have reached a different conclusion. In their approach, it is of fundamental constitutional importance that a judicial determination is binding between the parties.

Lord Mance and Lady Hale held that the Attorney General could issue a certificate if he disagreed with the Upper Tribunal. However, disagreement with findings of fact or law would require very clear justification, while disagreement as to the balance between competing public interests would require properly explained and solid reasons. Neither had been provided here.

**Retrospectivity**

17. *R (on the application of APVCO 19 Limited and others) v HM Treasury and HMRC [2015] EWCA Civ 648*

In APVCO, the appellants challenged the legality of retrospective tax legislation. They had sought to take advantage of a tax avoidance scheme designed to avoid the payment of Stamp Duty Land Tax. The government had then introduced retrospective legislation that rendered the scheme ineffective. It was argued that this breached their rights to peaceful enjoyment of possessions (Article 1 of Protocol 1 - A1P1) and a fair hearing (Article 6) under the European Convention on Human Rights.

The appellants had argued that they had been deprived of the tax that they would now have to pay. The Court of Appeal held that unpaid tax can be regarded as a possession
within the meaning of A1P1; however, as there was an argument as to whether the tax was payable to HMRC or not, it could not be properly regarded as a possession for A1P1 purposes in this case.

The appellants also argued that their Article 6 rights were breached on the basis that the legislation deprived them of a tribunal hearing to determine the effectiveness of the scheme. This argument was also dismissed, as tax disputes fall outside the scope of Article 6.

This case is important in confirming that in certain circumstances, in particular in the field of tax law, retrospective legislation can be lawful.

The court confirmed that even if either of the Convention rights had been engaged, the interference would have been both lawful and proportionate, as it was in the public interest to prevent taxpayers taking advantage of abusive tax avoidance schemes after clear warnings have been given that such schemes would be tackled with retrospective legislation.

**Human Rights Act damages**

18. **DECC v Breyer Group PLC & Others [2015] EWCA Civ 408**

Damages are not a remedy traditionally available in judicial review. However, following the leading case of Infinis, the judgment of the Court of Appeal in Breyer further demonstrates the power and scope of the claims for damages that are available under the Human Rights Act.

The Department of Energy & Climate Change (DECC) consulted on proposed changes to a subsidy scheme for solar energy, which were designed to substantially reduce the amount of the available subsidies. Those changes were declared unlawful (in an earlier case - Friends of the Earth) and not made as originally proposed. However, the claimants, who were installers of solar equipment, argued that by the time the courts had given a ruling they had already sustained substantial losses (approximately £195 million between them) in terms of the loss of current and future contracts, because the mere fact of the consultation had undermined the market for their products.

The Court of Appeal agreed that there was marketable goodwill in (certain types of) existing contracts, which meant that the claimants had possessions under Article 1 of the
First Protocol (A1P1) to the European Convention on Human Rights, and also that DECC’s actions constituted interference with those possessions, which was not justified.

The case provides additional clarity on what constitutes an A1P1 possession, but is important more particularly in establishing that Human Rights Act damages are available not only for carrying through an unlawful policy, but even for consulting on the intention to do so if that consultation is the direct cause of loss to third parties.

In this approach, consulting on an unlawful policy is itself an unlawful act, and a trigger point for a financial claim if it interferes with Convention rights.

**Judicial Review reforms**


Hawke is an important early case about changes recently made to section 31 of the Senior Courts Act 1981 by the Criminal Justice and Courts Act 2015. These changes require the courts to deny relief following an otherwise successful judicial review claim where it is 'highly likely' that the outcome for the claimant would not have been substantially different if the unlawful action had not occurred.

The claimants consisted of a prisoner and his disabled wife who cannot realistically visit him in the facility in which he is currently detained. As part of the claim, it was asserted that the government’s refusal to move the prisoner nearer to his wife’s home breached the public sector equality duty (‘PSED’) under section 149 of the Equality Act 2010.

The court found no evidence that the government had had any real regard to the PSED when making the relevant decisions. This was sufficient to establish that they were unlawful. However, the court then applied the new provisions of the Senior Courts Act. It held that, even if the PSED had been considered, it was highly unlikely that the outcome for the claimants would have been different.

The case is not only one of the first in which the new test has been applied, but the first in which it has been successfully relied on by a defendant to avoid any consequence of its unlawful action.

However, in finding for the government on this point, the judge seemed to indicate that the burden of proof was on the claimant to show that the section 31 test was not met, i.e. to prove that lawful conduct would have made a difference. This contrasts with the previous
case of Logan and the later case of Enfield, in which the burden was (surely more correctly) held to rest with the defendant.

Public/Private divide

20. *In the matter of Capita Translation and Interpreting Limited* [2015] EWFC 5

This case concerned the effect of Capita’s contract with the Ministry of Justice to provide interpreters for court proceedings. The Family Court booked two interpreters for a hearing through Capita, neither of whom appeared. The local authority sought to recover its costs of the adjourned hearing from Capita.

The court granted the application and in doing so followed *Applied Language Solutions Ltd*, a criminal case heard in the Court of Appeal on similar facts. In ALS, Capita in its former incarnation argued that the effect of the key performance indicators in its contract was that it had to provide interpreters on no more than 98% of occasions when asked. The court disagreed. ALS had taken on responsibility to discharge the State’s obligation to provide an interpreter and this meant 100% of the occasions when one was required, whatever the contract said.

Implicit in this approach, which Capita now extends into a non-statutory civil context, is that a contract to perform the role of the State may be given a purposive interpretation so that the counterparty finds itself having agreed to step into the shoes of the State as regards ‘responsibility’ for certain actions.

This raises an interesting question - if the responsibility that was contracted for is not confined within the private law bounds of the relationship between the government and the company, but instead may give rise to wider duties to third parties, do those duties also include the duty to comply with the public law obligations to which the State itself was subject?

That possibility, the logical implication of this line of case law, has the potential to challenge earlier judgments on where to draw the perennially challenging public/private boundary.

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