Written by Gowling WLG’s team of public law and regulation experts, our case update offers a straightforward and concise overview of six recent important cases in public law and regulation and the key points which can be taken from them.

In this edition, our experts examine the following cases:

1. **The standards of consultation required, legitimate expectation and intensity of review in the context of the Heathrow judicial review challenges** - R (Spurrier) v Secretary of State for Transport and R (Heathrow Hub) v Secretary of State for Transport

2. **The applicability of EU proportionality tests to national measures restricting EU rights in relation to freedom of movement of persons and the proper interpretation of the 'residency test'** - Secretary of State for Work and Pensions v Gubeladze

3. **The legality of a voter ID Pilot Scheme made by order under section 10 of the Representation of the People Act 2000** - R (on the application of Coughlan) v The Minister for the Cabinet Office and others

4. **The need for clear and express words if a statutory power conferred on a member of the Executive is able to be exercised to override a duty set out in other primary legislation** - R (on the application of VIP communications) v Secretary of State for the Home Department

5. **Whether a press statement could be capable of giving rise to a legitimate expectation** - R (on the application of Sargeant) v First Minister of Wales

6. **The Courts' willingness behind the veneer of crowd funded litigation to the**
1. Consultation, legitimate expectation and intensity of review in the Heathrow challenges

In R (Spurrier) v Secretary of State for Transport and R (Heathrow Hub) v Secretary of State for Transport, two sets of claimants brought unsuccessful challenges against the decision of the Secretary of State for Transport to designate the Airports National Policy Statement (ANPS). The ANPS set out the government’s policy to approve an additional runway to the north west of the current runways at Heathrow airport (the NWR Scheme).

The challenge in Spurrier was brought by a group of claimants in favour of a second runway at Gatwick Airport (the G2R Scheme). Their challenge focused mainly on the Secretary of State's treatment of evidence in relation to noise, climate change and pollution levels, as well as whether the statutory consultation had been conducted with an open mind.

On the environmental grounds, the Divisional Court held that the Secretary of State had regard to the wide range of advice and evidence and did not act inconsistently with the relevant legislation. The NWR Scheme was capable of being delivered in a way that ensured that matters of environmental importance were protected, which was sufficient at this stage in the development process.

On the consultation ground, the court emphasised that the Secretary of State was permitted to have a strong preference for the NWR Scheme and to highlight this in various speeches, press releases and leaflets. Having such a preference did not amount to predetermination. The consultation had been properly carried out and there was no evidence that he did not approach it with an open mind.

The claimants in Heathrow Hub were advocates of an extension to the current northern runway at Heathrow (the ENR Scheme). Although they had designed the scheme, its actual delivery depended on Heathrow Airport Limited (HAL), which was in favour of the NWR Scheme. They claimed that they had a legitimate expectation that the Secretary of State would not consider issues relating to the deliverability of a scheme arising from the identity of the promoter. This expectation was breached by the request that the claimants obtain from HAL a 'guarantee' that HAL would implement the ENR Scheme if selected, with HAL’s refusal to provide this being a deciding factor against the scheme.
The court held that no legitimate expectation existed as the Secretary of State had not made an express promise to the effect claimed. Statements made by the Airports Commission relied on by the claimant could not create a legitimate expectation which bound the Secretary of State.

If, contrary to this, an expectation did exist, the Secretary of State was entitled to use his discretion to depart from it in order to determine the very important issue of whether the scheme could actually be implemented and delivered. In any event, the ENR Scheme was rejected on its merits, not on the basis of deliverability.

In both cases, the Divisional Court emphasised the wide margin of appreciation given to decision-makers in relation to issues of national economic, political and social policy, particularly where detailed technical and scientific advice was relied upon. The ANPS covered a wide spectrum from broad macro-economic judgments to the proposal to locate the airport expansion in a particular locality. Where on the spectrum a particular strand of policy under challenge lies may affect the intensity of review, whether the alleged ground is made out, or the nature of any relief granted.

2. Applicability of EU proportionality tests to national measures restricting EU rights in relation to freedom of movement

By virtue of the Act of Accession (an annex to the '2003' Athens Treaty) ten countries became EU member states (the Accession States). The Act enabled existing EU member states to apply national measures which derogated from the right to freedom of movement for nationals of eight of the Accession States (AS nationals) for period of five years, extendable for a further two years in cases of 'serious disturbances to their labour market or threat thereof'.

The UK applied its national measures by way of introducing the Workers Registration Scheme (WRS). This required AS nationals to pay a £90 fee and register before commencing (and when changing) employment. The obligation to register applied until the AS national had been working for a continuous period of 12 months. Failure to register would mean that the work would not entitle the worker to a right to reside in the UK. Initially introduced for five years, the WRS was extended for a further two years in 2009.

In October 2012, Ms Gubeladze - an AS national from Latvia, living in the UK since 2008 and working for periods between September 2009 and November 2012 - made a claim for
state pension credit. The basis of the claim was that she had a right of residence in the UK pursuant to the requirements of the Citizens Directive (Directive 2004/38/EC, implemented in the UK by the Immigration (EEA) Regulations 2006) - namely that she had resided continuously in the UK for three years and had worked for at least a year.

The claim was refused on the ground that the three year residency had not been met because the requirement was for 'legal' (rather than physical) residence, and her legal residence did not start until August 2010 (when she first registered under the WRS).

The claimant challenged this decision on two grounds. Firstly, that the 2009 extension of the WRS was disproportionate (in EU law terms) and secondly that the three year residency test meant actual, not legal, residency. She succeeded on both grounds at the First Tier Tribunal, and on the first ground at the Court of Appeal, meaning that the Secretary of State's refusal of her claim was unlawful.

The Secretary of State appealed to the Supreme Court (Secretary of State for Work and Pensions v Gubeladze). Although the core question on appeal was whether the extension of the WRS was proportionate, the Supreme Court also gave permission for the Secretary of State to advance a new argument that the decision to extend the WRS could not be challenged on the grounds of proportionality.

In dismissing the appeal, the Supreme Court held that -

- The extension of the WRS could be challenged on the grounds of proportionality - the Act of Accession conferred protected rights and any national measure adopted under the available temporary derogations still had to be proportionate.
- The extension of the WRS was not a proportionate measure - the assessment showed that while the WRS would have only a small and speculative mitigating effect of reducing the serious disturbances to the UK labour market, the burdens and detriments it would impose on employers and AS nationals were substantial and serious.

Although it was not required to do for the purposes of this case, the Supreme Court also made an important finding for all EU nationals resident in the UK - that the three year residency rule applies in respect of actual, not legal, residency.

3. Legality of Voter ID Pilot Schemes

Following an announcement made in November 2018, the Minister for the Cabinet Office made orders - under section 10 of the Representation of the People Act 2000 (the Act) - for the implementation of pilot schemes which required voters to produce some form of ID
Section 10(2)(a) of the Act provides that a scheme under section 10 is one which makes provision 'differing in any respect from that made under or by virtue of the Representation of the People Act 1983 or the 2000 Act as regards...(a) when, where and how voting at the elections is to take place'.

In R (on the application of Coughlan) v The Minister for the Cabinet Office and others, Mr Coughlan contended that the Minister had acted outside of her powers in approving the Voter ID pilot schemes because: (i) the requirement to produce ID is not concerned with 'how' voting takes place; and (ii) the schemes were contrary to the statutory purposes for which the section 10 power could be exercised, which he contended was only for the purpose of facilitating and encouraging voting at elections.

Firstly, the claimant argued that 'how voting at elections is to take place' is concerned with the way or manner in which voting occurs or the physical means by which it takes place and is not concerned with entitlement to vote.

The court disagreed and held that section 10(2)(a) of the Act deals with voting procedures and, on their natural and ordinary meaning, the words in dispute were broad enough to include procedures for demonstrating an entitlement to vote. In support of its conclusion, the court highlighted that: (a) had Parliament intended to limit the provision to a physical mechanism by which a vote is cast it could have made that clear (as it had in section 10(2)(b of the Act); and (b) if, as accepted by the claimant, the words were broad enough to impose ID requirements for remote electronic voting, that indicated that they were also broad enough to include ID requirements in non-remote voting.

The claimant's second argument proceeded on the basis that the purpose of the power under section 10(1) of the Act is only to facilitate or encourage voting.

The court disagreed and accepted the Minister’s reasoning that the pilot schemes could test a range of matters concerned with the modernisation of electoral procedures in the public interest and that there was no express limitation on the public interest considerations to which the Minister may have regard for these purposes.

The court also agreed that even if the claimant had correctly identified that the purpose of the section 10(1) power was to facilitate or encourage voting at an election, (a) the voting that is to be facilitated is lawful voting (i.e. by persons entitled to vote), and (b) the purpose cannot be limited only to the pilot schemes themselves but extends to schemes that lead to changes in procedures that encourage voting over the longer term.
4. Clear and express words are required if a statutory power conferred on one person is to override a statutory duty conferred on another

In *R (on the application of VIP communications) v Secretary of State for the Home Department*, the court considered whether section 5(2) of the Communications Act 2003 (the *CA 2003*) created a power entitling the Secretary of State to direct Ofcom (the communication regulator) not to comply with a statutory duty which was imposed on it under section 8(4) Wireless Telegraphy Act 2006 (*WTA 2006*).

The section 8(4) duty requires Ofcom - where it is satisfied that certain conditions as specified in section 8(5) of *WTA 2006* are met in respect of the use of wireless telegraphy stations or apparatus - to make regulations providing for exemptions from the individual licensing requirement set out in section 8(1) of *WTA 2006*.

Having consulted on the issue, Ofcom issued a notice setting out its intention to make regulations exempting a type of telecoms device known as a 'GSM Gateway' from the individual licensing requirement. The Secretary of State gave a direction to Ofcom under section 5(2) of the *CA 2003* not to make the proposed regulations, because of concerns about national security and public safety arising from the use of GSM Gateways.

The claimant brought a claim for judicial review on the basis that the direction was *ultra vires* because the powers available to the Secretary of State pursuant to section 5(2) of the *CA 2003* did not permit a direction under that section to have the effect of directing Ofcom not to comply with a statutory duty imposed on it under other primary legislation.

The Secretary of State argued that: (a) section 5(2) not only conferred powers on her but imposed a duty on Ofcom to act in accordance with any directions given under it and therefore imposed a duty on it not to comply with its duties under primary legislation; and (b) the claimant's construction of section 5 would lead to absurd consequences which Parliament could not have intended.

The court considered and summarised the principles of law applicable to statutory construction and agreed with the claimant. It concluded that: (i) clear words are required to give a power, by way of secondary legislation, to override a statutory duty imposed by primary legislation, (ii) section 5(2) of *CA 2003* did not include such express wording, (iii) the power conferred under section 5(2) was limited to the giving of a direction as to how Ofcom should carry out its duty; and (iv) a direction not to carry out that duty could not be
said to be within the scope of the statutory power.

5. Is a press statement capable of giving rise to a legitimate expectation?

*R (on the application of Sargeant) v First Minister of Wales* was a judicial review of the establishment of an investigation into Carl Sargeant’s departure from his post as Cabinet Secretary for Communities and Children in Wales (the *Investigation*).

The First Minister removed Mr Sargeant from office following allegations of inappropriate behaviour. Mr Sargeant took his own life shortly afterwards. In the immediate aftermath of his death, the First Minister told a press conference that he would welcome scrutiny of his actions and that it would be appropriate for this to be done independently. A press statement was then released the following day stating that the First Minister was establishing an independent investigation led by a senior QC to investigate and report on the circumstances surrounding Mr Sargeant’s removal from office. It stated that in order to ensure that this happened separately from the First Minister's office, the Permanent Secretary would undertake the preparatory work on establishing the investigation, including discussing the terms of reference with Mr Sargeant’s family.

The family made a number of representations about the terms of the Inquiry, including proposing that the investigator should be able to compel witnesses and that the family should be able to ask questions of witnesses. The final set of terms was signed off by the First Minister who rejected the changes sought by the family.

The claimant, Mr Sargeant’s wife, issued proceedings arguing that the press statement had created a legitimate expectation that the Investigation and its procedures would be set up and decided independently of the First Minister and that this had not been the case. She also argued that the terms of the Investigation were irrational in themselves.

The court rejected the First Minister’s argument that a press statement could not found a legitimate expectation. Turning its attention to the statement in question, the court held that it indicated that the Permanent Secretary would undertake all of the necessary work to set up the Investigation and would do so independently of the First Minister. However, since the Permanent Secretary had been given a remit for conducting the preparatory work by the First Minister, and had obtained his approval of the final terms of the operational protocol for the Investigation, it could not be argued that the Investigation had been set up independently.
The court found that it would 'be unfair for the First Minister both to retain the political capital of the announcement that the work necessary to establish the Investigation would be undertaken independently from his office, and to retain the power to decide what the arrangements for the Investigation should be'. The legitimate expectation had been breached without any justification for doing so.

Although it consented to quashing the terms of the inquiry that had been set in breach of the expectation, the court noted that the terms around the powers of the investigator and the questioning of witnesses did not give rise to any error of law in themselves.

6. Court looks behind the veneer of crowd funded litigation to the personal resources of those funding it

R (on the application of We Love Hackney Ltd) v Hackney London Borough Council concerned an application for a cost capping order by the claimant and an application for security of costs by the defendant council in respect of an application for judicial review of the council's decision to adopt a revised statement of licensing policy (SLP).

The revised SLP made changes to Special Policy Areas within the London Borough of Hackney and changed the core hours policy for licensed premises within the borough. The claimant was concerned that the changes were likely to make it harder for licensed venues to operate.

The claimant was a company made up of local residents and business owners who campaigned about Hackney's night-time economy and, in particular, the council's proposed changes to its SLP. The judicial review was crowd funded by the claimant, with £20,000 having initially been raised through multiple small donations and progress being made towards a 'stretch target' of £53,000. By October 2018 4,341 supporters had registered their support for the claimant on social media.

However, at least two of the three directors of the company were successful entrepreneurs with access to significant financial resources and with a commercial interest in the outcome of the proceedings. The third appeared to be a senior manager within one of the other director's companies.

The claimant sought a costs capping order limiting its exposure to the council's costs to £35,000 on the basis that it was a crowd funded vehicle with limited resources. That application was dismissed on the ground that the proceedings were not public interest
proceedings as required under the relevant legislation. While it was argued that the council had no regard to the public sector equality duty in formulating its SLP, this point related only to the way in which it had formulated its own policy and did not relate to a factual or legal point with general or national consequences.

The judge considered that, even if there were an issue of general public importance, it would not be an appropriate to make a costs capping order due to the resources of those behind the claimant company who, rather than being unable to fund the litigation beyond the level of third party support, simply did not want to do so.

It was unlikely that either as individuals, or through their businesses, they would be unable to fund litigation that they considered to be of great commercial importance to them. As such, the application was dismissed.

The judge accepted that the claimant company would be unable to pay the council's costs as this was the basis of its application for a cap. However, given her findings as to the resources of its backers, she disagreed that the claim would be stifled if the council was granted security for costs and consequently granted its application to that effect.

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