The No Substantial Difference Test

How is it being applied?

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Brick Court Chambers

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R (Logan) v London Borough of Havering [2015] EWHC 3193

- 55. In my judgment, any consideration of whether the outcome was highly likely to have been substantially the same even if due regard had been had to the PSED should normally be based on **material in existence at the time** of the decision and not simply post-decision speculation by an individual decision maker. Any other course runs the risk of reducing the importance of compliance with duties of procedural fairness and statutory or other requirements that certain matters be taken into account and others disregarded. Indeed**, it would undermine the efficacy of judicial review as an instrument to ensure that the rule of law applies to decision making by public authorities**, by deterring claimants from bringing a case or the court from granting permission by a declaration by a decision maker who has failed to obey the law to the effect that obedience would have made no difference. **Whatever else Parliament may have intended to achieve by this legislation, I cannot infer that it included so draconian a modification of constitutional principles.** It may well be that the new provision was only intended to apply to somewhat **trivial procedural failings** that could be said to be incapable of making a material difference to the decision made…"

Basics

- S. 31 of the Senior Courts Act 2015 (introduced by amendment to Criminal Justice and Courts Act 2015)
    - The regime applies at both the permission and substantive stages.
    - At the permission stage, the Court may apply the provision of its own motion or, when asked by the defendant, it must do so.
    - Following a full hearing of the judicial review application, the Court must not grant relief if satisfied that the statutory test is made out.

Basics (contd.)

- The court can exercise its powers to refuse permission or relief only when it is satisfied that it is ‘highly likely’ that the outcome would not have been ‘substantially different’ if the conduct complained of had not occurred.

- Even when it is so satisfied the Court can refuse to exercise the available power to refuse permission or relief if it considers that it is appropriate to do so for reasons of ‘exceptional public interest.” If so it must certify this to be the case.

Is it really a new test?

- *Simplex GE (Holdings) Ltd v Sec of State for the Environment* [1988] 3 PLR 25
- *Smith v NE Derbyshire PCT* [2006] EWCA Civ 1291
- *R (Rogers) v Wycombe DC* [2017] EWHC 3317 (Lang J)
- *R (Wet Finishing Works Ltd) v Taunton Deane BC* [2017] EWHC 1837 (Singh J)
- *R (Bokrosova) v London Borough of Lambeth* [2015] EWHC 3386 (Laing J)
- *R (DAT) v West Berkshire Council* [2016] EWHC 1876 (Laing J)

Is s.31 Imposing Inappropriate Decisions on Judges?

- *Smith v NE Derbyshire PCT* [2006] EWCA Civ 1291
- *R (Cooper) v Ashford Borough Council* [2016] EWHC 1525 (John Howell QC)

Judge Over Your Shoulder?

- aka JOYS!

- Have we moved to “Judge as your Additional Decision-Maker”?

What Evidence must the Defendant Produce?

- *R (Enfield LBC) v SS Transport* [2015] EWHC 3758 (Laing J)
- *R (Logan) v London Borough of Havering* [2015] EWHC 3193 (Blake J)
- *R (Wiggins and Jones) v Neath Port Talbot County Borough Council* [2015] EWHC 2266 (Gilbart J)
- *R* (Harvey) *v Mendip DC and ors* [2018] JPL 419 (CA – Sales LJ)

How High is the Hurdle?

- *R (Hoare) v Vale of White Horse DC* [2017] EWHC 1711 (John Howell QC)
- *Glencore Energy UK Ltd v HMRC* [2017 EWHC 1476 (Green J)

Where Does it Leave Reasons and other Procedural Challenges?

- *R (Rogers) v Wycombe District Council* [2017] EWHC 3317 (Lang J)
- *R (A and B) v Oxfordshire CC* [2016] EWHC 2419 (Langstaff J)

Are the Cases Taking Off?

- Section 31(2A) (substantive hearing): 4 x 2015; 41 x 2016; 34 x 2017; 8 x 2018.
- Section 31(3C) (permission stage): 1 x 2015; 5 x 2016; 8 x 2017; 1 x 2018.
- Totals: 2015 – 5; 2016 – 46; 2017 - 42; 2018 – 9

Are the Cases Taking Off? (contd.)

- *Monarch Airlines* [2017] EWCA Civ 1892
- *Uber v TfL* [2017] EWHC 435

Constitutional Principle and the Public Interest Test

- *R (on the application of OMED ABID) v. SSHD* [2017] EWHC 1962 (Helen Mountfield QC)

s. 31(E) and (F) provide:

"(3E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.

(3F) If the court grants leave in reliance on subsection (3E), the court must certify that the condition in subsection (3E) is satisfied."

Constitutional Principle and the Public Interest Test

- "…Although it seems to me **highly likely** that the outcome would not have been substantially different if the errors complained of had not occurred, this is a case where…**section 31(3E) is in play**…[T]here is a **great public interest** in the state detaining people indefinitely for the purposes of effecting removal from the jurisdiction only where the conditions for doing so are clearly made out. That was not the case here. It is wrong for casual and careless risk assessments to form the basis for detention…**Where, as here, there have been errors of law in administrative detention, there is an exceptional public interest in the court saying so and disapplying section 31(3D)** of the [1981 Act]." [89]

Thank you

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