Remedies in Judicial Review

How far can you push the Court on relief and remedies, given the recent reforms to JR, and the ramifications of decisions such as Imam v Croydon (2023) in the Supreme Court?

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R (Imam) v Croydon LBC

- [2023] UKSC 45, [2023] 3 WLR 1178

- Issue: what approach should a court adopt to granting a mandatory order as a remedy against a local housing authority in breach of a statutory duty under s.193(3) Housing Act 1996?

Iman: The facts

- Claimant was a full-time wheelchair user with three children
- Applied to Croydon for homelessness assistance in February 2014
- Croydon accepted she was in priority need and not homeless intentionally and that it owed her a duty under section 193(2)
- In September 2014 it offered her temporary accommodation, which she accepted but sought a review of its suitability
- In June 2015 Croydon accepted it was unsuitable – it lacked a level access toilet on the first floor suitable for her to use at night
- It failed to provide suitable accommodation

Iman: The Facts

- The claimant issued judicial review claim in March 2020
- It was accepted by Croydon that from June 2015 onwards it had been in breach of its duty under section 193(2) [which provides *"unless the authority refer the application to another local housing authority (see section 198), they shall secure that accommodation is available for occupation by the applicant"*]
- However Croydon resisted mandatory relief. Its position? *"The defendant faces significant difficulties as a result of acute budgetary pressures, very high demand for housing in the Borough and a limited pool of properties available to meet this demand."*

Decision at first instance

- The judge declined to make a mandatory order. His reasoning included:
  - Her position at the property was not “intolerable” and it could not be said that the situation had been going on for so long that “enough is enough”
  - Croydon had considered the claimant across all the potential pools of properties available to it and was doing all it reasonably could, consistently with its policies and limited resources, to fulfil its statutory duty
  - Court should consider the wider context regarding Croydon’s resources
  - Granting a mandatory order requiring Croydon to provide a property would involve the court “requiring the defendant to spend money which on the evidence it does not have or to reallocate money from the provision of other public services in order to provide accommodation to the claimant”

Decision in the Court of Appeal

- The claimant appealed to the Court of Appeal
- R (Elkundi) v Birmingham CC [2022] EWCA Civ 601, [2022] QB 604
- *"Public law remedies, including a mandatory order, are discretionary remedies"*
- Lack of resources/budgetary constraints were not relevant
- Correct approach was to consider whether the local housing authority has taken all reasonable steps to perform the duty
- If it has done so, and still not been able to secure suitable accommodation, *"that may be a good indication that it may not be appropriate to grant a mandatory order as it may not be possible to secure suitable accommodation within a specified time"*

- Having found errors in judge’s reasoning, the Court of Appeal decided the appropriate course was to remit the case to the High Court for further consideration with the benefit of additional evidence
- Croydon appealed to the Supreme Court

Supreme Court's decision

- Croydon had failed to fulfil its duty over almost six years
- Starting point was that the duty was a public law one imposed by Parliament and not qualified in any relevant way by reference to resources
- *"where it is established that there has been a breach of such a duty, it is not for a court to modify or moderate its substance by routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament's legislative instruction"*

- Public law remedies are discretionary and it is incumbent on a court to exercise its discretion in accordance with principle and to avoid arbitrariness
- Where a breach of the law is established, the ordinary position is that a remedy should be granted
- Court should proceed cautiously in exercising its discretion to refuse to make an order – should do so only where that course is clearly justified
- But it may be that due enforcement of the law can be sufficiently vindicated by an order other than a mandatory one

- A quashing order is the usual remedy in public law
- A mandatory order takes the matter out of the hands of the authority and to that extent makes the court the primary actor – the court must have regard to whether such an order might undermine to unjustified degree the ability of the authority to fulfil functions conferred by Parliament
- Where a court issues a mandatory order, that order produces legal consequences of its own over and above those inherent in the duty – the court should consider whether it is right to create those additional effects in all the circumstances of the case

Impossibility?

- The limitation on issuing a mandatory order with which it is impossible to comply is well established but the court held that this gives rise to the question of what qualifies as impossibility of performance in the present context and the relevance of resources
- Starting point is the requirements that effect be given to the will of Parliament and that the law be enforced in an appropriate manner
- Onus on the authority to explain why a mandatory order should not be made and this requires a detailed explanation of its situation and why it would be impossible to comply
- Question of whether authority has taken all reasonable steps is objective one, not a *Wednesbury* matter

Impossibility?

- A public authority is obliged to give priority to using its resources to meet its duties (see *Tandy*)
- For constitutional reasons to do with the authority of Parliament, the general position is that Parliament imposes a statutory duty on the footing that the authority must be taken to have the resources to comply
- Not for the court to dilute a clear statutory duty by reference to its own view of the available resources
- When assessing claim of impossibility, court should usually refer to the authority's position at the time of the proceedings

Exercise of discretion in Imam

- 5 comments relevant to the exercise of court's discretion
- (1) the authority may have a general contingency fund to deal with unexpected calls for expenditure – if so, it should consider its use
- (2) relevant if the authority was on notice in the past of a problem relating to non-performance of its duty and failed to take opportunity to react in good time – the longer it has sat on its hands, the more important it may be to enforce the law by mandatory order - an inquiry may be necessary to examine when the authority became aware of the problem "at council level" and if unaware, why
- (3)the extent of the impact on the individual is relevant and the individual should normally adduce evidence of that impact

- (4) if there is no sign that the authority is moving to rectify the situation, that is a factor pointing in favour of the making of a mandatory order
- (5) the court should take care not to create a situation which is unfair to others, by giving a claimant undue priority over others who are also dependent on the authority and may have an equal or better claim
- Court dismissed the appeal and agreed with the Court of Appeal that it should be remitted to the High Court for further consideration

R (HXN) v London Borough of Redbridge

- [2024] EWHC 443 (Admin)
- Failure by local education authority to provide the package of special educational provision set out in H's Educational, Health and Care Plan (EHCP)
- Clear statutory duty under section 42 of Children and Families Act 2014 to secure the special educational provision specified in the EHCP
- Court decided to make a mandatory order requiring its provision within 5 weeks

- The features which led the court to impose a mandatory order included:
  - The provision for H had fallen significantly short of that specified in the EHCP for over a year
  - This was likely to have had a material impact on the quality of his education and was not a technical or minor shortfall
  - The failure to comply was persisting and no credible plan had been presented for bringing the breach of duty to an end
  - There were options available to the council for providing H with the full package of special educational provision
  - There was little to suggest the authority was taking seriously its statutory duty
- *"Absent a mandatory order, the Court could have no realistic expectation that the remedy it granted would make any substantive difference in upholding H's rights"*

R (DXK) v SHHD

- [2024] EWHC 579 (Admin)
- Challenge to the lawfulness of the system of allocation of asylum accommodation under the Immigration and Asylum Act 1999 as it relates to pregnant and new mother asylum-seekers and failed asylum-seekers
- Central allegation that the SHHD has unlawfully failed to collect and monitor relevant statistical data on the allocation of dispersal accommodation to this group
- Judge found that the failure to collect such data was a breach of the public sector equality data; without the data the SSHD could not discharge, and was therefore in breach of, the continuing duty under s. 149(1)(b) Equality Act 2010

- The claimant sought a mandatory order compelling the SHHD to introduce a suitable system for statistical data monitoring within a specified timetable; the SHHD opposed this as an unjustified fetter on the SHHD's freedom to discharge his public functions in the public interest, citing *Imam*
- Judge acknowledged that a declaration is *"usually a sufficient public law remedy where unlawfulness has been demonstrated"* (because, although it has no coercive effect, it is binding on the parties and as a matter of constitutional convention the executive may be expected to comply with its terms: R (NCCL) v SSHD [2019] QB 481) but decided that a mandatory order was necessary.

- Judge's reasoning was that:
  - The SHHD had not remedied the unlawfulness declared in an earlier case *(R (DMA) v SHHD* [2021] 1 WLR 2374*)* to have occurred in relation to disabled people (a similar lack of statistical data monitoring and evaluation)
  - The SHHD had resiled without explanation from an earlier undertaking to the court to introduce such monitoring in relation to pregnant women and new mothers
- The judge set out the minimum requirements (in terms of the data to be collected) necessary to ensure fulfilment of the PSED, but did not specify the means by which it should be collected or impose any deadline. He observed that the SHHD *"may be expected to introduce such a system as soon as it is reasonably practicable"*

R (LND1) v SHHD

- [2024] EWCA Civ 278
- Judge at first instance found that the decision that the claimant did not meet conditions in Afghan Relocation and Assistance Policy (ARAP) was wrong and irrational and that there was only one rational decision the MOD could reach.
- The Court of Appeal found that the judge's findings were flawed, but that so too had been the decision under challenge. The judge had been wrong to conclude there was only one rational outcome.

- In deciding that the decision should be quashed and the matter remitted to the MOD for reconsideration, the CoA considered the approach to remedies.
  - The appropriate remedy **generally** is to quash the unlawful decision and remit the matter to the public authority for reconsideration in light of the judgment
  - The judge ought in any event to have specified the appropriate remedy: *"A decision that the claim for judicial review is allowed is not, generally, sufficient to dispose of a claim. Judicial review is a process whereby a claimant seeks to establish that a public body has acted unlawfully in a public law sense and to obtain an appropriate remedy, either one of the prerogative remedies such as a quashing order (or a prohibiting or mandatory order if appropriate) or a declaration or injunction."*
  - There may be occasions when no substantive remedy is needed by the time of the hearing and then it may be appropriate simply to give judgment setting out the legal position rather than granting any particular remedy

Compliance with declarations: Craig v HM Advocate

- [2022] UKSC 6
- Case concerned the unlawful failure of the Government (SHHD) to make a commencement order bringing into force provisions of an Act of Parliament designed for the protection of individuals whose extradition has been requested
- That failure had been successfully challenged by an individual whose extradition was sought in proceedings in which the court made a final order declaring that the Government was acting unlawfully and contrary to its statutory duties
- Notwithstanding that order, the Government's failure to make the commencement order continued over a period of years

- Against that inauspicious background, it was submitted on behalf of the Advocate General (on behalf of the SHHD) that by making a declaratory order and not an order for specific performance, the court had told the SHHD that the failure to commence the provisions was unlawful but not that the provisions had to be commenced
- Lord Reed, giving the judgment of the Court, noted that the argument that, where a statutory duty exists which is capable of being enforced by a coercive order, a party should apply for such an order against a government minister, instead of relying upon compliance with a declaratory order, *"has implications for the constitutional relationship between the Government and the courts"*

Craig v HM Advocate

- It had been firmly established since *M v Home Office* [1994] 1 AC 377 that there is a clear expectation that the executive will comply with a declaratory order and *"it is in reliance on that expectation that the courts usually refrain from making coercive orders against the executive and grant declaratory orders instead"*
- In *Vince v Advocate General for Scotland* [2019] CSIH 51 the court had accepted the Government's submission that it was unnecessary to make a coercive order against the Prime Minister, because members of the Government could be expected to respect a declaratory order
- The Government's compliance with court orders, including declaratory orders, *"is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts … But trust depends on the Government's compliance with declaratory orders in the absence of coercion"*
- A declaratory order has important legal consequences – the legal issue is determined and is res judicata, and a minister who acts in disregard of the law as declared by the courts *"will normally be acting outside his authority as a minister, and may consequently expose himself to a personal liability for wrongdoing"*

Judicial Review and Courts Act 2022

- Introduces section 29A of Senior Courts Act 1981
- Suspended quashing orders and prospective quashing orders
- Section 29A(1): a quashing order may provide:
- (a) for the quashing not to take effect until a date specified in the order, or (b) removing or limiting any retrospective effect of the quashing
- Under (a), the impugned act is (subject to any conditions imposed under s. 29A(2)) upheld until the quashing takes effect - section 29A(3)
- Under (b), the impugned act is (again subject to any conditions imposed) upheld "in any respect in which the provision under section 29A(1)(b) prevents it from being quashed" – section 29A(4)
- Where an impugned act is upheld by virtue of (3) or (4) it is to be treated for all purposes as if its validity and force were and always had been unimpaired by the relevant defect

- In deciding whether to exercise the power in s29A(1), the court must have regard to
  - (a) the nature and circumstances of the relevant defect
  - (b) any detriment to good administration that would result from exercising or failing to exercise the power
  - (c) the interests or expectations of persons who would benefit from the quashing of the impugned act
  - (d) the interests of expectations of persons who have relied on the impugned act
  - (e) so far as it appears relevant, any action taken or proposed to be taken, or undertaking given, by a person with responsibility in connection with the impugned act

Ecpat UK

- Example of exercise of the section 29A power: R (Ecpat UK) v Kent County Council and SHHD
- Substantive judgment is at [2023] EWHC 1953 (Admin)
- Remedies judgment is at [2023] EWHC 2199 (Admin); following further relief hearing [2023] EWHC 3030 (Admin)
- Judge made order quashing the Kent Protocol (protocol agreed between Kent CC and SSHD setting out how Kent CC will deal with unaccompanied asylum seeking children) in its entirety and the NTS Protocol (protocol setting out procedure for transfer of responsibility from one local authority to another) in part, but suspended the effect of both orders under section 29A(1)(a) for three weeks and set a further hearing to consider relief

Ecpat UK

- *"These provisions provide a remedial flexibility that was previously unavailable. They enable the court to deal with situations where one or more public authorities are engaged in conduct that is unlawful, but real harm would be caused if that conduct had to stop immediately".*
- Reason for suspended quashing order re NTS Protocol was that an immediate order would mean responsibility for children accommodated in hotels could not be transferred to other local authorities.
- Reason for suspended quashing order re Kent Protocol was to allow renegotiation of the agreement contained in the protocol
- Three weeks was appropriate – *"Any more would fail to meet the urgency of the situation"* – and there would be stringent conditions during the period of suspension to ensure that everything was being done that could be to minimise the extent of the continued unlawful conduct

Ecpat UK

- Where the power in s.29A(1)(a) to suspend a quashing order is exercised, it may be necessary to hold a further hearing to check that the conditions for suspension have been complied with and to determine whether the suspension should be extended
- Declarations can be appropriate in conjunction with quashing orders, but there is no power to grant suspended declaration – if the court were to grant a declaration that an impugned act is unlawful and at the same time a suspended quashing order, it would be saying two inconsistent things.
- A declaration could now be made in respect of the Kent Protocol as the suspension had come to an end

Section 31(2A) Senior Courts Act

- Power to refuse relief on grounds that it is highly likely that the outcome for the claimant would not have been substantially different
- R (Wallpott) v Welsh Health Specialised Services Committee [2021] EWHC 3291 (Admin) (refusal to fund particular cancer treatment): *"very far indeed from an appropriate case in which to refuse relief under that section. It is not for me to put myself in the shoes of the decision-makers"*
- R (Dawson) v United Lincolnshire Hospitals NHS Trust [2021] EWHC 928 (Admin): burden of proof is on defendant; hurdle is a high one; court, in addressing the hypothetical or counterfactual question, necessarily has to undertake its own assessment of the decision making process
- R (Care North East Northumberland) v Northumberland CC [2024] EWHC 1370 (Admin): discussion of common law materiality and statutory materiality
- R(Chiswick) v Secretary of State for Justice [2024] EWHC 1223 (Admin) – case about the impact of Bailey unlawfulness (prohibition on state professional witnesses communicating a view on suitability for release to a parole board) – per Fordham J *"I cannot even say it is "likely" still less "highly likely". Parliament has not required me to undertake an exercise in speculation, and the case-law explains why such an exercise is inappropriate."*