Facts are facts, but not all facts are created equal

When is a fact “jurisdictional” and why does it matter?

James McClelland

Brick Court Chambers

Facts – the forbidden territory

1. **Primary fact finding is generally "*off limits*". Challenges to findings of fact are bounded by a forbidding threshold (*Wednesbury*).**

2. **When fact finding is admixed with expert judgment, it can be almost impregnable.**

3. **Methods of circumvention:**

   i. **Error as to "*an established and relevant fact*" –** requires a fact which is "*uncontentious and objectively verifiable*". See R (Wilson) v Prime Minister [2019] EWCA Civ 304 at ¶ 45; Begum v Tower Hamlets [2003] UKHL 5 at ¶7; E v SSHD [2004] EWCA Civ 49 at ¶66)

   ii. **Insufficiency of evidence.** See SSte for Education v Tameside [1977] AC 104 (a duty to take all reasonable steps to obtain the information reasonably necessary to take the relevant decision); R (British Sky Broadcasting Ltd) v Central Criminal Court [2011] EWHC 3451 (Admin) (a decision is only lawful if there is "*sufficient evidence before the judge to enable him to reach that decision*")

   iii. **Relevancy** – present the putative fact as a relevant matter which has been ignored; or impugn the factual finding as based on an irrelevant consideration: see R (Alconbury Developments Ltd) v SSte for Environment [2001] UKHL 23.

“Precedent” or “jurisdictional” facts are the exception

- No deference. No margin of appreciation. No judicial restraint
- No “right to be wrong” – the Court has full decision-making power
- These are facts with a “special” status

Topicality

- Brexit / 2021
- Absence of any systematic guidance or analytical framework.

Defining the concept

- Classic formulation in R v SSHD, ex p. Khawaja [1984] AC 74:

  "where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied."

- More simply: a precedent fact is one which must exist before a statutory power (or duty) is engaged.

- Gives rise to potentially difficult distinctions between:

  - Facts which are a precondition to the existence of any discretionary power (precedent facts); and

  - Facts which must be determined in the course of exercising that power – including facts without which the power may not be exercised ("ordinary" facts)

Illustration of this distinction

- Ahsan v SSHD [2018] H.R.L.R. 5 (CA): the SSHD decided that individuals were liable for removal under s. 10 of the Immigration and Asylum Act 1999 because they had "used deception" when seeking leave to remain.
  - (See s.10(b): "*A person who is not a British citizen may be removed from the United Kingdom, in accordance with directions given by an immigration office if – […] (b) he uses deception in seeking (whether successfully or not) leave to remain* […]").
- The existence of the deception was a precedent fact because it was a precondition to the power of removal (para. 117).
  - (cf Richards LJ in Giri (below): "*[…] as a matter of statutory construction, the very existence of the power to remove would depend on deception having been used; and in judicial reviewing proceedings challenging the decision to remove, the question whether deception had been used would be a precedent fact for determination by the court in accordance with Ex p Khawaja*").

- Compare and contrast with R (Giri) v SSHD [2016] 1 W.L.R. 4418 (CA): the SSHD had a power to grant leave to remain under s.3(1) of the Immigration Act 1971; detailed rules prescribed the exercise of that power, one of which provided that leave would be denied in cases of deception
    - (See para. 322(1A) Immigration Rules: leave is to be refused: "*where false representations have been made or false documents or information had been submitted […] or material facts have not been disclosed […]*).
- The existence of the deception was not a precedent fact. It was not a precondition to the power to grant leave; it was a question which arose when exercising that power.
    - "*The key point is that the statute confers the power on the Secretary of State […] to make the decision whether to grant or refuse leave to remain. It is for the Secretary of State […] in the exercise of that power […] to determine which provisions of the Rules apply and whether relevant conditions are satisfied*" (Richard LJ, at para. 19).

A jurisdictional function is necessary but not sufficient

- Even if a fact is a precondition to a statutory jurisdiction, this may not be sufficient;
- Whether it qualifies will depend on

(1) Examining the nature of the factual issue

a) is the fact hard-edged and objectively ascertainable; or

b) is it open-textured and evaluative (if so, *quaere* whether it is a "fact" at all)

(2) Considering the wider statutory context and drawing inferences over Parliamentary intent (is this a question which Parliament necessarily intended to leave to the primary decision-maker)?

Leading authority: R (A) v Croydon London Borough Council [2009] 1 WLR 2557:

- Was the appellant "***a child in need***" and therefore entitled to accommodation under the Children Act 1989.
- This question is a compound of two elements: (a) is X a child? (b) is X in need?
- Both elements were preconditions to the relevant jurisdiction arising.
- The Supreme Court split them:
  - whether an individual was a "*child*" was precedent fact (redetermination by the Court).
  - whether that child was "*in need*" was not (limited to Wednesbury review).

- Whether a child was **in need** raised value judgments to which "*there are no clear cut right or wrong answers"*; this supported an inference as to Parliamentary intent:

  "*[…] it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review*." (Baroness Hale at para. 26)

- However, there <u>is</u> a right or wrong answer to whether X is **a child**:

  "[…] the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers. […]" (¶27)

<u>However</u>, the distinction between hard and soft edged facts is indicative only, it can be overborne by context – context is king

A case-study in the difficulties of applying this distinction –

The jurisdiction of the **Financial Ombudsman Scheme**

- **FCA Handbook, DISP 2** – "*Jurisdiction of the Financial Ombudsman Scheme"*
- Contains a number of mandatory conditions, including
    - **Eligibility** of the complainant - can they claim under the Scheme?
    - **Timing** – was the complaint brought in time?
- Take those elements in turn

- **Timing** – the FOS cannot consider a complaint if it is made more than 6 months after the respondent sends its "*final response*".

  > *"The Ombudsman cannot consider a complaint if the complainant refers it to the Financial Ombudsman Service: more than six months after the date on which the respondent sent the complainant its final response or redress determination or summary resolution communication"* (DISP 2.8)

- Note that:
  - time is an objective concept; and
  - it has no evaluative component.

- **Eligibility** – various categories, one is a **consumer**.

- A natural person acting "*for purposes outside [their] trade, business or profession"*.

- What does that mean?

  - Acting to satisfy "*individual needs of private consumption*"

  - Needs which are not connected with their trade, business or profession save to a negligible extent.

- So, objective terms but with obvious potential for dispute:
  "*purpose", "trade, business or profession"*, *"private consumption", "negligible*".

- **And yet -**
  - **Whether someone is a *consumer* is a question of precedent fact**

    See R (Bluefin) v FOS [2015] Bus. L.R. 656 (Wilkie J.)

  - **Whether claim is brought in *time* is not**

    See R (Bankole) v FOS [2012] EWHC 3555 (Admin) (Sales J.)

Why the definition of a "consumer" was a precedent fact

(1) **It shaped the material scope of the jurisdiction:** it determined who could complain and therefore indirectly who could be complained against and in respect of what.

(2) **It was interconnected with more hard-edged concepts:** other categories of eligible persons were defined by reference to hard-edged criteria (e.g. a "*micro-enterprise"* – an enterprise employing >10 people with a turnover ≤ €2 million).

(3) **It was knitted into private law concepts:** the definition cross-referred to EU directives (e.g. UTCC Directive), which applied in the private law context; where the application of the "consumer" definition was applied by a judge.

Why timing was <u>not</u> a precedent fact

(1) No risk of "*jurisdictional creep*": timing only arises if the claim is otherwise within the subject-matter jurisdiction (i.e. brought by an eligible claimant in respect of a qualifying grievance).

(2) Consistency with key objectives: it would have been incompatible with the FOS Scheme (which focused on informal resolutions outside of Court) if every time the FOS decided that a claim was time-barred this could be reopened before the Court.

(3) The time bar was subject to derogations:

(a) <u>The time bar could be waived</u>: a respondent could consent to the FOS adjudication (DISP 2.8.2(5)).

(b) <u>FOS retained a discretion</u>: the prohibition was absolute on its own terms, however it had a limited qualification with a discretionary element: FOS could consider if there were "*exceptional circumstances"* (DISP 2.8.2(3)).

However, compare Bankole to R (Chaudhuri) v GMC [2015] EWHC 6621 (Admin) (Haddon-Cave J)

- Concerned the GMC Fitness to practice rules under which no allegation can proceed after 5 years unless it is "*in the public interest, in the exceptional circumstances, for it to proceed*".
- There was, therefore, a clear discretion vested in GMC.
- However, as to the 5 years itself:

> *"It is vanilla question of fact which admits only of a binary answer. No value judgment is required to answer it. […] The date upon which an event or an alleged event took place (as opposed to the event itself) is an objectively verifiable fact."*

- Bankole not cited.

A proposed analytical framework:

(1) First, is the fact truly "*jurisdictional*"?

(1) Is the wording expressly mandatory or jurisdictional? This is the strongest case.

(2) If not (and in any event) does it operate as a "gateway" to the existence (as distinct from the mere exercise) of a power or duty?

(3) If it is a gateway, then is it procedural (e.g. a time-limit) or substantive (e.g. a limitation on subject-matter or circumstances). The latter is more likely to constitute a jurisdictional fact.

(2) Second, is the fact truly "*objective*"?

(1) Is it an objective, hard-edged concept capable of only one "right" answer, even if that is difficult to identify?

(2) Conversely does it have a strong evaluative element? Do not confuse forensic difficulty with evaluation.

(3) Is the fact linked to private-law concepts or other issues which the Courts habitually decide?

(3) Third, consider the wider context and Parliamentary intent – in particular:

(1) Other inter-related provisions – are they hard-edged and jurisdictional (this may support a finding of precedent fact)? (Cf the other eligibility criteria in *Bluefin*)

(2) Other uses of the same language in the same statute – do they serve a jurisdictional function?

(1) NB the general principle that the same word(s) occurring in the same statute will bear the same meaning on each occasion that they are used: Littlewood v George Wimpey & Co Ltd [1953] 2 QB 501 (CA) 518;

(2) But this is not conclusive: see Giri at para. 29 – the same term could be precedent fact in one context and not in another).

(3) Other statutes – applying the principle of "informed interpretation". See R (Robinson) v SSHD [2019] UKSC 11:

(1) the question whether a claim was a "human rights claim", such as to trigger a right of appeal under s.82(1) of the Nationality, Immigration and Asylum Act 2002 was not a question of precedent fact;

(2) the Act had to be read alongside the existing Immigration Rules; and

(3) the Immigration Rules made clear that it was for the SSHD to determine whether a "fresh claim" had been made.