"CIVIL RIGHTS" AND THE REACH OF JUDICIAL REVIEW IN UK PUBLIC LAW

GORDON ANTHONY

Queen's University, Belfast.

I. Introduction

On 2 October 2000 the Human Rights Act 1998 ("the Act") came into force in UK law. Described in its long title as "an Act to give further effect to rights and freedoms" guaranteed under the European Convention on Human Rights (ECHR), the Act was widely expected to bring about significant change in UK public law and, in particular, the role that the courts play as the custodians of fundamental rights.[1] However, while it is axiomatic that change has occurred both under the Act and (indirectly) outside it,[2] it is sometimes also said that such change has not been as far-reaching as it might have been and that traditional common law precepts have remained largely unaffected by the reception of European norms.[3] For some commentators, this has inevitably meant that the Act has been something of a failed constitutional enterprise and that overall standards of rights protection have not been improved.[4] Others have been less negative in their assessment and have pointed, instead, to a nuanced relationship between the common law and the ECHR in contemporary UK constitutionalism.[5]

This paper builds upon the idea that there is a nuanced relationship between the common law and ECHR when considering recent developments on the reach of Article 6 ECHR. The specific focus of the paper is the protection

---

1 For pre-Act analysis see B. Markesinis (ed), *The Impact of the Human Rights Bill on English Law* (Clarendon Press, Oxford, 1998).

2 For one of the most comprehensive accounts of developments under the Act see A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, 2009). And for commentary on developments both under and outside the Act see Tom Hickman, *Public Law After the Human Rights Act* (Hart Publishing, Oxford, 2010).

3 For an early argument to that effect see RA Edwards, 'Judicial Deference Under the Human Rights Act' (2002) 65 *Modern Law Review* 859.

4 E.g., KD Ewing and J-C Tham, 'The Continuing Futility of the Human Rights Act' [2008] *Public Law* 668.

5 Hickman, n 2 above.

of "civil rights" under Article 6 ECHR and the requirement that individuals have access to courts of "full jurisdiction" when challenging decisions that are embraced by the Article.[6] The requirement of "full jurisdiction" has raised many difficult questions about the nature of judicial review in the UK, where public law orthodoxy has historically entailed that the courts should not engage in the so-called "merits review" of administrative and executive decisions.[7] This restraint-based approach to judicial review was initially regarded as insufficient for the purposes of Article 6 ECHR and it led the courts to revisit grounds for the substantive review of administrative and executive choices. However, to the extent that the "new" grounds for review have (arguably) given the UK courts fuller jurisdiction within the meaning of Article 6 ECHR, subsequent case law has seen the courts narrow the reach of Article 6 ECHR and return common law principle to many of its more traditional reference points. The paper will thus suggest that there has been something of a cyclical development of the law at the interface between domestic and European norms and that common law precepts have remained more dominant than had been anticipated.

The paper begins with a section on Article 6 ECHR and the implications that the concept of "full jurisdiction" has for the grounds of judicial review. It next examines the leading case law on the reception of Article 6 ECHR and how the courts initially approached the "full jurisdiction" requirement. The third section describes how the courts have since narrowed the scope of Article 6 ECHR and thereby removed the need for more intensive review in a range of disputes. The conclusion returns to the point about the nuanced nature of the relationship between the common law and ECHR in contemporary UK constitutionalism.

II. Article 6 ECHR, "Full Jurisdiction" and the Grounds for Judicial Review

The first point to be made about "civil rights" under Article 6 ECHR is that they have the "autonomous" meaning that is given to them by the

---

6 On the "civil rights" dimension of the Article see, among others, D. Harris, 'The Scope of the Right to a Fair Trial Guarantee in Non-Criminal Cases in the European Convention on Human Rights' in J Morison, K McEvoy and G Anthony (eds), *Judges, Transition and Human Rights: Essays in Memory of Stephen Livingstone* (Oxford University Press, 2007), p. 55, and R. Clayton and H. Tomlinson, *Fair Trial Rights* (Oxford University Press, 2010) pp. 119 ff.

7 See *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 154, Lord Brightman; and Lord Irvine, 'Judges and Decision-makers: The Theory and Practice of *Wednesbury* Unreasonableness' (1995) *Public Law* 59.

European Court of Human Rights (ECtHR).[8] Within that, it is well known that "civil rights" have historically been associated with the conception of private law rights that is found in civil law systems[9] and that Article 6 ECHR applies where there is a "dispute" about such rights in proceedings that are determinative of the rights.[10] However, the historical link to private law rights is not definitive of the reach of Article 6 ECHR, as the ECtHR has long accepted that some administrative decisions can also be embraced by the Article's procedural guarantees.[11] While this broader interpretive approach has been the source of some of the difficulties for UK courts – administrative decisions in the UK will often be challenged by way of judicial review[12] – it is reflective of the idea that the ECHR is a "living instrument" that is open to reinterpretation as the ECtHR deems necessary.[13] The case law of the ECtHR has thus established that "civil rights" can be engaged in disputes involving, among other things, land use,[14] monetary claims against public authorities,[15] licences (whether to be applied for or to be revoked),[16] social security benefits,[17] and disciplinary proceedings.[18] On the other hand, there are categories of decisions that apparently remain outside the scope of the Article, for instance those relating to immigration and asylum[19] and certain employment rights of public servants.[20]

The corresponding concept of "full jurisdiction" has its origins in the understanding that States can be in "composite" compliance with their procedural obligations under Article 6 ECHR.[21] Those obligations famously require that determinations about an individual's civil rights should be made only where the individual has had "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". In the ideal-type of case, there would of course be

---

8 On the autonomous meaning of provisions of the ECHR see, e.g., *Engel v Netherlands* (1976) 1 EHRR 647.

9 *Re Brolly's Application* [2004] NIQB 69, para 20.

10 *R (G) v X Governors School* [2011] UKSC 30; [2011] 3 WLR 237.

11 See P. Craig, 'The Human Rights Act, Article 6 and Procedural Rights' (2003) *Public Law* 753.

12 The basic rule is that decisions will be challenged by way of judicial review where an affected party does not have recourse to effective alternative remedy: see G. Anthony, *Judicial Review in Northern Ireland* (Hart Publishing, Oxford, 2008), pp. 50-52.

13 On the ECHR as a living instrument see, e.g., *Cossey v UK* (1991) 13 EHRR 622, 639, para 35.

14 E.g., *Ringeisen v Austria* (1979-80) 1 EHRR 455 and *Skarby v Sweden* (1990) 13 EHRR 90.

15 *Editions Periscope v France* (1992) 14 EHRR 597.

16 *Benthem v Netherlands* (1986) 8 EHRR 1 and *Pudas v Sweden* (1988) 10 EHRR 380.

17 *Mennitto v Italy* (2002) 34 EHRR 48.

18 *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1.

19 *Maaouia v France* (2001) 33 EHRR 42; and *Algar v Norway* (2012) 54 *EHRR* SE6.

20 *Pellegrin v France* (2001) 31 EHRR 651.

21 See J. Maurici and S. Blackmore, 'Focus on Article 6' (2007) *Judicial Review* 56.

only one decision-making body involved in the determination of civil rights and that body would enjoy the necessary qualities of independence and impartiality, together with a final power to determine all questions of law and fact. However, in the ordinary run of State administration, initial determinations will often be taken by persons or bodies who are not independent of the issues raised - for instance, a government Minister or a local authority official - and it is clear that such decision-makers cannot satisfy the minimum requirements of Article 6 ECHR. Nevertheless, the ECtHR has held that this need not amount to a violation of Article 6 ECHR so long as the affected individual has a subsequent right of recourse to a judicial body that has "full jurisdiction" in the matter in dispute (whether there is full jurisdiction depends upon context and, in particular, "the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal"[22]). This approach thus provides for overall compliance with the State's procedural obligations and it recognises the undesirability of subjecting administrative decision-making processes to the totality of Article 6 ECHR's judicial model of decision-making.[23] Should the decision of a Minister or a public official be open to challenge before a court - most obviously by way of a full appeal - Article 6 ECHR will therefore not be offended.

The perceived problem for judicial review is that the traditional grounds for challenging decisions may not always afford the courts the requisite "full jurisdiction". Although the context dependent nature of "full jurisdiction" means the court or tribunal need not always be able to substitute its decision for that of the original decision-maker,[24] UK public law orthodoxy starts from the premise that the judicial review courts should *never* substitute their decisions for those of the original decision-maker.[25] The underlying rationale borrows from the separation of powers doctrine and it has historically been associated with the so-called *Wednesbury* standard of review.[26] Under *Wednesbury*, courts will interfere with the decision of an administrative or executive authority only where the decision "is so unreasonable that no reasonable" authority could have taken it.[27] This is widely regarded as a difficult test to satisfy and it has variously been

22 *Bryan v UK* (1996) 21 EHRR 342.

23 See *Re Foster's Application* [2004] NI 248, 257, para 39ff, Kerr J.

24 *Bryan v UK* (1996) 21 EHRR 342, 360, para 45.

25 Although see s 21 of the Judicature (Northern Ireland) Act 1978.

26 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

27 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223, 233, Lord Greene MR.

described as "notoriously high" and as imposing a "heavy burden" on individuals who wish to overturn a decision.[28]

That said, the grounds for judicial review have never been regarded as immutable and, by the time that the Human Rights Act 1998 came into force, the *Wednesbury* threshold had already been lowered in cases involving common law fundamental rights.[29] While this revised standard of *Wednesbury* review did not equate to a proportionality enquiry under the ECHR,[30] it was indicative of a more intensive review that was sometimes described as "anxious scrutiny".[31] Moreover, to the extent that it did not correspond with a proportionality enquiry, the courts accepted that they should develop the proportionality principle in cases arising under the Human Rights Act 1998. This was because section 2 of the Act requires the courts to "take into account" the case law of the ECtHR and, while this does not mean that the courts will follow every pronouncement of the Strasbourg Court,[32] they will give effect to its "clear and constant jurisprudence".[33] In the seminal *Daly* case the House of Lords thus noted the differences between the *Wednesbury* and proportionality principles when accepting the latter principle's central place in case law under the Act.[34] It was also suggested in some other cases that the proportionality principle may even come to displace common law *Wednesbury* unreasonableness in cases that arise outside the framework of the Human Rights Act 1998.[35]

---

28 See, respectively, *R v Inland Revenue Commissioners, ex p Unilever plc* [1996] STC 681, 692, Sir Thomas Bingham and *Re Adams' Application*, 7 June 2000, unreported, Gillen J.

29 See, e.g., *Raymond v Honey* [1983] 1 AC 1; *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514; *M v Home Office* [1993] 3 WLR 433; *R v Home Secretary, ex p Leech* [1994] QB 198; *R v Ministry of Defence, ex p Smith* [1995] 4 All ER 427; *R v Cambridge Health Authority, ex p Child B* [1995] 25 BMLR 5; and *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 778.

30 *Smith v Grady v UK* (2000) 29 EHRR 493.

31 For discussion see M. Fordham, 'Common Law Rights' [2011] 16 *Judicial Review* 14.

32 E.g., *R v Horncastle* [2009] UKSC 14; [2010] AC 373. And compare the ECtHR's ruling in *Al-Khawaja v UK*, 15 Dec 2011, accepting some of the reasoning that led the UK Supreme Court to depart from Strasbourg case law in *Horncastle*.

33 *R (Ullah) v Special Adjudicator* [2004] 2 AC 323.

34 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532. See too, e.g., *In Re E (A Child)* [2008] UKHL 66; [2009] 1 AC 536.

35 *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 321, para 51, Lord Slynn; and *Re McQuillan's Application* [2004] NIQB 50, para 38, Weatherup J, considering *obiter* comments in *R (British Civilian Internees-Far Eastern Region) v Secretary of State for Defence* [2003] QB 1397.

A further development of note concerned judicial review for "error of fact". Given the courts' historical aversion towards review of the merits of a decision, they tended not to assess the factual findings of administrative and executive decision-makers save to the extent that those findings were vitiated by *Wednesbury* unreasonableness.[36] However, in an important line of case law, the courts indicated that they would interfere with administrative and executive decisions where they were characterised by an "error of material fact".[37] Although it was originally thought that this ground of review existed merely as a sub-heading of the better-known ground of "relevant and irrelevant considerations",[38] the courts emphasised that they would intervene where an error of fact caused "unfairness" to an individual. This was the approach adopted in *E v Home Secretary*,[39] which arose in the asylum context and concerned the question whether the decision of a tribunal could be appealed on a point of law where the tribunal had refused to admit new evidence when hearing an appeal (while the facts of the case placed it outside Article 6 ECHR, the points of principle considered in it were of broader significance).

Holding that intervention would be justified, "at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result",[40] the Court of Appeal in England and Wales equated the role of the Court in an appeal on a point of law (as in the instant case) with the role of the Court on a claim for judicial review. Viewing "unfairness" as a question of law, the Court of Appeal held that it was permissible for the courts to intervene where a mistake of fact had resulted in unfairness towards the individual. At the same time, the Court also said that, before a finding of unfairness could be made, it would have to be shown that the tribunal whose decision was under appeal had made a mistake as to an established fact which was uncontentious and objectively verifiable, including a mistake as to the availability of evidence on a particular matter. The Court of Appeal moreover said that it would have to be established that

---

36 See further P. Leyland and G. Anthony, *Textbook on Administrative Law* (Oxford University Press, 6th ed, 2009) pp 272-277.

37 The genesis of the case law is found in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1030, Lord Scarman and 1047, Lord Wilberforce.

38 On relevant and irrelevant considerations see Leyland and Anthony, n 36 above, at pp. 246-256.

39 [2004] QB 1044. For commentary see P. Craig, 'Judicial Review, Appeal and Factual Error' (2004) *Public Law* 788. And for subsequent application see, among others, *Jobson v Secretary of State for Communities and local Government* [2010] EWHC 1602 and *R (Assura Pharmacy Ltd) v NHS Litigation Authority* [2008] EWHC 289.

40 [2004] 2 WLR 1351, para 66.

the appellant or his advisers had not been responsible for the mistake, and that the mistake played a material, though not necessarily decisive, part in the tribunal's reasoning. If all these conditions were met, the appellate court could legitimately intervene and consider whether the tribunal had made a mistake of fact giving rise to unfairness such as amounted to an error of law.

III. Article 6 ECHR: The Initial Case Law

The resulting case law on the reception of Article 6 ECHR initially focused upon two main points about Strasbourg jurisprudence and its interface with common law principle. The first was the above noted point about "full jurisdiction" as a context dependent concept under which the role of a court should be conditioned by "the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal".[41] For instance, in the celebrated *Alconbury* case, the issue for the House of Lords was whether the Secretary of State's power to "call in" and recover planning appeals under the Town and Country Planning Act 1990 was compatible with Article 6 ECHR. Holding that it was compatible, the House of Lords relied upon the separation of powers doctrine when concluding that the traditional grounds for judicial review were sufficient in cases where challenges were made to the decisions of a Minister who had overall responsibility for planning policy. Although the Minister clearly was not impartial when calling in and recovering planning appeals, the House of Lords considered that judicial restraint of the kind associated with the traditional grounds for review was appropriate both because Parliament had entrusted the Minister with a particular policy-making function that was accompanied by detailed procedural rules and because the Minister was thereafter answerable to Parliament for the manner in which he performed the function.[42] And in *Runa Begum* the House of Lords likewise held that the traditional grounds were sufficient in a homelessness case centred upon a factual dispute about the suitability of housing that had been offered to the individual (the local authority accepted that the individual was unintentionally homeless and that it had a statutory duty, under the Housing Act 1996, to provide her with

---

41 *Bryan v UK* (1996) 21 EHRR 342, 360, para 45, quoted in, e.g., *R (Alconbury) v Secretary of State for the Environment, Transport and the Regions* [2002] 2 All ER 929.

42 See, e.g., [2001] 2 All ER 929, 998, para 141, Lord Clyde: once "it is recognised that there should be a national planning policy under a central supervision, it is consistent with democratic principle that the responsibility for that work should lie on the shoulders of a minister responsible to Parliament".

secure accommodation).[43] The individual had argued that the traditional grounds were insufficient precisely because they did not enable the court to substitute its finding of fact for that of a local authority official who had been deputed to conduct a review of the authority's original decision. However, in holding that Article 6 ECHR did not require an independent fact-finder in the case, the House of Lords emphasised that "the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators".[44]

Situating the case within its welfare context the House of Lords concluded that it was perfectly legitimate for the legislature to entrust decisions of the kind at hand to administrators with specialist expertise in the area, as they would be required to reach their decisions in accordance with particular procedures and their decisions would thereafter be subject to review on the traditional grounds. This, it was held, would avoid an over-judicialisation of the workings of the welfare state and, by analogy, other regulatory areas such as those concerned with licensing and planning.[45] In contrast, a more involved role for the courts was envisaged where decisions had implications for the private rights of individuals or where they were concerned with alleged breaches of the criminal law.

The second point concerned the emerging flexibility within the common law's grounds for judicial review and the fact that "the spectrum of challenge by way of judicial review is not inconsiderable ... [t]he breadth of challenge available … must go some considerable way to assuage concerns about the protection of such rights as may arise under [Article 6]".[46] The significance of this understanding was that, even though judicial review did not permit of an appeal on the merits, there remained a wide range of arguments that may be made even within the parameters of the traditional grounds for review. In *Runa Begum* Lord Bingham thus said that the traditional grounds allow the courts "not only to quash a decision … if it is held to be vitiated by legal misdirection or procedural impropriety or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact".[47] While this perhaps begs the question of the degree of elasticity in the error of fact doctrine that was outlined above, his Lordship's comments highlighted how the common law offered an apparently increased scope for judicial intervention. Indeed,

43 *Runa Begum v Tower Hamlets* LBC [2003] 1 All ER 731.

44 [2003] 1 All ER 731, 750, para 59, Lord Hoffmann.

45 See too Re Foster's Application [2004] NI 248, 261, para 45.

46 *Re Foster's Application* [2004] NI 248, 261, para 47, Kerr J.

47 *Runa Begum v Tower Hamlets LBC* [2003] 1 All ER 731, 736, para 7, Lord Bingham, quoted in *Re Foster's Application* [2004] NI 248, 261, para 47, Kerr J.

with the parallel emergence of the proportionality principle – albeit one wedded to a context sensitive doctrine of self-restraint[48] – it could be said that there was even more scope for intervention in cases in which other rights were affected by a decision.[49] The significance of this point is returned to below when discussing another welfare case that engaged rights under Article 8 ECHR.[50]

Notwithstanding such *dicta*, there were some cases that made clear that judicial review could not satisfy Article 6 ECHR. The case which highlighted the point clearly was *Tsfayo v UK*[51], which arose out of a local authority housing benefit review board's decision that the individual had not shown good cause for a delay in making a claim for welfare entitlements (the review board was comprised of three councillors from the local authority and was therefore neither independent nor impartial). In finding that there had been a violation of Article 6 ECHR, the ECtHR drew a distinction between cases involving disputed questions of fact that "required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims" (as in *Alconbury* and *Runa Begum*) and those, such as the instant case, in which the decision-maker "was deciding a simple question of fact, namely whether there was 'good cause' for the applicant's delay in making a claim".[52] In cases of this latter kind, the ECtHR considered that a reviewing court should be able to substitute its findings for those of the original decision-maker as "no specialist expertise [is] required to determine this issue … [Nor] … can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take".[53] However, the ECtHR noted that there had been no possibility of such review in the instant case, as the domestic error of fact doctrine does not extend so far as to permit the High Court to substitute its own findings of fact for those of the original decision-maker. There was, in the result, no composite compliance with Article 6 ECHR.

---

48 *R v DPP, ex p Kebeline* [2000] 2 AC 326, 381, Lord Hope, speaking of the "discretionary area of judgment" that decision-makers enjoy.

49 *R (Daly) v Home Secretary* [2001] 2 AC 532; and *Runa Begum v Tower Hamlets LBC* [2003] 1 All ER 731, 747, para 49, Lord Hoffmann.

50 *Manchester City Council v Pinnock (Nos 1 and 2)* [2010] UKSC 45; [2011] UKSC 6; [2011] 2 AC 104.

51 (2009) 48 EHRR 18. See too, e.g., *Kingsley v UK* (2002) 35 EHRR 177.

52 (2009) 48 EHRR 18, para 45.

53 (2009) 48 EHRR 18, para 45.

Tsfayo was soon considered by UK courts in cases that included *Re Bothwell's Application*.[54] The issue in this case was whether the High Court had full jurisdiction in an application for judicial review in which a farmer whose cattle had been compulsorily destroyed sought to challenge the award of compensation made to him by the Department of Agriculture and Regional Development. The award had initially been challenged before an Appeals Panel that had among its members a representative of the Department, and the High Court had to decide whether judicial review could ensure composite compliance with Article 6 ECHR. In holding that it could not, the High Court said that "judicial review does not extend to consideration of the merits of a decision but rather deals with challenges based on legality, procedural fairness and rationality [and] it is unsuited to the resolution of such disputes as to individual valuations".[55] Notwithstanding that it might have been argued that the determinations of the Appeal Panel had involved disputed questions of fact requiring expert knowledge, the High Court thus held that Article 6 ECHR had been violated.

IV. Article 6 ECHR: Beating a Retreat?

The implications of *Tsafyo* were much commented upon and some authors suggested that the reasoning of the ECtHR even undermined the logic of *Alconbury* and *Runa Begum*.[56] This was certainly the view of John Howell QC who said that while "it may appear that the ECtHR simply distinguished the decisions in *Alconbury* and *Runa Begum* cases … [*Tsfayo*] is more significant in its implications and it is inconsistent with the decisions in those cases".[57] However, to the extent that this suggested further problems in reconciling judicial review with the "full jurisdiction" requirement, two rulings of the Supreme Court have since redrawn the parameters of debate. The first, *Ali v Birmingham City Council*,[58] saw the Supreme Court narrow the reach of Article 6 ECHR as applies to administrative decisions. The

[54] [2007] NIQB 25. See too, e.g., *R (MA) v National Probation Service* [2011] EWHC 1332 (Admin).

[55] [2007] NIQB 25, para 24.

[56] See, among others, E. Palmer, 'Beyond arbitrary interference: the right to a home? Developing socio-economic duties in the European Convention on Human Rights' (2010) 61 *Northern Ireland Legal Quarterly* 225; Case comment, 'Tsfayo' [2007] *European Human Rights Law Review* 187; and L Johnson, 'Back to the drawing board? Article 6 and homelessness review decision following *Tsfayo v United Kingdom*' (2007) *Journal of Housing Law* 9.

[57] '*Alconbury* Crumbles' (2007) 12 *Judicial Review* 9, at 11.

[58] [2010] UKSC 8; [2010] 2 AC 39.

second, *MA (Somalia)*,[59] has reasserted a more orthodox view of the role that the court should play when reviewing a decision for error of fact, thereby taking the common law back to the cyclical position that was noted in the introduction.

IV.1. *Ali v Birmingham City Council*

The applicant in this case was a single mother who wished to challenge, before the County Court, the Council's determination that it had discharged its statutory duties to her under the Housing Act 1996 when offering her accommodation which the applicant had rejected. The powers of the County Court were essentially the same as those of the High Court on a claim for judicial review and the applicant argued, among other things, that she did not have access to a court of "full jurisdiction" for the purposes of Article 6 ECHR.[60] However, rather than resolve that issue the Supreme Court focused upon the anterior question whether Article 6 ECHR was even engaged by the housing decision.[61] Holding that it was not engaged, the Court drew a distinction between the class of social security and welfare benefits whose substance was defined precisely, and which could therefore amount to an individual right of which the applicant could consider herself the holder, and those benefits which were, in their essence, dependent upon the exercise of judgment by the relevant authority. The Court on that basis said that cases in the latter category, where the award of services or benefits in kind was dependent upon a series of evaluative judgments by the provider, did not amount to a "civil right" within the autonomous meaning of Article 6 ECHR. As the right to accommodation in this case fell into the latter category, it followed that no issue arose under Article 6 ECHR.

It is important to be clear just what *Ali* does, and does not, do. First, it would seem that the ruling has gone some way towards preventing an over-judicialisation of the workings of the welfare state, *viz* by obviating the need for complicated internal hearings and subsequent judicial review proceedings within the rubric of Article 6 ECHR. This was the unwelcome possibility that had been noted by the House of Lords in *Runa Begum*[62], and *Ali* has apparently addressed that concern by redefining evaluative

---

59 *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65.

60 Appeals were on a "point of law": Housing Act 1996, s 204.

61 And for a forerunner see *R (A) v Croydon LBC* [2009] UKSC 8; [2009] 1 WLR 2557.

62 *Runa Begum v Tower Hamlets LBC* [2003] 1 All ER 731. See, in particular, Lord Hoffmann's opinion.

decisions under the Housing Act 1996 as decisions that do not affect "civil rights". The impact of *Tsfayo* has, in that way, been blunted.[63]

On the other hand, it is not yet known whether *Ali* is a precedent that will be limited to essentially its own facts or whether it will apply to evaluative decisions taken across the welfare state more generally.[64] Moreover, to the extent that Article 6 ECHR no longer applies to some welfare decisions, it is apparent that other Articles of the ECHR may apply and that these may instead require the courts to engage in "closer look" review. This is the point that was touched upon above when discussing *Runa Begum* and the proportionality principle, and its implications can be seen in the Supreme Court's ruling in *Manchester City Council v Pinnock(Nos 1 & 2)*.[65] That was a case in which the local authority had brought County Court proceedings for a demotion order against one of its secure tenants under section 82A of the Housing Act 1985 for the reason that the family of the tenant had been involved in anti-social and criminal behaviour. The tenant wished to invoke his Article 8 ECHR rights by way of defence and the corresponding question for the Supreme Court was whether the County Court should thereby have the power to assess the proportionality of making an order and, in undertaking that assessment, to resolve any relevant dispute of fact. Holding that such powers of enquiry were necessary, the Supreme Court departed from an earlier, well-established line of House of Lords authority that had rejected the need for any such judicial assessment of the respective interests and rights of authorities and tenants.[66] Given the point, it may therefore be that the courts will still be required to have what would amount to "full jurisdiction" in some cases, albeit that the language and elements of Article 6 ECHR will be absent.

IV.2. *MA (Somalia)*

The Supreme Court's decision in this case may have a particular importance in the event that (a) *Ali* is read as excluding a majority of decisions about public services from the requirements of Article 6 ECHR and (b) no issues arise under other Articles of the ECHR, as in *Pinnock*. This is because there are *dicta* in the ruling that apparently reverse, at least in part, the trend towards a more intensive review of errors of fact. As was outlined

63 For subsequent consideration of *Ali* in the housing context see, e.g., *Bubb v Wandsworth LBC* [2012] BLGR 94.

64 For an indication that will so apply see *R (Saava) v Kensington and Chelsea RLBC* [2010] EWHC 414 (Admin), the Court noting *obiter* that the creation of personal budgets for sick and disabled persons falls outside Art 6 ECHR.

65 [2010] UKSC 45; [2011] UKSC 6; [2011] 2 AC 104.

66 *Harrow LBC v Qazi* [2004] 1 AC 983; *Kay v Lambeth LBC* [2006] 2 AC 465; and *Doherty v Birmingham City Council* [2009] AC 367.

above, the emergence of an enhanced doctrine of "error of material fact" had expanded the grounds for judicial review to such an extent that it was noted as germane to the question of "full jurisdiction" in the *Runa Begum* case. However, if full jurisdiction is no longer required in the majority of judicial review cases, it would follow that there is less necessity for more intrusive common law grounds for review. In that circumstance, the common law might be said to have gone full circle after a brief readjustment in the face of Article 6 ECHR.

The central issue in *MA (Somalia)* was the role that the Court of Appeal should play when hearing appeals on a point of law from a lower tribunal. More specifically, the question was whether the Court of Appeal had misunderstood its appellate role when examining the impact that an individual's lies had had on a decision of the Asylum and Immigration Tribunal. In a key passage on the interface between appeals on points of *law* and matters of *fact*, the Supreme Court said:

> "[43] We need to make some general points about the proper role of the Court of Appeal in relation to appeals from specialist tribunals to it on the grounds of error of law. Although this is not virgin territory, the present case illustrates the need to reinforce what has been said on other occasions. The court should always bear in mind the remarks of Baroness Hale of Richmond in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at para 30:
>
> 'This is an expert Tribunal charged with administering a complex area of law in challenging circumstances…[T]he ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right…They and they alone are judges of the facts…Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'

> [44] Those general observations were made in a case where the Court of Appeal had allowed an appeal against a decision of the AIT. The role of the court is to correct errors of law. Examples of such errors include misinterpreting the ECHR (or in a refugee case, the Refugee Convention or the Qualification Directive); misdirecting themselves by propounding the wrong test on some legal question such as the burden or standard of proof; procedural impropriety such as a breach of the rules of natural justice; and the familiar errors of omitting a relevant factor or taking into account an irrelevant factor or reaching a conclusion on the facts which is irrational.
>
> [45] But the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the AIT's assessment of the facts. Moreover, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account."[67]

It is important, again, not to overstate the significance of isolated *dicta*, as cases that engage other Articles of the ECHR may still require a judicial capacity to scrutinise decisions for errors of fact. Nevertheless, the comments made in *MA (Somalia)* are indicative of a much more orthodox role for courts that are hearing appeals on points of law or, by comparison, applications for judicial review. The comments thus mark something of a departure from the idea that the public law role of the courts will inevitably change under the direct and indirect influence of the ECHR.

V. Conclusion

This paper began by noting that the common law has a nuanced relationship with the ECHR in contemporary UK constitutionalism, and it used case law on judicial review and the reception of Article 6 ECHR as a means to illustrate the point. Little would be gained from repeating the fuller argument of the paper in summary form, and there is only one additional comment that will be made. That comment is simply that UK courts – as

[67] [2010] UKSC 49; [2011] 2 All ER 65, 80-81.

with courts elsewhere in Europe and beyond – are continually faced with the challenge of needing to reconcile external norms such as those found in the ECHR with norms that have historically defined the internal legal order.[68] While some of the corresponding UK case law on Article 6 ECHR has suggested that aspects of the common law are open to adaptation, other rulings have apparently set features of the common law at one remove from change. In the context of the contemporary UK constitution, this is thus here that the limits of "full jurisdiction" have been drawn.

SUMMARY

"Civil rights" and the Reach of Judicial Review in UK Public Law

GORDON ANTHONY

This paper considers the relationship that UK public law has with the ECHR within the framework of the Human Rights Act 1998. Its focus is on Article 6 ECHR and the requirement that individuals have access to courts of "full jurisdiction" for the purposes of challenging decisions that engage their "civil rights". That requirement initially caused far-reaching debate about the nature of judicial review under the UK constitution, as it was thought that the traditional grounds for review – which operate almost exclusively at the level of administrative law – were insufficient for the purposes of Article 6 ECHR. However, while this first resulted in a partial reinvention of the grounds for review, subsequent case law has since seen the courts narrow the reach of Article 6 ECHR and take common law principle back to many of its more traditional reference points. This paper thus provides something of a tale about a cyclical development of the law at the interface of domestic and European norms: while the reception of the ECHR projected far-reaching change to the common law, the corresponding case law has in fact returned to many of the constitutional assumptions that anchored judicial review pre-Human Rights Act 1998.

[68] For comparative perspectives see D. Oliver and C. Fusaro (eds), *How Constitutions Change: A Comparative Study* (Hart Publishing, Oxford, 2011).

RESÜMEE

“Bürgerliche Rechte” und der Zugang zur gerichtlichen Überprüfung nach dem Verfassungsrecht des Vereinigten Königreiches

GORDON ANTHONY

Der Artikel handelt von der Beziehung zwischen dem öffentlichen Recht des Vereinigten Königreiches und der Rechtsprechung des EGMR im Rahmen des Human Rights Act von 1998. Der Artikel konzentriert sich auf die Bedeutung des Artikels 6 der EMRK, der erfordert, dass jedem das Recht auf Anrufung der Gerichte uneingeschränkt einzuräumen ist, wenn zivilrechtliche Ansprüche oder Verpflichtungen betroffen sind. Diese Anforderung führte zu heftigen Debatten über das Wesen der gerichtlichen Überprüfung nach der Verfassung des Vereinigten Königreiches, weil die traditionellen Gründe für die gerichtliche Überprüfung – deren Anwendungsbereich ausschließlich aufs Verwaltungsrecht begrenzt ist – im Lichte des Artikels 6 der EMRK als unzureichend eingestuft waren. Das hatte zuerst zur Ausdehnung der Rechtsgrundlage der Überprüfung geführt, aber die neue Rechtsprechung scheint den Umfang der Überprüfung einzuschränken, da die Gerichte zu den traditionellen Referenzpunkten der Common Law Prinzipien zurücksteuern. Dieser Artikel erzählt etwas über die zyklische Entwicklung des Rechts an der Schnittstelle der nationalen und europäischen Normen: Obwohl die Rezeption der EMRK signifikante Änderungen projektiert hatte, die entsprechende Rechtsprechung neigt dazu, den ursprünglichen Zustand der gerichtlichen Überprüfung zurückzuholen.