



T-Mobile and O2 v Ofcom

New communications on judicial review

By Hanif Mussa

Public lawyers have long accepted that judicial review is a supervisory not appellate jurisdiction, concerned with the legality of administrative decisions rather than their substantive merits. Regarding challenges to Ofcom decisions under EC law, however, the Court of Appeal has now confirmed that recourse to judicial review is capable of constituting a “right of appeal” to a tribunal of “appropriate expertise” whereby “the merits of the case are duly taken into account”.

That conclusion was reached in appeals by T-Mobile and O2 against certain Ofcom decisions concerned with allocating electromagnetic spectrum bandwidth. A preliminary issue raised was whether the Competition Appeal Tribunal (CAT) had jurisdiction to entertain the claims. The tribunal considered whether s.192 and Schedule 8 to the Communications Act 2003 obliged T-Mobile and O2 to proceed by way of judicial review, and if so, whether these provisions met the obligation under Article 4 of the Framework Directive (2002/21/EC) for Member States to provide the specified right of appeal against regulatory decisions. The CAT found that, although on the true construction of the statute T-Mobile and O2 were confined to judicial review, this was still capable of satisfying Article 4. The Court of Appeal has now upheld the decision.

The CAT rejected T-Mobile and O2’s arguments that since Article 4 distinguished between a “right of appeal” on the one hand and a decision being “subject to review” on the other, something more than the supervision of the High Court was required. The Directive was not to be construed in light of traditional concepts of English administrative law, since all Member States might not accept such a sharp distinction between appellate and supervisory jurisdictions. At least for EC law purposes, judicial review was classifiable as a right of appeal.

More controversially, the CAT reasoned that since it was not necessary for a full review on the merits in order for the merits of a case to be “duly taken into account”, it followed that judicial review could fully satisfy the Article 4 right. Great emphasis was placed on the idea that as a tribunal of inherent jurisdiction, the High Court could apply a flexible standard of review to satisfy obligations under EC law. This has precedent in a different context. For judicial review claims on the ground of proportionality under the Human Rights Act 1998, the House of Lords has accepted that there must be more intensive review than would ordinarily apply. Nonetheless, this does not mean that there has been a change in the purpose of the exercise constituting a shift to merits review: *R v (SB) v Governors of Denbigh High School* [2007] 1AC 100 per Lord Bingham. The CAT envisaged that an even more aggressive approach was permissible in the context of EC law, and that the High Court could if

necessary apply a standard of review nearing, but falling just short of, a full review on the merits.

The Court of Appeal has gone further. Relying in particular on the difficult case of *Wilkinson v Broadmoor Special Authority* [2002] 1 WLR 419 it found that “there can be, if necessary, a full merits investigation on a JR application.” This expands the traditional boundaries of the supervisory jurisdiction and indicates that the purpose of judicial review varies widely with context. Due to the route favoured to dispose of the case, other issues of principle received little consideration. Nothing was said on how European Convention obligations informed the construction of EC law. All parties had accepted that Article 4 of the Framework Directive was an emanation of the principle of effective judicial protection enshrined in Article 6 ECHR: Case C-426/05 *Tele2 Telecommunication GmbH v Telekom-Control-Kommission* (21 February 2008). There was, however, dispute as to whether Article 4 should be read so as to provide for more than that minimum guarantee, and as to the salience of Convention jurisprudence on the sufficiency of judicial review in protecting rights under Article 6 ECHR.

Secondly, the CAT and the Court of Appeal did not need to decide what remedial steps ought to be taken if Article 4 had not been properly implemented. Two options were presented. In compliance with the *Marleasing* interpretive obligation, the CAT should construe the domestic provisions to allow T-Mobile and O2 to proceed with a full appeal. Alternatively, if this was not possible, following *R v Secretary of State for Employment, ex parte EOC and others* [1995] 1 AC 1, statutory provisions limiting the CAT’s jurisdiction should be disapplied. Each suggestion begs the unresolved question of whether domestic tribunals lacking inherent jurisdiction can endow themselves with further powers to satisfy obligations under EC law.

T-Mobile and O2 v Ofcom reveals how even the most technical EC regulatory disputes rely upon and develop the core doctrines of English administrative law. If upheld, the Court of Appeal’s decision will have powerful ramifications for all public law litigation.

Michael Fordham QC appeared for T-Mobile, Lord Pannick QC, Thomas de la Mare and Tom Richards for O2 and Dinah Rose QC for Ofcom.