

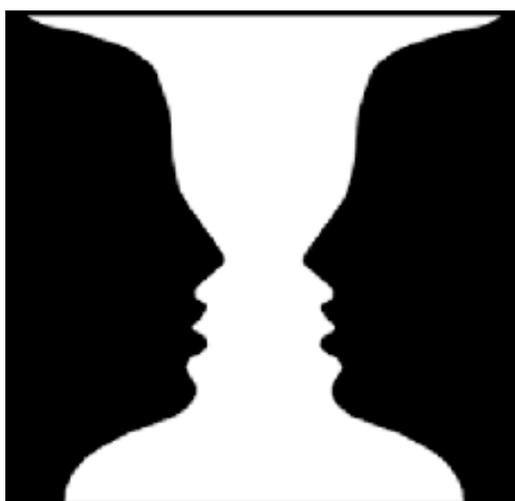
**FACTUAL DISPUTES IN JUDICIAL
REVIEW CASES**

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What is this talk about?

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Problems with facts



- The difference between primary jurisdictional facts and the assessment of facts by a public body as part of a discretionary decision
- What happens if the public body simply gets the facts wrong
- How does the Claimant prove their version of the facts
- How does the Defendant prove their version of the facts
- How does the court deal with a genuine dispute of fact.

Jurisdictional facts



- *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74.
- The existence of the power of removal depended upon that fact. It was not enough that an immigration officer had reasonable grounds for believing the person to be an illegal entrant.
- Lord Scarman said "*. . . 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*" (p 110).

Jurisdictional facts (2)



- *R (A) v London Borough of Croydon (Rev 1)* [2009] UKSC 8 and who is the decision maker on whether a person is a child
 - All depends on who Parliament intended the decision maker to be
 - Lady Hale and Lord Hope: It is a question for the court
 - Problem of JR being an inappropriate remedy was dismissed by Lady Hale at para 33

Fact based judgments



- Fine distinction between pure facts – which engage article 6 rights and need an independent and impartial tribunal and “*the issues to be decided required a measure of professional knowledge or experience and the exercise of discretion pursuant to wider policy aims*”
 - Former may be for the court: *Tsfayo v United Kingdom* (2009) 48 EHRR 18.
 - Latter for the public body: *Bryan v United Kingdom* (1996) 21 EHRR 342
 - Ultimately depends on what statute says

What happens if the public body simply gets the facts wrong?



- Error of fact as a ground of judicial review
- *E v SSHD* [2004] QB 1044. Mistake must be:
 - fact must be uncontentious
 - objectively verifiable, including a mistake as to the availability of evidence on a particular matter,
 - the appellant or his advisers had not been responsible for the mistake, and
 - the mistake had played a material though not necessarily decisive part in the tribunal's reasoning

Can be factual omission



DLA Delivery Ltd v Baroness Cumberlege of Newick & Anor (Rev 1) [2018] EWCA Civ 1305

"there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers ... would not be in accordance with the intention of the Act": CREEDNZ

Para 68: *"The inspector may have been led into error by the parties, but it is clear that he was in error, and so too was the Secretary of State. Part of the site is within the 7km "zone of influence".*

But where facts are for the public body..



- Challenge to the factual assessment can only be on the basis the factual conclusion was Wednesbury unreasonable
- *R (AC) v Berkshire West Primary Care Trust & Anor* [2011] EWCA Civ 247
- *“The appellant in this case was seeking NHS funding for a surgical operation where the PCT had reasonably concluded (as the judge found and was, in my view, entitled to find) that there was an absence of evidence that it was likely to be clinically effective to improve the appellant's health”*

How does the Claimant prove their version of the facts



- Witness evidence and documents
- Substantial limits of expert evidence in judicial review
- PD 54A 5.6. Claim Form must include “a statement of the facts relied on”
- Remedies under Part 18 are available in judicial review
- Defendant’s duty of candour

Facts and the Defendant



- Duty of candour applies
- Requirement to put the whole of the facts before the court
- Generally counter-productive to defend the indefensible – later corrections should be admitted
- But be wary of account of primary facts being re-written to suit a conclusion.

Disputes of Fact (1)



St Helens Borough Council v Manchester Primary Care Trust & Anor [2008] EWCA Civ 931 at para 13

“Judicial review is a flexible, but not entirely unfenced jurisdiction. This stems from certain intrinsic features. The court's relevant function is to review decisions of statutory and other public authorities to see that they are lawful, rational and reached by a fair and due process. The public authority is normally the primary decision maker with a duty to apprehend the facts underlying the decision by a fair procedure which takes properly into account all relevant facts and circumstances. If the public authority does this, the court will not normally examine the merits of the factual determination. Accordingly, a court hearing a judicial review application normally receives evidence in writing only, and does not set about determining questions of disputed fact”

Disputes of Fact (2)



- Series of recent cases where underlying facts were crucial to determining the legality of the matters under challenge:
 - Prison governor cases
 - Immigration cases
 - NHS cases
 - Local government governance cases
- Dyson J in *R (Fisher) v North Derbyshire Health Authority* [1997] EWHC Admin 675: “Indeed, I have considerable doubts as to whether it was the true reason. It is striking that this was not the reason given at the time”

Disputes of Fact: General rules



- Parties that are truthful about the case may win
- Claimants who mislead the court about the facts lose
- Defendants who do not tell all the facts to the court lose
- Whilst cross examination is rare – the court can see an incomplete case a mile off.

Breach of Human Rights



R (Begum) v. Denbigh High School [2006] UKHL 15

- The court determines the proportionality issue on the merits – which is a judgment of mixed fact and law
 - Does so without hearing witnesses
 - On appeal, fresh assessment of proportionality
 - Can be evidentially problematic
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