Systemic challenges: test

ZK v LB Redbridge [2020] EWCA Civ 1597

Steve Broach

The test

- Context of *ZK* – whether LA policy as to the provision of specialist teaching assistants for pupils with severe visual impairment was lawful (High Court and Court of Appeal said yes)
- No written policy to challenge – claim was against a 'decentralised' model used by the LA (schools employ TAs), as opposed to a 'centralised' model operated in other areas (LAs employ TAs and deploy to schools)
- Grounds of challenge included that the 'decentralised' model was inconsistent with the duty to secure provision in section 42 of the Children and Families Act 2014
- Court of Appeal first said that Swift J applied test of 'whether the policy was capable of lawful application, [assessed] realistically and pragmatically'

The test (cont)

- BUT later (para 61) the Court of Appeal described test applied by Swift J as ‘whether the arrangements in place under which specialist teaching assistants are employed by schools and trained and supported by JCES gave rise to any inherent likelihood that Redbridge would fail to comply with its section 42 obligation’
- [Surely these are not the same tests…?]
- Some clarity from para 63: ‘What matters in a systemic challenge of this kind is the need to distinguish between an inherent failure in the system challenged and individual examples of failings or unfairness which do not touch on that system's integrity, however difficult it might be in practice to distinguish between those two situations’
- See further ‘In other words, the court must distinguish between examples in the evidence which demonstrate a systemic problem from those which remain cases of individual operational or other failure.’

The test (cont)

- Application of test on facts of *ZK* – para 65:
- ‘In light of the evidence and the factual findings summarised above, it seems to me that Swift J was amply entitled to conclude that the arrangements in place under which specialist teaching assistants are employed by schools and trained and supported, including for the management of transfers between schools at the end of Year 6 for the beginning of Year 7, are sufficient when considered at a systemic level, and do not entail any inherent likelihood that Redbridge will fail to comply with its section 42 obligations.’

But note *R (Humnyntskyi) v SSHD* [2020] EWHC 1912 (Admin) – test expressed as ‘does the Secretary of State's policy create a real risk of unfairness in a significant number (that is in more than a minimal number) of cases.’ [CoA in *ZK* says no difference unfairness / unlawfulness]

Meeting the test

- Meeting the test – *Humnyntskyi*
- ‘Once it is demonstrated that there are legally significant categories of case where there is (as a result of the terms of the policy) a real risk of a more than minimal number of procedurally unfair decisions, the policy will be shown to be systemically unfair. In some cases it may be possible to demonstrate that the test is met by reference to the wording of the policy: for example, whether the written policy patently creates an unfair process and it is accepted that the written policy is applied in practice. The cases show that systemic illegality can sometimes be demonstrated without reference to the facts of a large number of different cases – see Razai and Q and R (Help Refugees) v Secretary of State for the Home Department [2018] EWCA Civ 2098 [2018] 4 WLR 168.’

Human Rights cases

- Any different approach in human rights cases?
- *R (Drexler) v Leicestershire CC* [2019] EWHC 1934 (Admin)
- Claim that local authority policy in relation to post 16 school transport resulted in age and disability discrimination contrary to Article 14 ECHR. LA argued claims premature because specific impact of the challenged policy on the Claimant was not known.
- Swift J said no: ‘In these proceedings the Claimant challenges the policy itself. She is entitled to do that, and is entitled to contend that the SEN Policy is inconsistent with her Convention rights. When deciding the merits of the claim it is right that I should take account of the elements of flexibility within the policy …. But on the facts of this case the possible range of those "moving parts" is not such as to render it impossible to assess the legality of the policy against the Claimant's discrimination claims.’

Systemic challenges: evidence

R (DMA) v SSHD [2020] EWHC 3416 (Admin)

Katherine Barnes

The problem

- Power under s.4 IAA 1999 to provide destitute failed asylum seekers with accommodation and subsistence payments in certain circumstances.
- Becomes a duty where accommodation is needed to prevent a breach of Article 3 (essentially where there is a “good” reason preventing the individual from leaving the UK).
- Often long delays between the SS accepting that the duty is owed to an individual, and the accommodation actually being provided by the SS’s private contractor.
- In the meantime vulnerable individuals sleep rough and/or live precariously relying on goodwill of charities etc.
- If lucky enough to have solicitor, issue urgent JR re delay. Invariably settle at pre-action stage or post-issue once interim relief granted.

Setting up the claim in DMA

- Obvious need to challenge underlying system. But how?
- Previous attempts with individual claimants had failed as settled in return for EA or HRA damages.
- Referral from charity re delays in provision of s.4 support for c.20 individuals. PAP sent on behalf of all. Accommodation provided in all but 4 cases. Issued claim with those 4 individuals as claimants. Accommodation granted to 2 post-issue and 2 at interim relief hearing.
- Permission granted to pursue claim despite SSHD's argument it was academic. (Effectively the court accepted that the *Zoolife* exceptions for hearing academic claims were met – key was evidence of extent of the problem).
- DMA subsequently joined to AA, concerned with particularly lengthy delays in provision of s.4 support to disabled failed asylum seekers.

The claim in DMA – Part 1

Part 1 – Individual decisions

- Challenged the failure to provide s.4 accommodation for all Cs (DMA Cs waited between 6 weeks and 6 months for accommodation; AA waited 9 months for accommodation suitable for his disabilities).
- Declaration granted that SSHD breached duty inherent in s.4(2) to provide accommodation within a reasonable period of time.
- A "reasonable" period of time in this context is very limited – even for those not yet street homeless – given the imminent prospect of conditions which breach Art 3 (see *Limbuela* for duty to act prospectively to avoid imminent breach of Art 3)
- Rejected argument that no breach of duty where charities helping:

"If the SS […] anticipates that charities […] will provide accommodation whilst charities […] look to the SS […] to do so, matters can quickly deteriorate to "who blinks first". The victim of that situation is an individual who already faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life" (at [200]).

The claim in DMA – Part 2

Part 2 – Systemic challenge

- Declarations granted that SSHD:
  - (i) Breach of Article 3 for failing properly to monitor the provision of s.4 accommodation.
  - (ii) Breach of PSED for failing properly to monitor the provision of s.4 accommodation to those with disabilities.
- Rejected argument the court should not consider the system:

"Where the SS's systems work in a ways that cause her to be in breach of her legal duty it is proper for the Court to say that, because the law is not being complied with. Where there is an aspect of the process that will necessarily cause or contribute to the real risk, both of unlawful decisions and of breach of duty, the Court should be prepared to declare it" [235]

Why was failure to monitor unlawful?

- Section 4(2) requires accommodation to be provided within a reasonable timeframe (i.e. expeditiously given that an Article 3 breach has already occurred or is imminent).
- Without monitoring of the private providers with whom the SS had contracted to provide s.4 accommodation there no way for the SS to know whether she is meeting this obligation:

> "The relevant aspect of the process in the present case is the failure to capture data properly and, using that data, to monitor properly, so that the Secretary of State can known whether she is acting lawfully and in accordance with her duty, and can act immediately if there is a sign that either is not the case" [236].

- In the context of "evidence of a real risk of a breach of the Secretary of State's statutory duty in a significant number of cases" [238].
- Court set out minimum requirements of monitoring at [243].

Evidence relied on (1)

Claimants' Evidence

- Evidence from Cs' cases
- Witness statements from solicitor and charities in the sector outlining their experience of delays
- Various Parliamentary reports and statistics from National Audit Office (dispute whether inadmissible due to Art 9 BoR – not needed anyway)
- But the above would unlikely have been enough in isolation:

"The challenges in the present proceedings admittedly concern the operation of a whole system […] The individual cases of the claimants in these proceedings reveal a good deal, and it can be debated whether that is enough to show a systemic issue. However, the system-wide figures provided by the SS […] indicate the position across the system, and that the SS did not know the true position across the system […] This is evidence from the full run of cases." [233]

Evidence relied on (2)

The disclosure saga

- Early on Cs sought disclosure pursuant to duty of candour of (i) SS's contract with private accommodation providers (eventually disclosed) (ii) monitoring data on timescales within which s.4 accommodation provided (SS said it did not hold such data)
- Contracts showed that accommodation providers were required to report on the extent to which accommodation was provided within the timeframes set by the Defendant ("KPI 2")
- Repeatedly requested this data – D refused primarily on basis it was not relevant(!) and would be disproportionate
- Application succeeded following hearing. D given short shrift.
- (Further shenanigans before data actually provided with sufficient information to understand it…)
- Substantive hearing began with D saying that data was inaccurate

Evidence relied on

The corrected data (materially worse than that disclosed originally):

Country/Region	Sep-Dec 2019	Jan-Mar 2020
Scotland	62%	67%
Northern Ireland	76%	92%
Wales	99%	98%
North East, Yorkshire and Humber	76%	79%
North West	94%	98%
Midlands and East of England	61%	64%
South	96%	98%

% shows dispersal to accommodation within timescale requested by SS (target = 98%)

Judge's analysis of evidence

Systemic delays

- Table shows systemic delays: "[C]ontext is crucial; these represent delays (of unspecified length) in provision of accommodation to those who faced "an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life" [151]

Judge's analysis of evidence

Inadequate monitoring

- Inadequate monitoring demonstrated by the SS's initial disclosure of inaccurate data, which she wrongly believed to be correct at the time:

"For all the performance management, provider monitoring […etc] the SS […] was not aware that in the Midland and East of England, accommodation was not being provided within timescales she had set in 36% of all cases" [237].

- The timescales monitored (to the extent that they were) under the contract were different to the timescales which applied to the SS in the performance of her legal obligations:

"[T]he monitoring negotiated for a contract will not necessarily be the same as the monitoring required to enable a Minister to perform his or her duty, assisted by officials. These proceedings illustrate that point well" [240].

The end of the tale?

"In identifying this aspect of the process, I am not to be taken as saying that there are no other failings in the system, which if not corrected will place the Secretary of State in breach of her duties" [239].

Lessons learned re evidence

- Multiple claimants as “case studies” of the systemic problem.
- Evidence from those “on the ground” with knowledge of the problem and its impact (e.g. charities etc). (Consider quantity carefully).
- Compelling evidence within bullet points 1 and 2 probably sufficient to get permission given low arguability threshold. But even this is likely to require good contacts and careful preparation before issuing.
- Think carefully about what evidence of the relevant systemic failure can helpfully and reasonably be requested from the decision-maker under the duty of candour.
- Follow through with an application for specific disclosure if the info is not provided. Explain clearly why the info is relevant to the claim.
- If the decision-maker does not hold the information, think about whether this in itself is compatible with the relevant legal obligations.
- Part 18 request if information disclosed is unclear.

Questions?

Systemic challenges: remedies

R (JCWI) v President of the UTIAC [2020] EWHC 3103 (Admin)

R (DA & Ors) v SSHD [2020] EWHC 3080 (Admin)

Jack Holborn

The *JCWI* case

- Challenge to the lawfulness of a Pilot Practice Direction:

"***Where a Chamber's procedure rules allow decisions to be made without a hearing, decisions should <u>usually</u> be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights and the Chamber's procedure rules…"***

- Challenge to lawfulness of parts of Presidential Guidance Note
- Suggests that each created an unlawful presumption that no oral hearing
- Challenged the lawfulness of guidance as to factors relevant to the decision of whether to hold an oral hearing, including as to the importance to the parties
- By time of the final hearing, hundreds of appeals heard without a hearing under Upper Tribunal Rule 34

The *JCWI* case

- Court refused permission to challenge PD. It did not create a presumption, per se, as had the proviso of the overriding objective
- Claim against the Guidance succeeded
- The Guidance communicated “an overall paper norm” inconsistent with overriding objective and common law procedural fairness
- The Guidance wrongly suggested that the “importance of the case” required the case to be more important that the norm
- In its context, the Guidance unlawfully omitted important factors in respect of whether there should be an oral hearing

Remedies in *JCWI*

- Relevant paragraphs of the Guidance Note were withdrawn. Not a given as interdependent.
- Judgment and Order to be published on the judiciary website

- What to do about individual cases?
- Tribunal could write to individuals, but not necessarily enough, and practical problems as to informing litigants
- Home Office asked to assist, but could not be compelled
- Issues as to what to be included in communications
- Questions as to re-opening individual appeals left to UTIAC (and Court of Appeal)

DA & Ors v SSHD

- Challenge to the lawfulness of the asylum screening process, in particularly since the start of the pandemic. Particular concern as to migrants travelling through Libya who may be victims of modern slavery.
- It was alleged individuals were not been identified as PVOTs at asylum screening and that this resulted in subsequent unlawful detention
- Questions for certain migrants at screening interviews curtailed so that they were not asked about their journeys. This was contrary to policy, but the change of practice had not been published

Remedies in *DA & Ors*

- Cs sought interim relief, namely:

(a) Full screening interview

(b) Transit through Libya indicated as potential indicator of slavery

(c) Referral to the SCA if any suspicion that an individual a victim of slavery

- Court granted:

(a) Two further questions, including te “Journey question” would be asked

(b) SSHD to take steps to confirm she is satisfied those conducting screening interviews are aware of a particular risk to migrants of being forced into modern slavery in Libya and of the test for and NRM referral.

Lessons as to remedies – from these cases and elsewhere

- Think about practical consequences in advance
- Mandatory orders are likely to be as limited as possible
- Defendant will generally be assumed to act lawfully in future
- It is the defendant who may be required to take action. Non-parties cannot be compelled to act
- Be prepared to have further submissions or hearings – much can depend on the basis of the decision.
- Simply stating “further and other relief” is unlikely to be sufficient
- Remember costs (*M v Croydon*) - is the remedy achieved that which was sought?

Questions?