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UNLAWFUL SYSTEMS: THE CONCEPT OF UNACCEPTABLE RISK

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Introduction

Administrative law may be witnessing a new, or at least developing, doctrine relating to unlawful systems. A number of recent cases have accepted the principle that a system will be unlawful where it carries, inherent within it, an unacceptable risk of illegality. It seems likely that future cases will see this principle developed further.

The *RLC* case

The principle seems to have made its first appearance in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2005] 1 WLR 2219. That case was concerned with the lawfulness of the asylum fast track scheme operated at Harmondsworth Immigration Removal Centre in London. The claimant was a not for profit agency concerned with the provision of legal services and argued that the system was unfair because it failed to offer sufficient opportunity to present an asylum claim. However the challenge was a system challenge, with no particular individual set of facts having been advanced. This gave rise to a preliminary issue: what question was the court answering? Was it, as the claimant said, whether the system was *incapable* of operating fairly? Or was the correct question, as in fact the Home Secretary submitted, did the system provide a fair opportunity to asylum seekers to put their case?

The Court of Appeal preferred the latter approach. It went on to explain and develop it. At [6] – [7]:

> "This avoids the arbitrariness inherent in Mr Fordham's alternative approach of seeking to construct a 'typical' case. It embraces, correctly, the full range of cases which may find themselves on the Harmondsworth fast track. There will in our judgment be something justiciably wrong with a system which places asylum seekers at the point of entry - that is to say, when no more is known of each one than that he is an adult male asylum-seeker from a country on a departmental 'whitelist' - at unacceptable risk of being processed unfairly. This, therefore, is the question which we propose to address.
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> We accept that no system can be risk-free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself. In other words it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects."

In the event, the Court went on to dismiss the appeal, but only because it was unnecessary to grant a remedy. The Home Office accepted that to be lawful the system had to be operated flexibly, and the Court gave guidance on what was required to ensure that happened (specifically, a written policy on exiting the fast-track). So the claimant had at least succeeded in achieving system change.

The *Medical Justice* case

The principle then re-emerged last year in *R (Medical Justice) v SSHD* [2010] EWHC 1925 (Admin). That was another immigration-related system challenge, brought by another charity, and once again not on the basis of any individual case or set of facts. The claimant submitted that a Home Office policy that permitted, in certain circumstances, removal from the UK with little or no notice (as an exception to the usual 72 hours notice), was unlawful, in part because it created an unacceptable risk of infringing the right of access to justice. The claim succeeded. Silber J followed the *RLC* case to hold that it was not necessary for the claimant to establish actual breaches of the right in question. That might be evidentially helpful (at [41]) but it was not appropriate to wait for individual challenges given the scale of harm inherent in any breach (see [173]). The test was the unacceptable risk test, and there being a "very high risk if not an inevitability" that the right would be infringed, together with inadequate safeguards designed to stop removal where access had plainly been impossible, the policy would be quashed: [172] – [173].

Suppiah

The next case was also an immigration-related case, this time concerned with the then policy concerning the detention of children pending removal from the UK. In *R (Suppiah) v SSHD* [2011] EWHC 2 (Admin) there were individual claimants, and Wyn Williams J found that they had been unlawfully detained. These individual findings were then relied on, together with broader evidence about non-compliance with the policy emanating from other sources such as inspectorate reports, in support of a challenge to the policy (and overall system) itself. The argument was that the evidence taken together revealed an unacceptable risk of illegality because the policy failed sufficiently to constrain the inevitably high risks of harm and therefore illegality that were inherent with the administrative detention of children. The claimants suggested that in order to make the policy lawful, additional safeguards were required including in particular the involvement of child welfare specialists in detention decision-making.

Wyn Williams J dismissed this argument on the basis the claimants were being overly prescriptive. There had been failings, he said, but it was premature to conclude that the policy could not be operated lawfully, particularly where the court was concerned with a period shortly after relevant statutory provisions had come into force: [219]. Importantly for present purposes, however, Wyn Williams J accepted the concession of the Secretary of State that the principle established in the *RLC* and *Medical Justice* cases could be applied in the present context. Although those cases had been about fairness, that was simply a species of illegality. An acceptable risk of unlawful detention, breaches of Convention rights or indeed any public law error would render the relevant system unlawful: [141].

The POVA cases

Wyn Williams J had in fact already considered something that looked like the same principle in *R (Royal College of Nursing) v SSHD* [2011] UKHRR 309. That case was handed down two weeks after the argument in *Suppiah* and was concerned with a challenge to the scheme for barring certain persons from working with vulnerable adults. Wyn Williams J applied Baroness Hale's reasoning in *R (Wright) v SS Health* [2009]

UKHRR 763 (a case concerned with an earlier version of the same statutory scheme) to find that *possible* not definite breaches of Article 8 had to be avoided if the scheme was to be lawful. At [69]:

> "The fact that there will be others who do not fall into that category is not the point. As Baroness Hale or Richmond stresses a scheme such as the scheme under consideration in the instant case must be devised in such a way as to prevent possible breaches of Article 8."

That is of course materially the same point that had been established in the *RLC* and *Medical Justice* cases, albeit in a different context.

E v DPP

The last case to consider the principle, however, did so expressly, and again outside the area of immigration. *R (E) v DPP* [2011] EWHC 1465 (Admin) included both a challenge to a decision to prosecute a child, and a challenge to the DPP's guidance on such decisions. The former challenge succeeded but the guidance challenge did not. The guidance challenge relied on *Suppiah* and was put on the basis that the guidance took insufficient account of various provisions of the UN Convention on the Rights of the Child and of the ECHR. Consequently, it was said, it gave rise to an unacceptable risk that victims of crime would be prosecuted in violation of the UK's obligations under international law.

Munby LJ, with whom McCombe J agreed, dismissed the argument in the following terms (at [53]):

> "Even assuming for the sake of argument that all these international instruments are binding, whether as a matter of domestic law or because they have been incorporated by the DPP in his guidance, and likewise assuming that they are to be read in every way as Mr Southey and Mr Strong would have us read them, it does not follow that the DPP's policy is thereby invalidated. It is not. If in the context of coming to a decision in a particular case proper effect is not given to relevant State obligations, then it may be that the decision will be amenable to challenge on its own merits (or lack of them). But that is not to say, and I entirely reject the proposition, that the legality of the DPP's carefully crafted and clearly formulated policy depends upon the amount of detail which he chooses to apply in his exegesis of such obligations. Despite Mr Southey's vigorous arguments, the present case is fairly far removed from the kind of case with which Wyn Williams J was concerned in *Suppiah*."

Implications

It is submitted that a number of points arise from all this. First, and most importantly, the principle is now well established that a system that carries with it an unacceptable risk of illegality is an unlawful system. If *Wright* is read as an example of its application, then the authority reaches all the way up to the House of Lords.

Second, and in any event, it is not difficult to discern the legal basis for the principle. It can be understood as a species of irrationality, given that it would be irrational for any

decision-maker to adopt a policy or system which carried inherent within it an unacceptable risk of illegality.

However, it is submitted that the justification goes further than that. Fundamentally, the principle is concerned with preventing harm that has not yet (or not yet fully) occurred. Thus as Silber J observed in the *Medical Justice* case, why wait for a case to arise, particularly in circumstances where the harm attendant with that is likely to be grave (in that case, unlawful removal from the UK)? Judicial review is of course not just about correcting past wrongs. It also has a forward-facing dimension where it promotes good public administration in the public interest.

Equally, the application of this principle is one for which the courts are particularly well equipped. It is about the assessment of risk, but specifically the assessment of the risk of illegality. A court is obviously competent to assess a risk of that kind. All the more so, it may be said, where the risk in question is one of unfairness. It is therefore unsurprising that this is the context in which the principle first emerged.

It is however also clear that the doctrine is not confined to fairness challenges. Such a proposition would be difficult to reconcile with *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, but impossible to justify if rationality is taken as the basis for the principle. No rational decision maker would risk unacceptable illegality whatever precise form that took. But *Suppiah* and *E v DPP* in particular put this beyond doubt.

The real issue, therefore, is what amounts to an unacceptable risk. As to that, it is clear that it will be context specific. Any risk assessment involves an assessment of probability together with an assessment of the likely level of harm. A low chance of a high level of harm may therefore be unacceptable. But "unacceptability" also imports a proportionality test, because it may be irrational to take even a low (or moderate) chance of a low (or moderate) level of harm if there is an obvious safeguard that could easily be deployed. All these matters are therefore relevant.

What is also clear is that it is not necessary to establish that the system would operate unlawfully in every case, or even most cases: the question is only one of unacceptable risk. This could conceivably produce an interesting consequence: a system which carried an unacceptable risk of, say, Article 8 ill treatment would be an unlawful system as a matter of domestic law. A person subject to such a system – say via detention, or the application of a barred list – would then be subject to a system that was other than in accordance with the law for Article 8 purposes. That would in turn seem to produce a breach of Article 8 even though the individual himself had suffered no direct harm.

Another point is that in *E v DPP* Munby LJ was obviously concerned with what he saw as an attempt to re-write the detail of the relevant policy. It may be that similar concerns drove Wyn Williams J in *Suppiah* (although his central conclusion was one of prematurity). The answer to that may be that detail is particularly context-specific. In some cases, it will be helpful, and may be necessary in order to constrain what might otherwise give rise to illegality. In others it may be far too restrictive. Again, in the end, the issue is always one of risk.

Finally, the fact that the risk must inhere in the system is obviously important. It will generally exclude human errors and individual aberrations, although it may be possible to conceive of situations where a confusing policy together with untrained staff combine to

produce an unlawful system. "Inhere" is in any event a flexible word, capable of broad interpretation, and so is "system". Neither Wyn Williams J in *Suppiah* nor Munby LJ in *E v DPP* was upset by the principle that a failure to constrain might give rise to an unacceptable risk. It seems to us that any pattern of illegality, on which a policy, practice or simple arrangement might bear, could be a target for this kind of challenge.

No doubt all this can be worked out in the cases to come. They are interesting questions. But one observation leaps out: three substantial cases in less than twelve months suggests there might be quite a lot more to come[1].

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[1] And indeed since writing this article it has come to our attention that *TN (Vietnam)* [2010] EWHC 2184 (Admin) in the Court of Appeal (listed with *MD (Angola)* and *CJ (Dominica))* with judgment awaited may be about to say something more about it, this time in the context of safe systems for managing those with HIV in immigration detention.