BRICK COURT
CHAMBERS

Public Law Seminar

Chaired by Paul Bowen QC

Friday 24th April from 2pm to 3pm — via videolink

Amenability to judicial review — Malcolm Birdling

Malcolm Birdling will discuss the circumstances in which a Court will permit judicial review challenges to decisions or acts of private law bodies, by reference to two cases he has recently been involved in. The first is *R (Holmcroft Properties Ltd) v KPMG LLP* [2018] EWCA Civ 2093, [2020] Bus LR 203, which concerned an application for judicial review arising out of the mis-selling of interest rate hedging products by a number of banks. The banks (here, Barclays) undertook to the FCA that it would set up a scheme to provide redress to affected customers. The FCA required that an independent party, KPMG, should oversee the implementation and application of this scheme. The Court of Appeal ultimately concluded that KPMG's oversight of the scheme was not amenable to judicial review. The second concerned whether decisions of the British Standards Institution (a body set up pursuant to a Royal Charter) relating to the setting of national safety standards are amenable to review.

Malcolm acted for Holmcroft Properties.

A1P1 and legitimate expectations — Tim Johnston

Tim Johnston will speak about *R (British Telecommunications) v Her Majesty's Treasury* [2018] EWHC 3251 (Admin) and *R (British Telecommunications) v Her Majesty's Treasury* [2020] EWCA Civ 1. The new State Pension ("nSP") was introduced in 2016. One consequence of the nSP was that public service pensioners would no longer enjoy indexation of their Guaranteed Minimum Pension ("GMP"); the indexation mechanism had been abolished. HMT conducted a public consultation concerning how it should continue to index that entitlement. Under the terms of the BT pension scheme, some BT pensioners – who were employed in the public sector prior to privatisation – were entitled to equivalent indexation if the Treasury used the conventional mechanism to index public service pensions. This would cost BT around £120 million. HMT rejected BT's request to deploy an alternative legal mechanism that did not trigger any right to an increase under its scheme. BT challenged that decision on various grounds. The Divisional Court held that the BT pensioners enjoyed a substantive legitimate expectation that the conventional mechanism would be used to index public service pensions.

Tim acted for HM Treasury.

Voter identification and Padfield impropriety — Emily MacKenzie

Emily MacKenzie will discuss *Coughlan v Cabinet* Office [2019] EWHC 641 (Admin), which was a challenge to "pilot schemes" that trialled voter ID requirements in various of the May 2019 local elections. The claimant, who was a former district councillor who opposes voter ID, argued that the pilots were *ultra vires* the relevant power contained in s. 10 of the Representation of the People Act 2000 for two reasons. First, the Minister is permitted to pilot schemes for testing "how voting… is to take place", whereas the claimant argued that the requirement to produce ID concerns whether voting is permitted to take place at all. Second, he claimed that the schemes pursued an improper purpose because the power could only lawfully be exercised to run a pilot that intended to "facilitate and encourage" voting at elections. The claim was dismissed by Supperstone J in March 2019 and the appeal was heard by the Court of Appeal on 23 April 2020.

Emily acted for the Cabinet Office.

Factual disputes and judicial review: Challenging the CPS's approach to rape — Jennifer MacLeod

Jennifer MacLeod will speak about *R (EVAW) v Director of Public Prosecutions* [2020] EWHC 929 (Admin), a recent decision of the Divisional Court dismissing the high-profile attempt by the End Violence against Women Coalition ("EVAW") to judicially review the CPS' approach to rape prosecutions. Since 2017, the rate and volume of such prosecutions have fallen precipitously, collapsing to the lowest level since records began. EVAW, represented by the Centre for Women's Justice, sought to judicially review this fall in prosecutions, focusing on numerous changes to the guidance and training for Crown Prosecutors. The President of the Queen's Bench Division and Singh LJ refused to grant permission on the claim, holding that the Court was bound to accept the DPP's position that there had been "no change in approach". In light of the comprehensive evidence submitted to the contrary, Jennifer will discuss the serious questions raised as to the boundaries of the principle that the Court must defer to the decision-maker on issues of fact.

Jennifer acted for EVAW.

Article 8 and 10 ECHR and EU law limits to secret surveillance regimes — David Heaton

David Heaton will discuss recent litigation in the UK courts, the Court of Justice of the European Union ("CJEU") and European Court of Human Rights ("ECtHR") which raises fundamental questions about the scope and content of EU and ECHR rights to privacy and freedom of expression in the context of digital communications, national security and bulk interception/hacking/datasets. Recent Advocate General's Opinions in Cases C-623/17, C-512/18, C-511/18 and C-520/18 suggest that EU law requires safeguards for retention and access to communications data in the national security context by MI5, MI6 and GCHQ. Liberty has successfully challenged Part 4 of the Investigatory Powers Act 2016 ("IPA") on EU law grounds, and its challenge to other parts of the IPA on this (and other) grounds is stayed pending the CJEU's decision: *R (Liberty) v SSHD* [2018] EWHC 975 (Admin), [2019] QB 481. Liberty's challenge to the IPA on ECHR grounds was unsuccessful ([2019] EWHC 2057 (Admin), [2020] 1 WLR 243), but time for appeal has been extended pending the ECtHR Grand Chamber's decision in *Big Brother Watch v United Kingdom* (App Nos 58170/13, 62322/14 and 24960/15). In addition, Privacy International and Liberty have issued a claim in the Investigatory Powers Tribunal ("IPT") (Claim No IPT/20/01/CH) following disclosure in the High Court challenge showing systemic flaws in MI5's data retention systems.

David acts for Liberty in the High Court challenge and the claimants in the IPT and appeared for the applicants in the Grand Chamber in *Big Brother Watch*.

Reasons given to Parliament and Article 9 of the Bill of Rights — Emma Mockford

Emma Mockford will speak about the recent judgments of the Divisional Court and Court of Appeal in *Heathrow Hub Limited v Secretary of State for Transport* [2019] EWHC 1069 (Admin) and [2020] EWCA Civ 213. This was one of the recent high profile claims for judicial review of the Government's decision to endorse airport capacity expansion in the South East of England by way of a third runway at Heathrow. Emma will focus on one under-reported aspect of the judgments, namely the treatment of issues relating to parliamentary privilege and Article 9 of the Bill of Rights 1689. The particular question which arose in the case is whether a claimant in judicial review proceedings can rely upon an allegedly unlawful reason given by a Minister to Parliament in order to explain the motivation for executive action taken outside Parliament. The Divisional Court and Court of Appeal expressed divergent views on the point, with the latter casting doubt on the previous decision of the Privy Council in *Toussaint v The Attorney General of Saint Vincent and the Grenadines* [2007] UKPC 48.

Emma acts for the Claimant, Heathrow Hub.