When will courts entertain academic public law claims? (L, M and P v Devon County Council)

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Public Law analysis: In this case, the claimants sought judicial review of decisions communicated in pre-action correspondence to the effect that amended education, health and care (EHC) plans would not be produced by Devon County Council (the Council) within a particular timescale. The claims raised a short point of statutory construction. Permission to claim judicial review was granted on the papers. At the substantive hearing, despite hearing full argument on the statutory construction point, the judge declined to decide the point on the basis that the claims had become academic. The Court of Appeal decided that he erred in doing so. Written by Jonathan Lewis, barrister, at Henderson Chambers.

L, M and P v Devon County Council [2021] EWCA Civ 358 (16 March 2021)

What are the practical implications of this case?

The Court of Appeal's judgments provide a useful summary and distillation of the principles governing when the Administrative Court will entertain academic judicial review claims. In considering whether to pursue such claims, practitioners should take into account, among other considerations, the nature of the dispute (whether it is only a short point of construction) and what will be involved in deciding it and whether it raises issues of general public importance.

If the relationship between the parties is ongoing, the court might be more inclined to hear the claim as the same issue might arise in the future. The fact that permission has been granted after a claim has become academic does not preclude the court hearing the claim from refusing to decide it on the basis that it is academic.

What was the background?

Section 37(1) of the Children and Families Act 2014 makes provision for EHC plans. A meeting had been held to review the claimants' EHC plans. They judicially reviewed the time in which it had taken the Council to produce a final EHC plan. They sought declarations, quashing orders and a mandatory order requiring the Council to issue final EHC plans within two working days of the court order. The Council's case was that, upon a proper reading of the legislation, it was permitted to wait for eight weeks after the date when it notified the children that it intended to amend the EHC plans before serving the amended EHC plan.

In its acknowledgement of service, the Council argued that, as it had served the amended EHC plans, permission should be refused because the claims were academic. Permission was nonetheless granted on the papers. At the substantive hearing, HHJ Allan Gore QC heard full argument on the point of statutory construction and raised the issue of the claim having become academic. He decided against deciding the case on the basis that it had become 'unnecessary and academic'. This was despite the fact that he had found that the question underlying the claim for declarations was 'a very interesting hotly contested question of pure statutory interpretation[…]' and that the question gave 'rise to general issues of public importance'.

What did the court decide?

The Court of Appeal set out the various descriptions of academic claims in the authorities (at paras [62]–[64]): a claim will be academic if the outcome does not directly affect the rights and obligations of the parties—'an academic question, the answer to which cannot affect the respondent in any way'; 'having no interest in the outcome', 'the outcome of these appeals will not directly affect the applicants'; 'hypothetical questions that do not impact on the parties'; and 'there is no longer any live issue between the parties'. It stated that one reason why this case was difficult to categorise was because the relationship between the parties was ongoing (at para [65]). Where there is real doubt about whether a claim is academic, that will be one of the factors that the court will take into account when deciding whether to hear it (at para [66]).

The starting point was *R v Home Secretary ex p Salem* [1999] AC 450 in which the House of Lords decided that it had a discretion to hear an appeal where there is an issue involving a public authority on a point of public law, even if, by the time of the hearing 'there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se'. However, that discretion 'even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future'.

The appellants relied upon the decision in *R (Brooks) v Islington London Borough Council* [2015] EWHC 2657 (Admin); [2016] PTSR 389, where the court found the principles in *Salem* applied to first instance decisions and was prepared to decide an academic point of statutory construction (see para [35]).

The Court of Appeal assumed that claims were academic (at para [49]). It stated that judicial review is a flexible and practical procedure and that all its remedies are discretionary (at para [50]). The Administrative Court has at its disposal a range of doctrine to control access to its scarce resource (such as that judicial review will not generally be available where there is a suitable alternative remedy and its approach to timeliness). The discipline of not entertaining academic claims is 'part of this armoury'. As a matter of judicial policy, the best way of controlling access to the court for claims where the claimants have obtained 'all the practical relief which the Court' could give them is the 'rigorous filter of the test in Salem' (at para [50]).

In this case, the factors in favour of hearing the claim were: permission had been granted and the parties were before the court; the parties had incurred the costs of preparing for the hearing; the point in question was fully argued; it raised issues of general public importance; and the overriding objective would have been furthered by deciding it (at para [52]).

The Court of Appeal was prepared to interfere with the judge's exercise of his discretion as he had erred in principle by confusing claims for which there is an alternative remedy and claims which were academic (atparas [54] to [56]). In finding that the judge should have decided the claim, the Court of Appeal noted that the dispute was 'a pure issue of statutory construction' which 'potentially affects many children and young people who have EHC plans (and their parents)' and which might arise again between these parties (at para [56]).

The Court of Appeal clarified the differences between the ratio decidendi of an academic case and decisions that were obiter dicta (at paras [67]–[69]). There is no reason in principle why the ratio of an academic case should not represent a precedent for other cases. Such a decision would in principle have been appealable.

Case details

- Court: Court of Appeal
- Judges: Lord Justice Peter Jackson, Lord Justice Haddon-Cave and Lady Justice Elisabeth Laing
- Date of judgment: 16 March 2021

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