[2011] AACR 39

(*Eba v the Advocate General for Scotland*
[2011] UKSC 29)

SC Lord Phillips, President
Lord Hope, Deputy President
Lord Rodger
Lady Hale
Lord Brown
Lord Clarke
Lord Dyson

22 June 2011

Judicial review – scope of judicial review of the refusal of permission to appeal by the Upper Tribunal in Scotland – whether standard to be applied the same as in England and Wales

The claimant had applied to the Upper Tribunal for permission to appeal against a decision of the First-tier Tribunal (Social Entitlement Chamber) which had dismissed her claim for disability living allowance. The Judge of the Upper Tribunal (Judge May QC) refused permission to appeal. The claimant lodged a petition in the Court of Session for judicial review of that decision. In the Outer House, the Lord Ordinary dismissed the petition on the basis that, as an appellate tribunal constituted under the Tribunals, Courts and Enforcement Act 2007 (the Act), decisions of the Upper Tribunal should be regarded as final except where there was a right of appeal or where there were exceptional circumstances. There was no statutory right of appeal and the Lord Ordinary did not consider that there were exceptional circumstances. The claimant brought a reclaiming motion to the Inner House, which held that the decision refusing permission to appeal was amenable to judicial review under the supervisory jurisdiction of the Court of Session and that the grounds on which it could be reviewed were not subject to any limitation on policy or discretionary grounds. The Advocate General for Scotland appealed to the Supreme Court, where the case was heard with *R (Cart) v Upper Tribunal* [2011] UKSC 28 (reported as [2011] AACR 38) and *R (MR (Pakistan) (FC)) v the Upper Tribunal (Immigration and Asylum Chamber) and another*.

Held, dismissing the appeal that:

1. the decision of the Inner House was affirmed although for different reasons. The approach in Scots Law to unappealable decisions should be aligned with that which is taken in England and Wales (paragraph 34);

2. there were two factors which required to be considered: (a) the familiar point that the court should be slow to interfere with the decisions of specialist tribunals; and (b) the limitation on the scope for second appeals in the Act and in the Rules of the Court of Session. In particular, it would not be consistent with the intention underlying the Act and the Rules that the court provided a wider opportunity for the decisions of the Upper Tribunal to refuse permission to appeal to itself to be reconsidered by way of judicial review (paragraphs 45 to 47);

3. accordingly, the benchmark for judicial review should be the same as the scope for an appeal from the Upper Tribunal namely that there must be “some important point of principle or practice” or “some other compelling reason” (paragraph 48).

DECISION OF THE SUPREME COURT

David Johnston QC and Simon Collins, instructed by Office of the Solicitor to the Advocate General for Scotland, appeared for the appellant.

Jonathan Mitchell QC and Lorna Drummond, instructed by Quinn Martin and Langan appeared for the respondent.

Michael Fordham QC and Tim Buley instructed by Herbert Smith LLP appeared for the intervener (Public Law Project).

Alex Bailin QC, Aidan O'Neill QC and Iain Steele, instructed by Freshfields Bruckhaus Deringer LLP appeared for the intervener (JUSTICE).

James Mure QC and Anna Poole, instructed by The Scottish Government Legal Directorate) appeared for the intervener (Lord Advocate).

LORD HOPE, delivering the judgment of the Court:

1. This is an appeal from an interlocutor of the First Division of the Court of Session (the Lord President (Hamilton), Lord Kingarth and Lord Brodie) of 10 September 2010: [2010] CSIH 78; 2011 SC 70; 2010 SLT 1047. By that interlocutor the First Division allowed a reclaiming motion by Blajosse Charlotte Eba against an interlocutor of the Lord Ordinary (Lord Glennie) dated 31 March 2010: [2010] CSOH 45; 2010 SLT 547. It refused a cross-appeal against that interlocutor by the Advocate General for Scotland, representing the Department for Work and Pensions. The issue with which it was concerned was the scope of the remedy of judicial review in the Court of Session of decisions of the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007 (the 2007 Act) which are excluded from review by way of an appeal.

2. The Lord Ordinary had dismissed Ms Eba's petition for judicial review of a decision of Judge DJ May QC, sitting as a judge of the Upper Tribunal, dated 6 February 2009. Judge May had refused her application for permission to appeal to the Upper Tribunal against the refusal on 27 January 2009 by the First-tier Social Entitlement Chamber of her appeal against the refusal by the Department on 11 February 2008 of her claim to disability living allowance. The First Division, reversing the decision of the Lord Ordinary, held that the decision of the Upper Tribunal on this matter was amenable to judicial review under the supervisory jurisdiction of the Court of Session and that the grounds on which it could be reviewed were not subject to any limitation on policy or discretionary grounds: [60].

3. Ms Eba had also sought judicial review of the decision by the First-tier Tribunal on 27 January 2009 to refuse her application for permission to appeal to the Upper Tribunal. Section 11(3) of the 2007 Act provides that the right to appeal to the Upper Tribunal may be exercised only with permission. Section 11(4) provides that permission may be given by the First-tier Tribunal or the Upper Tribunal. But, as there was an alternative remedy against the decision of the First-tier Tribunal because permission could also be sought from the Upper Tribunal, the focus of attention throughout these proceedings has been on the decision of the Upper Tribunal to refuse permission: see the Lord Ordinary, 2010 SLT 547, [1].

4. It should be noted that there was no right of appeal to the Court of Session against the Upper Tribunal's decision to refuse permission, as section 13(1) of the 2007 Act provides that the right to appeal to that court on any point of law arising from a decision of the Upper Tribunal does not extend to an "excluded decision". Section 13(8)(c) provides that for the purposes of section 13(1) an "excluded decision" includes any decision of the Upper Tribunal on an application under section 11(4) for permission to appeal. So the only way that unappealable decisions of that kind would be open to challenge in Scotland would be by way of judicial review in the Court of Session under the supervisory jurisdiction of that Court.

The issues

5. The appeal by the Advocate General in Ms Eba's case was heard together with appeals by the applicants against the decision of the Court of Appeal in *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859; [2011] QB 120; [2011] 2 WLR 36 and that by Sullivan LJ in *MR (Pakistan) v Upper Tribunal* [2010] EWHC 3558 (Admin) which raised the same issue. In *Cart* the Court of Appeal held that the unappealable decisions of the Upper Tribunal were amenable to the supervisory jurisdiction of the High Court in those cases only where the Upper Tribunal had exceeded its own jurisdiction in the sense understood prior to the decision of the House of Lords in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 or where it conducted the hearing so unfairly as to render its decision a nullity: [2011] 2 WLR 36, [37].

6. In setting the boundaries of the supervisory jurisdiction in this very narrow way in relation to the Upper Tribunal, the Court of Appeal in *Cart* applied the decision in *R (Sivasubramaniam) v Wandsworth County Court* [2002] EWCA Civ 1738; [2003] 1 WLR 475. In that case the Court of Appeal held that the supervisory jurisdiction was not available for the review of decisions of the county courts, save only in very rare and exceptional circumstances. These were where it was sought on the ground of an absence of jurisdiction as opposed to a mere error of law, or where there had been a procedural irregularity such that the applicant had been denied a fair hearing. In *MR (Pakistan)* Sullivan LJ held that the reasoning in *Cart*, in which the decision that was under review came from the Social Entitlement Chamber, applied to unappealable decisions of the Immigration and Asylum Chamber of the Upper Tribunal too. The Lord Ordinary in Ms Eba's case followed the reasoning of the Divisional Court in *Cart*: 2010 SLT 547, [76].

7. The Advocate General joined with the Secretary of State for Justice, the Secretary of State for the Home Department and the Child Maintenance and Enforcement Commission in supporting the decision of the Court of Appeal in *Cart* and of the High Court in *MR (Pakistan)*, and there is much that is common ground between all three appeals. But a separate judgment is needed in Ms Eba's case in view of the questions that her case raises that are of particular interest in Scotland. The principal issue in her case relates to the grounds on which a decision of the Upper Tribunal to refuse permission to appeal under section 11(4) of the 2007 Act is amenable to the supervisory jurisdiction of the Court of Session. Ms Eba submits that unappealable decisions of the Upper Tribunal are amenable to the supervisory jurisdiction of the Court of Session on the grounds applicable to public tribunals in general which, she maintains, are without limit and have never been, and should not be, circumscribed.

8. This issue lies at the heart of the relationship between the Court of Session and the new system for specialist tribunals which was created by the 2007 Act. On the one hand there is the rule of law, which is the basis on which the entire system of judicial review rests. Wherever there is an excess or abuse of the power or jurisdiction which has been conferred on a decision-maker, the Court of Session has the power to correct it: *West v Secretary of State for Scotland* 1992 SC 385, 395. This favours an unrestricted access to the process of judicial review where no other remedy is available. On the other hand there is the principle of finality. There is obvious merit in achieving finality at the tribunal level in the delivery of administrative justice. The new structure introduced by the 2007 Act lends force to this argument.

9. The importance of the issue is not, of course, confined to Scotland. The new, simplified statutory framework for tribunals which the 2007 Act created extends to England and Wales and to Northern Ireland too. The provisions of section 11 as to the right to appeal to the Upper

Tribunal with permission (or, in Northern Ireland, leave) on any point of law arising from a decision made by the First-tier Tribunal apply to those jurisdictions as well. The provisions of section 13(1) and section 13(8)(c), which exclude from the right of appeal under section 13(2) decisions of the Upper Tribunal to refuse permission to appeal to the Court of Session, apply also to refusals of permission to appeal to the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland.

10. There are however two further issues which need to be considered in Ms Eba's case. The first arises because there are significant differences between the circumstances in which the remedy of judicial review is available in England and Wales and Northern Ireland and the right of the citizen to invoke the supervisory jurisdiction of the Court of Session in Scotland. The first question, then, is whether in Scotland too the scope for judicial review of unappealable decisions of the Upper Tribunal should be restricted in some way. The Advocate General's position is that the intention of Parliament was that the Upper Tribunal should be amenable to judicial review to the same extent in the Court of Session as in the High Court in England, and that the First Division of the Court of Session was wrong to hold otherwise. For Ms Eba it is submitted that this argument should be rejected as, whatever may be held to be the position in England, the suggestion that the grounds of judicial review of decisions of the Upper Tribunal should be restricted in Scotland is not supported by authority and to adopt it would destroy the consistency of Scots law.

11. The position in Scotland is also more complicated than that which arises in England and Wales. The 2007 Act can be said to have effected a complete reordering of the system of administrative justice in England and Wales. But that is certainly not true of Scotland. There are a large number of tribunals and other similar bodies which sit in Scotland which have not been included within the new structure. They are mainly confined to the Scottish tribunals that deliver administrative justice in matters devolved under the Scotland Act 1998 whose functions cannot be transferred to either the First-tier or the Upper Tribunal by order of the Lord Chancellor: section 30(5)(a). Various Scottish tribunals which exercise functions in relation to devolved matters have been restructured under legislation that applies only in Scotland. These measures include the Mental Health (Care and Treatment) (Scotland) Act 2003, the Planning etc (Scotland) Act 2006, the Judiciary and Courts (Scotland) Act 2008 and the creation of Additional Support Tribunals under the Education (Additional Support for Lifelong Learning) (Scotland) Act 2004. However, at least one tribunal exercising functions in Scotland in relation to reserved matters – the Pensions Appeal Tribunal – remains at first instance mainly outwith the structure of the 2007 Act. So too do the Employment Tribunals and the Employment Appeal Tribunal.

12. So there is this further question. Should there be a different approach to the grounds on which judicial review of unappealable decisions is available in the case of tribunals over which the supervisory jurisdiction of the Court of Session is exercised that are within the scheme of the 2007 Act from those that lie outside it?

Background

13. A comprehensive description of the statutory framework that the 2007 Act provides is to be found in the opinion of the First Division which was delivered by the Lord President (see 2011 SC 70, [2]–[4]) and in the judgment of Lady Hale in the cases of *Cart* and *MR (Pakistan)* in this Court: [2011] UKSC 28, [22]–[29]. It is necessary, in order to set the scene for the purposes of this judgment, only to sketch in a few details.

14. The 2007 Act was designed to implement proposals in a report by a committee chaired by Sir Andrew Leggatt, *Tribunals for users – One System, One Service* (DCA 2001). It sets out a two tier structure which comprises a First-tier Tribunal, into which were transferred most existing first instance tribunals exercising functions in relation to reserved matters, and an Upper Tribunal whose function is primarily to deal with appeals from the First-tier Tribunal but also to take over the work of some first instance tribunals from which there was no appeal. Both the First-tier Tribunal and the Upper Tribunal are composed of a number of separate Chambers into which the work of the existing tribunals was grouped according to subject matter. One of the aims of this reform, as described in paragraph 6.30 of the Leggatt Report, was to create a comprehensive and systematic right of appeal on points of law from the First-tier Tribunal to the Upper Tribunal and from there to the Court of Session or the Court of Appeal. Any point of law was to be open to challenge before experts within the Tribunals system, and the senior members of the Upper Tribunal were to be judges. They were to include judges of the Court of Session, judges of the Court of Appeal in England and Wales, Lord Justices of Appeal in Northern Ireland and puisne judges of the High Court in England and Wales and Northern Ireland: see section 6(1)(a)–(d).

15. In paragraph 6.30 the Leggatt Report added this comment:

> "It would be significantly to users' benefit to use that appeal system, rather than have recourse to the more complicated procedures and more limited remedies of judicial review. We think that this latter possibility should be excluded. Slightly different arguments apply to the appellate Division and first-tier tribunals."

In paragraph 6.31 it offered two options for the removal of judicial review from the Upper Tribunal. One was to constitute all the appeal tribunals a superior court of record, as had already been done with the Employment Appeal Tribunal and the Transport Tribunal. The other was to exclude judicial review by express statutory provision. It recognised that the option of designating most of the First-tier Tribunals as superior courts of record was manifestly inappropriate. The recommendation in their case was a statutory provision prohibiting review of their decisions where there was a right of appeal which had not been exercised.

16. In the event the 2007 Act does not contain any provision which excludes judicial review of decisions of either the First-tier or the Upper Tribunal. It provides instead that the Upper Tribunal is to be a superior court of record: section 3(5). This is a term that is unknown to the law of Scotland and has never been applied to any of the Scottish courts. But it is to be found in legislation relating to courts in other parts of the United Kingdom and to the Supreme Court of the United Kingdom itself: Constitutional Reform Act 2005, section 40(1). It is used there to indicate a court that keeps a permanent record of its acts and proceedings and has power to punish for contempt.

17. The Divisional Court in *R (Cart) v Upper Tribunal* held that section 3(5) of the 2007 Act did not have the effect of excluding the judicial review jurisdiction from the Upper Tribunal, whatever the historic scope of the expression "superior court of record" might be: [2009] EWHC 3052 (Admin), [2011] QB 120, [31]–[32]. This was because the supervisory jurisdiction can only be ousted by the most clear and explicit words: *R v Medical Appeal Tribunal, Ex p Gilmore* [1957] 1 QB 574, 583, *per* Denning LJ. Laws LJ said that it was a constitutional solecism to suggest that the effect of section 3(5) was to exclude it by implication: [31]. Counsel for the Advocate General did not challenge that conclusion. But it was said to be an indicator of an intention by Parliament, when taken together with the seniority of the judges who were to sit on

it, that the Upper Tribunal was to take its place alongside courts of the level of importance of the High Court in England and Wales and Northern Ireland and not to be an inferior tribunal.

18. The 2007 Act sets out a carefully organised system for the review of decisions and appeals. Review of decisions of the First-tier Tribunal and of the Upper Tribunal is provided for by sections 9 and 10. Section 11 provides for a right of appeal to the Upper Tribunal, with permission or leave, on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision. A list of excluded decisions is set out in section 11(5), which has been supplemented by article 2 of the Appeals (Excluded Decisions) Order 2009 (SI 2009/275) as amended.

19. The same formula is repeated in section 13, which provides for a right of appeal to the Court of Session and the equivalent courts in England and Wales and Northern Ireland. As already noted, permission or leave is required. In the case of appeals under section 13, this can be given either by the Upper Tribunal or the relevant court. A list of the decisions that are excluded decisions for the purposes of this section is set out in section 13(8), which has also been supplemented by article 3 of the Appeals (Excluded Decisions) Order 2009 as amended. It includes the following:

> "(a) any decision of the Upper Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c 29) (appeals against national security certificate),
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> (b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c 36) (appeals against national security certificate),
>
> (c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),
>
> (d) a decision of the Upper Tribunal under section 10 –
>
> (i) to review, or not to review, an earlier decision of the tribunal,
>
> (ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or
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> (iii) to set aside an earlier decision of the tribunal,
>
> (e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under that section have begun), or
>
> (f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor."

20. Decisions of the descriptions in section 13(8)(a) and (b) are decisions from which, under the legislation referred to, there was no statutory right of appeal. Counsel for the government accepted that they are subject to the ordinary process of judicial review in the sense indicated by *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. Ms Eba's appeal is directed to decisions of the description set out in section 13(8)(c).

21. The Advocate General submitted in his cross-appeal to the Inner House that decisions of the Upper Tribunal were not in any circumstances amenable to the supervisory jurisdiction of the Court of Session: 2011 SC 70, [13]. The Lord President devoted much of his opinion to a discussion of that argument, which was rejected on the ground that the jurisdictional rule in Scotland pointed to an exclusion of the supervisory jurisdiction only where the subject body was a manifestation of the Court of Session or akin to such a manifestation, which the Upper Tribunal was not: [54]. The focus of the argument has accordingly shifted very considerably from that which was considered in the Inner House. It is no longer maintained that the supervisory jurisdiction has been excluded altogether. The question is as to the extent, if at all, it has been restricted in the case of decisions of the Upper Tribunal that are unappealable.

22. There is one other provision in the 2007 Act which should be mentioned. Section 13(6) provides that the Lord Chancellor may, as respects an application for permission or leave to appeal to the Court of Appeal in England and Wales or Northern Ireland from any decision of the Upper Tribunal on an appeal under section 11 from a decision of the First-tier Tribunal, make provision by order for permission or leave not to be granted on the application unless the Upper Tribunal or the relevant court considers:

> "(a) that the proposed appeal would raise some important point of principle or practice, or
>
> (b) that there is some other compelling reason for the relevant appellate court to hear the appeal."

An order to this effect has been made by the Lord Chancellor: see The Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008/2834), which came into force on 3 November 2008.

23. The 2007 Act did not confer an equivalent power on the Lord President in relation to Scotland, perhaps because the question of second appeals was being considered in the Scottish Civil Courts Review that was then taking place under the Chairmanship of Lord Gill. But a provision broadly to the same effect as section 13(6) was made by SSI 2008/349 with effect from 3 November 2008 by inserting into the Rules of the Court of Session 1994 a new rule 41.59. It provides:

> "(1) This rule applies where an application is made to the court under section 13(4) of the Tribunals, Courts and Enforcement Act 2007 for permission to appeal a decision of the Upper Tribunal which falls within section 13(7) of that Act and for which the relevant appellate court is the Court of Session.
>
> (2) Permission shall not be granted on the application unless the court considers that –
>
> > (a) the proposed appeal would raise some important point of principle or practice, or
> > (b) there is some other compelling reason for the court to hear the appeal."

As a result the position in relation to the granting of permission for a second appeal is now the same in the Court of Session as it is in the High Court under the statute. But it should be noted that the Scottish Rule of Court does not apply to applications made to the Upper Tribunal as opposed to the Court of Session, while the Order in other parts of the United Kingdom applies to applications to either the Upper Tribunal or the Court of Appeal.

Some areas of common ground

24. Mr Mitchell QC, in his helpful submissions for Ms Eba, drew together various matters relating to the position in Scotland which he said appeared to be common ground between the parties. It is worth repeating some of them, as they help to put into focus the points on which the parties are divided.

25. First, the issue before this Court is confined to those decisions of the Upper Tribunal which are unappealable because, in the language of section 13(8) of the 2007 Act, they are excluded decisions. The effect of the exclusion is that these decisions are not amenable to the process of internal review within the tribunal system under the statute, which has not provided any alternative remedy. So, as Mr Mitchell submitted, it is either judicial review or it is nothing.

26. Second, the question for decision is not whether judicial review is available at all. In the Inner House the Advocate General submitted that, in view of its constitution, jurisdiction and powers and its relationship with the Court of Session, the Upper Tribunal should properly be regarded as having a status so closely equivalent to the latter that its decisions were not appropriately amenable to its supervisory jurisdiction at all: 2011 SC 70, [14]. That extreme position is no longer contended for. The question is as to the scope or extent of the remedy.

27. Third, the grounds of judicial control of administrative action in Scotland are based on legal principle. Judicial review by the Court of Session is not an exercise of judicial discretion, in contrast to what was said as to the position in English law in *R (Sivasubramaniam) v Wandsworth County Council* [2002] EWCA Civ 1738; [2003] 1 WLR 475, [47]. Every person who complains that he has suffered a wrong because of an error or abuse of the power conferred on a decision-maker is entitled to apply to the Court of Session for judicial review under Chapter 58 of the Rules of the Court of Session 1994 as of right, in exactly the same way as he could have done by way of an ordinary action before the Rules of Court were amended to introduce the current procedure in 1985: *West v Secretary of State for Scotland* 1992 SC 385, 404. He does not have to apply for permission to do so and, although the Court has a discretion to refuse a remedy in judicial review on what may be described as equitable grounds, it has no discretion to refuse to entertain a competent application: *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47; 2007 SC (HL) 1, [53].

28. As the law currently stands, the hurdle that a petitioner must cross for a motion for a first order to be granted is a low one. In the Inner House the Lord President said that it seemed that this had been done only where the application was manifestly without substance: [35]. This approach was confirmed in *Y v Secretary of State for the Home Department* [2011] CSIH 3; 2011 SLT 508, where the Extra Division said that only in very exceptional circumstances should a refusal to grant first orders be made: [16].

Watt v Lord Advocate

29. It is also common ground that the history and nature of the supervisory jurisdiction in Scotland shows that, contrary to what was said in *Watt v Lord Advocate* 1979 SC 120, the Court of Session has power to correct an error of law made by a statutory tribunal that acts within its statutory jurisdiction but has misunderstood the question that it has been given power to decide. In that case the pursuer sought and was granted reduction of a decision of a National Insurance Commissioner that he was not entitled to unemployment benefit. Lord President Emslie said that

it was not necessary for him to express a concluded view on the point, as he had held that the Commissioner had exceeded his statutory powers and that his decision was *ultra vires*, but that he had the gravest doubt whether, if that had not been so the Court would have had power to review it.

30. The Lord President went on to say this at 131:

> "…it seems clear that, however much this is to be regretted, the Court Session has never had power to correct *an intra vires* error of law made by a statutory tribunal or authority exercising statutory jurisdiction. As Lord Justice Clerk Moncrieff said in *Lord Advocate v Police Commissioners of Perth* (1869) 8 M 244 at p 245 – 'In the ordinary case it would now, I think, be held that where statutory powers are given, and a statutory jurisdiction is set up, all other jurisdictions are excluded …' There is no indication in any subsequent authority that this view has been doubted or even questioned and I entirely agree with the Lord Ordinary for the reasons which he gives that the fact that the Court of Session may have exercised a comprehensive corrective jurisdiction over determinations of parochial aid in the 18th and early 19th Centuries does not in any way support the existence of a jurisdiction in this court to correct errors by a statutory tribunal in the due performance of its statutory duties."

31. As the Advocate General has pointed out, this approach suggests that the supervisory jurisdiction of the Court of Session is restricted to what is commonly referred to as pre-*Anisminic* error. That is not the way that Lord Fraser of Tullybelton seems to have understood the position to be, as in *Brown v Hamilton District Council* 1983 SC (HL) 1, 42, he said:

> "It is not necessary for me to consider the grounds on which judicial review may be open. The decisions in the English cases of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, and *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, so far as they relate to matters of substance and not of procedure, are accepted as being applicable in Scotland: see *Watt v Lord Advocate* 1979 SC 120. There is no difference of substance between the laws of the two countries on this matter… ."

It does appear however that, in expressing the position as narrowly as he did in *Watt*, the Lord President failed to appreciate the significance of the decision in *Anisminic*, which abolished the distinction between errors of law that went to jurisdiction only in the strict sense and those that did not: Clyde and Edwards, *Judicial Review*, paragraphs 22.21–22.24.

32. In a passage from his speech in *Anisminic* at 171 which the Lord President quoted in *Watt* at 130, Lord Reid said:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity."

There then followed a list of examples which, as Lord Reid said was not intended to be exhaustive of errors that fell into that category, including where the tribunal has misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question that was not remitted to it, has refused to take into account something that it was required to take into account or has based its decision on some matter which it had no right to take into account. He ended this passage with these words, which indicate precisely where the boundary lies between what is open to review and what is not:

> "But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

33. As the Lord President observed in the present case, *Anisminic* has come to be interpreted and applied in the English courts in a way that does not appear to sit easily with Lord President Emslie's dictum: 2011 SC 70, [43]. The distinction between jurisdictional and other errors, which he was endorsing, has been abandoned. Furthermore, the way that his dictum has been applied in practice appears to have been somewhat patchy. It was applied in *O'Neill v Scottish Joint Negotiating Committee for Teaching Staff* 1987 SC 90, by Lord Jauncey at 94 and in *Rae v Criminal Injuries Compensation Board* 1997 SLT 291, by Lord Macfadyen at 295 I–J. More recently, since the decision in *West v Secretary of State for Scotland* 1992 SC 385 in which the court said at 413 that there is no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review, it has been ignored, as in *Mooney v Secretary of State for Work and Pensions* 2004 SLT 1141 [also reported as R(DLA) 5/04] and *Donnelly v Secretary of State for Work and Pensions* 2007 SCLR 746. In *Diamond v PJW Enterprises Ltd* 2004 SC 430, [37]–[38] the Lord Justice Clerk referred to the argument that *Anisminic* had made obsolete the traditional distinction that was recognised in *Watt* between an error of law as to jurisdiction and an error of law made *intra vires* but found it unnecessary to decide the issue. In *Hyaltech Ltd, Petitioners* 2009 SLT 92, [53] too, as there had been no misapplication of the relevant law, the court found this not to be necessary. But the dictum has never been expressly disapproved.

34. In my opinion the time has come for it to be declared that Lord President Emslie's dictum in *Watt v Lord Advocate* 1979 SC 120, 131 is incompatible with what was decided in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147. In *In re Racal Communications Ltd* [1981] AC 374, 382 Lord Diplock said that the decision in *Anisminic* was a legal landmark which proceeded on the presumption that, where Parliament confers on an administrative tribunal or authority power to decide particular questions defined by the Act, it intends to confine that power to answering the question as it has been so defined and that, if there is any doubt what that question is, this is a matter that the court must resolve. I would hold that the dictum in *Watt* cannot be reconciled with that interpretation of the decision and that it should no longer be followed. Once again it must be stressed that there is, in principle, no difference between the law of England and Scots law as to the substantive grounds on which a decision by a tribunal which acts within its jurisdiction may be open to review: *Brown v Hamilton District Council* 1983 SC (HL) 1, 42 per Lord Fraser; *West v Secretary of State for Scotland* 1992 SC 385, 402 and 413.

The extent of the remedy in English law

35. The choices in relation to unappealable decisions of the Upper Tribunal in England and Wales were examined in the judgment that the Court has given today in *Cart* and *MR (Pakistan)*: [2011] UKSC 28. As Lady Hale explained in [37], three points had become clear in the course of oral argument. First, there is nothing in the 2007 Act which purports to exclude judicial review

of unappealable decisions of the Upper Tribunal. Second, it would be inconsistent with the new structure introduced by the 2007 Act to distinguish between the scope of judicial review in the various jurisdictions which it has gathered together in that new structure. I note in passing that the Advocate General submitted in Ms Eba's case that its scope should be the same across all the chambers of the Upper Tribunal, that there was no submission from anyone else to the contrary and that the Inner House agreed that there should be no distinction between any of them: 2011 SC 70, [61]. Third, as the object of judicial review is to ensure that decisions are taken in accordance with the law and not otherwise, the question is what machinery is necessary to ensure that mistakes as to what the law requires are kept to a minimum. Should there be any jurisdiction in which mistakes of law are immune from scrutiny in the higher courts?

36. There were, then, three possible approaches which the Court could have taken. First, it could have endorsed the decision of the Court of Appeal in *Cart* and held that the scope of judicial review should be restricted to an excess of jurisdiction in the pre-*Anisminic* sense or where there had been a procedural irregularity such that the applicant had been denied a fair hearing. Second, it could have held that nothing had changed and that judicial review of the kind that had always been available before the 2007 Act should be retained. Third, a course between these two options could be adopted in which judicial review would be limited to the grounds on which permission might be granted for a second-tier appeal to the Court of Appeal.

37. The first option was rejected. The approach of the Court of Appeal in *Cart* was too narrow, as it left the possibility that serious errors of law affecting large numbers of people would go uncorrected: [44]. The second option, too, was rejected. Although the courts have adopted principles of judicial restraint when considering the decisions of expert tribunals, it had found more favour in some contexts than others. A principled but proportionate approach was now required: [51]. Unrestricted judicial review was not necessary for the maintenance of the rule of law and was not proportionate: Lord Dyson, [127]. This left the adoption of the second-tier appeals criteria, which would be a rational and proportionate restriction upon the availability of judicial review. It would recognise that the new tribunal structure deserves a more restrained approach to judicial review than had previously been the case: [57]. But, as Lord Phillips said in his judgment at [92], some overall judicial supervision was needed in order to guard against the risk that errors of law of real significance may slip through the system. So it was the third approach which was adopted.

Should the same approach be followed in Scotland?

38. For the Advocate General, Mr Johnston QC submitted that the conclusion that was reached as to the extent of the remedy for England and Wales should be applied to Scotland too. He expressed concern about the extent of the burden that applications for judicial review would impose if the decision of the Inner House were to be supported, especially in immigration and asylum cases. The Scottish Court Service had drawn attention to this problem in the consultation on immigration appeals in 2008, pointing out that many of these applications took in excess of one judge-day to consider and that they accounted for approximately the equivalent of the time of one full-time judge for which no additional resource had been provided. While the number of these applications might seem to be small in comparison to the position in England and Wales, it was nevertheless a significant burden on the Scottish Courts. There was no current mechanism for sifting out unmeritorious applications, apart from that indicated by *Y v Secretary of State for the Home Department* [2011] SLT 508, [16]. The fact that petitions for judicial review occupied a disproportionate amount of sitting days had been noted by Lord Gill in his *Report of the Scottish Civil Courts Review* (September 2009), chapter 12, paragraph 50. The recommendation

in paragraph 51 of that chapter that a requirement to obtain leave should be introduced had not yet been implemented. It was open to the court to set the parameters. This was not just a matter for Parliament. The Inner House had been wrong to decline this opportunity: 2011 SC 70, [60].

39. He drew attention to the fact that the scope of the remedy can be tailored by the court to the needs of the particular body. A good example of this was the ecclesiastical case of *McDonald v Burns* 1940 SC 376, in which Lord Justice Clerk Aitchison at 383 had addressed the question as to the circumstances in which the Courts would entertain actions arising out of the judgments of ecclesiastical bodies. As the Lord Ordinary had pointed out, there were many fields in which the courts in Scotland had tailored their approach to the nature of the tribunal, the subject matter of the dispute and the perceived parliamentary intention behind any relevant legislation: 2010 SLT 547, [89]. The Inner House had simply been wrong to rely on the mere fact that a petitioner was entitled to bring the case into court: 2011 SC 70, [60]. *Tehrani* did not support this approach to the grounds on which the remedy might be exercised. Also the 2007 Act is an enactment of the Parliament of the United Kingdom. It should not be applied in a way that would encourage forum-shopping.

40. Intervening on behalf of the Lord Advocate, Mr Mure QC submitted that there was no pressing need to control the exercise of the supervisory jurisdiction in Scotland in respect of the 2007 Act tribunals by restricting the grounds of review. He accepted that this case provided the court with an opportunity to mould its approach, but he maintained the post-*Anisminic* grounds of review should remain. It should be left to the Court of Session to adapt the intensity of the review to the needs of each case. Resources were an issue, but this was a matter for the Scottish Government to address. The 2007 Act was a United Kingdom statute, but it had been careful to make separate provision for Scotland. This allowed for a different approach to be taken to the way the supervisory jurisdiction should be exercised in Scotland from that which might be adopted in England.

41. For Ms Eba, Mr Mitchell stressed that the Scottish approach to the supervisory jurisdiction was that described in *West v Secretary of State for Scotland*. She had a right to have her complaint dealt with by the court. The Inner House had been right to observe that in Scotland, in contrast to what had happened in England and Wales, the right of the citizen to invoke the jurisdiction of the Court of Session to control the actings of statutory bodies had never been circumscribed on discretionary or similar grounds: 2011 SC 70, [60]. It had always been accepted in Scotland that it would require clear, unambiguous and express words to oust that jurisdiction: eg *Dunbar v Scottish County Investments* 1920 SC 201, 217; *Hume v Nursing and Midwifery Council* [2007] CSIH 53; 2007 SC 644, [17]; Clyde and Edwards, *Judicial Review*, paragraph 11.04.

42. Mr Mitchell accepted that the grounds for review could vary according to the nature of the bodies themselves. But he submitted that it would not be right to restrict the intensity of review by analogy with the test that the 2007 Act had laid down for second appeals. The Act had not effected a complete re-ordering of administrative justice in Scotland, as there was not and could not be a unified system for the whole range of Scots tribunals. There was no reason why the approach that was taken to a decision made by a sheriff under the Mental Health (Scotland) Act 1984 in *R v Secretary of State for Scotland* [1999] 2 AC 512; 1999 SC (HL) 17 should not be applied generally. It was wrong to see the 2007 Act as having created something that was fundamentally different from what was there before. It had long been established in the social security context that unappealable refusals of leave to appeal were amenable to judicial review on ordinary grounds, with due recognition and respect for specialist expertise. Such statistics as

were available suggested that the increase in the number of applications in immigration and asylum cases was not a pressing issue that was incapable of being dealt with by case management. The court should not pre-empt what might come from the reforms indicated by the Civil Courts Review.

43. The submissions which I have set out in this brief summary were, of course, presented on the assumption that one of the choices with which the court was presented was to endorse the approach of the Court of Appeal in *Cart.* There is no doubt that a decision by this Court to endorse that approach with regard to unappealable decisions of the Upper Tribunal in England and Wales would have presented a very real problem in Scotland. To extend it to Scotland would have created a rift between the broad and flexible approach that is taken to the supervisory jurisdiction in Scotland generally, which is available as of right to everyone, and the very limited opportunity for review which it would have provided in the case only of that class of unappealable decisions. It would also lead us back, in their case only, to the distinction between jurisdictional and other errors to which Lord President Emslie referred in *Watt v Lord Advocate* 1979 SC 120, 131 but was effectively abandoned after *Anisminic,* as Lady Hale said in *Cart* and *MR*, [39]. This would indeed have destroyed the consistency of the approach to the supervisory jurisdiction in Scots law, as was submitted for Ms Eba. It would have been hard to justify.

44. As it is, the decision of this court in *Cart* and *MR* not to endorse that approach has removed that objection. It has made it much easier for the Scots approach to the supervisory jurisdiction in relation to unappealable decisions of the Upper Tribunal in Scotland to find common ground with that which must now be taken in England and Wales. The key to our doing so lies in a recognition that the issue is not one about access to the remedy, which will remain available to the citizen as of right, or the purpose for which the supervisory jurisdiction may be exercised. It is an issue about how best to tailor the scope of the remedy according to the nature and the expertise of the Upper Tribunal and the subject matter of the decisions that have been entrusted to it by Parliament.

45. There is no doubt that the supervisory jurisdiction is capable of being moulded in this way. As was pointed out in *West v Secretary of State for Scotland* 1992 SC 385, 397, a distinction must be made between the question of competency as to whether a decision is open to review by the Court of Session in the exercise of its supervisory jurisdiction, and the substantive grounds on which it may do so:

> "The extent of the supervisory jurisdiction is capable of a relatively precise definition, in which the essential principles can be expressed. But the substantive grounds on which that jurisdiction may be exercised will of course vary from case to case. And they may be adapted to conform to the standards of decision-taking as they are evolved from time to time by the common law."

There is an element of flexibility within this system that has enabled the grounds of judicial review to be adapted to a diverse range of decision-making bodies. As the Lord Ordinary observed, the Court of Session has been slow to interfere with decisions of specialist tribunals, and it has been restrained in its approach in reviewing decisions of arbitrators and decisions of adjudicators under the Housing Grants, Construction and Regeneration Act 1996: 2010 SLT 547, [89]. This can be compared with the cautious approach to giving permission to appeal from decisions of the Social Security Commissioners in England and Wales because of their particular expertise in a highly specialised area of the law that was indicated by Hale LJ in *Cooke v*

Secretary of State for Social Security [2001] EWCA Civ 734; [2002] 3 All ER 279, [also reported as R(DLA) 6/09], [15]–[17].

46. The fact that, as was stressed repeatedly in *West v Secretary of State for Scotland* (see 403, 405 and 413), there is no substantial difference between English and Scots law as to the grounds on which the process of decision-making may be open to review provides further support for the argument that there should be no difference between them as to the scope for the judicial review of unappealable decisions of the Upper Tribunal on either side of the Border. This is why Scots law has been able to follow the developments in the English approach to judicial review since *Anisminic* in preference to the approach indicated in *Watt v Lord Advocate* 1979 SC 120, 131. Lord Fraser's observations in *Brown v Hamilton District Council* 1983 SC (HL) 1, 42 show that there is no obstacle to its doing this. It would not, therefore, be a very large step for the Scots approach to unappealable decisions of the Upper Tribunal to align itself with that which has now been decided should be taken in England and Wales.

47. As to whether it should now do so, I would unhesitatingly answer that question in the affirmative. I would do so for reasons that have at least as much to do with the restraint that the Court of Session has already recognised it should take to decisions of that kind as with the need for it to find common ground with the position in English law. Two factors seem to me to carry particular weight. One is the familiar point that the court should be slow to interfere with decisions that lie within the expertise of specialist tribunals. As Dyson LJ said in *R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258 [reported as [2010] AACR 30], [54], the reviewing court should not be astute to detect some error in their decision to refuse leave to appeal. That is already well established, as a matter of practice, in Scots law. The other is the fact that the limitation on the scope for second appeals in section 13(6) of the 2007 Act has been reproduced in rule 41.59 of the Rules of the Court of Session: see [22] and [23], above. That rule gives effect to a particular intention about when questions of law should be subject to further scrutiny by a higher court. It would not be consistent with that intention, to which the amendment to the Rules has given effect, for the court to provide a wider opportunity for the decisions of the Upper Tribunal to refuse permission to appeal to itself to be reconsidered by way of judicial review.

48. So I would hold that the phrases "some important point of principle or practice" and "some other compelling reason", which restrict the scope for a second appeal, provide a benchmark for the court to use in the exercise of its supervisory jurisdiction in relation to decisions that are unappealable that is in harmony with the common law principle of restraint: see, as to how these phrases are applied in practice in England and Wales, *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [17[and [24] *per* Dyson LJ and *Cramp v Hastings Borough Council* [2005] EWCA Civ 1005 [68] *per* Brooke LJ. Underlying the first of these concepts is the idea that the issue would require to be one of general importance, not one confined to the petitioner's own facts and circumstances. The second would include circumstances where it was clear that the decision was perverse or plainly wrong or where, due to some procedural irregularity, the petitioner had not had a fair hearing at all.

49. I would leave it to the Court of Session to give such further guidance as may be needed as to how this analogy with the second appeals criterion should be applied in practice. But it may be helpful if I were to mention these points:

> (a) Lord Reid's observation in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 171 that if a statutory tribunal decides a question remitted to it for

decision without committing an error of law as to what that question is, it is as much entitled to decide that question wrongly as it is to decide it rightly remains the basic yardstick: see also *West v Secretary of State for Scotland* 1992 SC 385, 413, [2].

(b) The court must then distinguish between errors of law that raise an important issue of principle or practice, or reasons that are compelling, and those that do not answer to this description. The question whether the application meets this test must depend on the facts of each case. It ought to be capable of being applied at the earliest possible stage, and certainly at the stage of the first hearing, as a matter of relevancy.

(c) Under the current rules a person who invokes the supervisory jurisdiction does not require permission to do so. But a petition for judicial review can be dismissed at the stage of a motion for a first order: *Sokha v Secretary of State for the Home Department* 1992 SLT 1049; *Butt v Secretary of State for the Home Department*, 15 March 1995, unreported (1995) GWD 16-905. As the law currently stands, the hurdle that a petitioner must cross for a motion for a first order to be granted is a low one: *Y v Secretary of State for the Home Department* 2011 SLT 508; see [28], above. I think that this is perfectly acceptable as the test for use in relation to applications to the supervisory jurisdiction of the Court of Session generally. But its application to that special category of cases where a petitioner seeks to bring unappealable decisions of the Upper Tribunal under review needs now to be reconsidered.

(d) The ever-increasing pressure on the court's business by applications for judicial review to which our attention has been drawn, together with the fact that the new tribunal structure requires that a more restrained approach be taken to judicial review of decisions of this kind, suggests that the Lord Ordinary to whom a petition is presented under rule 58.7 for a first order for the review of an unappealable decision of the Upper Tribunal should be encouraged to consider the question whether there is an arguable case that the criterion referred to in paragraph (b) is satisfied before he or she decides whether or not a first order should be granted. It seems to me, with respect, that the approach which Lady Smith took to this issue in the Outer House when she declined to grant the petitioners' motion for first orders because she was not satisfied that an arguable case had been made out in *Y v Secretary of State for the Home Department* 2010 SLT 170, [12]–[14], has much to commend it, and that it would be appropriate for use in relation to cases falling within this special category.

Other Scottish tribunals

50. For the Advocate General Mr Johnston said that there were good grounds for distinguishing between those tribunals that are within the system of the 2007 Act and those that are not. Tribunals of the latter kind should be left to another day. For the Lord Advocate Mr Mure said the position is still in flux and that this court should be wary of telling the Court of Session how to deal with them. A number of tools are available and it should be left to the Court of Session to choose between them. For Ms Eba Mr Mitchell expressed concern about what he referred to as seepage into decisions of the other tribunals if the approach of the Court of Appeal in *Cart* were to be applied to unappealable decisions of the Upper Tribunal in Scotland. That problem, however, does not now arise.

51. As noted above, it is already well established in Scots law as a matter of common law that restraint should be exercised in the opening up of decisions of specialist tribunals to judicial

review. What is lacking in the case of these other tribunals is the intention of Parliament which is indicated by the statutory restriction on the availability of second appeals. Rule 41.59 does not apply to them. But the harmony between the statutory restriction and the common law principle of restraint suggests that the absence of that additional element is unlikely to make any substantial difference in practice. It is not necessary for us to reach any decision on the point, as a case that has been the subject of decision by a tribunal within this group is not before us. But I do not see any good reason why a different approach should be taken to the application of the common law principle of restraint to unappealable decisions of those tribunals from that which must now be taken to those of the Upper Tribunal that are unappealable.

Conclusion

52. Ms Eba accepted before the Lord Ordinary that she had not pled herself within the "exceptional circumstances" test that was used as a shorthand for an excess of jurisdiction in the pre-*Anisminic* sense: 2010 SLT 547, [4]. But it was also accepted that, if the Advocate General's argument were to fail, there would require to be further procedure to determine the merits of Ms Eba's case. Scrutiny of the merits of her case was taken no further in the Inner House in view of its decision that the scope of the supervisory jurisdiction of the Court of Session to judicially review unappealable decisions of the Upper Tribunal was unrestricted.

53. I would therefore dismiss the appeal by the Advocate General and, although for different reasons, affirm the interlocutor of the Inner House of the Court of Session. The case should be remitted by the Inner House to the Lord Ordinary to examine the question whether Ms Eba has sufficient grounds for judicial review of Judge May's decision, which was to refuse her application for permission to appeal to the Upper Tribunal against the refusal of her claim to disability living allowance. I would direct him, when he does so, to apply the approach to the scope for review that has been described in the judgment of this Court.