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CASE AND COMMENT

THE GOVERNMENT VERSUS THE OMBUDSMAN: WHAT ROLE FOR JUDICIAL REVIEW?

WHEN the office of Parliamentary Commissioner for Administration was established in 1967, it was envisaged as an adjunct to the political process. The system was intended to augment MPs' capacity (individually) to chase constituents' grievances and (collectively) to hold the executive branch to account in the event of administrative failure. Thus the Ombudsman (as the Commissioner is now almost universally known) can make findings of maladministration and can recommend what should be done in the light thereof, but the Government is under no statutory obligation to accept what the Ombudsman says. Whether this means that, as a matter of law, ministers are wholly free to dismiss the Ombudsman's reports was the question at stake in *R. (Equitable Members Action Group)* v. *HM Treasury* [2009] EWHC 2495 (Admin).

In the late 1990s, it became apparent that the Equitable Life Assurance Society was financially incapable of honouring guarantees concerning the worth of policyholders' pensions. This caused the near-collapse of the Society and unexpected reductions in the value of hundreds of thousands of people's investments. After a four-year investigation, the Ombudsman concluded that regulators were guilty of complacency and serial failure, and recommended, *inter alia*, that the Government establish a compensation scheme to put people in the position they would have been in but for the maladministration she had identified. The Treasury, however, rejected some of the Ombudsman's findings of maladministration occasioning injustice, and agreed only to compensate a narrower category of policy-holders (those who had suffered a "disproportionate impact"). The claimant sought judicial review, arguing that the Treasury had acted unlawfully by rejecting the Ombudsman's *findings* (of maladministration and of injustice

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occasioned thereby) and by refusing fully to implement the Ombudsman's *recommendation* concerning compensation.

On the first point, the claimant was partly successful. The Ombudsman found that the Government Actuary Department's failure to ask and resolve questions arising from some of Equitable's regulatory returns constituted maladministration, and that this had caused injustice to policyholders. The Treasury's rejection of the latter finding, held the Administrative Court, was unlawful. Nor, said the Court, had the Treasury acted lawfully when it rejected the Ombudsman's finding that maladministration occasioning injustice had resulted from the Department's failure to act on information indicating that an influential rating agency had been misled by Equitable's regulatory returns. Significantly, these were findings of substantive unlawfulness: the Treasury's decisions had not been made in the wrong way procedurally; rather, it was not open *at all* to the Treasury to reach the conclusions that had been reached.

Except in human rights cases, the test for substantive unlawfulness remains that of *Wednesbury* unreasonableness—a notoriously high (if imprecise) hurdle for claimants to clear. However, in *Equitable*, the Administrative Court—following the Court of Appeal in another Ombudsman case, *R. (Bradley)* v. *Secretary of State for Work and Pensions* [2008] EWCA Civ 36, [2009] Q.B. 114—adopted an unusual definition of unreasonableness, equating it with an absence of "cogent reasons". This is an easier test for a claimant to satisfy than the standard of outrageous illogicality propounded by Lord Diplock in the leading case of *GCHQ* [1985] A.C. 374. In neither *Bradley* nor *Equitable* was this divergence explained, but two possibilities arise. First, a novel version of the doctrine of relative institutional competence may have been in play. That concept normally operates so as to blunt substantive review when the *defendant* has particular expertise (as compared to the *court*). But there is no reason why it should not, as here, sharpen review of a *public body's* decision to dismiss the findings of an *ombudsman* who is clearly competent to conduct an investigation into the matter concerned and who has done so with great thoroughness. Rational ministers will not reject an expert investigator's findings without good reason.

There is, however, a second potential explanation for the relatively robust review undertaken in relation to the dismissal of the Ombudsman's findings. One of the principal reasons for reticence in relation to substantive review is that striking down a decision on such grounds limits the range of policy options open to the decision-maker, raising questions about the legitimacy of such review. But such concerns do not apply to a judicial decision to strike down as unreasonable a ministerial rejection of the Ombudsman's findings. While, in such

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circumstances, the only lawful option is for ministers to accept the findings, the repercussions are largely political (albeit that if such findings cannot be lawfully dismissed, they will form part of the background against which any judicial assessment of the lawfulness of a decision to reject recommendations falls to be made). So while a government forced to accept the Ombudsman's findings will find it harder to evade political responsibility for the maladministration concerned, this, in itself, triggers no legal obligation to do anything.

The crunch question, then, is whether courts will require ministers to act upon the Ombudsman's recommendations for putting things right. On this issue, however, the court in *Equitable* adopted a notably less interventionist approach. The Government's decision to implement a less generous compensation scheme than that recommended by the Ombudsman was, said the court, not unreasonable. Indeed, it is clear that the matter was considered barely justiciable: in their joint judgment, Carnwath L.J. and Gross J. said that "whether to establish a compensation scheme in any particular context, and the limits of such a scheme, is a matter for the Government, reporting to Parliament, and not reviewable in the courts save on conventional irrationality grounds".

Thus the claimants in *Equitable* won a largely empty victory. While it had been unreasonable (on the cogent reasons test) for the Treasury to reject certain of the Ombudsman's findings, it had not been unlawful (on the conventional irrationality test) to refuse to implement her recommendations in full. This, it might be thought, indicates that judicial review in such cases is ultimately futile. However, such a conclusion would reflect an insufficiently sophisticated view of the constitutional arrangements for securing government accountability. The Ombudsman is, and was always meant to be, part of the political, not the legal, machinery for holding the executive branch to account. It would therefore be inappropriate to enter into strict scrutiny review of decisions to reject the Ombudsman's *recommendations*, since this would, by the back door, render such recommendations legally enforceable. But strict review of dismissals of the Ombudsman's *findings* is a different matter. Such review strengthens the proper role of the Ombudsman—it stops ministers from evading political responsibility by dismissing her conclusions—while recognising that whether such conclusions should be acted upon remains a policy question for government and Parliament. If the latter is unable to bring sufficient political pressure upon the former to do the right thing—which might or might not entail doing all that the Ombudsman recommended—then that is a further argument for strengthening the role of Parliament, not for legal enforcement of the Ombudsman's recommendations.

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