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## Supreme Justice: The activity of the Supreme Court in 2016

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## The Supreme Court in 2016

### The personnel

The only change to the composition of the Supreme Court during 2016 was the retirement of Lord Toulson in September. The Court decided not to immediately appoint a replacement but to await the retirement of Lord Neuberger (the President) and Lord Clarke in the summer of 2017. Lords Hughes, Mance and Sumption are due to retire in 2018. A competition to find three replacement Justices is to begin early in 2017 and a second competition for three more early in 2018.

In the meantime Lord Toulson and Lord Dyson (who retired as Master of the Rolls in 2016) have joined the Supplementary Panel of retired senior judges who can sit in the Supreme Court as and when required. They are eligible to do so until they reach the age of 75 or until five years have elapsed since they last held office as a senior judge. Two retired Scottish judges, Lord Gill and Lord Hamilton, are already members of the Panel.

### The output

In 2016 the Supreme Court issued 65 sets of judgments, a noticeably lower figure than in 2015 (when it was 79). Six of the judgments related to two, or in one case three, conjoined appeals, and two sets of judgments related to the same appeal (*Willers v Joyce* [2016] UKSC 43 and 44). Moreover one case was not an appeal but an application to vacate a previous judgment (*Bancoult (No 2)* [2016] UKSC 35). Altogether, then, 70 appeals were decided. Of these, 32 were successful in whole or in part (46%). Three appeals resulted in questions being referred to the Court of Justice of the EU.

Six of the 65 cases involved appeals from Scotland (11 in 2015), with just two from Northern Ireland (3 in 2015). The cases from Scotland did not have to be preceded by an express grant of permission. Of the other appeals, all but one appear to have come to the Supreme Court as a result of permission being granted by a committee of the Court itself rather than by a lower court. Three of the 70 appeals were leapfrog appeals which by-passed the Court of Appeal, but in each of them permission to proceed in this way was granted by the Supreme Court.

### The judgments

Seven of the 65 sets of judgments involved benches of seven Justices and two (the two decisions in *Willers v Joyce*) involved nine Justices, the first such case since the assisted suicide case of *Nicklinson* two years earlier ([2014] UKSC 38). All of the other 56 cases were decided by five Justices, including, surprisingly, *R v Jogee* [2014] UKSC 8, where for the first time ever the highest UK court sat together

with the Judicial Committee of the Privy Council to hear conjoined appeals from England and a foreign jurisdiction (Jamaica).

The trend towards single judgments continued apace. No fewer than 44 of the 65 sets of judgments took the form of a single judgment, the highest ever percentage (68%). There were two other cases where there was essentially a single judgment supplemented by a very short additional judgment of just a couple of paragraphs. One of the cases involving nine Justices, and four of the cases involving seven Justices, were dealt with by a single judgment. Three of the single judgments were jointly authored by two or, in one case, three Justices.

The most prolific authors of single judgments, with five apiece, were Lord Neuberger, Lady Hale (the Deputy President) and Lord Sumption. All Justices except Lord Clarke (who delivered none) delivered at least two single judgments.

In 12 of the 65 cases (18%), at least one Justice dissented. In five of those two of the five Justices dissented, in one of the 7-judge decisions two Justices dissented and in one of the 9-judge decisions the split was 5 v 4. The Justice who dissented most often was Lord Clarke, doing so on four occasions. Only Lords Hodge, Hughes and Wilson did not dissent at all.

### **The prominent issues**

As usual public law featured frequently. Thirteen cases were judicial reviews of administrative action, 11 concerned immigration, deportation or extradition and 11 raised human rights or discrimination arguments. Nine cases dealt with matters of EU law. Six focused on criminal law and a further six on insurance law. There were four cases each on family law, taxation law and social security law.

Three cases attracted considerable publicity during the year. The first was *R v Jogee*, which led some newspapers to suggest that many prisoners serving long sentences for involvement in serious crimes would be able to have their convictions quashed on the basis that their foresight of what the principal offender might do in the course of a joint enterprise did not necessarily mean that other persons involved in the activity intended to assist and encourage what the principal then did. In fact, although several such appeals have since been brought, the success rate has not been high. The decision exemplified the anomaly that important parts of the criminal law are still based on common law rather than on legislation. Likewise, in *R v Golds* [2016] UKSC 61 the Supreme Court held that when considering a defence of diminished responsibility a jury does not need to be directed on what constitutes a 'substantial' impairment of mind.

In *Jogee* the Supreme Court did not expressly apply the 1966 Practice Statement, whereby the highest court can 'depart from a previous decision when it appears right to do so'. But in a case decided less than a week later the Court did expressly apply that Statement in *Knauer v Ministry of Justice* [2016] UKSC 9, where a 7-judge Court departed from two previous House of Lords decisions and ruled that the date from which the multiplier for future loss should be calculated in a claim for loss of dependency should be the date of trial and not the date of death.

Secondly, in *PJS v News Group Newspapers* [2016] UKSC 26 four of the five Justices upheld an interim injunction obtained by a famous entertainer to prevent the disclosure of his extra-marital sexual activities, even though the material had already been published in Scotland and North America. The majority stressed that rights to privacy and free speech have to be balanced on a case by case basis and that privacy deserves more protection than confidentiality whenever a person's family may be affected by the disclosure, especially when the information in question is of limited public interest (even if it is of great interest to the public). Lord Toulson dissented on the basis that the cat was already out of the bag and he could not agree that publishing information on the internet was not as intrusive and distressing as publishing it in English newspapers.

Thirdly, in the bedroom tax case of *R (MA) v Secretary of State for Work and Pensions* [2016] UKSC 58 the Court held that the government's capping of housing benefit went too far in cases involving people with a disability. There was no good reason for the distinction made by Regulation B13 of the Housing Benefit Regulations 2006 between adult partners who cannot share a bedroom because of disability and children who cannot do so because of disability, nor for that between adults and children in need of an overnight carer. However, against the strong dissent of Lady Hale, the Court also held that the Regulation did not unjustifiably discriminate against women who are living in accommodation specially adapted to protect them against a severe risk of domestic violence.

### **Other important decisions**

In a year when the Brexit vote prompted litigation over whether the government could use prerogative powers to trigger Article 50 of the Treaty of Lisbon, a case decided in January 2016 confirmed that the Foreign Secretary's power to list someone as a person whose UK assets should be frozen did not breach any common law principle (distinguishing the famous case of *Entick v Carrington*, 1765) and had to be reviewed only in accordance with ordinary judicial review principles rather than on a merits basis (*Youssef* [2016] UKSC 3). But in another case the Public Law Project succeeded in convincing the Supreme Court that regulations restricting civil legal aid to persons who have been lawfully resident in the UK for at least a year are *ultra vires* the parent Act ([2016] UKSC 39).

On the human rights front the Supreme Court reasserted in *McDonald v McDonald* [2016] UKSC 28 that, when dealing with a claim for possession of land by a private sector owner against a residential occupier, a judge is not required to consider the proportionality of the eviction under human rights law. This is another consequence of the rather absurd situation whereby only public authorities have to comply with human rights law while both public and private authorities have to comply with equality law. In *Bancoult (No 2)* [2016] UKSC 35 an attempt to vacate an earlier House of Lords decision on the eviction of Chagos Islanders from their homeland, on the basis that important evidence had allegedly been withheld from the Law Lords, narrowly failed, but only because Lord Mance, who had dissented in the earlier case, did not maintain the same line in the later case. In *Christian Institute v Lord Advocate* [2016] UKSC 51 the Court ruled that Part 4 of the Children and Young People (Scotland) Act 2014, passed by the Scottish Parliament supposedly to help safeguard children from abuse, was incompatible with children's right to privacy under both the ECHR and EU law. And in *Johnson* [2016] UKSC 56 a provision in the Immigration Act 2014 was found to be incompatible with Articles 8 and 14 of the ECHR because it discriminated against the children of parents who were not married at the time of their birth.

The Court also struck down a scheme designed to avoid the payment of income tax on bankers' bonuses (*UBS AG v HMRC* [2016] UKSC 13) but held that the HMRC had wrongly disclosed information to a journalist about the tax affairs of a company (*R (Ingenious Media Holdings) v HMRC* [2016] UKSC 54).

In *Willers v Joyce*, the most closely contested case of the year, the Supreme Court and Privy Council jointly held, by 5 v 4, that the tort of malicious prosecution can be used not just in the wake of criminal proceedings but also after civil proceedings. The majority favoured a recent precedent set by the Privy Council to a much older one set by the House of Lords and in a separate set of judgments the Justices ruled unanimously that, if an appeal to the Privy Council involves an issue of English law on which a previous decision of an appellate court in the UK is challenged, the Privy Council may rule that the previous decision was wrong and that the Privy Council's decision should from then on be treated as the binding precedent.

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