# ALBA Conference – 21 july 2012

**Useful (recent) EU cases for public lawyers**

**Kelyn Bacon, Brick Court Chambers**

### Uniplex v NHS Business Services Authority Case C-406/08, [[2010] 2 CMLR 47](http://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=ia744d064000001389fade4071b8d84e4&docguid=I65224F10BD4311DFAD93A450BAF0166B&hitguid=ID47685603E0511DF85D3E0E8EDE7F714&spos=1&epos=1&td=8&crumb-action=append&context=3&resolvein=true) (28 January 2010)

Challenge to tendering process for the procurement of haemostats. High Court referred to ECJ question as to the lawfulness of Regulation 47(7)(b) of the Public Contracts Regulations 2006, adopted in order to implement Directive 89/665. Regulation 47(7)(b) provided that review proceedings must be brought “promptly and in any event within three months from the date when grounds for the bringing of the proceedings first arose unless the Court considers that there is good reason for extending the period”. ECJ ruled that this provision gave rise to unacceptable uncertainty. §42: “a limitation period, the duration of which is placed at the discretion of the competent court, is not predictable in its effects. Consequently, a national provision providing for such a period does not ensure effective transposition of Directive 89/665.”

### Commission v Ireland Case C-456/08, [2010] 2 CMLR 42 (28 January 2010)

Challenge by Commission to Ireland’s implementation of Directive 89/665, in light of domestic provision that review proceedings must be brought “at the earliest opportunity and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending such period.” Again, ECJ ruled that this gave rise to unacceptable uncertainty.

### R (Buglife) v Medway Council [2011] EWHC 746 (Admin), [2011] 3 CMLR 39 (30 March 2011)

Judicial review of decision to grant planning permission to develop a brownfield site as a business park. Objection was non-compliance with Environmental Impact Assessment Regulations, implementing the EIA Directive. Permission opposed on ground that claim not brought promptly, because filed only 2 days before expiry of 3 month time limit. HHJ Thornton QC rejected this, applying *Uniplex*. §63: “[*Uniplex*] applied general and core principles of Community Law which are applicable to all directives. The requirement of certainty and the application of that requirement to limitation periods imposed on those seeking to enforce their rights arising under the directive in a national court has general application to such enforcement proceedings arising out of any directive.”

### R (U and Partners) v Broads Authority [2011] EWHC 1824 (Admin), [2012] Env LR 5 (13 July 2011)

Judicial review of planning permission for construction of a new flood defence system in Norfolk, again raising issue of non-compliance with Environmental Impact Assessment Regulations. Permission again opposed on grounds that claim not brought sufficiently promptly. Collins J rejected that argument, applying *Uniplex* and *Ireland.* ButNB §46, rejecting argument “that in any case to which the Directive 85/337 applied the *Uniplex* approach should prevail even if there was compliance with the Directive but a challenge was made on other grounds”.

### R (Berky) v Newport City Council [2012] EWCA Civ 378, [[2012] 2 CMLR 44](http://login.westlaw.co.uk/maf/wluk/app/document?&suppsrguid=ia744d064000001389fb33939983bbda4&docguid=IF471C970C7C811E18D61CDC0052F53A0&hitguid=IE7F5C70079F811E1B247A701CFF8490A&spos=1&epos=1&td=4&crumb-action=append&context=13&resolvein=true)  (29 March 2012)

Challenge to planning permission for Morrisons supermarket. Permission refused on merits but judge also thought that claim not brought promptly. CA agreed with refusal of permission on merits. As to delay, *Carnwath LJ* thought that *Uniplex* only applied to EU ground and not domestic law grounds, and also only applied to CPR 54.5 requirement and not also to general discretion under Senior Courts Act 1981 s. 31(6) to refuse relief for undue delay; *Moore-Bick LJ* agreed that *Uniplex* only applied to EU law challenge, but thought that it did extend to s. 31(6) discretion to refuse relief; *Sir Richard Buxton* thought that not possible to sever EU and domestic law grounds, and that *Uniplex* extended to s. 31(6) discretion to refuse relief as well as CPR 54.5, though reached the latter conclusion “with unfeigned regret” and commented that (§§75 and 77):

“The court in *Uniplex* necessarily was not exposed to the implications in the national legal order of the extension of its ruling to all types of administrative acts. In another case greater emphasis on the effect on applicants for planning permission as well on the effect on objectors, and appreciation that the requirement of promptitude is indeed judicially-controlled, and only applied after judicial consideration of the circumstances of the case, might lead to a different result. ... The wider implications of the need for an effective remedy in the specific context of planning therefore merits reconsideration”.

### R (Zagorski and Baze) v Secretary of State for Business, Innovation and Skills [2010] EWHC 3110 (Admin), [2011] Eu LR 315 (29 November 2010)

Judicial review of decision by SS not to prohibit the export of sodium thiopental, an anaesthetic that was being used in the USA for the purposes of executions by lethal injection. Lloyd Jones J considered that in deciding whether to impose an export ban the SS was acting within the material scope of EU law and was “implementing” EU law within the meaning of Article 51 of the Charter of Fundamental Rights of the EU, but concluded that on the facts the case fell outside the jurisdictional scope of the Charter.

### N.S. v Secretary of State for the Home Department Cases C-411 and 493/10, [2012] 2 CMLR 9 (21 December 2011)

Afghan national (NS) had been arrested in Greece and expelled to Turkey before arriving illegally in the UK to claim asylum. SS ordered his removal to Greece; NS then asked SS to accept responsibility for examining asylum claim under Article 3(2) of Regulation 343/2003; request rejected; NS sought judicial review on ground that return to Greece would breach his rights under Article 4 of Charter. High Court thought SS bound by Charter but Article 4 not breached on substance. On appeal, CA referred to ECJ. ECJ confirmed that State that was deciding whether to exercise discretionary power under Article 3(2) was “implementing” EU law within the meaning of Article 51 of the Charter, and that the systemic deficiencies in the Greek asylum procedure indicated that NS’s Charter rights would be breached if he were returned there.

### Åklagaren v Fransson Case C-617/10, (AGO 12 June 2012)

Swedish fisherman, Mr Fransson, fined for failure to comply with Swedish VAT legislation, and then also prosecuted for tax evasion. Fransson argued that criminal prosecution violated the *ne bis in idem* principle enshrined in Article 50 of the Charter. Swedish court referred to the ECJ. Primary conclusion of AG is that ECJ does not have jurisdiction to answer question since in bringing criminal prosecution Swedish authorities were not “implementing” EU law within the meaning of Article 51.

### Ruiz Zambrano v ONEM Case C-34/09, [2011] 2 CMLR 46 (8 March 2011)

Reference to ECJ on rights of residence of Columbian nationals whose children were born in Belgium. ECJ decided case on basis of citizenship rights in Article 20 TFEU. AG also considered scope of EU fundamental rights protection, but concluded that at material time in main proceedings fundamental rights could not be invoked as free-standing rights independently of any other link with EU law.

### British Aggregates Association v Commission Case T-210/02 RENV, (7 March 2012)

Judicial review of Aggregates Levy. Moses J (in 2002) found that levy not State aid. Commission in decision (also in 2002) reached same conclusion. GC on appeal (in 2006) upheld Commission decision. ECJ on further appeal (in 2008) set aside judgment of GC. GC on remittal finally annulled Commission decision. Commission now required to adopt new decision in light of GC judgment.

### Eventech v Parking Adjudicator [2012] EWHC 1903 (Admin), (11 July 2012)

Judicial review of fine imposed on Addison Lee drivers for using Southampton Row bus lane; effectively became a dispute between Addison Lee and TfL. Grounds for review: free movement of services, freedom of establishment, equal treatment, domestic law irrationality, State aid. Burton J considered principle of equal treatment to be engaged but considered that differential treatment was justified; on same basis rejected irrationality and State aid arguments. Principles of free movement of services and freedom of establishment held not to be engaged.