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[2009] A.C.D. Part 1

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TIMES NEWSPAPERS LTD v SECRETARY OF STATE FOR THE HOME DEPARTMENT

ADMINISTRATIVE COURT

Ouseley J.: October 17, 2008

[2008] EWHC 2455 (Admin); [2009] A.C.D. 1

Anonymity; Control orders; Freedom of expression; Open justice; Reporting restrictions; Right to respect for private and family life

H1 *Prevention of Terrorism Act 2005 s.3—Contempt of Court Act 1981 ss.4 and 11—Civil Procedure Rules Pt 76—European Convention on Human Rights arts.8 and 10—control orders—anonymity order—practice.*

Introduction

H2 The applicant newspaper company (T) applied at a control order directions hearing for the lifting of an anonymity order imposed by Mitting J. at the permission stage.

Facts

H3 The respondent (S) applied for permission to make a control order against the interested party (AY). Permission was granted by Mitting J. On S's application, Mitting J. ordered that the controlled person be identified only as AY. The application was considered only on paper and without notice to AY or the media. This was the usual way in which those powers were exercised. At the subsequent directions hearing, required by the Prevention of Terrorism Act 2005 (the 2005 Act), in addition to the usual directions for the hearing of the substantive merits of the control order, agreed between S and AY, T submitted that the anonymity order should not be sustained on its merits. It also submitted that there were defects in procedure and in its drafting. Both S and AY opposed the substantive application for the lifting of the anonymity order.

Legal framework

H4 The 2005 Act and CPR Pt 76 permitted an order to be made for the anonymity of a controlled person. Such an order could be made without a prior opportunity to object being given to the media or to the controlled person.

Submissions

H5 The applicant made submissions under the following heads:

(i) Procedure—the judge should have a proper basis for making an anonymity order and should not make it without giving proper consideration to the art.10 rights of the media and to the public interests in open justice and in knowing the steps being taken to protect the public.

(ii) The form of the order was too terse. It could have been thought to have been addressed just to the court for listing purposes. It prevented AY from being referred to by his real name even if no mention were made of his being subject to a control order. There was also no end to the operation of the order.

(iii) There was not a sufficiently compelling case for maintaining anonymity.

H6 As regards procedure, both S and AY submitted that the judges who dealt with such matters were well aware of the arguments for anonymity at least at the stage of granting permission. The media could contest anonymity at the directions hearing, as T had done in the instant case. S relied on open evidence from a Home Office civil servant, as well as a closed statement, to demonstrate why anonymity was required. AY relied on a statement from himself and from his solicitor for the same proposition.

H7 Both parties also made submissions about the giving of notice to the media that an anonymity order had been made.

Held, dismissing the application:

H8 It was accepted that an anonymity order should not be made automatically. However, that was a long way from saying that the factors in favour of anonymity should not lead to an anonymity order at the permission stage. S and the controlled person would have no realistic opportunity to argue for anonymity if the controlled person's name or address or both had been released to the media at the permission stage. The media, on the other hand, could challenge the anonymity order at the directions hearing. There was normally a very compelling argument for an order to be made which enabled the ring to be held rather than the pass to be sold. It was very difficult to see what overriding problems for open justice, art.10 rights, or other aspects of the public interest were created by an order which preserved the position, so that, if desired, its merits could be challenged at a later hearing. A control order might be made some time before it was served on the individual, perhaps as a precautionary measure, and it might well be necessary to avoid alerting the individual to this, because of the risk of his evading service. That provided a further reason for an anonymity order at the permission stage.

H9 The application for anonymity at the permission stage should be accompanied by some short reasoning in support from S so that judges could see what factors were relied on in a particular case. It should also deal with whether a distinction could realistically be drawn between name and address at that stage. The absence of such reasoning should not prevent the judge from reaching his own conclusions on the material provided to support the control order itself, using his experience and a sensible appraisal of the situation.

H10 The criticism that the order could be thought to be addressed solely to the court for listing purposes was rejected. It was, however, agreed that the order could be read as preventing AY being referred to by his real name even if no mention were made of his being subject to a control order or being known as AY in certain contexts. The form of the order would thus be amended. It was true that the anonymity order would remain in force even after any discharging or quashing of the control order. However, Ouseley J. did not express any final view on that point, as it had not been fully argued. The court's jurisdiction to make an anonymity order was not obviously limited to the length of time the control order was in force and the purpose of anonymity did not inevitably cease with any of those events. The continued force of the order could be reviewed from time to time if an application was made for that purpose.

H11 It was not the place of the judgment in the instant case to announce or specify a system for notifying the media that an anonymity order had been made. That should be done by the Administrative Court in consultation with the Press Office, representatives of the media—perhaps the Press Association—and S. In the interim, if the media wanted to refer to someone as subject to a control order, it should assume that an anonymity order was in force and should check the position either with the Home Office or with the Administrative Court, suitably identifying itself.

H12 As regards the substantive merits of the application to lift the anonymity order, the 2005 Act and CPR Pt 76 contained no provisions setting out the principles or factors which were to apply to the exercise of the power to order anonymity. The disclosure provisions in relation to closed material were not directed to that power and provided only incomplete guidance as to the public interests which it engaged, and none as to private interests. The media and public had a perfectly proper interest in the naming of AY. A clear and overriding case had to be made out by S and AY to prevent it. It was undoubtedly the case, however, that the stronger the public interest in the identification of a controlled person, the greater the risk of the control order, following identification, being undermined by ill-intentioned acts of members of the public, whether to help the controlled person in some way or to harass or harm him, or by irresponsible or ignorant acts of the media.

H13 Ouseley J. accepted that the media could make a proper case, in principle, that there was a public interest in the publication of the address of a controlled person which would have to be overridden by sufficiently compelling reasons.

H14 It was not accepted that exceptions could be made to the principles of open justice only to the extent necessary for the administration of justice. Nor was it accepted that if the concern was the risk of prejudice to a control order hearing or to some other trial, that could only be dealt with by an order under s.11 or s.4(2) of the Contempt of Court Act 1981 (the 1981 Act). That would render the power in the 2005 Act otiose. It was plain that there were many reasons why an anonymity order was empowered by the 2005 Act, which went far beyond, and might not always include, the administration of justice in control order hearings or other trials. The effective operation of the control order before and after any hearing at which it was upheld was the major public interest behind

the anonymity provision. The court when making an order under the 2005 Act and striking any necessary balance, was not exercising an inherent jurisdiction or creating by analogy new limitations on press reporting of court proceedings. It was exercising a statutory power, the scope or basis of which had to reflect the purposes of the 2005 Act and the making of a control order. It was accepted that the existence of powers in the 1981 Act did not exclude factors relevant to the administration of justice from consideration under the 2005 Act, whether or not they would precisely justify an order under the 1981 Act. Where, however, the administration of justice was the sole basis upon which anonymity was sought, it should be dealt with pursuant to the powers in the 1981 Act.

H15 Although the balance between the conflicting arts 8and 10 rights and competing public interests in the instant case needed to be resolved after careful scrutiny, there were important differences as regards the considerations of open justice in criminal proceedings. A control order hearing was not a criminal trial, the proceedings were not criminal proceedings and they did not lead to convictions or acquittals. There was no real analogy with the position of a convicted person after release, or serving a community sentence, or on the Sex Offenders' Register, or with that of someone acquitted of an offence in circumstances which were less than a complete exoneration. The publicity which might attend such individuals was an inevitable part of the criminal process, and even more so of conviction and punishment. The individual subject to a control order might never clear his name or have the allegations of involvement in terrorism proved beyond a reasonably based suspicion. The proceedings did not bring finality except where the control order was not upheld on its merits and ceased to be pursued. Rather, they created ongoing obligations which were breached at the risk of criminal prosecution.

H16 In control order cases, although the art.8 rights of the individual and his family could be engaged as a consequence of publicity being given to S's suspicion about his involvement in terrorism, that private right might readily co-exist with the public interest in the effective operation of the control order. It was a continuing measure to control those who might pose a serious risk but who could not be prosecuted or removed. Its effectiveness was an essential part, potentially the crucial part, of the balance which was to be struck pursuant to the particular statutory powers in the 2005 Act. It would be a mistake to suppose that S sought anonymity for the controlled person essentially out of concern for his wellbeing.

H17 The risk of attack against the controlled person should not cause a departure from the principle of open justice resulting in a defendant being named. Other measures should be taken to protect the individual. The normal reporting of proceedings in court was not to be held responsible for every way in which the public might use or abuse it. However, the reality of the effect of publicity could not be ignored, whether looking at art.8 or art.10 rights, or particularly when considering the public interest in the effective operation of the control order.

H18 The case for maintaining anonymity was compelling and justified the restrictions on the media right to freedom of expression and on the public interest in knowing who AY was.

Cases considered:

Belfast Telegraph Newspaper Ltd's Application, Re 1997 N.I.L.R. 309 Div Ct

McCarten, Turkington Breen (a firm) v Times Newspapers Ltd [2001] A.C. 277

Murungaru v Secretary of State for the Home Department [2008] EWCA Civ 1015; (2008) 105(37) L.S.G. 20

R. v Felixstowe Justices Ex p. Leigh [1987] Q.B. 582; [1987] 2 W.L.R. 380; [1987] 1 All E.R. 551 QBD

R. v Legal Aid BoardEx p. Kaim Todner [1999] Q.B. 966; [1998] 3 W.L.R. 925; [1998] 3 All E.R. 541 QBD

R. (on the application of Malik) v Manchester Crown Court [2008] EWHC 1362 (Admin); [2008] 4 All E.R. 403; [2008] E.M.L.R. 19

R. (on the application of Trinity Mirror Plc) v Croydon Crown Court [2008] EWCA Crim 50; [2008] 3 W.L.R. 51; [2008] 2 All E.R. 1159

S (A Child) (Identification: Restrictions on Publication), Re [2004] UKHL 47; [2005] 1 A.C. 593; [2004] 3 W.L.R. 1129

Scott (aka Morgan) v Scott [1913] A.C. 417 HL

Mr A. Hudson (Times Newspapers Ltd) appeared on behalf of the applicant.
Mr J. Eadie Q.C. (Treasury Solicitor) appeared on behalf of the respondent.
Ms K. Markus (Birnbirg Peirce Solicitors) appeared on behalf of the interested party.

David Blundell, Landmark Chambers

R. (ON THE APPLICATION OF ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS) v SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

ADMINISTRATIVE COURT

Sir Robin Auld: October 7, 2008

[2008] EWHC 2321 Admin; [2009] A.C.D. 2

Avian influenza; Compatibility; Infectious disease control; Poultry; Proportionality; Statutory provisions

H1 *Control of avian diseases—use of ventilation shutdown—Welfare of Animals (Slaughter or Killing) Regulations 1995 and Amendment Regulations 2006—compliance with EU Council Directive 93/119—whether ventilation shutdown compatible with animal welfare principles in EU Directive—whether proportionate—whether circumstances in which used adequately certain*

Legislative Framework

H2 EU Council Directive 93/119 on the protection of animals at the time of slaughter or killing (the 1993 Directive) was designed to establish common minimum standards ''for the protection of animals at the time of slaughter or killing'' and provided, in art.3, that ''Animals shall be spared any avoidable . . . pain or suffering during . . . stunning, slaughter or killing''. It prescribed various permitted methods of stunning and killing. It also provided for the manner of killing of birds for disease control etc, using the permitted methods of stunning and killing but also allowing emergency killings by other methods provided that, if they do not cause immediate death, ''appropriate measures are taken to kill the animals as soon as possible, and in any event before they regain consciousness'', and ''nothing more is done to the animals before it has been ascertained that they are dead''.

H3 The 1993 Directive was implemented in the United Kingdom by the Welfare of Animals (Slaughter or Killing) Regulations 1995 (the 1995 Regulations), which in reg.4 prohibited ''avoidable pain or suffering to any animal''. In relation to slaughter of birds for disease control an Annex set out various methods and required that death be immediate or swift and cause minimum pain or distress to the birds. In 2006, Amendment Regulations (SI 2006/1200) were introduced because of concerns about avian-carried diseases which posed a serious risk to public health (control of which was required by Council Directive 2005/93 supplemented by a Commission Decision, 2006/416, establishing measures for the control of avian flu).

Facts

H4 The 2006 amendment allowed killing by ventilation shutdown (namely the cessation of ventilation in a building housing the birds, which could be combined with raising the temperature) if other methods were impracticable, which had to be certified by the Secretary of State: this is not a method listed in the 1993 Directive. The RSPCA challenged the introduction of ventilation shutdown as ultra vires on the basis that (1) it was incompatible with the 1993 Directive because it did not cause immediate death, guarantee rapid unconsciousness or guarantee death without regaining consciousness; (2) it was not proportionate, as was required by EU law and (3) it was inadequately certain to comply with EU law, reliance being placed on the absence of criteria for when ventilation shutdown would be authorised and how its use would be monitored; it was suggested that any unpublicised operating instruction would not remedy this defect.

Submissions

H5 Evidence relied on by the RSPCA included: (1) the European Food Safety Authority (EFSA), an independent agency funded by the European Union to provide information on matters requiring scientific risk assessment, which had in a report in May 2008 cautioned against the use of ventilation shutdown as a method for killing birds with avian influenza because in relation to some categories of bird and especially in cooler weather or in older buildings anecdotal evidence suggested that there was no guarantee of a rapid complete kill; (2) three scientific witnesses produced by the RSPCA, who noted the lack of any experimental work demonstrating that ventilation shutdown would always guarantee rapid unconsciousness enduring until death which meant that it might cause pain and suffering; and expressed their views that there were no circumstances in which it should be permitted, even as a last resort; it was noted that there were various gas-killing systems and also that there were anti-viral drugs to protect farm workers.

H6 The Secretary of State accepted that there had been no experimental work (though there had been modelling work done suggesting that in a reasonably well-sealed building a ventilation shutdown would be most likely to kill birds through hyperthermia after about 45 minutes); he also pointed out that such an experiment would have resulted in unnecessary suffering and so have been unlawful in the absence of a licence for animal experimentation, and that accordingly it had been decided to monitor a ventilation shutdown should one become necessary. He noted that there was a hierarchy of priorities in relation to a serious outbreak of contagious avian diseases, namely (1) the protection of human health and life (both of those involved in disease control and the public), (2) swift and effective disease control and (3) animal welfare; he also noted that logistical problems would arise from the large number of birds (160 million) in a large number of units (24,000) which were unevenly distributed and of a large variety of units (ranging from small domestic units to large sheds with 10 tiers of cages); and that ventilation shutdown, had the benefit of being quick to implement and

required no resources or contact between humans and birds. The Secretary of State resisted the claim on the basis that there was no incompatibility with EU law, and that ventilation shutdown was a last resort measure where other methods of control were insufficient to control a serious outbreak of avian influenza, and had been approved after its introduction by the Farm Animal Welfare Council; he also noted that operating instructions were being developed that would include provision, if death is not achieved within three hours, for recourse to another accepted method of killing and would take into account recent research into the use of killing by various forms of gassing.

H7 **Held,** dismissing the application:

H8 (1.) In implementing directives, EU Member States must take into account views of scientific bodies, such as the EFSA: but nothing in its guidance or that of other relevant bodies provided specific advice against the use of ventilation shutdown.

H9 (2.) The 1993 Directive did not require that methods of killing birds guarantee that there be a rapid loss of consciousness enduring until death where the method used, by its very nature and the exigency calling for its use as a last resort might not always be able to achieve that result, despite due professional care. The 1993 Directive required that means be used to kill animals as soon as possible and, in any event, before they regained consciousness and that there be no interference with them until after death: but there was no requirement as to guaranteeing success. The context of interpreting the 1993 Directive was the practical difficulties in ensuring that, in an emergency where the government had to protect the public against the contingency of a serious outbreak of a contagious and dangerous disease, there could be a guaranteed method of avoiding distress or suffering. Accordingly, there was no incompatibility with the 1993 Directive.

H10 (3.) Nor did allowing ventilation shutdown as a last resort offend against the EU principle of proportionality. Member states had a significant margin of appreciation where there was a significant risk to public health, and so a national court should be slow to interfere with a decision taken, as here, after consultation with expert advisers on what was needed to protect the public. Moreover, no suggestion had been made that the decision of the Secretary of State was irrational

H11 (4.) The 2006 Amendment was sufficiently certain in its application to conform with the EU law requirement as to the implementation of a directive. The 2006 Amendment provided that ventilation shutdown could be used only if there was an emergency and other methods were impractical: this could not be spelled out any further as it would depend on the circumstances of each outbreak and as methods of control developed. As such, it required an informed decision by the Secretary of State: any legislative attempt at greater prescription for the contingency involved could undermine the objective of the measure, namely disease control and would be disproportionate as a means of implementing the principle in the 1993 Directive of sparing animals any avoidable pain or suffering in the cause of disease control.

H12 (5.) The 1993 Directive was sufficiently clear, and there was no need for a reference to the ECJ pursuant to art.234 of the EC Treaty on any of the issues arising.

H13 **Cases considered:**

A. Tempelman v Directeur van de Rijksdienst voor de keuring van Vee en Vlees (C-96/03 and C-504)

Commission of the European Communities v Ireland (354/99) [2001] E.C.R. 1-7657

Commission of the European Communities v Italian Republic (363/85) [1987] E.C.R. 1733

Commission of the European Communities v Kingdom of Belgium (102/79) [1980] E.C.R. 1473

France v Delattre (C-369/88) [1991] ECR I-1487

Land Oberosterreich and Republic of Austria v Commission of the European Communities (C-439/05 P and C-454/05)

R. (on the application of Daly) v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 AC 532; [2001] 2 W.L.R. 1622

R. v Secretary of State for Health Ex p Eastside Cheese [1999] 3 C.M.L.R. 123; [1999] Eu. L.R. 968; [2000] E.H.L.R. 52 CA

H14 *Rhodri Thompson Q.C.* and *Ms Kate Cook* (instructed by Leigh Day & Co) for the applicant.

Hugh Mercer Q.C. (instructed by DEFRA Legal GP) for the defendant.

Kris Gledhill, Barrister

R. (ON THE APPLICATION OF KRISHNAPILLAI) v SECRETARY OF STATE FOR THE HOME DEPARTMENT

HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT)

Cranston J.: September 10, 2008

[2008] EWHC 2737 (Admin); [2009] A.C.D. 3

Mental health; Proportionality; Removal; Right to respect for private and family life

H1 *European Convention on Human Rights art.8—Human Rights Act 1998—Immigration Rules HC 395 para.353—fresh human rights claim—potential effect of deterioration in mental health on private and family life—meaning of "further submissions" for purposes of fresh asylum and human rights claims.*

Facts

H2 The claimant (K) sought judicial review of the decision of the defendant Secretary of State (D) not to treat her as making a fresh human rights claim and consequently to remove her to Sri Lanka.

H3 K had arrived in the United Kingdom in 1992. She had claimed asylum and had subsequently made a claim that her rights under art.8 of the European Convention on Human Rights (the ECHR) would be breached by her removal. These applications were in turn rejected by D and in each case her subsequent appeal was unsuccessful.

H4 Following the dismissal of her second appeal in 2003, K wrote again to D asking to be allowed to remain in the United Kingdom, first on compassionate grounds and then under a long residence policy. Before those applications were dealt with, K's solicitors wrote to D in December 2006 enclosing medical evidence stating that she was suffering from post-traumatic stress disorder (PTSD). Further submissions were made in July 2007 and September 2007.

H5 On February 18, 2008, K was detained under immigration powers. A letter from D rejecting her outstanding application was served. This noted, amongst other matters, that there was no up-to-date medical report available. K was interviewed and claimed to be suffering from suicidal thoughts and to have recently overdosed on painkillers. She said she was dependent on her sister, with whom she had been living since 1997. She was removed to Sri Lanka the same day.

H6 In apparent anticipation of that decision, in January 2008, an Immigration Service official had authorised a proposal to detain K and remove her from the United Kingdom on the same day on the grounds that any prolonged detention before removal might add to her fear and anxiety.

H7 K sought judicial review of her removal.

Grounds of challenge

H8 K argued, first, that D had acted unlawfully in failing to take into account the evidence relating to her mental condition which she had given at interview on the day of her removal; and, second, that D had acted irrationally or perversely in failing to determine that her claims of dependency on her sister and about her mental condition amounted to a fresh human rights claim.

Policy background

H9 The framework within which a fresh asylum or human rights claim—a further claim made following the failure of an initial claim—is to be considered is para.353 of the Immigration Rules, which reads, so far as material:

> ''When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.''

H10 **Held,** dismissing the claim:

H11 Reliance might be placed on art.8 to resist removal where there were consequences for the individual's mental health. The preservation of mental stability was a pre-condition to the effective enjoyment of art.8 rights. Deterioration in a person's mental health could bear on their personal integrity and also on the relationship between family members, and, therefore, not only could art.8 be engaged, but it might become disproportionate to remove the person from the United Kingdom. The deteriorating mental health of a person could moreover lead to the establishment of family life for purposes of art.8 through the provision by their family members of real, committed or effective support, that having been held by Sedley L.J. in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31 to be ''the irreducible minimum of what family life implies''.

H12 On the facts, however, D had been entitled to conclude that K's removal would not breach her rights under art.8. There had been no up-to-date medical evidence before D's officials, no evidence that K had ever seen a psychiatrist and no evidence that the suicide attempt, which she reported on the day of her removal, had been serious.

H13 It was clear from the wording of para.353 of the Immigration Rules and from D's internal guidance to her officials that D must consider ''implied human rights

claims'', in other words that there was no requirement for an individual explicitly to assert that he or she was intending to make a human rights claim or to make specific reference to the ECHR. D must be alive to potential fresh claims.

H14 However, the first pre-requisite to the consideration of a fresh claim under para.353 was that there should be further submissions. What constituted a further submission was a question of fact in each case: ''further'' simply meant ''additional'' and ''submission'' meant more than an insubstantial and unsubstantiated assertion. Although the additional information need not be in any way elaborate, something of substance was required if the process of removing persons were not to be frustrated by the lodging of purported fresh claims on the eve of removal.

H15 Here, K had not advanced further representations based on dependency on her sister before the day of her removal, and although she did raise it on that day, it was not enough for her to make such an assertion at so late a stage without anything to support it, and it could not be characterised as a further submission engaging para.353. D's officials had been aware of her suicidal tendencies, as shown by the proposal to ensure same-day removal in light of her mental health. Therefore K's mention of her attempted suicide was also not a further submission and D had been entitled not to treat it as such.

H16 **Cases considered:**

B v Secretary of State for the Home Department [2008] UKHL 39; [2008] 3 W.L.R. 166; [2008] 4 All E.R. 1146

EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2008] 3 W.L.R. 178; [2008] 4 All E.R. 28

Huang v Secretary of State for the Home Department [2007] UKHL 11; [2007] 2 A.C. 167; [2007] 2 W.L.R. 581

Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31; [2003] I.N.L.R. 170; [2003] A.C.D. 32

N v United Kingdom, Application no 26565/05, May 27, 2008

R. (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27; [2004] 2 A.C. 368; [2004] 3 All E.R. 821

S v United Kingdom [1984] 40 D.R. 196

Senthuran v Secretary of State for the Home Department [2004] EWCA Civ 950; [2004] 4 All E.R. 365; [2005] 1 F.L.R. 229

WM (Democratic Republic of Congo) v Secretary of State for the Home Department [2006] EWCA Civ 1495; [2007] Imm. A.R. 337; [2007] I.N.L.R. 126

H17 *Mr S. Cox* (Fisher Meredith) for the claimant.

Mr P. Patel and *Mr R. Dunlop* (Treasury Solicitor) for the defendant.

Alasdair Mackenzie, Doughty Street Chambers

R. (ON THE APPLICATION OF EDWARDS) v CRIMINAL CASES REVIEW COMMISSION

DIVISIONAL COURT

Pill L.J., King J.: October 13, 2008

[2008] EWHC 2389 (Admin); [2009] A.C.D. 4

LT Criminal Cases Review Commission; Defences; Entrapment

H1 *Criminal Appeal Act 1995—duty of Criminal Cases Review Commission to refer a case to the Court of Appeal—whether prisoner can make allegations of entrapment inconsistent with the positive case of innocence he advanced at trial.*

Introduction

H2 The claimant sought judicial review of the Criminal Cases Review Commission's decision not to refer his conviction to the Court of Appeal.

Legislative Framework

H3 Section 9 of the Criminal Appeal Act 1995 provides that the Criminal Cases Review Commission may refer a conviction to the Court of Appeal. However, s.13 provides that no such reference may be made unless inter alia there is a real possibility that the conviction would be overturned.

Facts

H4 The claimant had been convicted of possessing a Class A drug with intent to supply. He had been arrested in the company of an undercover policeman inside a van containing a briefcase filled with packets of heroin. At trial the claimant had contended that he had been unaware that the packages contained heroin and that he thought they contained jewellery. He was convicted of possessing a Class A drug with intent to supply and his subsequent appeal was dismissed.

H5 The defendant subsequently considered whether there should be a further appeal based on allegations of entrapment made by the claimant, but found that there was no evidence that the claimant had been induced into committing the crime. It also held that the claimant's defence at trial was inconsistent with a submission of entrapment. Accordingly, the defendant held that there was no real possibility that the conviction would be overturned and it refused to refer the conviction to the Court of Appeal.

Submissions

H6 The claimant contended that advancing a positive case of innocence at trial did not preclude him from subsequently relying on entrapment nor did it relieve the defendant of its duty to investigate allegations of entrapment.

H7 The defendant argued that the issue of whether entrapment could be alleged at the same time as running a substantive defence did not arise in the instant case because the defendant had investigated and had found no evidence that the claimant had been induced into participating in the drugs transaction through entrapment.

H8 **Held,** dismissing the claim for judicial review:

H9 If there were some evidential basis for a finding of entrapment the Criminal Cases Review Commission might have a duty to investigate entrapment even where a defence was inconsistent with such an allegation. However, in the instant case it was not necessary to resolve this issue because there was no basis for a finding of entrapment. It was no more than fanciful that the drugs transaction had been set up in order to entrap the claimant. Accordingly, the commission had been justified in not referring the case to the Court of Appeal.

H10 **Cases considered:**

Edwards and Lewis v United Kingdom (2005) 40 E.H.R.R. 24 ECtHR
Mathews v United States 1987 485 U.S. 58
R. v Ahluwalia (Kiranjit) [1992] 4 All E.R. 889; (1993) 96 Cr. App. R. 133; [1993] Crim L.R. 63 CA
R. v Criminal Cases Review Commission Ex p. Pearson [1999] 3 All E.R. 498; [2000] 1 Cr. App. R. 141; [1999] Crim. L.R. 732 QBD
R. v H [2004] UKHL 3; [2004] 2 A.C. 134; [2004] 2 W.L.R. 335
R.v Looseley (Grant Spencer) (No.1) [2001] 1 W.L.R. 2060 CA
R. v Mack 1988 2 E.C.S. 903
R. v Neaven [2006] EWCA Crim 955; [2007] 2 All E.R. 891; [2006] Crim. L.R. 909
United States v Demma 523F. 2D 981

H11 *William Clegg Q.C.* and *James Hodivala* (Clarke Kiernan) for the claimant.
David Perry Q.C. (Criminal Cases Review Commission) for the defendant.

Richard Moules, Landmark Chambers

THOMPSON v FRANCE

HIGH COURT OF JUSTICE (ADMINISTRATIVE COURT)

Scott Baker L.J., Aikens J.: October 17, 2008

[2008] EWHC 2787 (Admin); [2009] A.C.D. 5

LT European arrest warrants; Extradition

H1 *Extradition Act 2003 Pt 1—Council Framework Decision of June 13, 2002 (2002/584/JHA)—required contents of European arrest warrant.*

Facts

H2 The appellant (T) appealed against the decision of a District Judge in November 2005 to dismiss his appeal against extradition to France at the request of the Respondent Public Prosecutor (P). T was said to have been part of a gang involved in smuggling tobacco through France into the United Kingdom with the use of stolen credit cards.

H3 The District Judge's judgment had been delayed until May 15, 2008, because T had not attended the original hearing and could not be found. The parties and the District Judge had at that point been under the impression that T was wanted by P as an accused person because that appeared to be the basis on which he was sought in the European arrest warrant sent to the United Kingdom by P.

H4 Subsequently, on July 24, 2008, P notified the parties that, on November 23, 2006, T had been convicted and sentenced in absentia to four years' imprisonment.

Grounds of challenge

H5 T argued that the arrest warrant was defective in a number of respects. First, he said that it did not state whether he was being sought for the purpose of being accused of committing an offence or with a view to his extradition to serve a sentence following conviction, as required by ss.2(3) and 2(5) of the Extradition Act 2003 (the Act). Nor, if the former, was it clear what stage the proceedings in his case had reached, or whether he was sought for prosecution or merely for questioning as part of the investigation. Secondly, it did not specify particulars of the sentence in respect of each offence which might be imposed under French law, as required by s.2(4)(d) of the Act. Third, in respect of one of the allegations, it did not specify the particulars of the circumstances of the offence, as required by s.2(4)(c) of the Act.

Held, allowing the appeal:

H6 The European arrest warrant procedure was designed, under Council Framework Decision of June 13, 2002 on the European arrest warrant and surrender procedures between Member States (2002/584/JHA), to provide a summary and speedy process for securing the extradition of accused and convicted persons between Member States of the European Union.

H7 Where a particular warrant contained, on its face, the information required under the Act, it was unnecessary and indeed inappropriate to go behind it.

H8 Section 2 of the Act drew a clear distinction between a warrant issued in respect of a person accused of the commission of a specified offence and one issued in respect of a person alleged to be unlawfully at large after conviction by a court of a specified offence. Reading the warrant in the instant case as a whole, it was clear that it was the former rather than the latter, i.e. that it was an ''accusation warrant'' rather than a ''conviction warrant''.

H9 As an accusation warrant, the warrant was invalid because it did not state that it had been issued with a view to T's arrest and extradition for the purpose of being prosecuted, as opposed to for the purpose of questioning. The English language wording of the pro-forma European arrest warrant annexed to the Framework Decision referred to a person being arrested and surrendered ''for the purposes of conducting a criminal prosecution''. The English version of the warrant, containing the words ''for legal proceedings'', did not comply with this wording. Whilst the original French, which included the expression ''poursuites pénales'', did coincide with the French-language version of the pro-forma warrant, the remainder of the warrant suggested that T had not yet been placed under formal examination. Thus the warrant could not be read as showing unequivocally that T was wanted for the purpose of being prosecuted

H10 The instant warrant was also defective for non-compliance with the requirement to indicate the maximum sentence. The reason why it was important that the sentence for each offence mentioned in a warrant should be specified was that it could then be seen whether it carried a sufficiently long sentence to qualify as an extradition offence and in relation to specialty.

H11 On the other hand, it could not be said that the warrant was defective on grounds of failure to particularise the circumstances of each offence.

H12 Obiter, it was inappropriate that the UK courts should be put in the position of having to consider detailed evidence about criminal procedures in Members States for the purpose of deciding whether or not the statutory requirements in the Act were fulfilled. The precise English-language wording in the pro-forma warrant annexed to the Framework Decision should be used in any European arrest warrant addressed to the United Kingdom and care should be taken to ensure that nothing in any such warrant might detract from such wording. It was desirable that any warrant received in the United Kingdom should be checked and any defect in it remedied before time was wasted on contested proceedings.

H13 **Cases considered:**

Boudhiba v Spain [2006] EWHC 167 (Admin); [2007] 1 W.L.R. 124; [2006] 3 All E.R. 574; [2006] A.C.D. 54

Caldarelli v Italy [2008] UKHL 51; [2008] 1 W.L.R. 1724; [2009] 1 All E.R. 1

Criminal Proceedings against Pupino (C-105/03) [2005] E.C.R. I-5285; [2006] Q.B. 83; [2005] 3 W.L.R. 1102

Haynes v Malta [2007] EWHC 2651 (Admin)

Ismail, Re [1999] 1 A.C. 320; [1998] 3 W.L.R. 495; [1998] 3 All E.R. 1007 HL

Kuprevicius v Lithuania [2006] EWHC 1518 (Admin); [2006] Extradition L.R. 151

McCormack v France [2008] EWHC 1453 (Admin)

Office of the King's Prosecutor (Brussels) v Cando Armas [2005] UKHL 67; [2006] 2 A.C. 1; [2005] 3 W.L.R. 1079; [2006] 1 All E.R. 647

Vey v Public Prosecutor of Montluçon [2006] EWHC 760 (Admin); [2006] Extradition L.R. 110

H14 *Nick Yeo* and *Helen Lyle* (Hallinan Blackburn Gittings & Nott) for the appellant.
Rebecca Hill (Crown Prosecution Service) for the respondent.

Alasdair Mackenzie, Doughty Street Chambers

STEPHEN ATWOOD v HEALTH SERVICE COMMISSIONER

ADMINISTRATIVE COURT

Burnett J.: October 6, 2008

[2008] EWHC 2315 (Admin); [2009] A.C.D. 6

Bolam test; Clinical negligence; Health Service Commissioners; Misdirections on law; Professional opinion

H1 *Health Service Commissioners Act 1993 ss.1, 3, 4 and 5—whether the 1993 Act required the application of the Bolam test by the Health Service Commissioner in investigating complaints—whether the Bolam test was the test which the Health Service Commissioner had in practice routinely applied.*

Introduction

H2 The claimant consultant doctor (A) sought judicial review of a report by the defendant (H) into complaints about the treatment received by one of A's patients, John Ambrose (J), who died in January 2002. A had treated J and was severely criticised in the report.

Facts

H3 A was a consultant gastro-intestinal surgeon employed by Salford Royal Hospitals NHS Trust (the Trust) at Hope Hospital, Salford. J was a patient under the care of the Trust who, towards the end of 2001, was found to have a large polypoid tumour at the lower end of his oesophagus. After pre-operative chemotherapy, A performed a cardio-oesophagectomy (the removal of the lower half of the oesophagus and stomach). Following that operation, J was discharged from hospital. He lost a large amount of weight after the operation. He was taken into hospital as an emergency but not admitted and ultimately sent home having been taken by members of his family to a medical drop-in centre. At the drop-in centre, they were told that he was very ill and would probably only have weeks to live. He died shortly after he arrived home the same day.

H4 Following a complaint to the trust, J's daughter complained to H. H's Senior Investigating Officer who compiled the report appointed two independent assessors to assist him. Two earlier drafts of the report were provided to the claimant who commented on them through his solicitors. In their second response, they contended that the *Bolam* test should be applied.

H5 In the final report, it was found that J's condition was not properly monitored or effectively followed up following his discharge from hospital. It was also found that neither J nor his family were given adequate information about his condition

between the date of the operation and his death. However, H had not set out anywhere in the final report the test being applied. In response to the letter before claim, H's solicitors stated that the test applied was whether the service provided by the Trust ''fell below a standard which the patient could reasonably have expected in the circumstances''.

Legal framework

H6 The general remit of H was set out in s.3(1) of the Health Service Commissioners Act 1993 (the 1993 Act). It empowered H to investigate alleged failures in a service provided by a health service body, failures of such a body to provide a service which it was the function of the body to provide or maladministration connected with any other action taken by or on behalf of such a body. As originally enacted, s.5 excluded from H's jurisdiction any investigation of matters exclusively of clinical judgment. However, that provision was repealed from April 1, 1996.

H7 By s.4, the Commissioner was not permitted to conduct an investigation in respect of action in relation to which the person aggrieved had a right of appeal, reference or review to or before a Tribunal, or a remedy by proceedings in a court of law, unless the Commissioner was satisfied in the particular circumstances that it was not reasonable to expect that person to have had recourse to it.

H8 The expansion of H's jurisdiction in 1996 was accompanied by statements by H of how he intended to apply the statutory test in s.3(1) to questions of clinical judgment. These included a paper in December 1995 entitled ''Responsibilities of the Health Service Commissioner''. In para.42 of that paper, H stated that he would be asking his professional advisers as a general rule, ''to advise him on whether the actions complained of were based on a reasonable and responsible exercise of clinical judgment of a standard which the patient could be reasonably entitled to expect in the circumstances in question''. Similar observations were made in a ''Guide to the Work of the Health Service Ombudsman'' in April 1996.

Submissions

H9 On behalf of A, it was submitted that:

(i) The language of s.3, when considered in the context of clinical judgement, necessarily contemplated that a finding of a failure in a service causing injustice or hardship could only be made if the clinician had acted unreasonably in a *Bolam* sense.

(ii) Even if the language of the statute did not dictate that outcome when read alone, and H was free to apply a different test, she and her predecessor had repeatedly articulated the test in terms leading to the conclusion that it was the *Bolam* test.

(iii) H had not applied the *Bolam* test in the final report.

(iv) There were a number of other detailed flaws in the reasoning of the report in the instant case.

H10 On behalf of H, it was submitted that:

(i) The language of the Act nowhere echoed the language of negligence and it was clear that patients should be able to obtain from H relief not available from the courts. It was wrong in principle to seek to read s.3 as a surrogate for negligence in the context of clinical judgement.

(ii) A patient was entitled to expect something better than the standard dictated by *Bolam*. The test as applied by H in practice was that identified in the response to the letter before claim.

(iii) The detailed complaints gave rise to no public law error. The appropriate standard to apply to the examination of the reasoning was that set out in the planning context in *South Buckinghamshire DC v Porter (No.2)* [2004] UKHL 33.

Held, allowing the claim:

H11 The purpose of H (and the other Commissioners having jurisdiction over complaints relating to other aspects of public life) was to adjudicate over complaints and provide redress by making findings and recommendations. It was clear that Parliament was not seeking to create a parallel jurisdiction to courts and tribunals, which jurisdiction should apply the same principles by reading over established legal concepts into the language of the various Acts governing the jurisdiction of the Ombudsmen. The concepts of ''maladministration'' and ''injustice'' for the purposes of this area of legislation, did not stick like glue to notions of illegality and loss in the common law. Similarly, the concept of a ''failure in a service'' did not necessarily import culpability in the sense required in an action for damages founded in negligence. As a matter of principle, it was for H to decide and explain what standard she applied before making a finding of a failure in a service. That standard as defined would not be interfered with by a reviewing court unless if reflected an unreasonable approach.

H12 H was entitled to approach the question of failure in service, even in the context of clinical judgment, from a point of view that was different from the approach of the courts in negligence actions. Section 3(1) did not itself dictate that the *Bolam* test should be applied by the Ombudsman to questions of clinical negligence.

H13 However, the various formulations in the documents issued by H at the time of the enlargement of her jurisdiction indicated that the test she applied for stigmatising clinical judgment as unreasonable was the same as the test applied by the courts to the same question when it arose in clinical negligence cases. H's own documents indicated that when considering whether to stigmatise a clinical judgment as unreasonable, she and her predecessor had stated that they would apply a test indistinguishable from the *Bolam* test. H had accordingly misdirected herself in law in applying a different standard to the question whether A had acted unreasonably in the management of J after his discharge.

H14 As regards the individual complaints about the reasoning of the report, the general approach to reasons in the planning context, as summarised in *South Buckinghamshire DC v Porter (No.2)*, was appropriate in cases involving H. It was nonetheless important to bear in mind that the approach was a flexible one. In each case a court of review would look to determine whether the reasons were adequate, whether the conclusions on the principal contentious issues had been stated, and whether the principal factual disputes had been resolved with

some explanation. Whether reasons were adequate would inevitably depend upon the nature of the issue under consideration. The more serious the allegation and impact of any adverse finding the more explanation would be required of the conclusions. A process which resulted in almost bare conclusions without significant reasoning would be unfair to those criticised.

H15 Although anyone subject to criticism would naturally want every point taken on his behalf to be dealt with expressly, and all evidence examined in detail and every dispute resolved, neither the courts nor H were expected to adjudicate on that basis. The report had to be read as a whole in a fair way. Very fine analysis of small parts of it was likely to defeat that aim. The reasoning in the report had to be read in the knowledge that those to whom it was sent would be familiar with its background and the way in which the issues developed and were investigated.

H16 The context of the report included the earlier drafts and the detailed submissions made on behalf of A. This was an important part of the background when considering the discrete challenges. Those discrete challenges did not raise any point of law. H's reasoning and conclusions were adequate and not irrational.

H17 **Cases considered:**

Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582; [1957] 2 All E.R. 118; [1955-95] P.N.L.R. 7 QBD

Bolitho (Deceased) v City and Hackney HA [1998] A.C. 232; [1997] 3 W.L.R. 1151; [1997] 4 All E.R. 771 HL

Bolton Metropolitan DCv Secretary of State for the Environment (1993) 71 P. & C.R. 309

R. v Local Commissioner for Administration for the North and East Area of England Ex p. Bradford City Council [1979] Q.B. 287; [1979] 2 W.L.R. 1; [1979] 2 All E.R. 881 CA

R. v Local Commissioner for Administration in North and North East England, Ex p. Liverpool City Council [2001] 1 All E.R. 462; (2000) 2 L.G.L.R. 603; [2000] B.L.G.R. 571 CA

R. (on the application of Middleton) v HM Coroner for Western Somerset [2004] UKHL 10; [2004] 2 A.C. 182; [2004] 2 W.L.R. 800

R. v Parliamentary Commissioner for Administration, Ex p. Balchin (No.1) [1998] 1 P.L.R. 1; [1997] J.P.L. 917; [1997] C.O.D. 146 QBD

Sidaway v Board of Governors of the Bethlem Royal Hospital [1985] A.C. 871; [1985] 2 W.L.R. 480; [1985] 1 All E.R. 643 HL

South Buckinghamshire DC v Porter (No.2) [2004] UKHL 33; [2004] 1 W.L.R. 1953; [2004] 4 All E.R. 775

H18 *Mr P. Havers Q.C.* (Radcliffes Le Brasseur) on behalf of the claimant.
Mr J. Maurici (Beachcroft LLP) on behalf of the defendant.

David Blundell, Landmark Chambers

SECRETARY OF STATE FOR THE HOME DEPARTMENT v F

COURT OF APPEAL

Sir Anthony Clarke M.R., Waller V.P. and Sedley L.J.:
October 17, 2008

[2008] EWCA Civ 1148; [2009] A.C.D. 7

LT Closed material; Disclosure; Non-derogating control orders; Right to fair trial

H1 *The European Convention on Human Rights art.6—The Prevention of Terrorism Act 2005—The Civil Procedure Rules Pt 76—the conditions for making and upholding a non-derogating control order*

Introduction

H2 AE, AF, AM and AN were each the subject of respective non-derogating control orders under the Prevention of Terrorism Act 2005. AE appealed from the decision of Silber J. that he had had a fair hearing in relation to the imposition of the control order. The Secretary of State appealed from the decisions of Stanley Burnton J., Sullivan J. and Mitting J. that AF, AM and AN respectively had not had fair hearings.

H3 The issue for the court (in light of the House of Lords decision in *MB and MF*) was in what circumstances an individual subject to a control order (a controlee) would be regarded as having had a fair hearing.

Legislative framework

H4 The conditions for making or upholding a non-derogating control order under ss.2(1)(a) and 3(10) of the Prevention of Terrorism Act 2005 are that the Secretary of State had reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity and considered it necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

H5 Part 76 of the Civil Procedure Rules sets out the procedure for the court on reviewing whether or not those conditions were met, including provision for the non-disclosure of information to the controlee and for the use of special advocates. It was established that these provisions were to be read down under s.3 of the Human Rights Act 1998, so that they took effect only when that would be consistent with fairness.

H6 **Held,** dismissing AE's appeal, dismissing the Secretary of State's appeal in the case of AM and allowing the Secretary of State's appeals in the cases of AN and AF (both to be remitted to the High Court):

H7 The question was whether the hearing under s.3(10) of the Prevention of Terrorism Act 2005 infringed the controlee's rights under art.6 of the European Convention of Human Rights (ECHR), i.e. whether, taken as a whole, the hearing was fundamentally unfair in the sense that there was significant injustice to the controlee, he was not accorded a substantial measure of procedural justice or the very essence of his right to a fair hearing was impaired. More broadly, the question was whether the effect of the process was that the controlee was exposed to significant injustice.

H8 All proper steps should be made to provide the controlee with as much information as possible, both in terms of allegation and evidence, if necessary by appropriate gisting. Where the full allegations and evidence were not provided for reasons of national security, the controlee must be provided with a special advocate.

H9 There was no principle that a hearing would be unfair in the absence of open disclosure to the controlee of an irreducible minimum of allegation or evidence (Clarke M.R. and Waller V.P.). Alternatively, any such irreducible minimum could, depending on the circumstances, be met by disclosure of very little information.

H10 The House of Lords decision in *MB and MF* was not authority for the proposition that where the judge could be sure that the undisclosed evidence was unanswerable, the requirements of a fair hearing would automatically be satisfied. Whether a hearing would be unfair would depend upon all the circumstances, including the nature of the case, what steps had been taken to explain the detail of the allegations to the controlled person, what steps had been taken to summarise the closed material, the nature and content of the material withheld, how effectively the special advocate was able to challenge it on behalf of the controlee and what difference its disclosure to the controlee would or might make. In considering whether open disclosure to the controlee would have made a difference, the court must have in mind the problems for the controlee and special advocates and must take account of all the circumstances.

H11 There were no rigid principles. What was fair would be a matter essentially for the judge, whose decision should very rarely be interfered with on appeal.

H12 The court granted permission to appeal to the House of Lords in the cases of AE, AF and AN on the art.6 ECHR related issues.

H13 **Cases considered:**

Al-Nashif v Bulgaria (2002) 36 E.H.R.R. 655 ECtHR
Ashingdane v United Kingdom (1985) 7 E.H.R.R. 528 ECtHR
Brown v Stott [2003] 1 A.C. 681; [2001] 2 W.L.R. 817; [2001] 2 All E.R. 97 PC
Bullivant, Re [2007] EWHC 2938 (Admin); [2008] A.C.D. 25
Chahal v United Kingdom (1997) 23 E.H.R.R. 413; 1 B.H.R.C. 405 ECtHR
Charkaoui v Minister of Citizenship and Immigration [2007] S.C.C. 9

Feldbrugge v The Netherlands (1986) 8 E.H.R.R. 425 ECtHR
Fitt v United Kingdom (2000) 30 E.H.R.R. 480; [2000] Po. L.R. 10 ECtHR
Fox Campbell and Hartley v United Kingdom (1990) 13 E.H.R.R. 137/ (1991) 13 E.H.R.R. 157 ECtHR
Jasper v United Kingdom (2000) 30 E.H.R.R. 441; [2000] Po. L.R. 25; [2000] Crim. L.R. 586 ECtHR
John v Rees [1970] Ch. 345; [1969] 2 W.L.R. 1294; [1969] 2 All E.R. 274 Ch. D
Kadi and Yusuf v Council of the European Union (C-402/05 P and C-415/05 P).
Liversidge v Anderson [1942] A.C. 206 HL
Luca v Italy (2001) 36 E.H.R.R. 807/ (2003) 36 E.H.R.R. 46; [2001] Crim. L.R. 747 ECtHR
Murray v United Kingdom (1995) 19 E.H.R.R. 193 ECtHR
R. v Inland Revenue Commissioners Ex p. Rossminster Ltd [1980] A.C. 952; [1980] 2 W.L.R. 1; [1980] 1 All E.R. 80 HL
R. v Shayler [2002] UKHL 11; [2003] 1 A.C. 247; [2002] 2 W.L.R. 754
Secretary of State for the Home Department v AF [2008] EWHC 689 (Admin); [2008] 4 All E.R. 340; (2008) 158 N.L.J. 557
Secretary of State for the Home Department v AF [2008] EWCA Civ 117; [2008] 1 W.L.R. 2528; [2008] A.C.D. 55
Secretary of State for the Home Department v E [2007] UKHL 47; [2008] 1 A.C. 499; [2007] 3 W.L.R. 720
Secretary of State for the Home Department v JJ [2006] EWCA Civ 1141; [2007] Q.B. 446; [2006] 3 W.L.R. 866
Secretary of State for the Home Department v JJ [2007] EWCA 651 (Admin)
Secretary of State for the Home Department v MB [2007] EWCA 651 (Admin)
Secretary of State for the Home Department v MB and AF [2007] UKHL 46; [2008] 1 A.C. 440; [2007] 3 W.L.R. 681
Secretary of State for the Home Department v MB and JJ [2007] UKHL 45; [2008] 1 A.C. 385; [2007] 3 W.L.R. 642
Tinnelly & Sons Ltd and McElduff & Others v United Kingdom (1999) 27 E.H.R.R. 249; 4 B.H.R.C. 393; [1998] H.R.C.D. 715 ECtHR
Van Mechelen v The Netherlands (1998) 25 E.H.R.R. 647; 2 B.H.R.C. 486 ECtHR

H14 *Mr Philip Sales Q.C.*, *Mr Nicholas Moss*, *Miss Cecilia Ivimy*, *Mr Andrew O'Connor* and *Miss Kate Grange* (the Treasury Solicitor) for the Secretary of State for the Home Department.
Mr David Pannick Q.C., *Mr Timothy OttQ.C.*, *Mr Zubair Ahmad* and *Mr Tom Hickman* (Middeweeks) for AF.
Mr Timothy Ott Q.C. and *Miss Kate Markus* (Messrs Arani & Co) for AM.
Mr Tim Owen Q.C. and *Miss Frances Webber* (Messrs Birnberg Peirce) for AN.
Mr Owen Davies Q.C. and *Mr Ali Nanseen Bajwa* (Messrs Chambers Solicitors) for AE.
Mr Hugo Keith and *Mr Jeremy Johnson*, special advocates for AF.
Mr Mohammed Khamisa Q.C. and *Miss Shaheen Rahman*, special advocates for AM.

Mr Andrew Nicol Q.C. and *Mr Paul Bowen*, special advocates for AN.
Mr Michael Supperstone Q.C. and *Mr Tom de la Mare*, special advocates for AE.
Mr Michael Fordham Q.C., *Miss Shaheed Fatima* and *Mr Tom Richards* for Justice (intervening).

Rachel Kamm, 11KBW Chambers

R. (ON THE APPLICATION OF FEDERATION OF TOUR OPERATORS) v HM TREASURY

COURT OF APPEAL

Waller, Buxton, Smith L.JJ.: July 2, 2008

[2008] EWCA Civ 752; [2009] A.C.D. 8

Air passenger duty; Flights; Package holidays; Peaceful enjoyment of possessions; Proportionality; Tour operators

H1 *European Convention on Human Rights art.1 of Protocol 1—Finance Act 2007—Package Travel, Package Holidays and Package Tours Regulations 1992—package holidays—air passenger duty—proportionality*

Introduction

H2 The appellant tour operators appealed against a decision of the High Court holding that an imposition of an increase in air passenger duty was lawful.

Facts

H3 In December 2006, the Government announced the doubling of air passenger duty, to take effect seven weeks later. Airlines were able to pass the duty on to any passengers with whom they had direct contracts and to all tour operators, whether or not direct contracts were in place. Due to the operation of reg.11 of the Package Travel, Package Holidays and Package Tours Regulations 1992, the tour operators were precluded from passing on the increase to passengers who had already booked holidays. The appellant brought this to the attention of the Government, but a postponement of the imposition of the increase in duty was refused.

H4 At first instance, the judge held that there were substantial reasons for not deferring the imposition of the increase and for refusing to exempt package holiday bookings.

H5 On appeal, the tour operators argued that the timing of the imposition of the increase in duty was an unjustified interference with their rights under art.1 of Protocol 1 to the Convention and that accordingly s.12 of the Finance Act 2007 imposing the increase was incompatible with the Convention. The tour operators further argued that the imposition of the increase in relation to existing bookings could not further the environmental aim underlying the increase.

The Legislative Framework

H6 Article 1 of Protocol 1 to the Convention provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

H7 Section 12 of the Finance Act 2007 increased the rate of air passenger duty imposed in relation to any carriage of a passenger on an aircraft which began on or after February 1, 2007.

H8 Regulation 11 of the Package Travel, Package Holidays and Package Tours Regulations 1992 provides:

"(1) Any term in a contract to the effect that the prices laid down in the contract may be revised shall be void and of no effect unless the contract provides for the possibility of upward or downward revision and satisfies the conditions laid down in paragraph (2) below.

(2) The conditions mentioned in paragraph (1) are that:

(a) the contract states precisely how the revised price is to be calculated;

(b) the contract provides that price revisions are to be made solely to allow for variations in:

(i) transportation costs, including the cost of fuel;

(ii) dues, taxes or fees chargeable for services such as landing taxes or embarkation or disembarkation fees at ports and airports; or

(iii) the exchange rates applied to the particular package; and

(3) Notwithstanding any terms of a contract,

(i) no price increase may be made in a specified period which may not be less than 30 days before the departure date stipulated; and

(ii) as against an individual consumer liable under the contract, no price increase may be made in respect of variations which would produce an increase of less than 2%, or such greater percentage as the contract may specify, (non-eligible variations) and that the non-eligible variations shall be left out of account in the calculation."

H9 **Held,** dismissing the appeal

H10 Though the duty was to be treated as being de facto imposed on tour operators, it was not aimed at tour operators alone but was principally imposed on operators of aircraft, the justification for which would not generally be susceptible of challenge under art.1 of Protocol 1 to the Convention.

H11 It was impossible to conclude that if s.12 of the Finance Act 2007 did not exempt passengers who had booked with tour operators prior to December

2006, it imposed either an excessive, disproportionate or individual burden on tour operators or was otherwise unreasonable.

H12 Any postponement which singled out tour operators would have been difficult to justify to airline operators and a general postponement of the imposition of the higher rate of duty would have involved a substantial loss of revenue. The tour operators were not uniquely disadvantaged as any airlines which passed on the increase to their pre-booked passengers would be taking a commercial risk. In any event, the tour operators could mitigate any harm caused by the increase in duty and absorb its impact by increasing their charges for passengers booking after December 2006. The increase in duty had only a short term effect on the tour operators' profitability and was not inconsistent with the Convention.

H13 **Cases considered:**

A v Secretary of State for the Home Department [2004] UKHL 56; [2005] 2 AC 68; [2005] 2 W.L.R. 87

James v United Kingdom (1986) 8 EHRR 123; [1986] R.V.R. 139 ECtHR

R. (on the application of Daly v Secretary of State for the Home Department [2001] UKHL 26; [2001] 2 A.C. 532; [2001] 2 W.L.R. 1622

Sporrong and Lonnroth v Sweden (1983) 5 E.H.R.R. 35 ECtHR

H14 *Mr Charles Haddon-Cave Q.C.* and *Mr Tim Ward* (Herbert Smith LLP) appeared on behalf of the appellant.

Mr David Anderson Q.C. and *Miss Sarah Lee* (Treasury Solicitor) appeared on behalf of the respondent.

Richard Blakeley, Brick Court Chambers

R. (ON THE APPLICATION OF LIMBU) v SECRETARY OF STATE FOR THE HOME DEPARTMENT

ADMINISTRATIVE COURT

Blake J.: September 30, 2008

[2008] EWHC 2261 (Admin); [2009] A.C.D. 9

LT Discretionary powers; Entry clearances; Immigration policy; Irrationality; Military service

H1 *European Convention on Human Rights—Immigration Rules 2004—Immigration policy—Discretionary powers—Irrationality—Military Service—Right of Gurkha veterans to settle in the United Kingdom*

Introduction

H2 The claimants (L), all of whom were former Gurkhas or their widows, applied for judicial review of decisions refusing them clearance to enter the United Kingdom for the purpose of settlement here.

Facts

H3 The Immigration Rules 2004 enacted a change in the immigration policy towards Gurkhas following the return of Hong Kong to Chinese sovereignty and the relocation of the Gurkha Brigade's headquarters to the United Kingdom. Under the new rules, Gurkhas became entitled to apply for indefinite leave to enter the United Kingdom following their discharge. This was in accordance with the armed forces concession which already applied to Commonwealth citizens. The Home Office was however concerned with the effects of retrospectively applying that policy and limited it to Gurkhas discharged after July 1, 1997.

H4 It was recognised by the Home Office that some retrospective effect was desirable, and operational instructions were issued to entry clearance officers to waive the requirements of the Immigration Rules in cases in which there were strong reasons why settlement in the United Kingdom was appropriate. The reasons focused primarily on time spent living in the United Kingdom by the individual Gurkha or his family members.

H5 The claimants (or their former husbands) had all been discharged prior to July 1, 1997. Accordingly, L could not bring themselves within the new rules. Each were refused entry clearance by notices stating that they did not fall within the

terms of the discretionary policy as they had not established a sufficient connection with the United Kingdom.

H6 The claimants' cases were selected as test cases. L argued that the policy was discriminatory and contrary to art.14 of the Convention and further that the apparently exclusive criteria adopted for the exercise of the entry clearance officers' discretion were irrational in the context of the policy's purpose: the recognition of the debt of gratitude the nation owed L for their loyalty and commitment to the United Kingdom through their military service. The Secretary of State submitted that immigration policies were typically not retrospective and that basing the discretion on physical or family links with the United Kingdom was rational.

The Legislative Framework

H7 The Diplomatic Service Procedures (DSP) set out the discretionary policy for the grant of a right to settlement for Gurkhas not meeting the requirement for discharge from the Army in Nepal after July 1, 1997. Chapter 29 of Entry Clearance Volume 1 General Instructions of the DSP is entitled ''Settlement entry for former members of HM Forces and their dependants''. Chapter 29.4 provides:

> **"29.4 Discretion-Gurkhas**
>
> In addition to the discretion exercised during the transitional period, discretion may also be exercised by ECOs in individual cases where an applicant does not meet the requirement of discharge from the British Army in Nepal after 1st July 1997, or discharge not more than 2 years prior to the date of application. Discretion may be exercised to waive these requirements in cases where there are strong reasons why settlement in the UK is appropriate. For example, consideration should be given to the following factors:
>
> - Strength of ties with the UK—have they spent a significant amount of time living in the UK, such as a three year tour of duty pre-discharge or 3 years living in the UK after discharge?
> - Do they have any close family living in the UK? What proportion of their close family are in the UK as opposed to living in Nepal?
> - Do they have children being educated in the UK?
> - Do they have a chronic/long-term medical condition where treatment in the UK would significantly improve quality of life?
>
> If one or more of the factors listed above are present, ECOs may exercise discretion and grant entry clearance for settlement in the UK.
>
> Close family means immediate family, such as brothers, sisters, children, parents or grandparents.
>
> The requirements for an applicant to have completed at least four years service as a Gurkha with the British Army and to have been discharged on completion of their engagement should not be waived.''

H8 **Held,** allowing the claim:

H9 Though L's claims for discrimination (both statutory and under the Convention) were unmeritorious and the policy itself was not quashed, the individual decisions refusing entry clearance were to be quashed and redetermined.

H10 The immigration policy was not a typical one and was not based on physical presence in the United Kingdom. Rather, it was based on the lengthy military service which had been performed by the Gurkhas for the benefit of the Crown at the instigation of the United Kingdom government. This amounted to a connection to the United Kingdom, wherever it was performed.

H11 The purpose of the policy was to honour an historic debt, whereas it appeared the factors to be considered were limited to the physical presence of a Gurkha or his family in the United Kingdom. Accordingly, the policy under challenge either irrationally excluded relevant and material considerations as to the underlying purpose of the policy or was so ambiguous as to the expression of its scope as to mislead L, entry clearance officers and immigration judges as to which reasons entitled an applicant to a discretionary right to settle in the United Kingdom. As such, the instructions given to entry clearance officers were unlawful and needed urgent revisiting. It was not necessary to quash the policy, but the decisions refusing L entry clearance were set aside for redetermination.

H12 **Cases considered:**

AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12; The Times, February 2, 2007

Abdulaziz v United Kingdom (1985) 7 E.H.R.R. 471 ECtHR

Al-Nashif v Bulgaria (2006) 36 E.H.R.R. 37 ECtHR

AL (Serbia) v Secretary of State for the Home Department and R. (on the application of Rudi) v Secretary of State for the Home Departmentt; [2008] UKHL 42; [2008] 1 W.L.R. 1434; [2008] H.R.L.R. 41

R. (on the applicaiion of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37; [2006] 1 AC 173; [2005] 2 W.L.R. 1369 HL

R. (on the application of Gurung) v Ministry of Defence [2002] EWHC 2463 (Admin); (2003) 100(6) L.S.G. 25; The Times, December 28, 2002

R. (on the application of Gurung) v Ministry of Defence [2008] EWHC 1496 (Admin)

R. (on the application of Purja) v Ministry of Defence [2003] EWHC 445 (Admin); [2003] A.C.D. 45; The Times, March 10, 2003 QBD

H13 *Mr Edward Fitzgerald Q.C.*, *Mr Mark Henderson* and *Mr Mark O'Connor* (Howe & Co) appeared on behalf of the claimants.

Mr Steven Kovats (Treasury Solicitor) appeared on behalf of the defendant.

Mr Sharaz Ahmed (NC Brothers) appeared on behalf of the interested party.

Richard Blakeley Brick Court Chambers

R. (ON THE APPLICATION OF TB) v SECRETARY OF STATE FOR THE HOME DEPARTMENT

COURT OF APPEAL

Thorpe, Rix, Stanley Burnton L.JJ.: August 14, 2008

[2008] EWCA Civ 977; [2009] A.C.D. 10

Abuse of process; Asylum; Asylum seekers; Dangerousness; Leave to remain; Presumptions; Previous convictions; Serious offences

H1 *Convention relating to the Status of Refugees 1951—Asylum Convention—Nationality, Immigration and Asylum Act 2002—leave to remain—previous convictions*

Introduction

H2 The appellant Secretary of State (S) appealed against a decision of the High Court that it was an abuse of process to refuse leave to enter to the respondent asylum seeker (TB).

Facts

H3 TB, a Jamaican national, had been granted temporary admission to the United Kingdom. He was subsequently charged with supplying a Class A drug, pleaded guilty at trial and was sentenced to a term of imprisonment. S notified TB of her intention to seek his deportation, and TB claimed asylum as a result, alleging that any deportation would be contrary to his human rights. TB's claim for asylum was refused and he appealed to the Asylum and Immigration Tribunal.

H4 Before the Tribunal, S took no point as to whether TB was a danger to the community and accordingly disentitled to the protection of the Convention relating to the Status of Refugees 1951 by virtue of art.33(2) of that Convention. TB's appeal was allowed by the Tribunal and it was determined that he had refugee status. He was accordingly entitled to five years' leave to remain in the United Kingdom. S subsequently informed TB that she had determined that he was a danger to the community and granted him discretionary leave to remain for only six months. TB's claim for judicial review was successful and S appealed.

The Legislative Framework

H5 The Convention relating to the Status of Refugees, as amended provides insofar as relevant:

"Article 1. Definition of the term 'refugee'

A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

. . .

(2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Article 33. Prohibition of expulsion or return ('refoulement')

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

H6 Section 72 of the Nationality, Immigration and Asylum Act 2002, so far as is relevant provides:

"(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

. . ."

H7 **Held,** dismissing the appeal

H8 S was bound by the Tribunal's decision. Accordingly, insofar as her subsequent action was inconsistent with the decision that TB had refugee status it was unlawful. It had been open to S at the hearing of TB's appeal to establish that TB fell within art.33(2) and was a danger to the community. It was also open to S to appeal against the determination of the Tribunal on the basis that it had erred in law in failing to apply the statutory presumption provided for in s.72 of the Nationality, Immigration and Asylum Act 2002. S had failed to do so, and

there was no reason to allow the point to be raised subsequently in circumstances in which S was bound by the Tribunal's determination.

H9 In any event, the Tribunal had ruled that TB's conviction did not justify interfering with his Convention rights. This was inconsistent with TB being a danger to the community. As such, even if S had raised art.33(2) and the statutory presumption before the Tribunal, this would not have impacted the determination and the presumption would have been rebutted.

H10 It would subvert the statutory system if S were able to circumvent the Tribunal's determination by virtue of a subsequent, inconsistent administrative decision. S was therefore bound to grant TB five years' leave to remain, that being the leave to which the Tribunal's decision entitled him.

H11 **Cases considered:**

Johnson v Gore Wood & Co (No.1) [2002] 2 A.C. 1; [2001] 2 W.L.R. 72; [2001] 1 All E.R. 481 HL

Henderson v Henderson [1843-60] All E.R. Rep. 378; 67 E.R. 313; (1843) 3 Hare 100

Mert v Secretary of State for the Home Department [2005] EWCA Civ 832 CA

R. (on the application of Boafo) v Secretary of State for the Home Department [2002] EWCA Civ 44; [2002] 1 WLR 1919; [2002] Imm. A.R. 383

R. (on the application of Mersin) v Secretary of State for the Home Department [2000] EWHC 348 (Admin)

R. (on the application of S) v Secretary of State for the Home Department [2006] EWCA Civ 1157; [2006] I.N.L.R. 575

R. (on the application of Saribal) v Secretary of State for the Home Department [2002] EWHC 1542 (Admin), [2002] I.N.L.R. 596

H12 *Mr Robert Jay Q.C.* (Treasury Solicitor) appeared on behalf of the appellant.
Mr Manjit Gill Q.C. and *Miss Joanne Rothwell* (Irving & Co) appeared on behalf of the respondent.

Richard Blakeley Brick Court Chambers

R. (ON THE APPLICATION OF LIVERPOOL CITY COUNCIL) v HILLINGDON LBC

ADMINISTRATIVE COURT

James Goudie Q.C.: July 18, 2008

[2008] EWHC 1702 (Admin); [2009] A.C.D. 11

Children; Children's services; Local authorities' powers and duties; Residential accommodation

H1 *Children Act 1989—duty to accommodate asylum seeker—determining which local authority responsibility for child—transfer of responsibility by local authority*

Introduction

H2 The issue for the court was whether the claimant local authority (L) or the defendant local authority (H) had responsibility for the interested party (AK).

Legal background

H3 Section 20(1) of the Children Act 1989 imposes a duty upon local authorities to provide accommodation to any child "within their area" who appears to them to require accommodation "as a result of",

> "(a) there being no person who has parental responsibility for him;
> (b) his being lost or having been abandoned; or
> (c) the person who has been caring from him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care".

Facts

H4 AK was an asylum seeker from Pakistan who had claimed asylum in Liverpool and L had assumed responsibility for him. AK stated that he was 15 years old, but L had carried out an age assessment and assessed AK to be an adult. L made a referral to the National Asylum Support Service and the Border and Immigration Agency who arranged for AK to be detained at an adult detention centre within H's area.

H5 When AK was in H's area, the Home Office made a referral to H requesting an age assessment. At the same time AK's solicitors obtained a report from a consultant paediatrician which concluded that AK was indeed 15.

H6 AK's asylum claim was dismissed and on appeal the immigration judge accepted the paediatrician's report. Consequently, the Home Office released

AK from the adult facility and he was accepted temporarily into H's case and H provided accommodation. AK however expressed a desire to return to L's area and so H returned him there. Thereafter AK was maintained by L, but only on the basis that he was an adult and that he remained H's responsibility.

Issues for determination

H7 The Deputy Judge identified the following issues for determination whether:

(i) L's responsibility ended upon the referral to the Home Office agencies;
(ii) H had responsibility when the referral requesting an age assessment was made;
(iii) H and L had agreed about responsibility for accommodating AK;
(iv) the position between H and L was governed by a joint protocol between the Immigration and Nationality Directorate of the Home Office and the Association of Directors of Social Services;
(v) if there had not been an agreement and the protocol did not apply, H became responsible for AK;
(vi) H remained responsible;
(vii) L became responsible for AK again;
(viii) pending the completion of an age assessment, AK should be accommodated as an adult or child; and to decide
(ix) what would be the consequence of H's continuing to be responsible.

Submissions

H8 L submitted that after H had returned AK to L he did not require accommodation from L because all he needed was for L to inform him that H should provide him with accommodation. In addition, L contended that AK did not require accommodation under the Children Act 1989 s.20(1) because his requirement for accommodation fell outside the statutory criteria and was simply the result of H's having deposited him within L's area.

H9 **Held,** dismissing the claim for judicial review

H10 (1) L's initial responsibility for AK ceased when he was no longer within its area following his removal to the adult immigration detention facility outside L's area.

H11 (2) H might have had a responsibility when AK was at the detention centre and a referral had been made by the Home Office to H with a view to further age assessment, but this was academic given subsequent events.

H12 (3) There was no agreement by L that it would take responsibility for accommodating AK. The dispute between H and L over which was responsible was not resolved when AK was taken by H to L.

H13 (4) The protocol did not cover or appear to contemplate the situation that arose, rather it dealt with conflicting age assessments. In the present case there was one assessment by L and an authoritative finding by an immigration judge, not by H.

H14 (5) H became responsible for AK; AK had been discharged from the detention facility within H's area, and H had accommodated him, interviewed him and had assisted him thereafter.

H15 (6) H's responsibility ceased however once AK returned to L. It made no difference that H assisted AK to make the journey to L.

H16 (7) AK was within L's area and therefore L was also responsible for him. Jack Beatson Q.C. held in *R. (on the application of S) v Wandsworth LBC* [2001] EWHC Admin 709 that more than one authority could be responsible at the same time and in the instant case the Deputy Judge held that that principle was not confined to the situation where there was a simultaneous connection with two local authorities. If L knew that someone else would provide accommodation it might reasonably conclude that it was not required to provide accommodation itself. However, it was not sufficient for L to point a putative child in need in the direction of a potential alternative provider, such as H, that did not agree to make provision for the child. The defendant was wrong in its contention that AK did not require accommodation as a result of any of (a), (b), or (c) in s.20(1) of the Children Act 1989. AK may well have required accommodation because H deposited AK within L's area, but that did not alter the fact that AK was a putative child in need within L's area who required accommodation as a result of there being no person who has parental responsibility for him. This was so irrespective of how AK came to be in L's area again.

H17 (8) Pending completion of the further age assessment, AK was to be accommodated as a child.

H18 (9) H could not insist that its duty to accommodate had been taken over by another local authority. However, that did not mean that AK was bound to accept that only H could have discharged the duty.

H19 (10) L's application was refused. H had ceased to be responsible when AK had returned to L. Alternatively, if H remained responsible, L also became responsible.

H20 **Cases considered:**

R. (on the application of B) v Merton LBC [2003] EWHC 1689 (Admin); [2003] 4 All E.R. 280; [2003] 2 F.L.R. 888

R. (on the application of G) v Barnet LBC [2003] UKHL 57; [2004] 2 A.C. 208; [2003] 3 W.L.R. 1194

R. (on the application of M) v Lambeth LBC [2008] EWHC 1364 (Admin); [2008] 2 F.L.R. 1026; [2008] A.C.D. 67

R. (on the application of S) v Wandsworth LBC [2001] EWHC Admin 709; [2002] 1 F.L.R. 469; (2001) 4 C.C.L. Rep. 466

H21 *Bryan McGuire* (City Solicitor, Liverpool City Council) for the claimant.
Hilton Harrop-Griffiths (Borough Solicitor, Hillingdon LBC) for the defendant.
Adam Fullwood (Jackson & Canter, Liverpool) for the interested party.

Richard Moules, Landmark Chambers

R. (ON THE APPLICATION OF DAVIES) v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

ADMINISTRATIVE COURT

Sullivan J. August 28, 2008

[2008] EWHC 2223 (Admin); [2009] A.C.D. 12

LT Local authorities' powers and duties; Material considerations; Permission; Planning appeals

H1 *Town and Country Planning Act 1990 s.288—giving of reasons—material considerations—adequacy of environmental statement—need for a permission requirement for s.288 applications.*

Introduction

H2 The applicant applied under s.288 of the Town and Country Planning Act 1990 to quash the Secretary of State's decision to grant planning permission for the construction of a link road to the M6.

Facts

H3 Following a five-week long inquiry the planning inspector produced a 99 page report which recommended that planning permission be granted subject to conditions. The claimant was a member of an action group which opposed the proposed road link and which had been represented at the inquiry.

H4 The claimant argued first that the Secretary of State had failed to have regard to a material consideration, namely the local authority's failure to follow the Department of Transport's transport analysis guidance when considering whether there were alternatives to the proposed road scheme. In the alternative she argued that the inspector had failed to give adequate reasons as to why the guidance need not be followed.

H5 Secondly, the claimant argued that the Secretary of State had failed to have regard to a material consideration, namely Planning Policy Statement 25 (PPS25) which dealt with ''development and flood risk''. In the alternative she argued that the inspector had failed to give adequate reasons for not applying that policy guidance.

H6 Thirdly, the claimant contended that the Secretary of State had erred in rejecting the contention that the local authority's environmental statement was inadequate in a number of respects, including a failure to consider a park and ride scheme, so that planning permission could not lawfully be granted.

H7 **Held,** refusing the application:

H8 In the instant case it did not matter whether the local authority's assessment of alternatives was inadequate because at the inquiry the inspector had been willing to and had considered any alternatives to major road building which were suggested by any of the parties. No suitable alternative had been identified by the claimant at the inquiry and there was no reason to suppose that any further investigations might realistically identify a suitable alternative.

H9 In relation to the giving of reasons for not following the guidance, neither the inspector nor the Secretary of State was required to respond to each and every point raised by the parties at an inquiry. Following *South Buckinghamshire DC v Porter (No.2)* [2004] UKHL 33, they were only obliged to deal with the principal important controversial issues. In the instant case, the principal issue was whether or not there was any evidence which suggested that a package of alternative measures would render the new road unnecessary. The question whether or not the local authority should have followed all the advice in the assessment guidance was not one of the principal controversial issues and accordingly reasons did not have to be given.

H10 There was no substance in the claimant's second ground. As far as the instant case was concerned there was no significant change in the policy advice in PPS25 which replaced PPG25. Therefore there was no need for the local authority expressly to refer to the new policy document. The inspector had accepted the local authority's case that there was no increased flooding risk and reference to the new, but materially identical, policy guidance could not have affected that conclusion. Policy guidance was an aid, not a hindrance to practical decision-making; policies should not be construed as though they were enactments, but rather with a measure of commonsense to the particular circumstances of the case.

H11 The claimant's third ground also had to fail. The inspector and the Secretary of State had both accepted that the environmental statement was adequate and had correctly held that any further assessment required in order to consider the separate park and ride scheme should be carried out as part of the application for permission for that separate scheme.

H12 The instant case illustrated the need to introduce a permission requirement into s.288, just as applied in respect of s.289 of the Town and County Planning Act. Challenges under s.288 had the potential to delay much-needed development even if they were devoid of merit and to greatly increase the costs for all parties, as well as occupying the court's time unnecessarily. The filter mechanism in s.289 operated well and there was no good reason why it should not also apply to s.288 applications.

H13 **Cases considered:**

BAA Plc v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1920 (Admin); [2003] J.P.L. 610

Berkeley v Secretary of State for the Environment [2001] 2 A.C. 603; [2000] 3 W.L.R. 420; [2000] 3 All E.R. 897

R. (on the application of Blewett) v Derbyshire CC [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29; [2004] J.P.L. 751
R. v Swale BC, Ex p. RSPB [1991] P.L.R. 6
South Buckinghamshire District Council v Porter (No.2) [2004] UKHL 33; [2004] 1 W.L.R. 1953; [2004] 4 All E.R. 775

H14 *Jeremy Pike* (Earthrights Solicitors) for the claimant.
John Litton and *David Blundell* (Treasury Solicitor) for the defendant.
Frances Patterson Q.C. (Lancashire CC) for the interested party.

Richard Moules, Landmark Chambers

SOUTH CAMBRIDGSHIRE DC v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

COURT OF APPEAL (CIVIL DIVISION)

Sir Mark Potter (President of the Family Division), Scott Baker L.J. and Sir Robin Auld: September 5, 2008

[2008] EWCA Civ 1010; [2009] A.C.D. 13

Alternative sites; Burden of proof; Gypsies; Planning permission; Travellers

H1 *Town and Country Planning Act 1990 s.288—Planning and Compulsory Purchase Act 2004 s.38(6)—planning permission—gypsies—grant of personal conditional planning permission for residential use of rural site—availability of alternative sites—burden of proof—whether requirement on applicant for planning permission to prove that no other sites available*

Introduction

H2 The appellant district council appealed against a decision by Keith J. of September 18, 2007 dismissing its application under s.288 of the Town and Country Planning Act 1990 (the 1990 Act) to quash the grant of planning permission by the Secretary of State's Inspector to the second and third respondents (AB and JB) in respect of a caravan site in rural Wallingham, Cambridgshire.

Facts

H3 AB and JB were of Gypsy status, but their travelling lifestyle was curtailed by the birth of their third child (KMB), with an acute and life-threatening medical condition requiring regular medical assistance and special care on both an ongoing and emergency basis. AB and JB sought to remain on caravan sites in the local area so as to obtain KMB's medical care and to allow her to attend a nearby special school.

H4 The Secretary of State's Inspector granted conditional personal planning permission to AB and JB for the residential use of the disputed caravan site, on the basis that the harm to the character and appearance of the local rural area was outweighed by other material considerations, most particularly the exceptional circumstances of the family.

H5 Further, the Inspector recorded that AB and JB had been unsuccessful in their attempts to find alternative sites and noted the lack of suitable sites run by the appellant. She rejected the appellant's argument that AB and JB had to prove

that no other sites were available or that their particular needs could not be met from another site, finding that such a level of proof would be practically impossible and that there was no absolute requirement for an applicant to prove that he had explored and exhausted all possible alternative options before planning permission could be granted.

H6 The appellant's various grounds of challenge to the validity of that decision were rejected by Keith J. and permission to appeal was subsequently granted on the narrow point of whether Keith J. was correct that: ''In seeking to determine the availability of alternative sites for residential gypsy use, there is no requirement in planning policy or case law for an applicant to prove that no other sites are available or that particular needs could not be met from another site.''

The Legislative Framework

H7 Under s.288 of the 1990 Act, a decision may only be challenged on ordinary administrative law grounds. The weight to be attached to the material considerations and matters of planning judgment are within the exclusive jurisdiction of the decision maker.

H8 The 1990 Act provides in s.70(2) that, in dealing with an application for planning permission, a planning authority should have regard to the provisions of the development plan, so far as is material to the application, and to any other material considerations. Under s.38(6) of the Planning and Compulsory Purchase Act 2004, where regard is had to the development plan, a determination must be made in accordance with the plan unless material considerations indicate otherwise.

The Appeal

H9 In relation to the point under appeal, Keith J. had held that there was no basis for saying that, if one of the material considerations for departing from the development plan was said to be the non-availability of a suitable alternative site, the applicant for planning permission would have to prove such non-availability. He had held that the real question would be whether the evidence which the parties had chosen to call revealed the existence or non-existence of an alternative site.

H10 The local authority argued that the judge had erred in holding that there was no requirement on AB and JB to prove non-availability of other sites or that their particular needs could not be met from another site.

H11 **Held,** dismissing the appeal:

H12 None of the cases relied on by the applicant supported the contention that the burden was on the second and third respondents to show that they had done all that reasonably could be done to find an alternative site that catered for their needs. *Rhodes v Minister of Housing and Local Government* [1963] 1 W.L.R. 208 QBD did not lay down how the existence of an alternative site should be established, but instead stated what would be a material consideration if the existence of an alternative suitable site emerged at a hearing. *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1987) 53 P. & C.R. 293 QBD and

Simmons v First Secretary of State [2005] EWCA Civ 1295 were distinguished on the basis that they were green belt cases.

H13 Finally, *McCarthy v Secretary of State for Communities and Local Government* [2006] EWHC (Admin) 3287 (Admin) did no more than emphasise that the issue of alternative sites would depend on all the circumstances. It correctly identified the danger of turning the principles derived from *Secretary of State v Edwards* [1994] PLR 62 CA, on whether the existence of alternative sites could justify refusal, into a test which applicants for planning permission had to pass, by proving that there was an absence of alternative sites in order to gain consent.

H14 The law was clear that there was no burden of proof on any party. The position was governed by s.38(6) of the 2004 Act. It was a matter for the planning authority or the Secretary of State's Inspector to decide what were the material considerations and, having done so, to give each of them such weight as was considered appropriate. That was a matter of planning judgment for the decision maker.

H15 In any event the Secretary of State's Inspector had identified that AB and JB had in fact searched for alternative sites but none were available.

H16 **Cases Considered**

McCarthy v Secretary of State for Communities and Local Government [2006] EWHC 3287 (Admin)

Rhodes v Minister of Housing and Local Government [1963] 1 W.L.R. 208; [1963] 1 All E.R. 300; (1963) 127 J.P. 179 QBD

Secretary of State for the Environment v Edwards (PG) (1995) 69 P. & C.R. 607; [1994] 1 P.L.R. 62 CA (Civ Div)

Simmons v First Secretary of State [2005] EWCA Civ 1295; [2006] J.P.L. 575; (2005) 149 S.J.L.B. 1354

Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1987) 53 P. & C.R. 293; [1986] 2 E.G.L.R. 185; [1986] J.P.L. 834 QBD

H17 *Robert McCracken Q.C.* and *Saira Kabir Sheikh* (Sharpe Pritchard) appeared on behalf of the appellant.

James Strachan (Treasury Solicitor) appeared on behalf of the first respondent.

Marc Willers (Community Law Partnership) appeared on behalf of the second respondent.

Estelle Dehon, 4–5 Gray's Inn Square

R. (ON THE APPLICATION OF HAASE) v INDEPENDENT ADJUDICATOR

COURT OF APPEAL

Sir Anthony Clarke M.R., Scott Baker L.J., Richards L.J.:
October 14, 2008

[2008] EWCA Civ 1089; [2009] A.C.D. 14

Disciplinary offences; Impartiality; Independence; Prisoners; Prosecutors; Right to fair trial

H1 *Prison disciplinary offences—Prison Rules 1999—European Convention on Human Rights, art.6—whether, in addition to need for independent tribunal when additional days at stake, art.6 required an independent prosecuting authority.*

Introduction

H2 Mr Haase (H), a prisoner serving 14 years' imprisonment, was charged with the disciplinary offence of disobeying a lawful order by failing to provide a urine sample for a drugs test in January 2006. The case was referred by the prison governor to an Independent Adjudicator, a visiting District Judge, who had the power to impose additional days' imprisonment on finding the charge proved and whose role was introduced by changes to the Prison Rules 1999 following a ruling of the European Court of Human Rights (ECtHR) that disciplinary offences that might lead to additional days being added to a sentence were criminal charges for the purposes of art.6 of the European Convention on Human Rights (the Convention). In the hearing before the Independent Adjudicator, in April 2006, the prosecution had been conducted by the prison officer, who had also given evidence against H; the main issue had been whether the officer was telling the truth. H was convicted and sentenced to an additional 21 days' imprisonment.

Submissions

H3 In judicial review proceedings, H contended that the proceedings had been conducted unfairly in breach of art.6 of the Convention because of the lack of an independent prosecutor: he relied on the decision of the Courts-Martial Appeal Court in *R. v Stow* [2005] EWCA Crim 1157 that a conviction by a court-martial should be quashed for breach of art.6 because the prosecution had lacked the necessary independence. It had been conceded that adequate independence and impartiality by the Naval Prosecuting Authority was required, but it had been argued that there were adequate safeguards in practice: this was rejec-

ted by the court, which found that there was accordingly a breach of art.6. H argued that the approach in *Stow* should be applied in the prison context to require that the prosecuting officer provide a sufficient guarantee of independence and impartiality by, e.g., coming from a different prison, being subject to a code of conduct and trained so as to ensure that all relevant material is disclosed and that the tribunal is not misled. The defendant contended that there was no requirement under art.6 that the prosecution be independent of the witnesses. The application was dismissed([2007] EWHC 3079 (Admin)), but the judge gave permission to appeal to the Court of Appeal.

H4 **Held,** dismissing the appeal:

H5 1. There was no general requirement arising from art.6(1) that the prosecutor be independent and impartial: the text of the Convention expressly required independence and impartiality in relation to the tribunal, but no requirement of prosecutorial independence had been set out in the limited jurisprudence from the ECtHR dealing with the role of the prosecutor.

H6 2. Although the Court of Appeal in *Stow* had rested its finding that a conviction was unsafe on the conclusion that the Prosecuting Authority did not enjoy sufficient safeguards of his independence and impartiality for the purposes of art.6(1), the need for prosecutorial independence was conceded by the Crown and so not subject to argument as to why no such requirement was to be read into art.6(1). Although it was right to note, as the court had done in *Stow*, the features of Crown Prosecutors and their independence, it was also to be noted that this was not a universal feature of prosecutions in England and Wales, which could be brought by private prosecutors, bodies such as the RSPCA and NSPCC, and local authorities, or elsewhere in Europe. The court in *Stow* had not taken this into account.

H7 3. It was also to be noted that the prison disciplinary setting was very different from the context of courts-martial in *Stow*.

H8 4. Accordingly, the claim that prison disciplinary proceedings required an independent prosecutor could not rest on the authority of *Stow* and there was no general principle to that effect arising from art.6. Rather, in relation to the role of the prosecutor, the question was whether any lack of independence and impartiality resulted in unfairness for the purposes of art.6.

H9 5. No specific unfairness arising out of the prosecutor's lack of independence had been alleged. There was no reason to believe that any relevant documents had been withheld, or that the adjudicator had been misled or that his assessment of the credibility of the officer giving evidence had been affected by the fact that the officer had also been conducting the prosecution.

H10 **Cases considered:**

Cooper v United Kingdom (2004) 39 E.H.R.R. 8; [2004] Crim. L.R. 577 ECtHR

Ezeh v United Kingdom (2002) 35 E.H.R.R. 28; (2002) 35 E.H.R.R. 28; 12 B.H.R.C. 589; [2002] Prison L.R. 354; [2002] Crim. L.R. 918 ECtHR

Ezeh v United Kingdom (2004) 39 E.H.R.R. 1; (2004) 39 E.H.R.R. 1; 15 B.H.R.C. 145; [2004] Prison L.R. 95; [2004] Crim. L.R. 472 ECtHR (Grand Chamber);

Findlay v United Kingdom (1997) 24 E.H.R.R. 221 ECtHR
Grieves v United Kingdom (2004) 39 E.H.R.R. 2; [2004] Crim. L.R. 578 ECtHR
Huber v Switzerland, Application no.12794/87, judgment of October 23, 1990
Morris v United Kingdom (2002) 34 E.H.R.R. 52; [2002] Crim. L.R. 494 ECtHR
Padovani v Italy, Application no.13396/87, judgment of February 26, 1993
R v Stow [2005] EWCA Crim 1157; [2005] U.K.H.R.R. 754

H11 *T Owen Q.C.* and *H Southey* (instructed by Langleys) for the appellant.
D Perry Q.C. and *S Grodzinski* (instructed by The Treasury Solicitor) for the respondent.

Kris Gledhill, Barrister

CHILTON-MERRYWEATHER v HUNT

COURT OF APPEAL, CIVIL DIVISON

Waller, Rix and Dyson L.JJ.: September 19, 2008

[2008] EWCA Civ 1025; [2009] A.C.D. 15

Council tax; Motorways; Noise; Pollution; Tax bands; Valuation

H1 *Local Government Finance Act 1992 ss.1, 5, 21, 22, 22B, 23 and 24—Local Government Finance Act 1988—General Rate Act 1967 s.20—Council Tax (Alteration of Lists and Appeals) Regulations 1993 regs 4, 5, 14 and 32—Council Tax (Situation and Valuation of Dwellings) Regulations 1992 reg.6—whether the change in volume of traffic noise and pollution was a "change in the physical state of the dwelling's locality".*

Introduction

H2 The appellant council tax listing officer (C) appealed from the decision of Collins J. that the change in the volume of traffic noise and pollution from the M61 motorway in the vicinity of the homes of the respondents (H) was a change in the state of a dwelling's locality for council tax purposes.

Facts

H3 The four respondent householders (H) lived in bungalows on Winslow Road, Bolton, a road which ran parallel to the northern carriageway of the M61 motorway near to its junction 5. The motorway ran at a higher level than the bungalows. The householders gave evidence of increased traffic, and hence enhanced noise and pollution levels, on the stretch of the motorway near their homes. They requested that the valuation band of their properties for council tax purposes should be reduced. C accepted that traffic had increased, but submitted that this was only an environmental change and not such a "physical change" as would justify a reduction of the houses' council tax under the legislation by reason of a "material reduction" in their value.

H4 C rejected H's proposals to alter their listings. They appealed to the Manchester North Valuation Tribunal. It decided in their favour. C's appeal to the High Court was dismissed by Collins J.

Legal framework

H5 Section 24(4) of the Local Government Finance Act 1992 (the 1992 Act) empowers the making of regulations to include provision that no alteration shall be made of a valuation band shown in the list as applicable to any dwelling unless, inter alia, there has been a material reduction in the value of the dwelling

since the valuation band was first shown in the list. Section 24(10) defined ''material reduction'' in the following terms,

> '''material reduction', in relation to the value of a dwelling, means any reduction which is caused (in whole or in part) by the demolition of any part of the dwelling, any change in the physical state of the dwelling's locality or any adaptation of the dwelling to make it suitable for use by a physically disabled person''.

H6 By reg.6 of Council Tax (Situation and Valuation of Dwellings) Regulations 1992 (the 1992 Regulations) the original valuation made for the purpose of the valuation list must be made on the basis of prescribed assumptions as to the physical condition of dwelling. One of those assumptions was that ''the size, layout and character of the dwelling, and the physical state of its locality, were the same as at the relevant date'', the ''relevant date'' being defined as the date on which the valuation took place.

Submissions

H7 C made submissions under three heads:

H8 1. Language—the combination of the word ''physical'' with the words ''state'', ''change'' and ''locality'' suggested that what the statute had in mind was an observable change in the physical fabric of the local area in which the dwelling was situated. Fluctuating matters, such as traffic and its environmental consequences in terms of noise and pollution, did not sit naturally or easily within such a concept, especially as they were unlikely to be associated with any given locality. The change in question was something which could be identified and dated more or less accurately to a specific event, such as occurred by reason of a change in the fabric of the locality, rather than to a process which was part of the use of the locality.

H9 2. Policy—the restriction on the right to propose an alteration in the valuation list governed by the concepts of ''material increase'' and ''material reduction'' was a deliberate policy to limit tightly the circumstances in which a dwelling could be revalued into a different valuation band. That policy was reinforced by the need to show a change which was both local and physical. Changes in mere value because of economic or market factors, and changes which were due to broad social or economic or national trends, were not intended to be encapsulated in the restrictive regime.

H10 3. Comparison of the language of the Local Government Finance Act 1988 (the 1988 Act) and the 1992 Act—the 1988 Act included the concept of a material change of circumstances arising not only from a change in the physical state of a locality but also from matters which though not affecting the physical state of the locality, were nonetheless physically manifest there.

H11 Neither H nor the Valuation Tribunal appeared. However, an advocate to the court was appointed by the Solicitor General. It was argued that:

H12 1. The linguistic and policy considerations were ultimately equivocal and neutral. As for language, traffic and its environmental consequences in terms of noise

and pollution were physical phenomena. The word ''state'' by itself could be given an extremely wide meaning. The advocate to the court accepted the distinction between national and local change, in particular economic and market change, but still submitted that where a national change in physical state, such as traffic, had particular local consequences there was nothing in the language or the policy of the Act to exclude it. Thus policy considerations were also neutral.

H13 2. There was some force in the argument based on the distinction in language between the 1988 and 1992 Acts, but it did not follow that the same result could not be achieved without the additional language found in the earlier Act.

H14 3. Ultimately, the advocate to the court supported the decision and reasoning of Collins J. In addition, he relied on an additional argument. The assumptions of reg.6(2) of the 1992 Regulations provided the only means by which matters which related to a date other than April 1, 1991 could be taken into account for the purpose of finding a valuation. It was absurd to distinguish between the existence of a nearby road and the traffic on it. C conceded during the course of the hearing that in practice the listing officer would value both the road and its traffic together as of the valuation date, original or subsequent.

H15 **Held,** allowing the appeal:

H16 C was properly concerned only with the essential fabric and character of house and locality, but not with other matters which went to their enjoyment, use, occupation or activity, such as the particular degree of traffic to be met on a particular date. Whereas the expression ''physical state'' could embrace traffic and its physical consequences such as noise and pollution, in context the emphasis on ''physical'' state was intended to distinguish matters of physical fabric, and perhaps character, from matters of use, activity, enjoyment or occupation. That was supported by the parallel treatment of both dwelling and locality in the statutory provisions.

H17 That reading of the 1992 Act was strongly supported by the difference in language between its provisions and those of the 1988 Act. Schedule 6, para.2(7) of the 1988 Act distinguished between both the ''physical state'' and ''physical enjoyment'' of the hereditament itself on the one hand, and on the other hand between ''the physical state of the locality'' and other matters which were ''physically manifest'' there without themselves affecting the physical state of the locality. It was not accepted that ''physical state of [the] locality'' in s.24(10) of the 1992 Act and reg.6(2) and (3) of the 1992 Regulations should receive the same interpretation as if that phrase stood as short-hand for the whole of the relevant language of para.2(7) of Sch.6 to the 1988 Act, and that, whereas in the 1988 Act parliaments had wished to put the matter beyond doubt, that was unnecessary in terms of the 1992 Act. This was not a possible conclusion, especially as the 1988 Act contained the wording ''though not affecting the physical state of the locality''.

H19 The distinction was also not supported by other elements in the language of the 1992 Act's associated regulations. The language of the 1993 Regulations suggested that the changes in question were events which could be ascribed to

a particular day, which is what would be expected of a change to the physical condition of a dwelling or to the physical fabric of a locality. The gradual development of traffic over the years was otherwise.

H20 The advocate to the court's final argument relating to reg.6(2) and (3) of the 1992 Regulations assumed the answer it purported to find. The question in issue was whether traffic flow was part of the ''physical state of [the] locality''. If it was, then the rest followed. If it was not, then there was no statutory assumption that had to be made concerning it.

H21 Policy considerations also supported this analysis. The circumstances in which an alteration might be permitted were extremely limited. The clear policy was to be restrictive. Given the fact that valuations were in bands, and that a change of value which did not carry a dwelling into a different band was of no ultimate relevance, it was understandable that alteration was tightly limited. That tight limitation was to be contrasted with the much more relaxed provisions relating to non-domestic hereditaments. Given that tight limitation, it was contrary to the policy of the 1992 Act to permit an alteration in the list for a reason which, although it manifested itself locally, was in truth part of a nationwide trend. If it were otherwise, then, what was intended to be a narrow and specific gateway designed to accommodate changes in the physical state of dwelling or locality would become a nationwide opportunity to revalue by reason of something happening throughout the land.

H22 **Cases considered:**

Addis Ltd v Clement (Valuation Officer) [1987] 1 E.G.L.R. 168; (1987) 281 E.G. 683; [1987] R.A. 1 CA

Clement (Valuation Officer) v Addis Ltd [1988] 1 W.L.R. 301; [1988] 1 All E.R. 593; [1988] 1 F.T.L.R. 393 HL

Williams (V.O.) v Scottish and Newcastle Retail Ltd [2001] EWCA Civ 185; [2001] 1 E.G.L.R. 157; [2001] R.A. 41

H23 *Mr T. Mould Q.C.* and *Mr D. Kolinsky* (H.M. Revenue & Customs) on behalf of the appellant.

Mr T. Buley (Treasury Solicitor) appeared as advocate to the court.

The respondents did not appear and were not represented.

David Blundell, Landmark Chambers

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