CO/1567/2007

Neutral Citation Number: [2008] EWHC 71 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 17th January 2008

B e f o r e:

LORD JUSTICE MOSES

Between:
THE QUEEN ON THE APPLICATION OF CORNER HOUSE RESEARCH
Claimant

v

DIRECTOR OF THE SERIOUS FRAUD OFFICE
Defendant

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(Official Shorthand Writers to the Court)

Mr B Jaffey (instructed by Leigh Day & Co) appeared on behalf of the **Claimant**
Mr P Sales QC & Ms K Steyn (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. LORD JUSTICE MOSES: This is a further hearing of interlocutory matters designed so as to enable properly to manage the hearing which is due for February.

2. The first question which I have to determine is as to the grounds on which it should be open to the claimant to argue. The important principle that should guide me, quite apart from the question as to whether the points that the claimant wishes to urge are arguable, is that there should be clarity. Nothing could be worse in a case of this importance than loose grounds that permit a tact to be changed, causing embarrassment to the respondent in how they deal with it. It is with that principle in mind that the question of what amendments should be made should be considered.

3. During the course of the hearing today I have expressed concerns that I have felt as a result of the opportunity afforded by these interlocutory proceedings to think about this case in advance. I wish to make it clear that although, naturally, I have spent time thinking about the case, I have not thought to any conclusion. Thus, indications that I have made as to what I regard as fundamental to the case do not connote in any way the conclusion that I might reach about it. I make that point because one point that has emerged, and has caused me concern, is the question as to whether the decision of the Director was unlawful, because it breached a fundamental constitutional principle in failing to maintain the rule of law by permitting a threat to influence and indeed govern the final decision reached to withdraw or discontinue the investigation. That, as Mr Sales QC points out, has not been pleaded, although it is touched upon in the evidence and tangentially arises in relation to one of the new grounds which the claimants seek to advance in relation to a failure to take into account the damage to national security flowing from the discontinuance of the investigation.

4. I make it clear that I do regard this as a point that arises on the evidence that I have now seen and the arguments already advanced. I therefore require, if the point is going to be argued, an amendment to be made to advance this ground. Of course it is not for me to decide which points the claimant wishes to take, but if they wish to take that point, as I have expressed it, then it must be properly pleaded and the claimants will have until close of business next Tuesday to plead that point. If it is pleaded, as I have already indicated, I will permit it to be argued at the full hearing. I have heard the observations that Mr Sales makes as to the answer to it: namely, there can be no absolute rule which forbids the prosecutor from taking into account risk to human life, however it arises, and therefore there is no such principle. But it seems to me eminently an arguable point, analogous, as it is, to the legality principle and to what Lord Bingham in his recent lecture described as the "sixth feature" of the rule of law.

5. The next question is as to whether the advice on the public interest given by senior ministers was flawed because it was tainted by questions as to commerciality and as to diplomatic considerations. Mr Sales argues, first of all, that the point was open to be taken at the outset but was not pursued by Miss Rose QC at the hearing in October. It was known by that time that the government was concerned on three bases: diplomatic relations, economic relations and national security; and in asserting that the sole basis for the decision was national security, that decision was tainted by the other considerations in one of two ways: either because the view as to the seriousness of the

threat to the national security by the government was affected by their concerns as to the relevant considerations, or, alternatively, that the Director could not be satisfied himself that the concerns of others would not be so tainted.

6. I have considerable sympathy for the submissions of the respondent that this question has either already been abandoned or is made impossible by the evidence, because, in reality, what is being alleged is bad faith. But I have to bear in mind that the fundamental first point in relation to Article 5 suggests that there is no proper dividing line to be drawn between those forbidden matters under the Bribery Convention and national security. In order to put flesh upon that submission, there does seem to me to be a link between the relationship between the three considerations and the legal point under Article 5. For that reason I shall grant permission to the point of 2.3 to be aired but I warn that I am unlikely to allow my colleague a great length of time to be deployed in pursuing it.

7. The next point on which permission is sought is in relation to a failure to take into account as a relevant consideration the damage to national security to flow from discontinuance. It should be noted that in the evidence it is asserted that this was taken into account by virtue of the letter expressing the Prime Minister's views, dated 12th December 2006, and further rebutted by the Director in his evidence. Nevertheless, the link that that point has with what I have expressed as being "a fundamental point" and the extent to which the government thought that the decision, even though it might show that the government did think that the investigation should yield to the threat, makes, it seems to me necessary that that argument should also be deployed and I give permission to the claimants to argue that point as well. It is not the point, however, I wish to emphasise, as Mr Sales emphasised to me, but the point as to the rule of law to which I have already referred. That requires a separate amendment.

8. Finally, it is alleged that the Shawcross exercise, that is the gathering by the Attorney of the views of the departments, was conducted improperly in the pressures placed upon the Director. That seems to me to be unarguable. However, the point when put at paragraph 49.2 of the grounds by way of amendment is that the Ministers, in response to the request to that Shawcross exercise, went beyond the bounds of constitutional propriety in expressing a view, in trenchant terms, as to what the Director's conclusion should be. That is said certainly by Edwards in Attorney-General's Politics and Public Interest 1984, at page 324, to be a principle that should not be breached in relation certainly to prosecutions. It is arguable that the same principle applies in relation to investigation, perhaps with even greater force. In those circumstances, it seems to me that it is a point which can properly be taken, in which but not in the terms it is drafted at the moment. Again, by the close of business on next Tuesday, if the point is to be argued, it should be amended in the terms set out at paragraph 49.2. That of course leaves open, I should make it clear, the question as to whether this Court can do anything about it; in other words, whether the issue is justiciable at all. To that extent I shall allow the amendments that I have indicated. If anything in the terms of the amendment arises that catches the respondent by surprise and makes it difficult or impracticable to know how to deal with the points at the hearing, then I shall receive submissions in writing to that effect and shall resolve them in writing as speedily as I may, but I hope there will not be any difficulty about it.

9. The next question relates to discovery. A number of submissions are made. Firstly, on behalf of the claimant, they are entitled to disclosure of any document to which documents already disclosed refer. I made it clear last time but I wish to reiterate that the department acting and counsel for the respondents are to be congratulated on the spirit and attitude they have taken to this case in the disclosure that has already taken place. It has enabled the Court to obtain a much clearer view as to what the issues are and ought to be, and must have been of great assistance in any event to the claimants. That has to be borne in mind in the approach to discovery. The proper approach to discovery is of course that which is set out in the decision of Lord Bingham in Tweed v Parades Commission for Northern Ireland [2007] 1 AC at paragraphs 3 and 4. There is no automatic right to discovery. The question is whether it is necessary, in order to resolve the issue fairly and justly, for the documents requested to be disclosed. It seems to me, therefore, applying that rule, that it is quite unnecessary for each and every document to which the documents in fact disclose to be discovered. I take the view that there is no such need, having regard to the issues set out in the original application and as amended. However, that also applies to the redactions. I have had the opportunity of seeing the unredacted documents and I see nothing in the redactions, cautious though they are, which would add to the strength of the claimant's case.

10. The question, however, arises as to whether there are documents which ought to be disclosed. I have indicated that it does seem to me material to know what triggered the whole question of whether the investigation should be halted. It is of significance -- I say nothing of concern to note -- that what appears to have triggered it is a letter from the very body that was the subject of the investigation, namely BAE. We do not have copies of that letter. Subject to any need for the respondent to make further submissions because of their content, or any sensitivity which requires redaction, those letters, namely the letter referred to in paragraph 9 and paragraph 13, which was unsolicited, should be disclosed. The reply to the original letter should, again, subject to those qualifications, be disclosed.

11. The next issue relates to documents at around the time that the final decision was made. It is important to appreciate that Mr Wardle's evidence is primarily evidence of the fact of his decision and the reasons why he took it. There is no basis for questioning the good faith in which he gives those reasons. Nevertheless, as the authorities revealed, summaries of reasons and indeed the necessary process of harking back to something that took place in the past may require the original record of the decision and the reasons why it was taken to be produced, and it may be of fundamental importance so as to override the vagaries of the passage of time, it being common knowledge that everybody thinks that they have said what they ought to have said or have heard what they would like to have heard. The way of avoiding that is to look to see what is recorded at the time. I make no order about it today because, having regard to the care and conscientiousness with which the exercise has so far been carried out on behalf of the respondent, I am happy and indeed grateful for the undertaking proffered by Treasury Counsel, Mr Sales QC, to look again at those documents and form a view, having regard to my observations as to the propriety of disclosing them, or some of them; or extracts from them. I trust him to see that that will be done. If anything further arises about that, the time to consider it is during the course of the argument in the case. I make that final observation because questions of discovery and disclosure

never open and shut in the sense that they determinate before the case is heard. Something might arise which will make it incumbent upon the matter being revisited. It may be that the claimants will get them, they may not. I do not want any further hearings about it or submissions about it at this stage. The most important thing is that people concentrate on the serious issues which this case raises.

12. I next turn to what of course is the most important issue in the case, and that is the question of money. A protective costs order has been made already in this sense: an order has been made which protects the claimants as to the amount which they would have to pay the respondent should they lose. It is accepted that that should be £70,000. The next question, however, which arises is whether the respondents should have the amount they have to pay in costs to the claimants, should they lose, capped. As I indicated back in October, it seems to me that the decision in the R v (Corner House Research) v Secretary of State for Trade and Industry [2005] 1 WLR 2600, in fairness does make it incumbent, in a case like this, upon the Court to make an order that caps those potential costs so as to protect the public purse. In order to identify a reasonable sum, and having regard to the fact that the claimants have entered into a CFA arrangement, the matter was sent off to the Senior Costs Master, but in fact the issue of quantum was resolved to this extent, that it was accepted by the defendants that the amount of the maximum based costs should be £95,000 and subjected to an uplift that would reach a figure of something in the region of £173,420.50p. However, the defendants have sought to argue before me that it is incumbent upon the claimants to seek legal representation, either by counsel or solicitors, or both, on a pro bono basis, and until the claimants have satisfied the Court that they have tried but failed to do that, the defendants should not be responsible for any legal costs should they lose, which could have been provided on a pro bono basis.

13. There is a dispute between the parties as to whether that was ever raised back in October, it now being said it is far too late. Highly skilled solicitors have been retained one can detect from the way in which this case has been advanced as well as counsel, and it is far too late now to go searching around for someone else to do it pro bono. I have no recollection as to whether this point was raised back in October, since I am afraid I have dealt with one or two other totally different matters since then. Both sides assert to the contrary, and I am not prepared to believe either side -- in other words, I just do not know. But, as Mr Sales recognises very fairly, the matter should not fall to be determined on that inadequate basis. It is an important point of principle and the most sensible thing is not to resolve it today but to make it clear that the point has not been resolved and that this case should therefore provide no precedent for whether this is a proper principle or not. The fact is that it is far too late now for anybody else to act, and the correct basis therefore should be that the defendants' costs that they pay to the claimants should be capped to the amount indicated, subject to one further question. The claimants have raised, for the purpose of this litigation, £70,000. Because the costs order has been capped in any amount that the claimants should have to pay the defendants, the defendants contended it is only fair that since the public purse is going to suffer in any event, that that £70,000 should be paid and therefore the £173,420.50 (or whatever sum should be) should suffer a deduction of the £70,000 that should be raised. I do not agree. In my view

the public purse has already been protected should the defendants lose, by the fact that not only are the costs capped to the sum involving a solicitor and junior counsel, but also that the sum agreed should be a modest amount. That it was the approach that the Senior Master would have had to adopt, and was adopted in reaching agreement, is entirely in accordance with what Brooke LJ said in Corner House, to which I have already referred. It seems to me therefore wrong that those who have put forward money on a voluntary basis should see that money go in reduction of what would otherwise have to be paid by the defendants if they lose. It must be recalled that this will only happen if they lose, and the public purse has been protected because a reasonable costs order is not being made against them, but one that is capped in the terms that I have already described. It does not seem to me right therefore that the public purse should be further protected by requiring that £70,000 to further reduce the liability of the losing party. In those circumstances the capped figure will be whatever the appropriate sum is. I am making no order as to that, but I have been given two figures. I only regret that I have not had the advantage of hearing Miss Steyn elaborate on the details as to how the correct figure ought to be reached.

14. MR JAFFEY: My Lord, the final point relating to those figures. The figures given by Miss Steyn, we have not had the opportunity--

15. LORD JUSTICE MOSES: You agree it.

16. MR JAFFEY: If we do not agree, we will come back.

17. LORD JUSTICE MOSES: No, do not come back. Subject to getting any written submissions about the orders, we will meet again.

18. MR SALES: Can I mention the timetabling point that I needed to raise, which was: we did prepare detailed grounds. Can I indicate that we will treat those as not our formal detailed grounds and that we will prepare, now, in the light of any additional points which are pleaded, proper detailed grounds. So I just indicate that.

19. LORD JUSTICE MOSES: Will those be instead of a skeleton? We do not need those and a skeleton.

20. MR SALES: If we could have a direction dispensing us from the detailed grounds.

21. LORD JUSTICE MOSES: Absolutely. I only want one document.

22. MR SALES: I think I have, in fairness to my learned friend, indicated in broad terms what our effective answers are to the particular things. That is all I needed to deal with.

23. MR JAFFEY: My Lord, the only other point is, could I ask for any transcript of your Lordship's judgment, permission for it to be expedited?

24. LORD JUSTICE MOSES: Yes, you can have it. It will not be corrected, but just get it. I am not going to bother revising it. It is much better to get on and get it.

25. Do I need make any orders about dates for skeleton arguments before the hearing?

26. MR JAFFEY: I think the ordinary rules govern. I think that given the ordinary rules which we may be due to serve our skeleton either yesterday... In the circumstances, given that Mr Sales has undertaken to look again at some documents...

27. LORD JUSTICE MOSES: When do you want their skeleton by?

28. MR SALES: 14th February, I suggest two weeks and one week. We will work out the dates, thank you very much. Thank you for sitting late.

29. LORD JUSTICE MOSES: So far as authorities are concerned, can you mark them up? Will there be time to sideline the bits that you think....

30. MR SALES: Could I suggest that we have a single bundle with sidelining?

31. LORD JUSTICE MOSES: That would be very helpful. The only other thing I did look at was, apart from Edwards, and I gave the citation to that, was Lord Bingham's lecture. I do not know if you have that.

32. MR SALES: Cambridge Law General, the Rule of Law.

33. LORD JUSTICE MOSES: I got it from the Internet. You know the one I mean, it was in Cambridge.

34. MR SALES: It was in Cambridge, and it is called the Rule of Law, in which case I think it is probably sensible if we treat the published version in the Cambridge Law Journal as, if you like, the authority.

35. LORD JUSTICE MOSES: It may not be of great assistance, but I set it out. Thank you all very much.