PTA Template 269E1 - OCT16 – JR (Admin)

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: **CA-2022-000243**

The King, on the application of

GRIZZIO LTD AND OTHERS **–v–** **THE CHIEF CONSTABLE OF MERSEYSIDE POLICE**

CA-2022-000243

ORDER made by the Rt. Hon. Lady Justice Andrews DBE

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal, against the refusal of the High Court to grant permission to apply for judicial review and certifying one of the claims as totally without merit

Decision:

An order granting permission may limit the issues to be heard or be made subject to conditions

Permission to appeal: Refused; both appeals are certified totally without merit.

OR

Permission to apply for judicial review: N/A

Where permission to apply for judicial review is granted, the application should be returned to the Administrative Court ☐

OR

There are special reasons (set out below) why the application should be retained in the Court of Appeal ☐

Reasons

1. The background to this case, set out more fully in Swift J's judgment [2022] EWHC 217 (Admin), is a criminal investigation by Merseyside Police into the affairs of Mr Sharipov ("A") and his two companies which was codenamed "Operation Kobus". A has made accusations of misconduct against the investigating officers and Merseyside Police (MP) and has sought to have them removed from the criminal investigation. A's first complaint was made to the MP on 17 April 2019 and was investigated by its Professional Standards Department (PSD). It was followed by three other complaints. These have not yet been finally resolved.

2. This application for permission to appeal concerns Swift J's decisions, following an oral renewal hearing, to refuse permission to proceed in two claims for judicial review. He certified one of them as totally without merit (TWM). Each decision was a matter of judicial discretion based on the judge's evaluation of the prospects of success of the claim, and therefore can only be overturned on appeal if the judge erred in law or reached a decision that no reasonable judge could make. That is a very high hurdle to surmount.

3. In the first claim, CO/3835/2019, A and the companies sought to challenge a "decision" communicated in a letter from DCI Vaughan, an officer of MP PSD dated 4 July 2019, responding to the 17 April 2019 complaint, allegedly refusing to remove certain MP officers from Operation Kobus and refusing to "recuse" MP from that operation and to refer the investigation to a different police force. The single ground of challenge was that the decision was irrational or unreasonable (in the public law sense) for four reasons, namely, a failure to consider all relevant factors, failure in the alternative to attach appropriate weight to all relevant factors, failure to properly follow the legal principles to be applied in cases of alleged bias, and "in the decisions' effects and consequences". As Swift J observed, this paragraph of the Statement of Facts and Grounds was generic and formed a boilerplate for numerous other claims by A for judicial review.

4. The Chief Constable ("R") defended the claim primarily on the basis that DCI Vaughan had not taken or purported to take a substantive operational decision on the merits of the recusal request. Indeed he had no power to do so. The matter was not amenable to judicial review. Other grounds of defence were delay in issuing the claim, the availability of alternative remedies, and that the claim was unarguable. R's position was that "it is not for the suspects in a criminal investigation to choose which police force or which officers or unit within a police force conduct the investigation into them".

5. Permission to proceed was refused by Julian Knowles J on 31 October 2019 on the basis that even on the assumption that there was a challengeable decision, the claim was unarguable on its merits. However despite taking the view that the claim was unarguable he did not mark it TWM (which means "bound to fail"). A renewed the application to an oral hearing.

6. Swift J dealt with this claim at paras 19 to 23 of his judgment. He agreed with R's primary case that the letter from DCI Vaughan was not a decision, but rather, a statement that the matters requested fell outside the complaints process. He pointed out that A appeared to recognise this, because an application was made on 22 January 2020 to amend the Grounds in the underlying JR proceedings to challenge the ACC's subsequent decision of 21 November 2019 that Operation Kobus would continue to be conducted by MP and that the officers singled out for complaint by A would not be removed. On 18 February 2020 A finally took the appropriate course by filing a new claim (CO/636/2020) challenging the ACC's decision. (On 27 January 2023 I made an order dismissing A's application for permission to appeal against Swift J's order refusing a renewed application for permission to proceed with JR in that case. This order should be read in conjunction with that order).

7. Swift J held that any challenge to the relevant part of the letter from DCI Vaughan had been abandoned by January 2020 and the application for permission to proceed should have been withdrawn at that time. He was not only entitled to make that finding, but right to do so. He might have added that (as A was told in 2019) DCI Vaughan had no power to make a substantive decision to hand over the investigation to another force and so there was no legitimate basis for complaining that he failed to do so.

8. In his lengthy "Grounds of Appeal" and "Combined Appeals Skeleton Argument " (which runs to some 200 pages including the appendices, and which, for the avoidance of doubt, I have carefully read and digested, including all the matters said to be "common" to all the appeals) A fails to properly engage with any of the substantive reasons given by the Judge. His sole ground of appeal in this case, which he characterises as "procedural", is that "it was not open to the court to refuse the claim and award costs when all efforts were done by the claimants to bring it up to date and the application for amendment was simply stalled by the court for 23 months".

9. This ground is hopeless. The claim was actively pursued when it should have been withdrawn. Although withdrawing it would have had costs consequences for A, it was abusive to keep a hopeless claim alive and seek to amend it in this manner, racking up further costs, merely to preserve some chance of recovering the costs that had already been expended. The absence of a decision susceptible of challenge could not be cured by seeking to amend the claim to challenge a different, later decision made by someone else. That would not have been the appropriate procedure even if there had been an earlier challengeable decision. The proposed amendment was not an "updating" of the existing claim but the proposed substitution of a new one. Less than a month after taking the wrong steps to address the ACC's November 2019 decision in this manner, A finally took the right steps by issuing a fresh claim. In those circumstances the application to amend was overtaken by events and it is hardly surprising if there was a delay in progressing it. A suggests that he was keeping his options open, in case the court decided that amendment of the existing claim was the right course to take, but A was legally represented at all material times, and it would never have been wrong to issue a fresh claim so long as this was done promptly and within the prescribed 3 months.

10. If, as A alleges, significant costs were incurred in CO/3835/2019, that was not a good reason to keep this claim alive. A has no conceivable grounds for arguing that he should not pay the successful party's costs of the AoS, since the claim for JR was misguided from the outset and A had no justification for pursuing it after the substantive decision on his request had been taken by the ACC. There was certainly no basis for seeking to maintain two sets of parallel proceedings for JR seeking to challenge that decision. The Judge was plainly entitled to deal with this claim on its merits, dismiss it for the reasons that he gave, and make a costs award in favour of R. The initial challenge was based on a misinterpretation of DCI Vaughan's letter and, as the Judge held, there was no decision in July 2019 that was susceptible of JR. In any event, as both Julian Knowles J and Swift J held, the grounds were unarguable. There is no other compelling reason for this Court to entertain the appeal.

11. The second of the underlying proceedings for JR, CO/3590/2020, sought to challenge a decision taken on 7 July 2020 described as a "refusal... pending the resolution and outcome of an extant appeal to the IOPC, to make a decision in relation to recusal". Permission was refused by William Davis J on the papers. The renewed application for permission is addressed by Swift J in paras 47 to 52 of his Judgment. He describes A's pleaded case as "very thin" – a reflection of its quality, not its length.

12. As the Judge identified, A's initial request that Operation Kobus be conducted by a different police force or that certain officers be removed from the investigation had been considered and determined by ACC Critchley in November 2019 against the background of the complaints of misconduct which were then still under investigation by the MP PSD, and by the time of this further request in July 2020 his decision was the subject of proceedings for JR (CO/636/2020). A's further request was made following the determination of the MP PSD's initial investigation into the underlying complaints, which A had appealed to the IOPC. It was in substance an invitation to revisit ACC Critchley's original decision. The MP PSD decided to wait until after the IOPC review of its investigation report and so informed A on 7 July 2020 in the terms quoted in para 49 of the judgment. As Swift J said, that was both legally permissible and a sensible course of action.

13. The first proposed ground of appeal is that the Judge failed to recognise that the claim was made "on the basis of the fresh failure to act upon fresh evidence", i.e. the report of the MP PSD (which had rejected the complaints). He did no such thing. The Judge was well aware that A was suggesting that the report was a justification for making a renewed request for recusal. As he said, "the suggestion in the pleading that because the PSD investigation had found no misconduct that itself provided cause for the MP to hand Operation Kobus over to

another police force is absurd". I agree with that comment which applies equally to the request to "recuse" the individual officers who had, at that stage, been exonerated. In any event, and irrespective of whether there was any justification for making another request for recusal of the MP (or of individual officers) before the appeal was determined, it was not arguably irrational to wait until after the IOPC had considered the appeal before addressing that request.

14. The next ground is that the Judge failed to deal with the issue of MP PSD's recusal from continuing to investigate A's complaints (as opposed to their removal from Operation Kobus itself) which was a new request. The short answer is that he was not obliged to do so. The challenge was to the rationality of a decision to abide the outcome of the appeal process before dealing with *any* requests for recusal, whether repeated or new. The decision as to who should investigate the complaints, if the appeal succeeded, was a matter for the IOPC. By making that request A was trying to pre-empt their decision. In the event, the IOPC upheld the appeal, though not on the basis that there was any evidence of corruption, and decided to remit the investigation to the MP PSD. That was a substantive decision and susceptible of challenge by JR. The question whether the MP PSD ought to continue with the investigation in those circumstances was therefore an issue which arose in the appeal, and if A was dissatisfied with the IOPS's decision in that regard, the matter was properly to be addressed in the JR of the decision to remit, and not by way of a challenge to the earlier decision to wait until after the appeal before considering the recusal requests.

15. Next it is claimed that Swift J erred in law by concluding that the exercise of police powers "can be done with bias" and/or that the bias test from *Porter v Magill* does not apply. I have already considered and rejected the *Porter v Magill* argument in my decision of 27 January 2023 refusing permission to appeal in CA-2022-000196 (on appeal from CO/636/2020) and need not repeat what I said on that occasion. Swift J rightly held that the correct legal test, when challenging a statutory investigation or its outcome, or decisions taken in the course of that investigation, including decisions as to the deployment of individual officers, is that of *Wednesbury* reasonableness. However, and more fundamentally, this is not a proper ground of appeal in this case. The "decision" under challenge in this claim for JR was NOT a substantive determination of a request to recuse, it was a rational decision not to consider that request until after the appeal was determined. What Swift J said in para 32 of his judgment, however relevant it may have been to a substantive determination, was plainly not addressed to this claim.

16. Next it is argued that Swift J erred in law by concluding that concerns about the integrity of police officers can be efficiently safeguarded by the CPS and the Courts. That is a somewhat startling proposition, but again this supposed ground of appeal has no bearing on any of the reasons given by Swift J for refusing permission to proceed with this particular claim for JR. It appears that A has simply chosen to re-hash his complaints about the determination of CO/636/2020 without giving any proper thought to the actual reasons given by the Judge for refusing permission in this particular case. This is illustrated by the fact that this ground of appeal is also addressed to what the Judge said in para 32.

17. "Ground 7" (the sixth ground of appeal in respect of this claim) is a challenge to the Judge's finding in para 52 which I have quoted in para 13 above. It is suggested that there is a difference between there being a "case to answer" and established misconduct, which of course there is, but transferring a substantial criminal investigation to another force is not a "light step" as A suggests, and it is hopeless to suggest that it would be arguably *irrational* for the Chief Constable or DCC or ACC to refuse a suspect's demands that a different force take over a criminal investigation or that individual officers be removed from that investigation merely on the basis that there is or was (in the complainant's view) a "case to answer" of serious misconduct which, upon investigation by the appropriate authority, had not been substantiated. Indeed it was not even established that there was a "case to answer" (and it was not Swift J's function to decide whether there was).

18. The question whether an individual police officer should continue to work on an investigation in circumstances in which the suspect has complained of misconduct by that officer but the complaint is still under investigation by the appropriate body, is quintessentially a matter of judgment for the senior officer charged with deployment. It involves a complex weighing of numerous factors which will vary from case to case. There is no generic rule that if there is some evidence to support the complaint of misconduct, there will invariably be a reason for concern about the officer's integrity or impartiality and they must be removed from the investigation before the complaint is determined (and, moreover, stay removed even if the complaint is dismissed - presumably on the basis that the "concern" has not been allayed). That contention flies in the face of the reasoning of the Supreme Court in *McQuillan*. In any event, this claim was not a challenge to a decision to reject the request for recusal.

19. "Ground 8" is fundamentally misconceived. It is a complaint that Swift J "did not consider the evidence". It seems clear from the skeleton argument (e.g. para 104) that A is labouring under the misapprehension that a rationality challenge is the same thing as a challenge to the merits of a decision, which it most certainly is not. In a case where the issue is one of *Wednesbury* reasonableness, the court does not and will not engage in second-guessing the merits of the decision itself. It cannot interfere on the basis that it would have reached a different decision. It is not an arguable error of law not to descend into the arena and usurp the decision-maker's function. The issue for the court is whether there is any real prospect of successfully challenging the decision in question on the specific public law grounds raised by the claimant in the claim for JR; sometimes, but not invariably, that will involve considering the information placed before the decision-maker, and how that information was assessed.

20. The judge was only obliged to consider the materials before him which related to each individual claim for JR,

primarily the decision(s) under challenge, the claim form and statement of facts and grounds, AOS and summary grounds of defence and any skeleton arguments (which are not evidence). It cannot be inferred from the fact that he did not expressly state in his judgment that he considered any relevant evidence that he failed to do so. I emphasise the word "relevant" because a claim for JR will not invariably require the court to consider the evidence that was placed before the decision-maker. It will if it is a ground of challenge that there was no evidence to support the decision, or that no reasonable decision-maker could have reached that decision on the basis of the evidence before them. *Golfrate*, on which A seeks to rely, was an example of such a case because the legality of the action complained of depended on whether there were reasonable grounds for suspicion and that question could not be answered without looking at the information available to the person seeking the search warrant. But in such a case it is incumbent on the claimant to plead that specific ground and to adduce the evidence relied on in support of it. The "boilerplate" Grounds adopted by A in most of his claims, including this one, in para 29, complained that the decision was irrational for five reasons which were adumbrated by the judge at para 50. It was not alleged in that paragraph that the decision was one that was not open to R on the evidence.

21. I reiterate that the decision under challenge in this claim was a decision to wait until the outcome of the appeal before taking any action on the fresh request for recusal. There was no need for Swift J to consider any of the material that was placed before ACC Critchley in order to determine whether *that* decision was irrational or unreasonable in the public law sense, in the light of the way in which the sole ground of challenge was pleaded. Irrespective of whether there was any merit in the latest recusal request, the outcome of the appeal plainly had a potential bearing on any future decision about that request. Although there was a single line in the lengthy narrative in the Statement of Facts and Grounds that "a decision to recuse is the only decision which could be made by a reasonable decision maker" there was nothing in that document which came close to supporting that contention. In any event it was not a Ground relied on in para 29.

22. "Ground 9" is a similarly misguided attempt to argue that the evidence relied on by A did not leave it open to the decision maker to wait until the outcome of the appeal before responding substantively to the fresh recusal request. This "Ground of Appeal" is not an arguable basis for challenging the Judge's decision to refuse permission to proceed. It appears to me that A is seeking to reargue (at length) the merits of A's underlying complaints of misconduct in an attempt to get the court to evaluate them and form its own view, instead of carrying out its review function.

23. In the course of considering this and the many other related applications for permission to appeal, I have read and digested the vast amount of material on which A seeks to rely, which has taken more than a week. However it is not for this Court to usurp the function of those charged with the duty of investigating complaints against the police, or of those who are responsible for the deployment of officers in criminal investigations. The fact that A alleges that the police and the IOPC have been turning a blind eye to or facilitating serious corruption does not mean that is what has happened, and thus far he has failed to substantiate those accusations to the satisfaction of anyone who has been responsible for considering them as part of the complaints process. It was the job of those charged with investigating the complaints, not the job of the court, to evaluate the evidence relied on and ascertain whether there was misconduct as alleged, and if so, what steps should be taken in response to it. It was not arguably irrational to resist attempts by A to short-circuit or bypass the investigative process in order to achieve his desired result. In this particular case there was no substantive decision either way on the request to recuse and A cannot treat the decision to wait as if it were such a decision.

24. There is no substance and no merit in any of the grounds of appeal. There is no other compelling reason for this Court to consider them. The Judge was right to certify this claim as TWM.

25. I have certified both appeals TWM because they were bound to fail and (although Swift J was charitable in not certifying the renewed application for permission TWM), the appeal in the first case sought to justify what was patently an abuse of the process.

Where permission has been granted, or the application adjourned, any directions to the parties (including, if appropriate, any abridgement of the 35 day time limit for filing evidence provided for in CPR 54.14)

Signed:
Date: Lady Justice Andrews
16 February 2023
BY THE COURT

Notes

(1) Rule 52.6(1) provides that permission to appeal may be given only where –
a) the Court considers that the appeal would have a real prospect of success; or

b) there is some other compelling reason why the appeal should be heard.

(2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.

(3) Rule 52.15 provides that, in granting permission, the Court of Appeal may grant permission to appeal or permission to apply for judicial review. Where the Court grants permission to apply for judicial review, the Court may direct that the matter be retained by the Court of Appeal or returned to the Administrative Court.

Case Number: **CA-2022-000243**