



Neutral Citation Number: [2022] EWHC 2004 (Admin)

Case No: CO/4729/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN MANCHESTER

28th July 2022

Before:

MR JUSTICE FORDHAM

Between:

THE QUEEN (on the application of

(1) SASHA LORD

(2) EZEKIEL TAYLOR

(3) KAYSHEAN SINGH-SHERI

- and -

**SECRETARY OF STATE FOR HEALTH AND
SOCIAL CARE**

Claimants

Defendant

David Lock QC and Hafsah Masood (JMW Solicitors) for the Claimants
Paul Skinner (Government Legal Department) for the Defendant

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HON. MR JUSTICE FORDHAM

Note: a non-confidential version of this judgment was released on 27 July 2022,
for finalisation (correction of typos) and formal hand-down on 28 July 2022.

MR JUSTICE FORDHAM:

Introduction

1. This is a Costs Determination, decided on the papers in a judicial review claim (see Administrative Court Judicial Review Guide 2021 §24.5). I consider it appropriate it should be in the public domain as a short judgment. Counsel's costs submissions referred me to R (Bahta) v SSHD [2011] EWCA Civ 895 [2011] 5 Costs LR 857 and its sequel R (M) v Croydon LBC [2012] EWCA Civ 595 [2012] 1 WLR 2607. As I explained in R (Wolverhampton City Council) v SSHD [2022] EWHC 1721 (Admin) at §1, my overriding objective is to do justice between the parties (M §32(iii)), having undertaken a reasonable and proportionate attempt to analyse the situation (M §36).
2. What happened in this case was that the Claimants brought a judicial review claim, part of which impugned the Table Meal Requirement ("TMR"), a pandemic-related requirement that alcohol only be served with a table meal. The claim was that the TMR was a measure constituting unjustified indirect discrimination contrary to section 19 of the Equality Act 2010 or section 6 of the Human Rights Act 1998 (Article 14 with Article 8) or was unreasonable in public law terms. Permission for judicial review of that measure on those grounds was granted on 5 February 2021 by HHJ Pearce. His decision on the papers was impressively careful, comprehensive and closely reasoned. He refused permission for judicial review in relation to other claims. Costs aspects relating to those were matters to be dealt with at that stage.
3. On 24 February 2021 the Defendant filed and served Detailed Grounds of Resistance and evidence in support. Two days earlier, on 22 February 2021, the Government published the "Roadmap" out of "Lockdown". That announcement made clear the Government's position: that the TMR would not be reimposed when hospitality could reopen. By a Consent Order dated 17 March 2021 the Claimant was granted permission to withdraw the claim for judicial review with directions as to costs submissions. These were provided from the Defendant on 24 March 2021, from the Claimants in response on 31 March 2021, and from the Defendant in reply on 8 April 2021. The papers came to me in July 2022. I do not know what happened in between. The parties, who helpfully provided me with a composite electronic bundle for speed of navigation, have waited patiently for a ruling. There are, in my judgment, two key issues.

Tolerable clarity

4. The Defendant's position is that the Claimant should be ordered to pay the costs of these proceedings, on the basis that it is "tolerably clear" who would have won, had the matter not settled (M §63). They say, in particular: that there is a statutory exemption so far as the 2010 Act is concerned; that the relevant "group" of black and minority ethnic people relied on by the Claimants for the discrimination analysis involve "a pre-existing state of affairs of relative poverty"; that the Claimants' reliance on Article 8 is based on a false premise that people could socialise with "members of other households", when this would not have been possible even absent the TMR; that the activity of members of "the same household" all going to the pub could not fall within the "ambit" of Article 8 "private life"; that no Article 14 "status" identifiable with objective criteria arises; that "in the context of a deadly pandemic in which it is known that hospitality plays a role in Covid spread, putting in place measures that help to limit that is plainly justified"; and that there was a "clear and rational basis" for "a measure intended to reduce transmission

of a deadly virus in a setting known to be a vector of transmission”. These points were and are hotly contested by the Claimants.

5. I am not prepared to enter into a “mini trial”, on the papers, for the purposes of determining costs in either direction. In think, at least in the present case, the idea of “tolerably clear” calls for a sufficient clarity. I would need a sufficiently high degree of confidence. The permission stage Judge saw no clean knock-out blow in any of these same points. That weighs with me. If these very same, supposedly straightforward, points had been a clear answer to this claim, they would have been clean knockout blows for the purposes of the permission stage. They were not. I cannot properly determine costs, in anyone’s favour, on the basis of who would have been likely to have won a substantive argument which never took place. I am in no position to recreate the arguments, and the way the analysis would have followed through, by having a pretend hearing in my head.
6. I think it may often be the case a defendant public authority will struggle to argue – thought they can try – that there is sufficient tolerable clarity for M (Croydon) costs-allocation purposes, that a judicial review claim would have failed, where (i) there is an independent change in circumstances which explains why the claim has been withdrawn and (ii) the supposedly ‘clear’ points are the same points which were (or could have been) taken as ‘clean knock-out blow’ points and yet (iii) permission for judicial review was granted by a High Court Judge who thought they were no such thing. It is sufficient to say that the Defendant has not succeeded in arguments of that kind in the present case.

Obtaining ‘the relief sought’

7. The Claimants submit that they should have their costs on the straightforward basis that they are the ‘winner’ and have obtained the ‘relief sought’. That is because the TMR requirement was confirmed as having been abandoned. They say the Court should treat with scepticism the Defendant’s contention that the decision to abandon the TMR was not the consequence of permission for judicial review having been granted in this case. They point to the fact that “underlying material to show that the decision was not influenced by the proceedings could have been evidence, but it was not”. They point to the fact that the Defendant did not inform the Claimants of the new policy position at the pre-action correspondence stage.
8. I have not been persuaded by those submissions either. In rather the same way as in the Wolverhampton case, I am satisfied that there was here a ‘bigger picture’, involving ongoing policy decision-making, on the policy merits. Moreover, I have a clear witness statement which is before the Court. A senior civil servant, in witness statement evidence (24 February 2021) supporting the Detailed Grounds of Resistance, verified by a statement of truth – in respect of which no application for cross-examination has been made – describes the change in the approach to hospitality. She says it was “taken due to the availability and successful rollout of vaccine”. She says: “if there was no rollout, the Government would not be able to adopt this new approach and the [TMR] could still be an appropriate risk reduction measure”. She says the “significant effect” of the vaccines “in reducing transmission” meant the TMR “is no longer considered necessary or appropriate”. Public authorities and their legal representatives owe a high duty of candour in judicial review cases. I have relied on this witness statement, for its truthfulness, and on the integrity of the Government lawyers involved in preparing it, with sight of the contemporaneous documents.

Conclusion

9. I am satisfied that the appropriate Order, in all the circumstances of this case, is no order as to costs.