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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 2373 (Admin)



No. CO/2973/2021

Royal Courts of Justice

Thursday, 7 July 2022

Before:

MRS JUSTICE LANG

B E T W E E N :

THE QUEEN
on the application of
CAGE ADVOCACY UK LIMITED

Claimant

- and -

SECRETARY OF STATE FOR EDUCATION

Defendant

MR D CHIRICO and MR D GRÜTTERS (instructed by Riverway Solicitors UK) appeared on behalf of the Claimant.

MR J AUBURN QC (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE LANG:

- 1 The claimant renews its application for permission to apply for judicial review of the defendant's letter of guidance ("the Letter") to headteachers and school leaders, dated 28 May 2021, headed "Antisemitic incidents within schools."
- 2 The claimant describes itself as an organisation that campaigns against discriminatory State policies and advocates for due process and the rule of law. It has a particular focus on the conflict in the Middle East.
- 3 Permission was refused on the papers by Poole J on 11 April 2022. Poole J also refused the claimant's application to admit expert evidence and that application is no longer pursued at the permission stage.

Time limits

- 4 The Letter was sent out on 28 May 2021 and it was publicised at the time. CPR 54.5 provides that claims for judicial review must be made (a) promptly and (b) in any event not later than 3 months after the grounds to make the claim first arose.
- 5 The claim was filed just within the three month longstop period. The three-month period expired on Saturday, 28 August 2021 and Monday, 30 August was a Bank Holiday. So time was notionally extended to the first working day thereafter, which was Tuesday, 31 August 2021, when the claim was, indeed, filed.
- 6 However, in my view, the claim was not made promptly. A letter before claim was not sent until 2 August 2021. The response was sent on 20 August 2021 but the claim was filed on the last possible day. I appreciate that the claimant has had other demands on its time, as it is described, but it chose to issue this claim and therefore it was obliged to comply with the requirements of the Civil Procedure Rules. Moreover, as the defendant said, promptness was particularly important in this case as the Letter was directed at a time-specific problem, the outbreak of military conflict in Israel/Palestine at that time, which has since subsided.

The Grounds

Ground 1

- 7 The claimant submits that the Letter contradicts and is inconsistent with s.406(1) and 407(1) of the Education Act 1996 ("EA 1996"). Section 406 is titled "Political indoctrination". Subsection (1) provides that:

"The local authority, governing body and head teacher shall forbid—
(a) the pursuit of partisan political activities by ... junior pupils, and
(b) the promotion of partisan political views in the teaching of any subject in the school."

Section 407 is titled "Duty to secure balanced treatment of political issues." It provides that:

"The local authority, governing body and head teacher shall take such steps as are reasonably practicable to secure that where political issues are brought to the attention of pupils...they are offered a balanced presentation of opposing views."

- 8 The meaning of these provisions was considered in *R (Dimmock) v Secretary of State for Education and Schools* [2007] EWHC 2288 (Admin).
- 9 The claimant submits that the Letter promotes the defendant's partisan political view of support for Israel's right to exist and so is likely to lead schools to adopt this view and promote it, which is contrary to s.406(1) of the EA 1996. The claimant further submits that the Letter is likely to prevent schools from ensuring a balanced presentation of one of the opposing views on the subject of Israel/Palestine in breach of s.407(1) of the EA 1996.
- 10 In my judgment, it is unarguable that the Letter is in breach of s.406 or s.407 of the EA 1996. On a fair reading, it reminds schools of their legal duties under s.406 and s.407 in the context of incidents of antisemitism with which the Letter is specifically concerned. It is not contrary to the guidance given in the case of *Dimmock*.
- 11 The passage that the claimant particularly focuses on in the Letter reads as follows:

“Schools should not present materials in a politically biased or one-sided way and should always avoid working with organisations that promote antisemitic or discriminatory views. Schools should be particularly wary of potential bias in resources which claim to present the conflict in a balanced manner. Schools should not work with or use materials from organisations that publicly reject Israel's right to exist.

There are reputable organisations that can support schools to teach about this sensitive topic in a balanced way, avoiding antisemitic and other discriminatory narratives...”

The Letter then goes on to recommend three organisations.

- 12 The claimant expresses concern that the Letter will prevent schools from working with legitimate organisations which would provide a view that would balance the one-sided view of those organisations which support Israel's right to exist. The claimant has not been able to provide any specific examples of such organisations being excluded from schools.
- 13 In my view, the defendant was entitled to warn schools of the risks of working with organisations that promote antisemitic or discriminatory views whilst purporting to present the Israeli/Palestinian conflict in a balanced manner. Organisations which publicly reject Israel's right to exist are likely to fall into this category. The defendant notes and supports the definition of antisemitism developed by the International Holocaust Remembrance Alliance (“IHRA”). This includes within it, as an example of antisemitism:

“Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavour.”

This illustrates how rejecting the existence of a State of Israel can be used as a front for antisemitic views.

- 14 In my view, the Letter was making a similar point, expressed in a way appropriate to a letter of guidance to schools. The defendant was not purporting to express any views as to the international law status of Israel, which the claimant spent some time addressing. The defendant was addressing a concerning increase in antisemitic incidents in schools. This was in accordance with his general duty under s.149 of the Equality Act 2010 to have due

regard to the need to eliminate discrimination in the exercise of his functions as Secretary of State.

15 For all these reasons, permission is refused on ground 1.

Ground 2

16 The claimant alleges direct and indirect discrimination contrary to the Equality Act 2010 under ground 2. The claimant submits that the Letter was directly discriminatory because it failed to recognise the significance of the Palestinian issue for Muslim pupils and to make any attempt to address the negative impact they may have been experiencing as a result of the recent escalation of the conflict. Muslim students were being sanctioned by their schools for their expressions of solidarity with the Palestinian cause. A number of cases came to the attention of the claimant at that time.

17 In my judgment, the defendant is correct to submit that the Letter did not treat Muslim students in a particular manner because of their religion and did not treat Muslim students less favourably than other students. The Letter stated:

“...It is unacceptable to allow some pupils to create an atmosphere of intimidation or fear for other students and teachers.”

That guidance was applicable to all students, Muslim and non-Muslim alike.

18 The Letter was deliberately restricted to one specific form of discrimination, namely antisemitic incidents affecting Jewish pupils. The defendant was entitled to take the view that Jewish and Muslim pupils were not in a comparable position. I do not think that it can be inferred from the issue of one letter that the defendant would not take any action in relation to discrimination against students of other religions, such as Muslims, if, in his view, it was appropriate to do so.

19 Ultimately the claimant submits that the defendant discriminated indirectly against Muslim pupils because the Letter was a provision, criterion or practice which impeded or failed to protect the rights of those with a strong personal interest in the plight of Palestinians from exercising their freedom of expression and of assembly and association. It was not a proportionate means to achieve a legitimate aim.

20 In my view, the Letter provided for compliance with existing legal duties and impartiality and the avoidance of antisemitism. This applied to all pupils, including Muslim pupils. The Letter stated:

“It is unacceptable to allow some pupils to create an atmosphere of intimidation or fear for other students and teachers.”

It is plainly justifiable to seek to curb antisemitic behaviour in this way, for the legitimate aim of protecting the rights and freedoms of those subjected to antisemitism.

21 For these reasons, permission is refused on ground 2.

Ground 3

- 22 The claimant submits that if the defendant consulted with organisations or individuals who are supportive of Israel before sending the Letter, he should also have consulted with organisations or individuals supportive of Palestine.
- 23 I accept the defendant's submission that the claimant has failed to establish any legal duty to consult before sending the Letter. There is no statutory duty to consult and there was no promise or prior practice of public consultation. There was no public consultation on this occasion. At its highest, there was only discussion with stakeholders, which is quite different to consultation.
- 24 Therefore, permission is refused on ground 3.

The February 2022 guidance

- 25 In the renewal application, the claimant questioned whether the Letter had been withdrawn or superseded by the defendant's formal guidance on Political Impartiality, issued by the new Secretary of State on 17 February 2022. The defendant has explained in correspondence, and in its skeleton argument, that whereas the Letter of 28 May was directed at a specific problem, namely the increase in antisemitic incidents in schools in May 2021 during an outbreak of military conflict in Israel and Palestine, the February 2022 guidance to schools is of general application and is more detailed and extensive. It does briefly address the Israeli/Palestinian issue.
- 26 I accept that the two documents are based on the same principles and there is no incompatibility between the two. In my view, the starting point for schools will now be the formal guidance issued on 17 February 2022 but on the specific issue of antisemitism schools should also have regard to the supplementary guidance in the letter of 28 May 2021, unless or until it is withdrawn by the defendant.

Conclusion

- 27 My conclusion overall is that permission to apply for judicial review is refused.

LATER

- 28 In the order dated 11 April 2022, Poole J ordered the claimant to pay the defendant's costs of preparation of the acknowledgement of service, summarily assessed in the sum of £6,863. That was the amount claimed in the defendant's statement of costs and the amount that the defendant seeks to have confirmed today.
- 29 The claimant filed a notice of objection in which it contended that the costs claimed were disproportionately high given the nature of the claim. It makes specific complaints of duplication of work and/or unreasonable costs in para.4(v) of its notice. It also complains about the billing in the light of the instruction of Queen's Counsel at para.(vi).
- 30 I have given careful consideration to these objections. However, in the light of the points made in the defendant's written response to the objections, supplemented by oral submissions today, I am satisfied that the defendant's claim for costs is both reasonable and proportionate given the sensitive and unusual nature of the claim and the volume of material that had to be considered. Therefore, I confirm the order made by Poole J.

CERTIFICATE

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This transcript has been approved by the Judge.