Neutral Citation Number: [2022] EWHC 3174 (Admin)

Case No: CO/1297/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2022

Before :

The Hon. Mr Justice Bourne

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Between :

THE KING on the application of JOSEPH EJIOFOR	**Claimant**
- and -	
THE COMMISSIONER FOR LOCAL ADMINISTRATION IN ENGLAND	**Defendant**
- and -	
(1) LONDON BOROUGH OF HARINGEY **(2) MR X**	**Interested Parties**

- -

Leo Davidson (instructed by **Edwards Duthie Shamash**) for the **Claimant**
John Bethell (instructed by **Bevan Brittan**) for the **Defendant**

Hearing dates: 1 December 2022

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Approved Judgment

This judgment was handed down remotely at 10am on 12 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Hon. Mr Justice Bourne:

Introduction

1. This is a renewed application for judicial review, permission having been refused on the papers by Heather Williams J on 5.7.22.

2. The claimant challenges a decision by the defendant to include his name in a report dated 10.1.22. The report followed an investigation into a complaint made by the Second Interested Party about the actions of the First Interested Party ("the Council") in connection with the proposed acquisition and demolition of his property. In 2020 the claimant was the Leader of the Council. The Council had planned to re-develop a site which was occupied by council tenants and by two private houses, one owned by the second interested party ("Mr X"). In June 2019 it purchased the other private house for £2.15m. There were discussions with Mr X about a price, but in March 2020, the claimant and other political representatives met with some of the council tenants. After that meeting the claimant, acting unilaterally, decided on the Council's behalf that Mr X's house would not be bought. As Leader, he was entitled by the Council's constitution to make the decision alone. Following a complaint by Mr X, the defendant investigated and made a finding of maladministration in respect of this decision, in that there was a lack of proper scrutiny and analysis in the decision to abandon the scheme after public money had been spent on the purchase of the first house.

3. Section 30(3) Local Government Act 1974 provides:

> "(3) Apart from identifying the authority or authorities concerned, the report shall not —
> (a) mention the name of any person, or
> (b) contain any particulars which, in the opinion of the Local Commissioner, are likely to identify any person and can be omitted without impairing the effectiveness of the report,
> unless, after taking into account the public interest as well as the interests of the complainant (if any) and of other persons, the Local Commissioner considers it necessary to mention the name of that person or to include in the report any such particulars."

4. On 7 October 2021 the defendant's draft report was sent to the Council and to Mr X. The draft report used the claimant's name throughout and stated at paragraph 6: "We have decided to name Councillor Ejiofor. This is because we consider it is in the public interest to do so."

5. The draft was accompanied by a covering letter which stated that the ombudsman considered it particularly important that the claimant have the chance to comment because it was intended to name him.

6. About four months earlier, the claimant had ceased to be Leader, having been narrowly defeated in what he described as an acrimonious Leadership battle among the Labour Group on the Council. However, he was still a member of the Council and there was therefore no difficulty for the Council in contacting him.

7. The Council forwarded the report to the claimant on 8 October 2021 by email and asked for a response by 26 October 2021. The claimant says that he did not read the email. His explanation is that at this time, he was recovering from the impact on him of losing the leadership 4 months earlier. In his witness statement he expressed the hope that the Court would understand "why I did not turn my attention to an email of the provenance described, having a lack of apparent importance".

8. As a result of overlooking that email, the claimant did not realize that he was named in the report until 19 January 2022, after it had been published.

9. The thinking behind the decision to name him is evidenced by notes kept by the defendant and his investigators.

10. On 17 August 2021 an investigator noted: "'I have to refer to the leader as it is key to the ability or not to make the decision so it will be clear who it is."

11. On 23 September 2021 the investigator noted: "to make any sense [in the Report] we have to say it was the leader of the Council and then it would be clear who it was anyway".

12. On 6 October 2021 a note by the ombudsman referred to the terms of section 30(3) and said:

> "Given the role played by the former leader, the impossibility of anonymizing his position, the seniority of his role, and the public interest in providing transparency and accountability around these events, I do consider it necessary to name him. The statement you have included in para 6 is helpful and sufficient to explain this decision. We should of course alert him to this, prior to publication, if we have not already. He should also see a copy of the draft, either through the Council if we are confident it will do that, or direct from us if we have any doubts."

13. The Council responded to the draft report with a letter from its Head of Legal on 28 October 2021, objecting to the proposal and suggesting that the claimant merely be identified as "Leader".

14. The defendant gave the matter further consideration. On 16 December 2021 the investigator noted:

> "We said to the [Council] that we would consider whether we name the councillor and will let them know our decision before we issue. [The ombudsman] was happy to name, his comments are here. I don't feel strongly about it. On the one hand there is no point not naming him, it has been in the press before and I am sure they will pick up on this. It will be obvious who it is. But you could say as that is the case then there I [sic] no need to name him. [Mr X] would like him named."

15. The defendant's Director of Investigations then considered the matter again and concluded:

> "… on balance, I think we should name the Leader. [the ombudsman] agreed this approach and the Council has not provided a substantive argument which would justify changing it. As you say, it would not take much of an internet search to work out who the Leader was, and it is in the public interest for us to be transparent in the circumstances. The Cllr has had an opportunity to comment on the draft report."

16. The defendant wrote to the Council on 4 January 2022, stating that the Ombudsman considered it would be in the public interest to name the claimant and that the report would be issued on 10 January 2022. The Council responded on 6 January 2022 with a further comment on the report but not on this issue. A further note by the defendant's Director of Investigations and the covering letter accompanying the final report emphasized the need for transparency on the question of how the Council's decision had been made.

17. The Ombudsman derives his powers from the 1974 Act and generally has a wide discretion to adopt the procedure that he thinks appropriate and to decide whether there has been maladministration. Various cases have emphasized that the Courts will interfere only when it is clearly necessary to do so. For example, in *R (Doy) v Commission for Local Administration in England* [2002] Env. L.R. 11 at paragraph [16], Morison J. said:

> 'In essence, the Ombudsman and not the court is the arbiter of what constitutes maladministration. The court's supervisory role is there to ensure that he [h]as acted properly and lawfully. However much the court may disagree with the ultimate conclusion, it must not usurp the Ombudsman's statutory function. It is likely to be very rare that the court will feel able to conclude that the Ombudsman's conclusions are perverse, if only because he must make a qualitative judgment based upon his [his department's] wide experience of having to put mistaken administration onto one side of the line or the other."

18. Leo Davidson, counsel for the claimant, advanced five renewed grounds for judicial review:

    (1) Section 30(3) places different restrictions on two separate acts, i.e. naming a person and including particulars which are likely to identify a person, but the defendant wrongly conflated them.

    (2) The defendant failed to take the claimant's interests into account when deciding to name him.

    (3) The defendant failed to apply the correct test of whether naming was "necessary".

    (4) The decision to name the claimant was procedurally unfair because he was not given sufficient opportunity to comment on the proposal.

    (5) The decision was insufficiently reasoned.

The claim in general and the construction of section 30

19. This claim faces the particular difficulty that the report was published nearly one year ago. The naming of the claimant cannot be reversed. If he is right, then at most this Court could declare that he should not have been named. It would now be surprising if a Court required the defendant to reconsider the decision to name the claimant.

20. The practical usefulness of this claim, assuming it to have merit, is therefore distinctly limited.

21. Mr Davidson responds to that concern by emphasizing his submission that, on a proper construction of section 30, naming the claimant, over and above any specific criticism of his conduct in the report, indicates a particular level of personal censure against him. So, Mr Davidson submits, an order quashing the decision to name him would help to restore his reputation.

22. In my judgment, that construction of section 30 is not arguable. The section does not focus on the position of a person criticised in a report. Instead, the restraint on identification applies to "any person". Whilst that may often mean that a person criticised will have the benefit of anonymity, the apparent purpose of the section is not to create some calibrated scale of censure. Its clear purpose is to protect confidentiality generally – when it is appropriate to do so – as was recognised in a judicial comment on a similarly worded provision in *Hession v Health Service Commissioner for Wales* [2001] EWHC Admin 619 at [7].

23. That is demonstrated by the fact that section 30(3) enjoins the ombudsman to take into account, among other things, "the interests of the complainant (if any) and of other persons", but makes no specific reference to the interests of any person facing criticism in the report. I accept that such a person can be included in the broad phrase "other persons", but if the statutory purpose were or included a restraint on naming as a heightened form of criticism, it would be bizarre for the section not to direct specific regard to be had to the interests of such a person.

24. There is no arguable ambiguity in section 30, nor any arguable assistance to be derived from the legislative history. Its clear meaning in my judgment cannot be further illuminated by the fact that it was amended to add, and later to remove again, a provision stating that a member who was found to have participated in maladministration and breached the National Code of Local Government Conduct would be named unless it was unjust to do so.

25. I conclude that even if the Court were persuaded that the decision to include the claimant's name was unlawful, a quashing order would serve little if any purpose, and it is hard to see any real point of declaratory relief.

Delay

26. Moreover, a quashing order would obviously cause administrative confusion. The existing report cannot now be removed from the public domain. There would presumably have to be a corrected version, and therefore two competing versions would be in the public domain.

27. That in turn emphasizes that delay is a very important consideration in this case. Whether or not more should have been done to bring the draft report to the claimant's attention, the fact is that it was sent to him on 8 October 2021 in an email which he did not read. That omission led to the present situation in which a report has been published but, months later, he seeks an order declaring it to be unlawful.

28. This judgment is not intended to indicate a lack of understanding of why the claimant overlooked the email on 8 October 2021. But that does not change the consequence of that omission. Once the report was published, it may well already have been too late to limit its transmission in any way, and too late to persuade a Court to interfere with it. But on any view, a challenge to the lawfulness of the report would have had to be pursued with the utmost urgency. One would also have expected to see an application for interim relief, and the outcome of such an application might well have decided the overall fate of the claim.

29. Instead, the claim was not issued until 8 April 2022. By reference to the date of the report (rather than its publication) which was 10 January 2022, this was right at the end of the 3 month long stop time limit. On any reasonable view, this claim, with its potential administrative consequences to which I have referred, was not issued promptly. Nor was it accompanied by any application for interim relief or expedition.

30. Delay would therefore provide a powerful reason to refuse permission for the judicial review claim, subject only to any countervailing force of the substantive merits of the proposed claim.

Ground 1

31. In my judgment the reasons for the defendant's decision are found in the note of 6 October 2021 quoted at paragraph 12 above. Although there was subsequent discussion and consideration of the question and it was tightly paraphrased in the report, the decision and reasons did not change.

32. That decision did not conflate the questions of (1) publishing the claimant's name and (2) publishing the identifying fact that he was Leader of the Council at the relevant time. Publication of the latter was a given because the report obviously would not make sense without it. The defendant therefore was only considering whether to publish the claimant's name. In accordance with section 30, he decided that it was necessary to do so.

33. Ground 1 is therefore not arguable.

Ground 2

34. Nor is it arguable that the decision was rendered unlawful by any failure to take the claimant's interests into account.

35. What was at stake was not the identification of the claimant as the person who took the controversial decision. He already was identified as that person, and the defendant's staff noted that the matter had had press coverage. There could be no

doubt that the person criticised in the report was him. All that was at stake was whether his name, which was already in the public domain, should also appear in the report.

36. Therefore ground 2, like ground 1, depends on the proposition that a decision to name an individual in a report connotes or expresses an elevated degree of censure. Since that is not arguable, ground 2 must fail.

37. Nor, in any event, do I think there is any prospect of the Court concluding that his interests were not taken into account. The claimant has not identified any very specific aspect of his interests as being relevant, save for the obvious one of his political reputation. It seems to me that when the defendant considered the question on 6 October 2021 and thereafter, the obvious potential impact on the claimant's reputation was implicit in that very consideration.

38. I also do not see what weight his interests could even arguably have carried. Where officials happen to be mentioned in a report, the inclusion of their names may violate a right to confidentiality. That is why section 30(3) is there. But where a person is elected leader of a local authority and acts in that capacity, I fail to see how they have any general expectation of confidentiality in any scrutiny of their actions, and nothing has been identified which introduced such an expectation into these particular circumstances.

Ground 3

39. Mr Davidson submits that the defendant failed to apply the statutory test of necessity. Emphasizing the demanding nature of that test, he draws a contrast with the broader discretion generally enjoyed by statutory ombudsmen to decide matters of both substance and procedure.

40. By reference to paragraph (b) of section 30(3), he also points out that identifying particulars other than names may be included if, in the ombudsman's opinion, they cannot be omitted without impairing the effectiveness of the report. Therefore, he submits, "necessary" in this context must mean something more than merely the fact that the omission of information would make a report less effective.

41. Mr Davidson therefore submits that there is no evidence of such a heightened test being applied. He also submits that the Ombudsman's Investigation Manual, to which the defendant has said that he had regard in this case, gives wrong advice at paragraph 29.3 where it states:

> "We should not normally name anyone involved in a complaint apart from the [public body] unless it is in the public interest to do so. We want to protect the anonymity of the complainant and other individuals (including other residents in a care setting and/or staff who are not at a senior level) unless it is absolutely necessary to include particulars that are likely to identify them for the effectiveness of the statement/report. Care will need to be taken about what level of detail to include about the complainant."

42. The complaint is that the test is more demanding than "in the public interest" and that section 30(3) does not make different provision for senior staff.

43. This ground is also not arguable. Although the report explained the naming by reference only to the public interest, that was a reasonable plain English paraphrase. The more detailed reasons in the note made on 6 October 2021 show that the defendant had in mind, and applied, a test of necessity. None of the other evidence can show that this test was not applied. I also do not think it arguable that "necessary" has any special technical meaning in this context. Nor is it appropriate to comb through the wording used by the defendant or his staff in the hope of detecting a legal error. Instead, the defendant judged naming to be necessary. He gave reasons, to which there is now no irrationality challenge. It also seems to me that the manual does no more than state the obvious, i.e. (1) naming will usually not be necessary unless it is in the public interest and (2) the test may yield different results depending on the seniority of the post held by the individual.

Ground 4

44. It is not arguable that the claimant was given insufficient opportunity to comment. I do not know what contact details the defendant had for the claimant, and it might have been better to send the draft report to him directly. However, there is no prospect of the Court concluding that sending the draft report to the Council with an express instruction to share it with a member of the Council was not reasonable or not sufficient. I also have no reason to believe that the claimant would have taken more notice of an email from the defendant than he took of the email from the Council.

Ground 5

45. Nor is it arguable that insufficient reasons were given.

46. Indeed, it should not necessarily be assumed that the defendant was bound to give reasons for including a name in a report. Be that as it may, whilst the single line explanation in the report itself can be criticised for not using the word "necessary", it was plainly sufficient in the circumstances because the rationale for the decision was very simple. The circumstances of this case meant that including the name of an individual, who could so easily be identified in any event, was in the public interest and therefore necessary.

47. Even if I am wrong about the sufficiency of the passage in the report, the reasons given in the note made on 6 October 2021 were entirely sufficient and, as I have said, I do not consider that any subsequent document can be interpreted as changing them. So even if there was a technical deficiency in the report on this point, it has been rectified for all practical purposes, and any merit in this ground would not justify a grant of permission.

Conclusion

For the reasons which I have set out in relation to the grounds of challenge, and also because the claim was not brought promptly, permission is refused.