

Public / Human rights

Public rights & wrongs

Robert Latham reports on disclosure, cross-examination & equality

IN BRIEF

- When the outcome of a judicial review application might depend on the determination of a factual dispute, urgent consideration should be given to ordering disclosure and cross-examination.
- A council's obligation to give due regard to its equality duties under the Disability Discrimination Act 1995, Sex Discrimination Act 1975 and the Race Relations Act 1976.

R (*Al-Sweady and Others*) v *Secretary of State for Defence* [2009] EWHC 2387 Admin (2 October 2009) raised hotly contested issues of fact as to whether members of the British army killed or tortured Iraqis, whom they had taken prisoner on 14 May 2004. The claimants contended that the rights of the prisoners under Arts 2, 3 and 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) had been infringed. The extent of the factual disputes and the failure of the secretary of state to give proper disclosure meant that the hearing of the judicial review application lasted for 20 days in April and May 2009 and 10 live witnesses were heard.

The secretary of state finally accepted that he could not give the reassurance that all material documents had been disclosed. The claimants then obtained the relief they sought, namely a fresh investigation into the allegations of murder and torture sufficient to comply with Arts 2 and 3 of the Convention.

The Divisional Court (Scott Baker LJ, Silber J and Sweeney J) gave its judgment on 2 October 2009 to explain how and why they dealt with a number of novel problems that arose during the hearing. On 10 July 2009 ([2009] EWHC 1687 (Admin)) the court gave a separate judgment dealing with the “disturbing failures” of the secretary of state in handling Public Interest Immunity Certificates.

In the instant judgment, the secretary of state's approach to disclosure was described as “lamentable” and led to an award of indemnity costs. The secretary of state's disclosure obligations had proved a constant and repeated source of friction and difficulty both before and during the hearing. The court paid tribute to the claimants' legal advisers who, although greatly outnumbered by the secretary of state's legal team, had persisted with their requests for disclosure skilfully and with commendable determination.

The usual procedure in judicial review is for there to be no oral evidence. In so far as there are factual disputes between the parties, the court is ordinarily obliged to resolve them in favour of the defendant (see *R v Board of Visitors of Hull Prison ex parte St Germain (No2)* [1979] 1 WLR 1401, per Lane LJ at 1410H).

Hard-edged questions

The court observed that, if that approach had been adopted in the current case, the secretary of state would have succeeded. It would have had the more far-reaching consequence that a defendant would always succeed if sued for an infringement of human rights which was disputed. A different approach was needed because these “hard-edged” questions of fact represented an important exception to the rule precluding the court substituting its own view in judicial review cases. The court was satisfied that it was necessary

to allow cross-examination of makers of witness statements on those “hard-edged” questions of fact. The court envisaged that such cross-examination might occur with increasing regularity in cases where there are crucial factual disputes between the parties relating to jurisdiction of the Convention and the engagement of its articles.

There is usually no order for disclosure in the Administrative Court (see Civil Procedure Rules, PD 54 12.1). Public authorities are under an obligation to make full disclosure to the court to explain the decision making process (see *R v Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763, per Lord Woolf MR at 775C).

For there to be effective cross-examination, the court recognised that it was vital for there to be full disclosure. Otherwise the evidence of witnesses could not be effectively challenged and appraised with the consequence that the truth would not have been discovered. Claims under Arts 2 and 3 relate to the most basic human rights. It was therefore incumbent on the court to consider with great care and to apply intense scrutiny to any claim that any of these three basic human rights had been infringed. This means that the duty of disclosure on the part of the defendant to such a claim is even more acute.

The court concluded that when it becomes clear that the outcome of a judicial review application might depend on the determination of a factual dispute, urgent consideration should be given to ordering disclosure and cross-examination. The parties and the court should always scrutinise with care the stance of parties to judicial review applications (and in particular those concerning human rights claims) to ascertain if there is any critical factual issue which requires orders for cross-examination of the makers of witness statements or disclosure as being necessary in order to resolve the matter fairly and accurately.

Courts should not be reluctant to make such orders in suitable cases, which are especially likely to arise in claims based on the Convention.

Disability equality duties

On 16 June 2008, the cabinet of the London Borough of Hammersmith and Fulham (the Council) decided to charge for its non-residential home care services pursuant to the Health and Social Services and Social Security Adjudications Act 1983 (HSSSSAA 1983), s 17. The three appellants, who were disabled service users, instructed the Public Law Project to challenge this decision (*R (Domb and others) v Hammersmith and Fulham LBC (The Equality and Human Rights Commission intervening)* [2009] EWCA Civ 941, [2009] All ER (D) 42 (Sep) (8 September 2009)).

Their complaint centred on the council's alleged failure to have due regard to its disability equality duties contained in Disability Discrimination Act 1995, s 49A. They also complained of the council's failure to have due regard to its gender and race equality duties under the broadly equivalent provisions of the Sex Discrimination Act 1975, s 76A and the Race Relations Act 1976, s 71. Between 2000 and 2006, the council had exercised its power under HSSSSAA 1983 to charge for home care services. In 2006, that policy was discontinued by the then Labour administration. The Conservatives won the May 2006 local government elections on a manifesto which included a policy of not charging for the services.

Financial pressure

However, over the next two years, the council experienced increasing financial pressure on its budget, including its social services budget. Officers identified two ways of bridging the gap in funding by:

- (i) increasing the threshold eligibility criteria; or
- (ii) introducing charges for them.

On 17 January 2008 the council embarked on a three-month consultation process on the possibility of re-introducing a home care charging scheme. Meanwhile, on 4 February 2008, the council agreed the budget for 2008–09. This included a 3% cut in the council tax. This decision was taken in the context of a medium term financial strategy; a forecast of increasing spending on home care services because of demographic changes and restrictions on funding on a national level.

The application initially came before Sir Michael Harrison on 19 December 2008. A challenge based on legitimate expectation was dismissed, and this was not renewed on appeal. Although the

judge had some criticisms of the manner in which the council had approached their equality duties, he was satisfied that they did have “due regard” to their general equality duties. He concluded: “The council did in substance, not just in form, have due regard to eliminate unlawful discrimination and to promote equality of opportunity in relation to the relevant equality duties in this case.”

The primary point taken on appeal was the council's positive duty to promote disability equality. It was argued that the council could not be said to have paid due regard to that duty in circumstances where the options which were considered were limited to imposing a charging scheme or raising the eligibility threshold. The positive duty required a consideration across the whole budgetary canvas. If the budget had to be balanced, it could have been done by forgoing the council tax reduction, or by reducing services elsewhere, or by imposing higher charges elsewhere. This argument was rejected. Rix LJ gave the lead judgment, with concurring judgments from Lord Clarke MR and Sedley LJ.

Rix LJ (at para 52) summarised the evolving jurisprudence on the scope of the equality duties:

- there is no statutory duty to carry out a formal impact assessment;
- the duty is to have “due regard”, not to achieve results or to refer in terms to the duty;
- “due regard” does not exclude paying regard to countervailing factors, but is “the regard that is appropriate in all the circumstances”;
- the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking;
- the duty must be performed with vigour and with an open mind; and
- it is a non-delegable duty.

During the course of the appeal, David Wolfe, counsel for the appellants, was forced to concede that the 3% council tax was a fixed datum. This decision had not been challenged at the time. It could no longer be asserted to be a component in the submission of a failure to have due regard to the council's positive duty to promote equality of opportunity.

In substance, the council had therefore had two options namely to: (i) introduce the charges; or (ii) restrict the eligibility criteria. The council had carried out a “Predictive Equality Impact Assessment” (PEIA). Rix

LJ held that it had not been irrational for the council to conclude that there was a positive impact for disadvantaged groups, namely that charging would enable it to continue to meet the population's growing adult social care needs at the current threshold for services.

Negative impact

The appellants also argued that the council had failed to have due regard to the negative impact on grounds of gender and race. The PEIA had identified that a disproportionate number of service users were women and black and Asian. These negative factors had not made their way into the report considered by the council. These arguments were rejected. The council contended that because the incomes of these users were lower than other services users, there would be no disproportionate adverse impact, as the charges were to be means tested. The court was satisfied that this conclusion was neither unreasonable nor perverse.

In his concurring judgment, Sedley LJ noted that the outcome of the appeal was inevitable, given that the appeal had been conducted on the “highly debatable premise” that the 3% cut in council tax had to be implemented. “The object of this exercise was the sacrifice of free home care on the altar of a council tax reduction for which there was no legal requirement. The only real issue was how it was to be accomplished.” All members of the court voiced misgivings as to how this issue had been approached. Sedley LJ summarised his concern in these terms: “There is at the back of this a major question of public law: can a local authority, by tying its own fiscal hands for electoral ends, rely on the consequent budgetary deficit to modify its performance of its statutory duties?” This is an issue which the Administrative Court is likely to revisit as the public sector faces an ever more hostile financial environment.

The government intends to enact its Equality Bill prior to a General Election in May 2010. Its current plan is to bring into effect the new public sector equality duty which is to be found in clause 145, in October 2010. The new clause embraces all the strands of the equality duties which are currently to be found in the different statutory codes. It specifies particular matters to which a public authority shall have regard. It is unclear what impact a change of government would have on these plans. NLJ

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