Neutral Citation Number: [2023] EWCA Civ 306

Case No: CA-2022-000567

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Cavanagh

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2023

Before :

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal (Civil Division))

- -

Between :

JASKEERAT SINGH GULSHAN	**Appellant**
- and -	
THE LORD CHANCELLOR	**Respondent**

- -
- -

Parminder Saini (instructed by **Direct Access**) for the **Appellant**
Katherine Apps (instructed by **the Treasury Solicitor**) for the **Respondent**

Hearing date: 9 February 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Underhill:

INTRODUCTION

1. This is an application for permission to appeal against a refusal by Cavanagh J of permission to apply for judicial review. I will refer to the Applicant as the Claimant. The Lord Chancellor is the Defendant in the proceedings as the Minister responsible for His Majesty's Courts and Tribunal Service ("HMCTS"). The Claimant has been represented before us by Mr Parminder Saini and the Lord Chancellor by Ms Katherine Apps: both also appeared before Cavanagh J.

2. For the purpose of the issues that we have to decide, the background to the claim can be stated very briefly:

   (1) On 8 April 2021 the Claimant attended Ealing Magistrates Court in order to support a relative who was appearing there. He is in fact a barrister, working for a firm of solicitors as an immigration and family lawyer; but that is not the capacity in which he was present on that occasion.

   (2) The Claimant is an observant Sikh. In accordance with the tenets of his faith he always wears a kirpan, which is a small curved knife in a sheath.

   (3) Sections 52-55A of the Courts Act 2003 give court security officers a variety of powers, including to exclude persons from court buildings and to require the surrender of various articles, including knives. At the relevant date guidance as to the exercise of those powers was given in version 11 (published in 2018) of Security and Safety Operating Procedures Guidance issued by HMCTS. Section 4 (e) of the Guidance provided that:

   > "Where a member of the Sikh community wishes to enter a court building, they can bring in a Kirpan that meets the following requirements:
   >
   > - Overall length is no more than six inches,
   > - Blade is no more than four inches in length.
   >
   > If the Kirpan exceeds these lengths, permission to enter may be refused but the senior person onsite must be consulted before any decision is taken."

   I will refer to that part of the Guidance as "the Kirpan Guidance". It was common ground before Cavanagh J, and he accepted, that the final sentence gave officers a discretion, if they judged appropriate after consulting the senior person onsite ("the SPOS"), to allow a person to bring in a kirpan of more than the prescribed length.

   (4) The Claimant was wearing a kirpan which was eight inches long and was denied access to the court on that basis. According to his account he was treated unreasonably and disrespectfully by the officers; but the Lord Chancellor's Summary Grounds of Defence give a different account in which it was the Claimant who behaved unreasonably. It is unnecessary to go into the details.

3. The Claimant issued judicial review proceedings challenging the lawfulness both of the Kirpan Guidance and of the way that he says he was treated by the security officers at the Magistrates Court. Mr Saini confirmed both to Cavanagh J and to us that the primary focus of the claim was on the lawfulness of the Guidance.

4. Permission to apply for judicial review was refused on the papers by May J. At a hearing on 10 March 2022 the Claimant's renewed application for permission was refused by Cavanagh J.

5. The Claimant applied for permission to appeal against that decision. Although such an application is normally determined on the papers, Dingemans LJ directed an oral hearing because there were apparent issues about whether the claim was academic and about the effect of section 31 (3C) of the Senior Courts Act 1981 on which he believed the Court might benefit from oral submissions. At the hearing we heard submissions from both counsel. We reserved our decision.

A PRELIMINARY POINT

6. In his written representations opposing the grant of permission to appeal the Lord Chancellor said that since Cavanagh J's judgment HMCTS has promulgated a new version of the Kirpan Guidance, in different terms, and that accordingly the pursuit of a challenge to the previous policy was academic. He subsequently applied to adduce evidence in the form of a witness statement from the responsible official, Ms Petit de Mange, exhibiting the new Guidance and also setting out what consultation had been undertaken with representatives of the Sikh community.

7. Mr Saini opposed the admission of Ms Petit de Mange's witness statement. His principal objection appeared to be that the consultation to which it refers was not with any body properly representing Sikhs, and he himself sought to adduce evidence addressing that question. He disputed that the new Guidance renders the claim academic.

8. I would admit Ms Petit de Mange's statement for the purpose only of establishing that there is indeed new Kirpan Guidance, which is something of which it was right that the court should be made aware. I do not, however, believe that it is necessary to consider its contents or the evidence in response on which the Claimant wishes to rely. Evidence about the contents of the new Guidance could only be relevant to the argument that the claim has become academic. I see some difficulties with the Lord Chancellor's contention on that point, and in my view it is better to deal with the application for permission to appeal as a matter of substance. Accordingly nothing in this judgment expresses any view about the lawfulness of the Kirpan Guidance in its new form.

THE ISSUES

9. Before Cavanagh J the Claimant advanced five grounds for his application for permission to apply for judicial review. In his skeleton argument for this hearing Mr Saini essentially sought to uphold each of those grounds, but he subdivided two of them so that there are now in effect seven. I will take them in turn.

Ground 1A

10. Mr Saini's primary submission under this ground is that the restriction on the length of a kirpan that can be brought into court is inconsistent with – or, as he put it, *ultra vires* – the provisions of section 139 of the Criminal Justice Act 1988. This reads, so far as relevant:

> "(1) Subject to subsections (4) and (5) below, any person who has an article to which this section applies with him in a public place shall be guilty of an offence.
>
> (2) Subject to subsection (3) below, this section applies to any article which has a blade or is sharply pointed except a folding pocketknife.
>
> (3) …
>
> (4) It shall be a defence for a person charged with an offence under this section to prove that he had good reason or lawful authority for having the article with him in a public place.
>
> (5) Without prejudice to the generality of subsection (4) above, it shall be a defence for a person charged with an offence under this section to prove that he had the article with him —
>
> (a) …
>
> (b) for religious reasons; or
>
> (c) …
>
> (6)-(6ZA) …
>
> (7) In this section 'public place' includes any place to which at the material time the public have or are permitted access, whether on payment or otherwise."

It will be seen that the effect of subsection (5) (b) is that it is not an offence for a Sikh to wear a kirpan in a public place. Mr Saini submits that it follows that the Claimant had a legal right to wear his kirpan in a court building and that it was unlawful for HMCTS to adopt a different rule.

11. That submission is based on a fundamental misunderstanding. The 1988 Act is concerned with criminal liability. Section 139 (5) (b) cannot confer a positive right which over-rides the entitlement of the persons responsible for a public building to impose conditions of access, which would include conditions governing the length of a kirpan that may be brought into the building. As Cavanagh J put it at para. 28 of his judgment:

> "The HMCTS Security Guidance is not concerned with the scope of the criminal law but with the circumstances in which persons should be refused entry to court buildings because they carry a blade or similar article. The claimant was not threatened with prosecution, let alone

> prosecuted. Neither section 139 (5) (b) of the Criminal Justice Act 1998 nor the criminal law in general provides the *vires* for decisions to exclude a person from a court building because he or she is believed to be carrying a bladed article. The *vires* comes from sections 52 to 54 of the Court Act 2003."

12. As a secondary submission Mr Saini contended that the length restriction in the Kirpan Guidance contravened the Human Rights Act 1998, but that adds nothing to ground 2, to which I will come presently.

Ground 1B

13. The substance of this ground is that the length restriction in the Kirpan Guidance is "arbitrary". Various points are made under this head which I take in turn.

14. First, the Claimant relies on the fact that guidance issued by the Scottish Courts and Tribunals Service is in different terms from HMCTS's Kirpan Guidance. The Scottish guidance reads:

> "**Wearing a Kirpan**
>
> A Kirpan may be carried for religious reasons under Section 49(4) of the Criminal Law (Consolidation) (Scotland) Act 1995.
>
> **Informing the Court**
>
> An initiated Sikh attending court should inform court officials in advance when possible, or on arrival, that a Kirpan is worn. Normal security procedures will be carried out, and the Sikh will be able to wear the Kirpan in court and the court environment.* In the court and its vicinity, the Kirpan must always be sheathed and worn out of sight. If you have any questions regarding the wearing of the Kirpan please contact the court concerned.
>
> * there may be exceptional circumstances when this will not be possible and those circumstances will be discussed on application."

15. That guidance contains no restriction on the length of the kirpan that may be worn, although the right is reserved not to permit the wearing of a kirpan in "exceptional circumstances". Mr Saini submits that the difference in practice between England and Wales on the one hand and Scotland on the other demonstrates that the restriction on the length of a kirpan in England is irrational. (In his skeleton argument Mr Saini sought to reinforce this point by submitting that the Lord Chancellor is the responsible minister in both jurisdictions, but that is wrong: the administration of the courts and (most) tribunals in Scotland is a devolved matter.)

16. That argument has no prospect of success. Different authorities may reasonably form different views about the risk posed by the wearing of a kirpan in court and how to address it. It is to be noted that even in Scotland the right is not absolute: Sikhs wishing to wear a kirpan in court still have to declare that fact, in advance where possible, and

the authorities reserve the right, albeit in exceptional circumstances, to decline permission.

17. Second, it is said that the Kirpan Guidance is unsupported by any evidence showing that the restriction to six inches was required as a matter of safety. As to that, I cannot improve on what Cavanagh J said at para. 33 of his judgment:

> "It is to state the obvious to say that a blade is more dangerous, potentially, the larger it is. This does not require evidential support and, indeed, it is hard to see what evidence could be provided for this truism. The claimant has explained in his evidence that a Kirpan may be a full-sized sword. It is not arguable that the defendant was not entitled to decide on a maximum overall size and a maximum blade size below which the Kirpan is automatically permissible and then to leave it to the discretion of the security officers onsite to decide whether to permit entry if the person is carrying a Kirpan which is larger. This approach plainly promotes public safety and assists operational efficiency. There is no blanket ban on Kirpans over six inches overall or with a blade larger than four inches. The fact that there has never been a security incident involving a person using a Kirpan in court is besides the point. The policy is designed to prevent such incidents. Even if the risk of a practising Sikh using his Kirpan as a weapon is very small indeed, the risk also exists of another person seizing the Kirpan and using it."

The same point is made in the Lord Chancellor's Summary Grounds of Defence (para. 29):

> "Courts/tribunals are highly charged and emotive places. While HMCTS does not believe that a devout, practising Sikh would use the Kirpan as a weapon, there is a risk of the Kirpan being forcibly removed and used a weapon by a hostile third party. A Kirpan measuring 6 inches or less will naturally be more discreet and the risk of its being deployed in this way are much reduced. The consequences of an assault with a larger bladed article are, in any event, likely to be more serious."

I agree.

18. Third, Mr Saini takes issue with a statement in the response to the pre-action protocol letter that the Guidance "was developed in consultation between the Judiciary and Sikh community". He refers to a letter from the then Lord Chancellor, Lord Irvine, to the British Sikh Federation dated 23 November 1999 which refers to the Guidance then in force as having been formulated "following legal advice and discussions with members of the Judiciary" and points out that there is no reference to consultation with the community. I do not see how the (apparent) absence of consultation on the issue in 1999 contradicts the Treasury Solicitor's statement about the guidance introduced in 2018. But in any event the absence of consultation is not of itself evidence that the policy is substantively irrational or arbitrary.

19. Fourth, it is said that there is no evidence that there has ever been a security incident in any court building involving the use of a kirpan. But that does not mean that there is no risk of such an incident, for the reasons identified above.

20. Fifth, the Lord Chancellor informed Cavanagh J that a regular review of the Kirpan Guidance was due in 2022. Mr Saini at that hearing expressed scepticism about whether that was the case, and he maintained that position in his skeleton argument, adding that even if such a review were to take place the Claimant did not accept that it was "regular" and regarded its timing as evidencing the untenable nature of the position adopted in the current Guidance. I do not see the relevance of this point. The Claimant's challenge is to the lawfulness of the policy that was in place at the time that he started the proceedings, and subsequent developments cannot affect that.

Ground 2

21. This ground is that the restriction on the right to wear a kirpan of more than six inches in length (albeit subject to a discretion) violates the Claimant's rights under articles 9 and 14 of the European Convention on Human Rights and is accordingly unlawful by virtue of section 6 (1) of the 1998 Act.

22. I take first the claim of a breach of article 9, paragraph 1 of which grants the right, so far as relevant for our purposes, for a person "to manifest his religion or belief, in worship, teaching practice and observance". Paragraph 2 provides:

> "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

That paragraph requires the application of the familiar proportionality test, in relation to which it is unnecessary to cite authority.

23. It was common ground before us that, if in a particular case security officers did not exercise their discretion to allow a Sikh wearing a kirpan of more than six inches in length to enter a court building, that would be an interference with his right to manifest his religion – though the interference might not be thought very grave given that he would be entitled to enter if he wore one no more than six inches long. The issue is whether that interference satisfies the requirements of paragraph 2 of article 9.

24. As to that, Mr Saini's first point is that the restriction in question is not "prescribed by law" because it is only contained in guidance. This point was not taken before Cavanagh J, and it would be open to us to refuse to consider it on that basis alone. In any event, however, I would not accept it. It is well established that in order to satisfy this requirement a measure does not have to be enshrined in legislation, whether primary or secondary. What is necessary is only that it should "have some basis in domestic law and … be compatible with the rule of law", which entails that it

> "must … be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct"

(see *Munjaz v United Kingdom* (app. no. 2913/06), at para. 88). Those requirements are satisfied in this case. The power to exclude persons on grounds of security derives from the provisions of the 2003 Act to which I have already referred, its terms are accessible, and it is formulated with sufficient precision to enable Sikhs who wish to bring a kirpan to court to regulate their conduct.

25. Mr Saini submitted that even if the basic rule had the quality of "law" the policy still failed the test under paragraph 2 because there is no guidance as to the exercise of the residual discretion noted at para. 2 (3) above. I do not believe that that is arguable. It is important to appreciate that there is a clear basic rule which enables observant Sikhs to regulate their conduct: they know that they will be permitted to wear a kirpan in court, provided it is no more than six inches long. By definition, any departure from that policy will be exceptional, and it is neither possible nor necessary for guidance of this character to specify in advance what such exceptional circumstances may be: as Lord Sumption observes at para. 11 of his judgment in *R (Catt) v Commissioner of Police of the Metropolis* [2015] UKSC 9, [2015] 1 AC 1065, it is unnecessary "to codify the answers to every possible issue which may arise".

26. I understood Mr Saini to accept the foregoing points when they were put to him in the course of his oral submissions; but whether he intended to do so or not they are plainly correct. However, he submitted that even if the restriction was "prescribed by law" it was disproportionate. As to that Cavanagh J said:

> "39. The aim of the restriction in the present case is the aim of keeping court building safe. Limitations consisting of restrictions on the carrying of articles with blades plainly are designed to achieve and will achieve that aim. The policy and the Security Guidance are plainly a proportionate means of achieving that aim. An exception is made in favour of Sikhs in that they are the only persons who are allowed to bring in a bladed article at all. It is proportionate to give an absolute permission for Kirpans below a particular size to be carried but not those above a certain length, as the larger an item is the more dangerous it is likely to be.
>
> 40. It is also proportionate because there is no absolute bar on larger Kirpans. It is a matter for the discretion of the security officer and their superior, taking into account matters such as the demeanour of the wearer, the type of court and the situation in court. …"

27. I see no prospect that on appeal this court would disagree with that assessment. In answer to a question from the Court Mr Saini in fact accepted that some restriction on the length of kirpans that could be brought into Court would be justified, but he argued that the six-inch restriction in the Guidance could not be said to be proportionate because there are different rules in different public buildings about whether kirpans are permitted and if so of what length. He referred to the witness statement of Ms Petit de Mange, which mentioned that the only case of which she was aware where an organisation allowed longer kirpans was that the Houses of Parliament limit the length of the sheath to six inches, which inevitably means that the whole kirpan, including the handle, will be greater. But the fact that there are differences in the approaches taken

by different authorities does not mean that a more restrictive rule is necessarily disproportionate.

28. My conclusion on the issue of justification means that the claim under article 14, which prohibits discrimination on grounds of (among other things) religion, has no real prospect of success either.

Ground 3A

29. The Claimant's case under this ground is that he has suffered discrimination on the ground of his religious belief. I cannot see how that differs from the Claimant's reliance on article 14 under ground 2, and Mr Saini did not suggest that it added anything. In any event, it can have no real prospect of success in view of my conclusion about justification.

Ground 3B

30. It is part of the Claimant's case that the restriction on the length of a kirpan that may be worn in Court affects his right to earn his living as a legal representative because he would wish to wear an eight-inch kirpan when attending court in a professional capacity; and that that would interfere with his rights under article 8 of the Convention.

31. Cavanagh J rejected that case both on the basis that his conclusion as to justification in the context of article 9 applied equally to any interference with the Claimant's article 8 rights (see para. 43 of his judgment) and because there was in any event no evidence that he had ever in fact been prevented from attending a court or tribunal for work because of the length of his kirpan (see para. 44). Mr Saini did not in his submissions directly challenge either of those reasons, and I see no prospect that this Court would differ from them if the appeal were permitted to proceed.

32. I record for completeness that Cavanagh J noted some other potential difficulties with the case under article 8; but I need not address them here. I also note that, confusingly, there is a passing reference at para. 69 of Mr Saini's skeleton argument to the Claimant being discriminated against on the grounds not only of religion but of race. That has nothing to do with his claim under article 8, and I have dealt already with the claim based on discrimination, where the justification relied on by the Lord Chancellor would apply equally whether the ground of discrimination is characterised as race or religion.

Grounds 4 and 5

33. Ground 4 is concerned not with the lawfulness of the Guidance but specifically with the events of 8 April 2021. What the Claimants says is that even if the Kirpan Guidance was lawful the security officers did not follow it because they failed to appreciate that they had a discretion to permit his entry even if his kirpan was longer than six inches or to consult with the SPOS. Cavanagh J accepted, on the evidence available to him, that that might have been the case, but he refused permission to apply for judicial review for two reasons, which can be sufficiently summarised as follows:

    (1) He found that it was highly unlikely that the Claimant would have been permitted to enter even if the security officers or the SPOS had appreciated that they had a discretion, both (a) because on the material before him the Claimant had been

behaving uncooperatively by refusing to allow the officers to see his kirpan and (b) (more importantly) because the magistrates themselves had been consulted and had indicated that they were unwilling to have a kirpan in the courtroom; and that, that being so, the case fell within the terms of section 31 (3C) of the 1981 Act (see paras. 51-54 of his judgment).

(2) He held that there was an alternative appropriate remedy for the treatment of which the Claimant complained, if proved. At para. 55 of his judgment he said:

> "The focus of the public law challenge, as it was developed in the amended statement of facts and grounds, was on the terms of the HMCTS guidance. For the reasons that I have already given, this is not arguable. The focus has shifted from the events on 8 April 2021. In any event, in relation to the events on that day rather than on the wider public law question as to the lawfulness of the contents of the policy, the real remedy that the claimant seeks is damages and this is not a suitable matter to be dealt with by way of judicial review, as it relates to an incident in respect of which the facts are substantially in dispute and the procedures for judicial review are not suited to the resolution of disputes of fact. Put another way, there is a more appropriate alternative remedy, which is a claim for damages in the county court …"

34. There were in fact two grounds numbered 5 in the Claimant's statement of facts and grounds, but at paras. 58-59 of his judgment Cavanagh J identified two particular points that Mr Saini appeared to be wishing to make, both of which related to the events of 8 April 2021 rather than to the lawfulness of the Kirpan Guidance. One appeared to be simply a claim for damages arising out of the events in question. The other was that the security guards were not empowered to require the Claimant to remove his kirpan because this would involve removing his trousers in public. As to that, he said (at para. 58):

> "That is unarguable. Sections 52 and 53 of the Courts Act allow security staff to search persons coming into a court building and the articles they carry. They were, thus, allowed by primary legislation to ask to see the kirpan. If the claimant was concerned about personal embarrassment, he could have asked to go into the toilets to remove it, but the claimant was not, in fact, required to remove his trousers."

35. Much of Mr Saini's skeleton argument under these two heads is devoted to reiterating his substantive points as advanced below; but he also challenges Cavanagh J's conclusion on the application of section 31 (3C) – point (1) – on the basis that he was not, in the absence of formal witness statements, in a position to form a view on what would have been likely to be the outcome if the officers had appreciated that they had a discretion and/or had consulted the SPOS.

36. I do not, however, need to consider that challenge because there is in my view no answer to Cavanagh J's second reason. The conduct on the part of the security officers of which the Claimant complained, if established, could unquestionably have been the subject of private law proceedings under the Equality Act 2010 and/or for breach of section 6 of the Human Rights Act 1998, and both declaratory relief under those heads

and damages are claimed in the Amended Statement of Facts and Grounds. Such relief is available in the County Court, and in the absence of any arguable challenge to the lawfulness of the Guidance that was plainly a suitable alternative remedy. Mr Saini said that the Claimant was no longer claiming damages, but – quite apart from the fact that that was apparently not his position before the Judge – the point is the same even if he is claiming only declaratory relief. He submitted in this context also that the Judge was in no position to say that there were significant disputes as to fact when the Lord Chancellor had not yet filed any evidence. As to that, Cavanagh J was plainly entitled to proceed on the basis of the parties' respective "pleadings" – that is to say, the Claimant's Amended Statement of Facts and Grounds and the Lord Chancellor's Summary Grounds of Defence; but in any event the absence of factual dispute would not affect the fact that County Court proceedings afforded an appropriate alternative remedy. It is trite law that judicial review proceedings cannot usually be brought in such a case, and there is nothing about the present case that warrants a departure from the usual rule.

CONCLUSION

37. I would refuse the Claimant permission to appeal against Cavanagh J's refusal of permission to apply for judicial review. I would not want it to be thought that that conclusion means that I do not appreciate the importance to Sikhs of the right to wear a kirpan. It means only that I do not believe that the very limited qualification of that right in the Kirpan Guidance can be said to be disproportionate.

The Lord Chief Justice:

38. I agree.