Neutral Citation Number: [2019] EWHC 1264 (Admin)

Case No: CO10432019

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

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: 17/05/2019

Before :

MR JUSTICE FREEDMAN

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Between :

THE QUEEN (on the application of (1) LXD (2) AXT (a child, by her mother and litigation friend LXD); (3) NXT (a child, by his mother and litigation friend LXD; and (4) DXD (a child, by his mother and litigation friend LXD)

Claimant

- and -

THE CHIEF CONSTABLE OF MERSEYSIDE POLICE

Defendant

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Blinne Ni Ghralaigh (instructed by **Hodge Jones & Allen Solicitors**) for the **Claimant**

Ian Skelt (instructed by **Force Legal Department, Merseyside Police**) for the **Defendant**

Hearing dates: 14 May 2019

Mr Justice Freedman

1. In view of substantial agreement about a number of matters before the Court, it is not intended to give a detailed judgment. The claim is for judicial review. A summary of the background facts appears in a judgment of Mrs Justice Thornton given on 28 March 2019 (neutral citation number [2019] EWHC 1120 (Admin)), which I gratefully adopt.

2. In that judgment, Mrs Justice Thornton dismissed an application for interim relief, but ordered expedition. She found that there was a real issue to be tried, but rejected the matter on the balance of convenience, in particular finding that it would not be in the interests of the Claimants to move from the accommodation where they were then residing. That would carry with it the unsettling prospect of having to move again in the light of an order which might be made following the trial of the claim. She ordered that *"the Defendant shall file and serve a response to the Claimants' updated statement of facts and grounds together with any evidence on which they intend to rely by 15 April 2019".*

3. The matter was due to be heard in a day at that stage as a rolled-up hearing (permission and judicial review all in one hearing), and on the basis of expedition, it was due to come on for hearing on 2 May or 14 May. In the event, it became 14 May since 2 May was not convenient to Counsel.

4. Since then, there have been various developments including the following:

   (1) No updated statement of facts and grounds was served by the Claimants;

   (2) Despite this, on 15 April 2019, although the Defendant filed a document headed "Grounds of response to the Claim", it did not serve evidence;

   (3) On 17 April 2019, an application was made by the Claimants seeking an order that the Defendant file their additional evidence on 23 April 2019;

   (4) On 23 April 2019, Mr Justice Murray refused the application and ordered an oral hearing for further directions in relation to the rolled-up hearing;

   (5) On 25 April 2019, the Defendant filed statements of Inspector Fallows and Temporary Inspector Speight;

   (6) On 1 May 2019, the Claimants served applications for further information and for disclosure including for the Defendant's risk assessment policy;

   (7) On 2 May 2019, the Claimants applied for consequential directions;

   (8) On 3 May 2019, the Claimants served further evidence, namely the third statement of LXD, the fifth statement of Alice Hardy and the first statement of Lindsey Williams;

   (9) On 7 May 2019, the Defendant wrote to the Court setting out points of factual dispute. The Claimants served a skeleton argument for the rolled-up hearing.

   (10) On 9 May 2019, the Claimants served an application to amend grounds. They responded to a letter setting out points of factual dispute. The Defendant served a skeleton for a directions hearing.

(11) On 10 May 2019, Mr Justice Supperstone heard the matter and ordered that the Defendant file his skeleton for the rolled-up hearing by 5pm on 10 May 2019, and that the rolled-up hearing happen on 5 and 6 June 2019 with 7 June 2019 to be kept in reserve. He also ordered that a directions hearing be heard on 14 May 2019, the date originally scheduled for the rolled-up hearing.

5. The hearing took place on 14 May 2019 before me. I heard the following matters, namely

(1) The application for further information;

(2) The application for disclosure;

(3) An application for further evidence of the Claimants as listed above;

(4) An application on the part of the Claimants to amend grounds of the application;

(5) An application to bar further evidence on the part of the Defendant.

6. In the course of the hearing, the Claimants were very critical about the approach of the Defendant to this action, in particular contending that it was involved in strategies to prevent this case from being tried. To that end, they relied on attempts to set up an argument to the effect that the action should be tried in the Queen's Bench Division or the County Court and not by way of judicial review. This was because it was contended that there were numerous disputes as to evidence and the need for cross-examination. The need for that discussion has been obviated by the order of Mr Justice Supperstone providing for a longer hearing for the judicial review application. The Court has thereby provided for the rolled-up hearing then to take place.

7. By this time, the Claimants had accepted that they would not cross-examine the Defendant's witnesses, albeit reserving their position to cross-examine the witnesses for the Defendant if new evidence were admitted. Although there were areas of factual dispute identified by the Defendant, the Claimants responded to the same, identifying why they would not require cross-examination. There is unlikely be scope for cross-examination. If there is, it is accepted by the parties that there can be cross-examination within judicial review, albeit that such cases are unusual. It would be expected to be precisely defined and confined.

8. The Claimants by their Counsel spent some time challenging the position of the Defendant in respect of the preparation for the hearing. I shall not set out in this brief judgment each of the matters. Suffice it to say that the gravamen of the challenge was that the Defendant was dragging its heels in respect of the application for judicial review, and it ought to have prepared its evidence by now.

9. They submitted that the Defendant's desire to put in more evidence was intended to derail the hearing dates, and that in the circumstances, there should be an order barring further evidence. They particularly drew attention to the fact that the Defendant's case had barely advanced since the response of the Defendant to the application for relief interim relief dated 20 March 2019. In particular, they showed very effectively through schedules, the similarity between that document and the Defendant's grounds dated 13 April 2019 and the statement of Temporary Inspector Speight dated 25 April 2019 and the Defendant's skeleton dated 10 May 2019. In short, there was an element of stagnation in the

Defendant's approach to evidence. The Claimants submitted that it would be wrong now to allow evidence which might cause prejudice to the Claimants in connection with the hearing.

10. I should record that I am sympathetic to the submission that there does not seem to be any good reason for the case of the Defendant not appearing to advance since late March. There is reason for concern from the matters set out in the preceding paragraph that the Defendant might consciously or unconsciously use evidence to have the effect of postponing the adjudication of the application for judicial review still further. Having said that, there are two observations to make. First, some of the background advanced by the Claimants was of more relevance to the rolled-up hearing than in respect of the applications before the Court. Second, the Defendant through Mr Skelt has been cooperative in respect of the directions in the applications and has agreed most of them (save in respect of the application to bar further evidence, to which I shall turn).

11. As regards the last point, there has been an important change since and as a result of the hearing before Supperstone J. Whereas the Defendant's skeleton argument before that hearing was in large part directed to an argument that there were numerous factual issues and the case should be transferred to the general Queen's Bench list or the County Court to resolve factual issues, the order of Supperstone J was to affirm the position that the application would be one which stay in the Administrative Court. It needed more time than had been allocated, and Supperstone J by his order has made that time available. In considering new factual evidence, the Court will be astute to ensure that this is not used to attempt to revisit that which has now been decided.

12. I shall now refer to the applications before me.

(1) Application for request for further information

13. Mr Justice Supperstone was sympathetic to the notion that these matters should be dealt with by way of formal responses and not by way of skeleton argument. The Defendant will provide the particulars sought by 21 May 2019. It has been clarified that the answers will be provided on the basis that the requests are valid ones: it will not be an answer to challenge the validity of the request. Further, there should not be cross referencing to other documents in the answers, but the answers should provide to the reader in one place. Mr Skelt for the Defendant agreed to do this.

(2) Application for disclosure

14. The disclosure sought was agreed, to be provided by 21 May 2019, save in one respect. The application for the risk assessment policy of the Defendant will not be provided in the event that there is a public interest immunity point. To that end, the order would be made, subject to a public interest immunity application ("the PII application") being made by 21 May 2019 in respect of any parts, which would then require redaction until after the PII application had been heard.

15. The disclosure application is especially important because ultimately far more important than ex post facto justifications are the contemporaneous evidence at the time from logs and the like. They are more likely to provide evidence as to the decisions made and the

reasons for them than later material created for the purpose of litigation, some time after the event.

(3) Application for further evidence

16. There is no objection to the Claimants' application for further evidence. The Claimants submit that the evidence is not new in that (a) the evidence of Lyndsey Williams is corroborative of other evidence, (b) the third statement of LXD is largely updating evidence, particularly about the housing of the Claimants since March 2019, and (c) the fifth statement of Alice Hardy, which is also updating evidence. This evidence is admitted.

(4) Application to amend grounds of application for judicial review

17. The Defendant does not object to the amendments to the grounds insofar as they insert new grounds and set out the relief sought. They provide more particularity about the nature of the claim, and as such they are unobjectionable. There was concern about the reference to the skeleton argument as being incorporated into the grounds since the grounds are different in nature from a skeleton argument. On reflection in argument, and as rightly acknowledged by Mr Skelt for the Defendant, this was not necessary since the skeleton argument was providing instances evidencing the grounds and did not themselves need to be pleaded.

(5) Application to bar further evidence

18. The basis of this application is that there had already been a direction to provide evidence. Evidence had been provided. It is said that there has been ample opportunity to adduce this evidence. Thus, it is said that it is now too late to adduce such evidence, and late evidence might cause prejudice in preparing for the hearing of the application and being ready to meet the application. In the alternative, it is submitted that the evidence should be limited to statements dealing with the new evidence adduced by the Claimants.

19. In my judgment, this is not a case of contumelious default. However, there has been delay since the evidence prepared in opposition to the application for interim relief, and most of the documents subsequently prepared have been little more than copy and paste in respect of that evidence. If it be the case that the evidence of the Defendant is still incomplete, then the obvious point is that that evidence should have come on 25 April 2019, and there is no obvious good reason why this did not take place.

20. It is possible, but not necessarily the case, that further evidence would cause prejudice such as to make it unfair to permit some or all of the evidence. However, it would be unjust and disproportionate at this stage to bar further evidence, particularly having regard to the evolving nature of the case, which does not depend solely on the events of 17/18 January 2019, but which has continued thereafter both in respect of incidents to consider and reactions to them by the Defendant and in respect of the accommodation of the Claimants. This has brought about some of the additional evidence on behalf of the Claimants which has been referred to above. Before making my decision, I wished to have information as to the scope of the intended evidence so that I could make an appropriate order in this application.

21. The concern of the Claimants as to possibility of the rolled-up hearing being derailed is, in my judgment, sensibly held. The Claimants are right to ensure that nothing happens which might impact adversely on the ability of the Court to determine the application for judicial review in early June 2019.

22. To this end, I ordered that the Defendant indicates the nature of the evidence which it intends to adduce at close of business on 15 May 2019, with the Claimants able to comment about this on 16 May 2019. This has given rise to the following:

    (1) A document from the Defendant indicating the various areas where there is an intention to consider further evidence. As is stated on the first page, this is not a submission as to why new evidence should be admitted. Although the document is 9 pages long, it is set out in large font with short lines and big spacing between lines. Nonetheless, the Defendant is encouraged to exercise restraint as to whether all of those areas need to be covered, and to ensure that the evidence is kept to a minimum. The Court is more likely to refuse evidence in the event that it is more extensive than necessary, bearing in mind its determination to ensure that nothing derails the hearing for 5 June 2019;

    (2) The Claimants have served a far longer and more dense response comprising over 13 pages. In terms of words, it is far longer than the Defendant's document. It goes beyond what the document in response was intended to be. It is to be noted that no evidence has yet been served. One of the matters on which the Claimants rely is that the subject matter of a number of the further areas of evidence is not the subject of factual dispute. That may be an echo of the matter before Supperstone J, but the question of factual disputes was relevant to forum for trial of the issues between the parties, but that has been resolved by the retention of the matter in the Administrative Court and by fixing the June hearing. There remains a concern that the Defendant should not introduce new factual disputes at this stage, and in view of this, any application for further evidence must be with the evidence for the Court to consider in advance of considering permission. For the moment, nothing in the document is persuasive to the effect that the Court should bar an application for further evidence or make directions at this stage limiting the scope of the intended application. However, these matters will be considered in the light of any application which the Defendant may make on 22 May 2019 for further evidence.

23. There are two further features to be noted:

    (1) The Claimants' document may useful in indicating to the Defendant areas where evidence might be unnecessary or irrelevant or prejudicial at this stage to the conduct of the hearing of 5 June 2019. This should condition further restraint on the part of the Defendant in evidence which it may seek to adduce.

    (2) Restraint needs to be exercised also by the Claimants. A blanket opposition to evidence or unreasonable or unrealistic attempts to curtail evidence will not assist the Court or in the end the Claimants. It is critical that there is a focus by the Claimants as well as by the Defendant.

24. The parties need to focus on the rolled-up hearing. They should consider carefully whether the resources are better spent involved in these preparatory interim matters or the preparation for the rolled-up hearing. The Court will be astute, if there is a hearing, to take a firm view in respect of any application for excessively wide evidence or the service of evidence prejudicial to the rolled-up hearing on the part of the Defendant. It will also be astute in the event that it has the sense of blanket or excessively wide or unreasonable or unnecessary opposition by the Claimants to evidence which the Defendant wishes to adduce. In other words, just as the Court is likely to be more receptive to a focused and limited application on the part of the Defendant, so too in respect of opposition of the Claimants.

25. For the moment, I shall not bar an application an application to seek to adduce further evidence. That is not to say that at this stage any further evidence is permitted: it is simply not barred.

26. If the Defendant wishes to adduce any further evidence, it must apply by Wednesday 22 May 2019, supported by the evidence which it wishes to adduce. If the application to adduce the evidence is not agreed, the Court will consider the application on Tuesday 28 May 2019. The Court will consider the matter afresh at this stage, but it may wish to take into account the following matters (as well as any other matters), namely

    (1) The impact of such evidence on the ability of the Claimants to prepare for an effective hearing on Wednesday 5 June 2019. That is why the Defendant can expect that the narrower and more focused its evidence, the more likely that it will be admitted. By parity of reasoning, the broader and less focused it is, the more likely that it will not be admitted.

    (2) Whilst the direction is not being made at this stage to exclude evidence other than responsive evidence to the new evidence adduced by the Claimants, the question why the evidence has not been produced at an earlier stage, and in particular on 25 April 2019 will be considered, and the prejudice to the Claimants, if any, arising out of the delay.

    (3) The question will arise as to how relevant or central the intended evidence is to the rolled-up hearing. It is to be borne in mind that the issue as to what was considered at the time and whether reasonable precautions and assessments were made are likely to turn upon the contemporaneous documents rather than ex post facto justifications in evidence prepared weeks or months after the events in question. The subjective views of an officer in this connection may be of little, or perhaps no, probative value since the questions are predominantly objective based on the information reasonably available to the Defendant at the time.

27. The other direction which will be made is that the Claimants will be able to serve any additional evidence and/or supplementary skeleton argument on which they intend to rely on response to disclosure made and/or the service of any additional evidence which the Defendant may be permitted to adduce.

28. In writing this judgment, it is expected that there will not be a need for cross-examination, particularly in the light of the provisional concession of the Claimant. In the event that

application is to be made for cross-examination, then such application should be indicated by 24 May 2019 so that that can be dealt with at the same time as any hearing of 28 May 2019. If such application is to be made, it would be expected in view of the matters to date that there would be a good reason for it, and that the scope of the application would be confined.

29. Finally, if there is required to be a hearing on 28 May 2019, the Claimants should serve a short document (no more than 4 pages size 12 font and 1.5 line spacing) indicating the evidence that is opposed and brief reasons for such opposition by 4pm on 24 May 2019. The parties should submit skeleton arguments limited to 15 pages each with the same layout requirements over the Bank Holiday weekend so that I receive them by not later than 12 noon on 27 May 2019.