Neutral citation: [2023] EWHC 1478 (Admin)

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Case Nos: CO/4400/2021 & CO/1854/2022

Courtroom No. 207

Birmingham Civil and Family Justice Hearing Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Monday, 22nd May 2023

Before:
HIS HONOUR JUDGE MITHANI KC
(sitting as a Judge of the High Court)

B E T W E E N:

PROFESSOR PHILIP PERCIVAL

and

POLICE & CRIME COMMISSIONER FOR NOTTINGHAM
and others

THE APPLICANT appeared in person
MS C VENTHAM appeared on behalf of the Respondent

JUDGMENT
(as approved by the Judge)

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HHJ MITHANI:

1. This is the claimant's renewed application for permission to bring judicial review proceedings in two claims brought by him against the defendants and various interested parties, following the refusal of permission on paper by His Honour Judge Williams, sitting as a Judge of the High Court. I will collectively or individually refer to the defendants and the interested parties in both claims, for the sake of convenience, as "the defendants".

2. The claimant seeks permission to challenge by way of judicial review:

   (a) the decision of the Police and Crime Commissioner for Nottinghamshire ("PCCN") of 30 September 2021, not to uphold a review of the outcome of a complaint made by the Claimant on 23 July 2020;

   (b) the decision of the Police and Crime Commissioner for Derbyshire ("PCCD") of 22 February 2022, not to uphold a review of the outcome of a complaint made by the Claimant on 27 October 2021.

3. The underlying complaint to which the decisions under challenge relate, or are concerned, with, is alleged litigation misconduct arising in an ongoing civil claim brought by the claimant against the Chief Constable of Nottinghamshire Police. The complaints were dealt with by different bodies: the first complaint, by Nottinghamshire Constabulary, subsequently reviewed on 23 July 2020 by the PCCN; and the second complaint, by the Derbyshire Constabulary, subsequently reviewed by the PCCD on 27 October 2021.

4. The application for permission was dealt with, on paper, on 3 February 2023, by His Honour Judge Williams. Judge Williams refused the application on the basis that the claims for judicial review had become academic. That was because the defendants had reviewed the handling of the claimant's complaints and concluded that it was appropriate that both complaints be looked at afresh. That conclusion was reached because: (a) the first complaint should have been handled by the Derbyshire Constabulary; and (b) prior to claimant's complaints being determined, contact was not made with the claimant (as it should have been) by the defendants for his input on the complaints.

5. On the basis that the defendants had agreed to look at the complaints afresh, Judge Williams concluded, at paragraph 3 of the reasons that he gave for refusing permission, that:

> "the remedy sought by the claimant in each of these judicial review claims is that the 'court makes a quashing order with respect to the decision to which the claim relates'. The defendants/interested parties accept those decisions cannot stand, due to shortcomings in the complaints' handling process such that they have agreed, effectively, to start afresh. It would serve no useful purpose, and would be wholly contrary to the overriding objective of dealing with cases justly and at proportionate cost, to allow the present claims to continue in the circumstances where they have been rendered utterly academic. To otherwise allow the claims to proceed would simply expose the parties to further significant expenditure of time and money for no discernible benefit". [Quotes not checked].

6. Recognising that there were flaws in the way in which the complaints had been dealt with by the defendants, and the indication given by the defendants that they would look at the

complaints afresh, Judge Williams awarded the costs of the claims to the claimant.

7. The claimant does not accept the decision of Judge Williams. He states, in his grounds of renewal, that the claims should proceed to a full hearing because:

    (a) the defendants have not accepted that the decisions challenged "cannot stand".

    (b) The defendants have "agreed effectively to start afresh" in only a limited sense; and

    (c) the claims have not, therefore, been rendered "academic";

    (d) further or alternatively, if the claims have been rendered academic, permission should still be given because of what the claimant says is "a public interest in the matter".

8. In paragraph 5 onwards of his renewed grounds of challenge, the claimant expands upon these grounds. Briefly, his position can be summarised as follows.

9. The claimant contends that the claims are not academic because even though the defendants have agreed to reconsider the decisions challenged, they have not done so by accepting the mistakes they have made and have not agreed to assign the complaints to the correct person. Nor have they taken into account certain previous decisions made by the defendants, which he claims were flawed.

10. That ground does not seem me to be to be arguable. Judicial review proceedings primarily involve challenging a decision reached by a public authority (or other body whose acts or omissions are reviewable), as opposed to the reasons given for them. If the decision taken by that authority or body is correct or – as is argued in the present case – become academic, then the reasons themselves cannot constitute a legitimate basis for a review in such proceedings, if the decision itself is not impeached or impeachable. There is a limited exception to that rule, which is rarely applicable. If there is what might be described as a substantial "residual" public interest of wide application in a case, the court may allow the application to proceed to a full hearing. However, as I point out later, no such public interest arises on the facts and circumstances of the present case, despite the claimant's contention that it does.

11. In the present case, whether or not the defendants accept that the reasons taken for the decisions are flawed, they accept that the decisions cannot stand and have agreed to look at the complaints afresh. On that basis, it is difficult for me to see how the judicial review proceedings cannot be said to be wholly academic.

12. Nor can I see how the claimant's contention that the complaints have not been assigned to the correct person is tenable. If, following the consideration of the claimant's complaints *de novo*, the defendants' decision is not acceptable to the claimant, he can raise this matter in any fresh proceedings for judicial review that he may decide to bring. The remedy which the claimant, himself seeks in his claims for judicial review, is essentially the same or similar remedy that

the defendants are prepared to provide to him by agreeing to look into his complaints afresh. This is clear from their letter dated 23 December 2022:

> "5 There appears to have been some confusion as to the identity of the appropriate authority for the first complaint. It was correctly identified that PCC(N) was not the appropriate authority given that the matters complained about did not concern the conduct of the Chief Constable himself but of others acting on his behalf in relation to ongoing litigation. It appears that the inclusion of references within the complaint to the conduct of police officers in April 2011 led to the (erroneous) conclusion that the Chief Constable was the appropriate authority. In fact, the first complaint should have been handled by the Derbyshire PSD given that, like the second complaint, it was concerned exclusively with the conduct of members of staff in EMPLS for whom the appropriate authority is the Chief Constable of Derbyshire (as was explained in the context of the second complaint [p.352]). Furthermore (and as was identified as a learning point in PCC(D)'s review decision in relation to the second complaint [p.85]), complaint handlers are required to make contact with a complainant in order to explore the nature of the complaint. My clients acknowledge that this did not happen in relation to either of your complaints …
>
> 6. First and foremost, my clients offer you an apology for the aforementioned shortcomings in the handling of your complaints.
>
> 7. Secondly, my clients propose to rectify matters by looking at both complaints afresh. If you are content with that proposal, it would involve the recording of the first complaint by Derbyshire PSD (in the terms set out in sub-paragraphs (i) – (vi) of paragraph 4(a) above). The second complaint has previously been recorded by Derbyshire PSD (in the terms set out at [p.78]). Derbyshire PSD would then take both complaints forward. The first step in that process would be for the allocated complaint handler to make contact with you in order to confirm/clarify the nature of your complaints. That process will inform decisions as to the appropriate handling of the complaints thereafter, including whether the complaints fall to be formally investigated and/or referred to the IOPC".
>
> 8. In the light of the history of this matter, the complaints would be allocated to an officer within Derbyshire Constabulary who has had no prior dealings with either complaint. That officer will be asked to make initial contact with you as a matter of urgency" [Quotes not checked].

15. That letter could not have explained matters more clearly: the offer is for an investigation by an unrelated Police force and, as part of that investigation, a decision about whether the complaints should be referred to the IOPC.

16. The claimant made lengthy submissions about why the original decisions made by defendants were untenable. These submissions were more appropriate for a substantive hearing of the application, which is now no longer necessary because of the offer made by the defendants.

16. As the defendants say, there is no public interest in allowing what will inevitably be costly and protracted judicial review claims to proceed, given the availability of a pragmatic, effective and ultimately more expeditious resolution of the claimant's underlying complaints. More specifically, they say in para. 11 of their skeleton argument – and I agree – that:

"(a) the most advantageous outcome that the claimant could hope to achieve from a full airing of his judicial review grounds is an order/judgment to the effect that the complaints (or part of them) must be formally investigated and/or referred to the IOPC;

(a) the claimant cannot achieve the upholding of his actual complaints in these proceedings;

(b) the likely timescale for the commencement of an investigation and/or referral to the IOPC, were the claimant to achieve such an outcome, would be several months hence; and

(c) by contrast, the route that the defendants have offered to the claimant would involve: (i) immediate consultation with the claimant as to the precise nature/scope of his complaint(s); (ii) the eradication of any ongoing misunderstanding between the parties as to the nature and scope of his complaint(s); (iii) an opportunity to streamline the various iterations of the complaint(s) into one concise, agreed scope; (iv) the identification of the correct "appropriate authority/authorities" to handle the complaint(s) (or parts thereof); (v) decision-making about the handling of the complaint(s) thereafter on the correct footing; (vi) implementing decisions about the handling of the complaint(s) and bringing the process to a conclusion in a timely manner". [Quotes not checked].

18. Of course, it always remains possible that the claimant may be dissatisfied with the handling of his complaints following their investigation by the defendants. If he is, he would be entitled to bring a fresh challenge at that point in this court. As the defendants say, in their skeleton argument, "the wider practical benefits of ensuring that the foundations of the complaint have been properly laid and understood in the first place are likely to be immeasurable (and may even result in an economy of time overall) in the event that it becomes necessary in due course for the handling of the complaint and/or the complaint itself to be subject to the scrutiny of either the IOPC or this court (or both)".

19. I do not agree with the claimant that the defendants' offer does not extend to considering all the issues arising in the complaints. The defendants have said that the complaints will be dealt with afresh. I take that to mean that they will consider <u>all</u> matters afresh. That fact is also reiterated by the defendants in their skeleton argument. As I have indicated, if they do not, the claimant may be able to consider judicially reviewing that decision.

20. One point upon which heavy reliance is placed by the claimant is this: he contends that the claims are not academic because the relief sought is for a mandatory referral to the IOPC, whereas reconsideration by the other parties could result in them deciding not to refer it there. That point is without substance. The defendants have said that they will look at matters afresh, which will include the possibility of referral to the IOPC. If they do not – and the decision is adverse to the claimant – he will no doubt be able to include that in his grounds in any subsequent application he brings for judicial review.

21. The present claims are, therefore, academic. There is no basis upon which it can be allowed to proceed because of what the claimant states are matters of general or substantial public importance that arise in the claims. The law on this is clear and is encapsulated in note 31 of *De Smith* Judicial Review, Eight Edition, 2018, (Eds Lord Woolf *et al*), at 2-010:

> "[In] *R. v Secretary of State for the Home Department Ex p. Salem* [1999] 1 A.C. 450, where the HL held that it had a discretion to hear an appeal which concerned an issue involving a public authority as to a question of public law, even where there was no longer any live issue which would affect the rights and duties of the parties as between themselves. In *Salem*, Lord Slynn stated (at 457A): "The discretion to hear disputes, even in the area of public law, must, however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future." Despite being overruled in relation to when an administrative decision is taken to have been made in *R. (on the application of Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 A.C. 604, *Salem* is still the leading authority on challenges which have become academic. The *Salem* principles were most recently applied in *Re Irwin's Application for Judicial Review* [2017] NIQB 75, where the court refused to exercise its discretion, as it was not in the public interest to do so and there were no similar cases anticipated in the future. In *Lamot v Secretary of State for Justice* [2016] EWHC 2564 (Admin); [2016] A.C.D. 123, an application by three prisoners to challenge the Secretary of State's refusal to accept the Parole Board's recommendation to transfer them to open conditions was refused on the ground that the decision was academic, all three having been subsequently released or transferred; where a matter between the parties was academic, it should not be heard unless there was a good reason in the public interest for doing so".

23. The reasons provided by the claimant do not support allowing a judicial review to proceed on this basis in the present circumstances.

24. Accordingly, permission is refused.

End of Judgment

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