

Neutral Citation Number: [2013] EWHC 2635 (Admin)

CO/1119/2013

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 22 February 2013

B e f o r e :

TURNER: MR JUSTICE TURNER

Between:

THE QUEEN ON THE APPLICATION OF CHEN_

Appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT_

Respondent

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WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
(Official Shorthand Writers to the Court)

MR T HICKMAN appeared on behalf of the **Applicant**

MS J LEAN (instructed by the Treasury Solicitor) appeared on behalf of the **Respondent**

MS N FINCH appeared on behalf of the Children's Commissioner

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE TURNER: In this case the claimants seek interim relief comprising an order from the court in general terms which would cover all those who are in detention in the same circumstances as the three individuals who are covered by the order of Collins J on 12 February 2013. The application was made in the context of judicial review proceedings. Those proceedings were based to a very considerable extent upon concerns that a policy relating to force to be used against pregnant women and children had been allowed to be revoked in March 2012 and had not subsequently been replaced by any alternative. In the fear that, in the absence of such a policy, effectively there would be inadequate safeguards for the obvious rights of those who may be subject to force in these conditions, the matter has come before the court.
2. In a very late development, the defendant has now confirmed that the old policy has been reintroduced and therefore the position in relation to the policy is the same as it had been prior to March 2012. Enquiries have revealed that that is the policy that was in place for approximately two and a half years, between September 2009 and the spring of 2012. It is not appropriate, in my view, that policies as important as this should effectively disappear and then reappear in the light of these proceedings. Having said that, these proceedings to that extent have at least achieved a substantial part of their objective to reimpose a proper policy framework in relation to these important matters.
3. Notwithstanding the indication from the defendant that the old policy has been reintroduced, it is still urged on behalf of the claimants that I should make an order which effectively requires that force should not be used in relation to children in particular, save where there is a risk of harm. Although harm is a very broad concept, some attempts have been made to narrow that by reference to injury either to the individual concerned or others.
4. I am concerned, as I believe Collins J was, about the implications of making an order in what he described as "the general terms sought." That is not to say that in any sense this court would condone any breach of the policy. The policy is there to be complied with, and there are serious consequences of failure to comply with the policy, but it is not, in my view, the function of this court to translate policy into injunctions, the breach of which gives rise to very different and serious consequences in comparison to the intent in public law in relation to compliance with policies.
5. This is a case in which I regard it to be imperative, having listened to the submissions made on behalf of the Children's Commissioner, that there should be a full and prompt consultation specifically in relation to matters which have been raised, not least, for example, the way in which children under 10, who are not usually in detention, should be treated. Those submissions are valid and the court would encourage, in the strongest possible terms, an immediate engagement on a serious basis to review the policy as it now stands reintroduced in order to produce a document which best fits the competing concerns of those involved in this particular area.
6. I am not persuaded that there is a seriously arguable case here that an order in these terms would be appropriate, either in the interim or in the long term. Substituting a

very short form of words for the text to a policy, as presently set out, with the consequences of breach of an injunction is not, in my view, appropriate. I am comforted by the fact that the policies that are in question have actually been implemented in the period of two and a half years and nobody has suggested that, either during that period or since, there is a serious generic problem in relation to excessive violence. That does not excuse the lack of a good policy but, in terms of balance of convenience, looking at a policy that is served over that period, its reintroduction preserves the status quo as it was and this judicial review application can proceed, bearing in mind what has happened, and proper counsel will be taken as to the future of that.

7. The order may by Collins J was made at a time when there was a lacuna in relation to any guidance and against that background. Now that the guidance has been reintroduced, and I am assured that it has been promulgated and will be complied forthwith in relation to those who work with that for the UK Border Agency, the order in relation to the individuals is no longer necessary and conceptually I think that there is no justification to provide an order in relation to them and not to anybody else.
8. I think that the logical way forward is to revoke the order in relation specifically to those individual claimants and I would therefore refuse the interim relief which is requested at this stage.
9. Are there any ancillary applications arising out of that?
10. MR HICKMAN: My Lord, I have obviously passed you some draft amendments. We obviously need to take stock in the light of the developments late yesterday, and in the light of my Lord's judgment, as to where this claim goes. My Lord has noticed that the claim has substantially succeeded in the sense that the main complaint, be not the only complaint has been satisfied by (inaudible) policy.
11. MR JUSTICE TURNER: You pretty much did the job you set out to do, if that is any encouragement.
12. MR HICKMAN: My Lord, I am grateful. We obviously need it take stock in light of events of yesterday because we simply have not had an opportunity. In those circumstances, I do ask the court to allow the amendments because they may be matters that we wish to pursue.
13. MR JUSTICE TURNER: These are the amendments that you handed up to me this morning?
14. MR HICKMAN: Yes, exactly.
15. MR JUSTICE TURNER: Is there any objection to those amendments being allowed? You may or may not take issue as to the merits but --
16. MS LEAN: My Lord, two points. One, we have had not much opportunity to engage with them substantially but if there is to be an amendment, perhaps we could have the full amended grounds so we can see exactly how they relate to the rest of the claim. I

am presuming they are additional to the other grounds but it maybe that they are subsumed but I want to be able to --

17. MR HICKMAN: I could answer that very easily. If you take the amendments, they simply slot in at the relevant paragraph, after the end of the other grounds. There are no further deletions or changes to the grounds.
18. MR JUSTICE TURNER: These are the points you have ventilated and they were ventilated in response to a very late reintroduction of a policy promulgated with the information.
19. MR HICKMAN: Yes, we need to look exactly at the terms of the policy that has been reintroduced and consider whether we have any points, so in my submission the amendments should be allowed and we will need to consider where the claim is taken from here.
20. MS LEAN: My Lord, I am grateful for the clarification. We do not object per se to the amendment. However, we would ask -- technically, on the current timescales, our summary grounds are due on Monday. So I would ask in light of the amendment, and obviously to others, if we might have 21 days from today to file and serve our summary grounds?
21. MR JUSTICE TURNER: Any objection to that?
22. MR HICKMAN: May I just take instructions. 21, that is fine.
23. MR JUSTICE TURNER: Yes.
24. MS LEAN: I am grateful, my Lord.
25. MR JUSTICE TURNER: Could I ask you put your heads together and draft an order for me to sign based on the rulings that I have made? Thank you.