

Case No: CO/986/2017

Neutral Citation Number: [2018] EWHC 639 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/03/2018

Before:

LORD JUSTICE HOLROYDE
MRS JUSTICE NICOLA DAVIES DBE

Between:

THE QUEEN on the application of
(1) QSA
(2) FIONA BROADFOOT
(3) ARB

Claimants

- and -

(1) SECRETARY OF STATE FOR THE HOME
DEPARTMENT
(2) SECRETARY OF STATE FOR JUSTICE

Defendants

Karon Monaghan QC & Keina Yoshida (instructed by Birnberg Peirce Ltd) for the
Claimants

Kate Gallafent QC & Christopher Knight (instructed by Government Legal Department)
for the Defendants

Judgment

Mrs Justice Nicola Davies:

1. This is the further judgment of the court to which we have both contributed.
2. On 2 March 2018 following the handing down of its judgment [2016] EWCA Civ 29, the court ordered that the claim for judicial review be allowed in respect of Ground 1 and dismissed in respect of Grounds 3 and 4 and that permission to apply for judicial review be refused in respect of Grounds 2, 5 and 7. The court invited submissions from both parties in respect of permission to appeal and other consequential matters. The submissions have been received.
3. We have considered the forms of declaratory relief as proposed on behalf of the claimants and the defendants. We make the following declaration:
 - i) It is declared that the provisions of Part V of the Police Act 1997 are incompatible with the claimants' rights under Article 8 ECHR to the extent that they require disclosure of all previous convictions that are recorded on central records, on certificates under Part V of the Act where there is more than one conviction.
 - ii) It is declared that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 cannot be read or given effect in a way which is compatible with the claimants' rights under Article 8 ECHR to the extent that it excludes from the definition of "a person with a protected conviction" a person with more than one conviction.
 - iii) The declarations at paragraphs (i) and (ii) above shall not take effect until the judgment upon any proposed appeal or further order in the mean time, upon the defendants agreeing to prosecute their appeal with expedition.

Permission to appeal

The claimants

4. We have carefully considered the Grounds of Appeal drafted on behalf of the claimants. In our judgment there is no merit in any ground. Further there are no other compelling reasons to grant permission to appeal.

The defendants

5. We grant permission to appeal on Ground 1. In relation to the application of Article 8 ECHR to the Police Act 1997 ("the PA 1997") at [55] of its judgment the court accepted that it was bound by the Court of Appeal in *R (P & Others) v Secretary of State for the Home Department* [2017] EWCA Civ 321 ("*P*") in concluding that the statutory scheme under section 113A and 113B of the PA 1997 is not in accordance with the law. The decision of *P* is under appeal to the Supreme Court, a successful appeal would affect the decision of this court in respect of Ground 1. Further, in considering the relevant provisions of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 ("the 1975 Order") the court considered the provisions of the 1975 Order separate from those of the 1995 Act.

6. We do not grant a certificate pursuant to Section 12 of the Administration of Justice Act 1969 to join this appeal with the appeals in the Supreme Court of *P* and *Re Gallagher's Application for Judicial review* [2016] NICA 42. The appeals are listed for three days in June 2018, attempting to join this case could jeopardise this hearing date. Further, the addition of this case is unnecessary. The matters of principle in respect of the PA 1997 are live in the appeals of *P* and *Gallagher*. As to the 1975 Order, the claimants will be arguing that the Court of Appeal in *P* considered the scheme as a whole, the PA 1997 and the 1975 Order. The issue of the application of Article 8 ECHR to the 1975 Order will therefore be canvassed before the Supreme Court. Accordingly the defendants' appeal on Ground 1 should be to the Court of Appeal upon the defendants agreeing to prosecute the appeal with expedition.
7. The declarations set out at paragraph 3 above shall not take effect until judgment upon the appeal to the Court of Appeal or further order. Although the parties have contemplated an order excepting the claimants from the effect of this stay, we are not persuaded that such an exception would be correct in principle; and in any event, we find it very difficult to see how it could be practicable in the circumstances of this litigation.

Costs

8. The claimants have succeeded upon one ground but have failed on five. The claimants seek an issues-based costs order pursuant to CPR 44.2(4)(b), namely that:

“(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

...

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful;...”
9. The claimants seek 75 per cent of their costs upon the basis that “the bulk of the argument (including submissions on the scheme and relevant authorities) was in respect of Ground 1”. The defendants submit that the appropriate order would be no order as to costs, alternatively the claimants should recover no more than 30 per cent of their costs. We do not accept the claimants' contention in respect of Ground 1. A considerable amount of the court's time was taken with the evidence, submissions and authorities, which included European Directives and Conventions, relevant to the remaining grounds. In our view a proportionate order of costs to reflect the claimants' success on Ground 1 would be that the defendants pay 33 per cent of the claimants' costs.