Neutral Citation Number: [2018] EWHC 976 (Admin)

Case No: CO/1052/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/04/2018

Before :

LORD JUSTICE SINGH
and
MR JUSTICE HOLGATE

- -

Between :

The Queen on the application of The National Council for Civil Liberties (Liberty)	**Claimant**
- and -	
(1) Secretary of State for the Home Department	**Defendants**
(2) Secretary of State for Foreign and Commonwealth Affairs	

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Martin Chamberlain QC, Ben Jaffey QC and David Heaton (instructed by **Bhatt Murphy**) for the **Claimant**
James Eadie QC, Gerry Facenna QC, Julian Milford and Michael Armitage (instructed by **the Government Legal Department**) for the **Defendants**

Hearing dates: 27-28 February 2018

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Approved Judgment on procedural matters

Lord Justice Singh :

Introduction

1. This is the judgment of the Court on procedural matters. We have today also given a separate judgment on the substantive claim for judicial review, which we heard on 27-28 February 2018. In this judgment we address two applications made by the Defendants:

   (1) an application for an extension of time to file and serve their skeleton argument for the substantive hearing;

   (2) an application to rely on further evidence, namely the second and third witness statements of Mr Andrew Scurry, with their exhibits.

(1) The Defendants' application for an extension of time for their skeleton argument

2. The Defendants apply for an extension of time in which to file their skeleton argument for the hearing on 27-28 February. That skeleton argument was filed on 19 February 2018, whereas previous extensions (which had been the subject of consent orders approved by the Court) had required the skeleton argument to be filed by 15 February 2018.

3. It is common ground that an application for an extension of time in such circumstances is akin to an application for relief from sanctions: see the decision of the Court of Appeal in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633; [2015] 1 WLR 2472, applying the well-known principles in *Denton and others v T H White Limited (Practice Note)* [2014] EWCA Civ 906; [2014] 1 WLR 3926. That exercise involves three stages:

   (1) to identify and assess the seriousness or significance of the breach;

   (2) to consider why the breach occurred;

   (3) to consider all the circumstances of the case, so as to enable the Court to deal justly with the application.

4. In the circumstances, when this application was considered at the beginning of the hearing on 27 February 2018, Mr Chamberlain QC (appearing on behalf of the Claimant) fairly accepted that, although the question is one for this Court, he would not resist the application for an extension of time.

5. On 27 February 2018, before the substantive hearing began, we announced our decision on this application (granting the extension of time) and made consequential orders. We said that we would give our reasons in writing later, which we now do.

6. This claim for judicial review raises what are, on any view, matters of great public importance, both to the Claimant and others who fear that their privacy rights are being unlawfully breached; and for the Government, which has a duty to protect the security and safety of the public. The case also raises important questions about the relationship between primary legislation enacted by the Parliament of the United Kingdom and fundamental rights which are protected in European Union ("EU") law, in particular in the EU Charter of Fundamental Rights and Freedoms. It is readily apparent therefore that this is no ordinary litigation.

7. When permission was granted by Jeremy Baker J on 14 June 2017, he made various directions as to the timetable which was to be followed leading up to a substantive hearing before this Court. According to that timetable the Claimant's skeleton argument was to be filed at least 28 days before the substantive hearing: that was 29 January 2018. The Defendants were to file their skeleton argument not less than 21 days before the hearing: that was 5 February 2018.

8. It became apparent that it would be sensible to extend those deadlines by a short amount because the Court of Appeal was due to give judgment in *R (Watson & Others) v Secretary of State for the Home Department* on 30 January 2018. Accordingly, on 26 January 2018 the Claimant sought an extension of time for its skeleton argument to be filed and served by 6 February 2018. The Claimant proposed that the deadline for the Defendants' skeleton argument should be extended to 13 February 2018. The Defendants agreed and that was the subject of a consent order made by a lawyer in the Administrative Court Office pursuant to his delegated powers.

9. On 1 February 2018 the Claimant asked for a further two day extension for its own skeleton argument. The Defendants again agreed, with their deadline being similarly adjusted to 15 February 2018. Again this was the subject of a consent order made by the lawyer in the Administrative Court Office.

10. The Claimant's skeleton argument was filed and served on the due date, 8 February 2018. However, the Defendants' skeleton argument was not filed and served on the due date of 15 February 2018. Furthermore, no application for an extension of time was made in advance of the expiry of that deadline. Indeed, no indication was given to the Claimant's representatives that there would be any difficulty in complying with the agreed extended deadline.

11. The Claimant's solicitor emailed the Defendant's solicitor to point out that nothing had been received. The Defendants' solicitor replied, stating that:

> "The situation is that due to immoveable and competing pressure on Counsel time, the Defendants require more time to finalise their skeleton argument. It will be ready on Monday 19 February. It is submitted that your client will not be prejudiced by this."

12. The Claimant's solicitors wrote back on 16 February 2018, noting that an application would be required and that, in the absence of an adequate explanation, the Claimant would not consent to it.

13. In the circumstances which we have outlined, we have come to the conclusion that the Defendants' application for an extension of time should be granted. We take the view that this was a significant breach of a court order, albeit an order which had been agreed between the parties.

14. The reasons for the application are now more fully set out in the skeleton argument filed in support of this application on behalf of the Defendants, at para. 2(f). Unfortunately, as Mr Eadie QC accepted on behalf of the Defendants, the full reasons were not sufficiently explained in the application for an extension of time. It was not simply because of pressure on counsel's time but for a number of reasons that the Defendants needed to apply for an extension of time.

15. In all the circumstances of this case, not least the great public interest in this case for all concerned and because there was no objection by Mr Chamberlain at the hearing before us, we have taken the view that justice requires that the extension of time should be granted.

16. However, we do not take the view that breaches of deadlines of this sort, even of a day or two, should be regarded with equanimity.

17. In the circumstances which have arisen, we accept the application made by the Claimant that the Defendants should have to pay the Claimant's costs of the application for extension of time in any event. We also take the view that they should be assessed on an indemnity basis.[1] Finally, we take the view that these costs should be outside the scope of the cost capping order which was made by Lang J in this case.

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[1] So far as relevant in the present case the test for costs to be awarded on an indemnity basis is whether the conduct of a party was "unreasonable to a high degree", bearing in mind that "unreasonable" in this context does not mean merely wrong or misguided in hindsight: see *Kiam v MGN Ltd (No. 2)* [2002] EWCA Civ 66; [2002] 1 WLR 2810, at para. 12 (Simon Brown LJ).

18. This is for the following reasons:

(1) The Defendants failed to apply for an extension of time before the relevant deadline expired.

(2) They did not even inform the Claimant's representatives of the need for one until after the deadline had expired, when those representatives enquired why they had not received the skeleton argument.

(3) The email correspondence between the parties at that time indicates to us that the Defendants' solicitors simply assumed that the extension of time would be granted, in effect presenting this as a *fait accompli* not only to the Claimant but also to this Court.

(4) Although the delay was only by a few days, in the context of a case of this importance and magnitude, that was not insignificant. It had an impact on the timetable which the members of the Court had otherwise available to them for proper preparation for the substantive hearing. It also had an impact on the time available for the Claimant's counsel to prepare for the hearing.

(5) The Government, like all litigants, must comply with orders made by the court, both to ensure fairness and to facilitate the orderly and efficient conduct of litigation, especially litigation as important to the public interest as this case.

(6) If this part of the costs were covered by the general costs cap made by Lang J, it would defeat the point of making this distinct costs order.

(2) Application by the Defendants to rely on further evidence

19. This case took an unusual turn during the course of the hearing before us. On the evening of the first day of the hearing, 27 February 2018, at 18.53, the Defendants served a second witness statement of Mr Andrew Scurry (albeit that it was at that time unsigned and undated) together with an exhibit, which was a letter dated 27 February 2018 by Sir Adrian Fulford (who is a Lord Justice of Appeal and is the Investigatory Powers Commissioner, the first holder of that new office, which was created by the Investigatory Powers Act 2016).

20. Mr Scurry is the Head of the Investigatory Powers Unit in the Home Office and has held that position since March 2016. He made a first witness statement dated 19 December 2017. In that statement he informed the Court that it was anticipated that the new Office for Communications Data Authorisations ("OCDA"), an independent body charged with the prior authorisation of requests for access to retained data, would begin considering applications from the summer of 2018: see para. 90 of the first witness statement.

21. However, in the Defendant's skeleton argument, dated 19 February 2018, it was said (upon instruction) that the best current estimate of the time by which the prior authorisation regime could be brought into operational force was now 1 April 2019. The main purpose of the second witness statement of Mr Scurry was to place these matters formally in evidence rather than leave them in the form of a skeleton argument. It was also to exhibit the letter from Sir Adrian Fulford.

22. In his letter Sir Adrian includes the following:

"…

> As the judge with responsibility for this endeavour, I write in support of the submission that the Court grants a stay until April 2019 before the new body (to be called the Office for Communications Data Authorisations 'OCDA') begins work. The detailed planning, as set out above, is underway in earnest, but this work has exposed the complexity and challenge of delivering an independent organisation that will consider applications for access to communications data. …
>
> It is important that the new body is established as a sustainable independent organisation. Any attempt to rush the complex work that needs to be undertaken will significantly increase the risk that errors will occur that could significantly undermine the new regime's efficiency and effectiveness, and which will put at jeopardy its ability to deal with the application in a secure manner.
>
> The initial plans that had been developed led to the previous suggested date for the establishment of OCDA of July 2018. However, the true extent of the task that needs to be undertaken has only been revealed as the planning has developed and a multiplicity of difficult issues have been identified. Following approval by the relevant Board, I was first presented with the detailed and properly articulated implementation plans on 21 February 2018. I am entirely satisfied that these plans are robust and that the conclusion that the OCDA cannot be established before April 2019 is sound.
>
> I will continue to scrutinise this developing work with care, and to encourage my team and the relevant external officials to accelerate the process of implementation. However, I do not believe the previous estimated date of July 2018 is achievable; indeed I am extremely concerned that the new body would be faced with a disastrous beginning if it is maintained.
>
> I greatly regret the continued delay, but I consider the revised date of April 2019 is achievable and gives an appropriate (yet not in any sense over generous) length of time to establish a robust organisation."

23. In a note prepared with admirable speed before the hearing resumed on 28 February 2018, counsel on behalf of the Claimant objected to the admission of that further evidence. They observed (correctly) that no application had been made to file such evidence. They also submitted that, if such an application to extend time for filing and serving the new evidence were made, the principles applicable to relief from sanctions would apply and that this Court should refuse such an application.

24. We are not persuaded by that submission on behalf of the Claimant. In our view, the Defendants are correct to submit that the application is simply an application to rely on written evidence which can be the subject of permission granted by the Court: see CPR Rule 54.16(2)(b). Such an application was made, after the hearing, on 2 March 2018.

25. In the meantime, at the hearing on 28 February 2018, Mr Chamberlain on behalf of the Claimant had raised a number of further questions which he said arose from the second witness statement of Mr Scurry. In the light of that development, this Court indicated that the Defendants should (if so advised) file a third witness statement by 2 March 2018 to deal with those questions. That was done in the form of a third witness statement of Mr Scurry dated 2 March 2018. We also gave the Claimant the opportunity to respond by 6 March 2018. The Claimant filed a note in response on 5 March 2018.

26. As we have mentioned, on 2 March 2018, an application was made by the Defendants to rely upon both the second and the third witness statements of Mr Scurry and associated exhibits.

27. Although, in our view, strictly speaking this is not an application for relief from sanctions, the Court must of course bear in mind that it must exercise its discretion to receive late evidence, especially if it is served during or after the hearing, with due caution. In particular the Court must ensure fairness, not only to the other party concerned but also to the public interest.

28. In the circumstances of this case we have come to the conclusion that the interests of justice require the Court to receive the further evidence on behalf of the Defendants. This is in order to ensure that it has the fullest and most up to date information which is relevant to the issues in the case. It is also because we have well in mind the wider public interest that this case raises.

29. However, there is an issue about the costs of the application to rely on further evidence. In our view, it was unsatisfactory that the evidence updating the Court from what had been said in Mr Scurry's witness statement dated 19 December 2017 was not filed earlier nor was any application made to rely upon it earlier. This should, in principle, have been done in sufficient time before the Claimant had to file its skeleton argument, so that it could be taken into account by the Claimant's representatives before they had to file that skeleton. In some cases this may not be possible, because events occur after that date on which the Court needs to be updated. However, in the present case, it was already apparent that the July 2018 "go live" date was not going to be realistic during the course of December 2017 and January 2018: see the third witness statement of Mr Scurry, paras. 8 and 10. It is troubling that Mr Scurry's first witness statement was allowed to remain before the Court as if it set out the up to date position when it was out of date almost as soon as it had been filed and served on or around 19 December 2017.

30. There should certainly have been an up to date witness statement filed and served before the start of the hearing on 27 February 2018 and, at least so far as possible at the same time as the Defendants' skeleton argument was served on 19 February. Even if matters had to wait for meetings which took place on 21 February 2018, we can see no good reason why this evidence could not have been filed and served a day or so after those meetings and certainly before the start of the hearing. It is unsatisfactory that this evidence should have been filed and served after the first day of the hearing, when counsel for the Claimant had almost finished their submissions, and apparently only because of questions which arose during the course of that day in court. It is also highly unsatisfactory that a third witness statement of Mr Scurry had to be filed as a result of developments during the course of the hearing and this could only be done after the hearing had finished. As we have mentioned above, that third witness statement in fact referred to matters that were known about in December 2017 and January 2018.

31. We take the view that there is a continuing obligation on public authorities (in particular in a case as important as the present) to keep the Court up to date with relevant evidence. The evidence which the Court had at the start of this hearing was on any view unsatisfactory because it consisted of an out of date witness statement from December 2017. We can see no good reason why up to date evidence should not have been filed at least by the time that the Defendants' skeleton argument was on 19 February 2018, not least because much of the further evidence (as the Defendants acknowledge) sought to place what was said in the skeleton argument on a firm evidential footing.

32. We also take the view that the point made in para. 7(2) of the Defendant's note of 2 March 2018 (that it was only when the Claimant's skeleton argument was served that it became known that the Claimant was asking for suspensory disapplication of the Investigatory Powers Act 2016 from July 2018) is disingenuous. As long ago as the Claimant's statement of facts and grounds in this claim for judicial review (February 2017) it was submitted that the Court should order disapplication of provisions which are incompatible with EU law, although it was accepted that an "appropriate period" for amendment of the Act should be allowed. The Defendants' detailed grounds of resistance (filed in December 2017) submitted that the claim was premature pending consideration by Parliament of amendments to the legislation, that no order for disapplication should be made and that only a declaration was either necessary or appropriate. In any event, we would note that the Claimant's skeleton argument was filed and served on 8 February 2018 when, even on the Defendants' view, their position was made clear.

33. In the circumstances which have arisen we have come to the view that the costs of the application to admit the second and third witness statements of Mr Scurry should be paid by the Defendants in any event. We also order that these costs should fall outside the costs cap otherwise ordered by Lang J earlier in these proceedings. This is again because it would defeat the point of making this distinct costs order if it simply fell into the costs covered by that general cap.

Conclusion

34. For the reasons that we have given we propose to make an order to the following effect:

(1) The Defendants' application for an extension of time to file and serve their skeleton argument is granted until 19 February 2018, the date on which that skeleton argument was in fact filed and served.

(2) The Defendants shall pay the Claimant's cost of that application for an extension of time in any event.

(3) Those costs shall be assessed on an indemnity basis.

(4) The Defendants' application to rely on further evidence, comprising the second and third witness statements of Andrew Scurry, and their exhibits, is granted.

(5) The Defendants shall pay the Claimant's cost of that application to rely on further evidence in any event.

(6) The two costs orders made above shall be outside the scope of the cost capping order made by Lang J.