JUDICIARY OF
ENGLAND AND WALES

18 June 2019

PRESS SUMMARY

Birmingham City Council v Afsar & ors
[2019] EWHC 1560 (QB)
Mr Justice Warby

1. This case is about a protest which has been carried on outside a primary school, Anderton Park School, against aspects of the teaching at the School. The case involves a conflict between a number of important civil rights, some of them fundamental human rights.

2. At a hearing on 31 May 2019, the Court (Moulder J, DBE) granted temporary injunctions to restrict the conduct of the protest. At a further hearing on 4 June 2019, the Judge extended the exclusion zone imposed by the original injunction. Both those hearings took place without notice to the respondents. The injunction orders provided for a review hearing to take place on Monday 10 June 2019.

3. This judgment follows that review hearing, which took place in Birmingham before Warby J. At that hearing the Judge gave directions for the case to be tried before the end of July. He then heard an application by the first to third defendants, for the discharge of the injunctions that had been granted on 31 May and 4 June 2019, and an application by the claimant to continue those injunctions until after judgment at the trial.

4. At the end of the hearing, the Judge announced his decision. He granted the defendants' application for discharge of the existing injunctions, on the grounds of failures to comply with the duty of full and frank disclosure owed by those who seek injunctions without giving notice to other parties. But he upheld the claimant's application, and granted fresh interim injunctions, so that protection remains in place pending trial. This was on the basis that the claimant was likely to succeed at trial in showing that restraint on the way the protests were being conducted was justified. The Judge said his reasons would follow. Today's judgment provides those reasons.

5. The Judgment sets out the factual background in outline **[3-10]**. The legal context is identified at **[11-27]**, concentrating on the duty owed by a party applying for an injunction without notice to the other parties, to make full and frank disclosure to the Court of all material points of fact, law and procedure. At paragraphs **[28-46]** the judgment sets out the history of the applications without notice. Paragraph **[42]** lists matters of law and procedure that were not put before the Judge at the without notice hearings. The chronology of the applications to Warby J is set out at **[47-48]**. Reasons for discharging the original injunction are given at **[49-67]**. Reasons for granting fresh injunctions are set out at **[68-74]**.

6. The original orders were discharged for five main reasons, taken cumulatively:

(1) *Application without notice.* Although the Council correctly identified the relevant procedural law, including s 12(2) of the Human Rights Act 1998, the evidence and argument advanced on this point fell short **[49]**. The Council's duty of full and frank disclosure required it to provide the Court with a distinct, clear, and sufficient explanation, founded upon evidence, for making its application without notice to any of the defendants, identifying the counter-arguments which could be put forward, and explaining why those arguments should not be accepted. It failed to discharge that duty **[55]**. The breaches of duty in this respect were particularly egregious when it came to the application of 4 June. By that time, it could no longer be said that giving notice might prompt escalation; the Council already had in place the very relief that it had sought at the hearing on 31 May. No other basis was identified. It seems that the question of notice was simply ignored [**56]**.

(2) *Failure to identify the threshold for granting an injunction*. The Council failed to cite s12(3) HRA, which provides that no relief affecting freedom of expression is to be granted before trial "unless the court is satisfied that the applicant is likely to show that publication should not be allowed." The Judge concludes that the reason it was not cited is that the Council failed to identify its relevance **[57]**; he rejects the Council's argument that s 12(3) was and is inapplicable as the case does not involve "publication" [**58-60]**; and he rejects the fall-back argument, that in substance the Council and the Court addressed the relevant test **[61]**. He adds that it might be argued that in some respects the higher threshold set by the "defamation rule" applied: **[62]**.

(3) *Other failures to refer to or follow the Master of the Rolls' Practice Guidance/Model Order.* These are cited at **[25-26].** The Judge holds that this Guidance and Order were relevant, rejecting the Council's submission that it is inappropriate to draw an analogy between cases such as the present and private information cases, governed by these documents **[63]**.

(4) *A2P1* The potential for an argument that the rights under Article 2 of the First Protocol to the Convention of the parents involved in the protest were engaged was not recognised, and hence not placed before the Judge **[64]**.

(5) *Non-disclosure: the facts.* The Judge concludes that the defendants overstated the position when arguing that the Council's presentation of the facts was "selective and partisan", but agrees "that the Council could and should have done more to highlight what the defendants might have said in opposition to its application, had they been given the chance to have a say" **[65].** The general nature of the likely responses was foreseeable. The Council, presenting the Court with a 220-page hearing bundle, could not assume that it would all be read in the available time. It ought to have identified for the Judge the chief points that could be made by the defence, so far as the facts are concerned **[66].** Some failings in that regard are identified **[67]**.

7. Despite these deficiencies in the presentation of the case at the without-notice stage, the Judge came to share the view of Moulder J that, on a proper assessment of the merits, interim injunctions are appropriate. The claimant had demonstrated that it would probably succeed at trial in showing a risk, justifying an injunction, that unless restrained the defendant would cause protest or demonstration which was unlawful, and actionable at the suit of the claimant; and that injunctions could be framed which served to restrain the

encouragement of unlawful conduct, without straying into improper restraint of lawful protest **[68]**.

8. The Judge is satisfied, with reservations, that the process of suing Persons Unknown was proper **[69-70].** There was much that had been said by the protestors that fell firmly within the realm of reasonable, peaceful and lawful protest, even if it was offensive **[71]**. But the gravity of the conduct engaged in by some of those attending the protests, and the seriousness of its impact on others, had been downplayed by the defendants **[72]**. The Judge takes particularly seriously the impact on children. Staff members speak of children being "very distressed" by the aggressive nature of the protests, and crying. The Headteacher's daughter has broken down in school due to worry over the protestors. It is to be recalled that this is a primary school.

9. The terms of the orders made on 31 May 2019 are set out in Appendices A and B to the present judgment. The modifications made to those orders as a result of the review hearing on 10 June are summarised at **[75]**.