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Case No: CO/2431/2022

In The High Court Of Justice
King's Bench Division
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2023

Before:

Mr Justice Chamberlain

- -

Between:

The King

On The Application Of

H.R.H. The Prince Henry Charles Albert David,

Duke Of Sussex — **Claimant**

-And-

Secretary Of State For The Home Department — **Defendant**

-And-

Commissioner Of Police For The Metropolis — **Interested Party**

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Shaheed Fatima KC, Jason Pobjoy and Gayatri Sarathy (instructed by **Schillings International PLC**) for the **Claimant**
Robert Palmer KC and Christopher Knight (instructed by the **Government Legal Department**) for the **Defendant**
Matthew Butt KC (instructed by **MPS Legal Department**) for the **Interested Party**

Hearing date: 16 May 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 23 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE CHAMBERLAIN

Mr Justice Chamberlain:

Introduction

1 The claimant is the Duke of Sussex. In January 2020, he announced his decision to step back from his position as a "working member" of the Royal Family with effect from April of that year. The claimant and his family moved to Canada and then to the United States. Up to that point, protective security had been provided for them by specially trained officers from the Royalty and Specialist Protection Command ("RaSP") of the Metropolitan Police Service ("MPS").

2 The Home Secretary is responsible for the formulation of policy about protective security for royalty and public figures and is accountable to Parliament for the delivery of that policy. She is also responsible for the allocation and scrutiny of funding for such protective security from the Protective Security Grant. However, under arrangements of long standing, she delegates decisions about whether to provide protective security measures in particular cases, and if so what measures, to a committee formerly known as the Royal and VIP Executive Committee ("RAVEC"). It is now known as the Executive Committee for the Protection of Royalty and Public Figures, but has kept the same acronym. It includes various senior officials and also representatives of the Royal Household and of the MPS.

3 On 28 February 2020, RAVEC decided that, because of the claimant's changed role, the provision of protective security would no longer be appropriate on the same basis as before and would cease no later than 31 March 2020, save in particular and specific circumstances. That decision and a subsequent one about security arrangements for a visit in June and July 2021 were the subject of a claim for judicial review filed in September 2021 ("the First Claim"). There was a permission hearing on 7 July 2022. In a judgment handed down on 22 July 2022, Swift J granted permission to apply for judicial review on some grounds and refused it on others: see [2022] EWHC 1936 (Admin).

4 One of the grounds for which permission was granted was that RAVEC should have had regard to the claimant's offer, made at a meeting with members of the Royal Household on 13 January 2020, to reimburse or proactively finance the cost of the security measures. In response, on 21 December 2021, the Home Secretary decided that it would be appropriate for RAVEC to decide an issue of principle: whether an individual whose position had been determined by RAVEC not to justify protective security should be permitted to receive it on the basis that they reimburse the public purse for its cost. If the answer was "Yes", RAVEC was asked to consider whether the claimant should be permitted to receive protective security on that basis. RAVEC met on 24 January 2022 and decided that the answer to the first "in principle" question was "No", so the second question did not arise. On 15 February 2022, the Chair of RAVEC wrote to the Home Secretary setting out RAVEC's reasons.

5 This second claim challenges the Home Secretary's decision to delegate the issue of principle to RAVEC and RAVEC's decision to answer the "in principle" question in the negative. Because RAVEC takes decisions on behalf of the Home Secretary, she is the defendant to the claim. The Commissioner of Police of the Metropolis ("the Commissioner") is an interested party. Permission was refused on the papers by Swift J on 15 February 2023. The application is now renewed. At the hearing, the claimant was represented by Shaheed Fatima KC, leading Jason Pobjoy and Gayatri Sarathy. The

Home Secretary was represented by Robert Palmer KC leading Christopher Knight. The Commissioner was represented by Matthew Butt KC. I am grateful to all counsel and their respective teams for their helpful submissions.

RAVEC's decision

6 The Chair of RAVEC's letter of 15 February 2022 explained that RAVEC had considered the advantages and disadvantages of permitting private funding of protective security provided by the MPS. He explained that RAVEC conducts difficult and sensitive balancing exercises when considering appropriate security measures for any individual within its cohort and when determining the circumstances in which an individual falls outside of its cohort.

7 RAVEC recognised that an individual who no longer permanently falls within its cohort may still face some level of threat, albeit one falling short of a threat to life that would engage Article 2 of the European Convention on Human Rights ("ECHR") so as to make the provision of police protection an obligation of the State. It also recognised that protection from MPS officers has advantages that cannot be fully replicated by private sector providers. The advantage of making available this enhanced level of protection was a factor to which RAVEC gave "some weight".

8 Against that, however, were six disadvantages. First, protective security was provided by police officers, who were obliged to put themselves in harm's way to protect their principal, in the public interest and the interests of the State. That duty could only be justified where the State has determined that the public interest requires it and has provided public money for the purpose. The determination was "one for which Ministers are ultimately democratically accountable to Parliament". It was said to be inconsistent with those basic propositions for an individual to be able to pay to achieve a level of protective security which the State has determined the public interest does not justify. Public confidence in the MPS and RAVEC may be undermined if it were believed that a wealthy individual could pay to receive protective security measures that they would not receive if they were less wealthy.

9 Second, there would be an adverse effect on RAVEC's ability to ensure that its decision-making is consistent: a less wealthy individual would feel unfairly treated.

10 Third, permitting private funding would be likely to reduce the availability of a limited specialist resource, which is provided for those cases where RAVEC have decided that it is in the public interest for protective security to be provided.

11 Fourth, any decision to permit private funding would constitute a precedent of uncertain scope. What may begin as an occasional use of protective security might expand into more extensive use. Other individuals may argue by analogy that they should also be permitted to fund protective security. There would be "no inherent guidance as to the boundaries of that principle". This would be unsatisfactory.

12 Fifth, there was in RAVEC's view "at best significant uncertainty as to whether the MPS would have the power to charge a private individual for the provision of protective security under s. 25(1) of the Police Act 1996". The existing case law indicated that charges can generally be levied only in respect of services provided on private land. Protective security was likely to be required in public places. There was "at most, no

legal clarity or certainty that an arrangement of the sort envisaged is legally permissible, even if were otherwise acceptable (which, as reflected in RAVEC's conclusion below, it is not)".

13 Sixth, the impact of the decision was limited for individuals, such as the claimant, who fall outside RAVEC's cohort generally but might qualify in particular circumstances where the public interest justifies it.

14 Overall, RAVEC considered that the disadvantages cumulatively carried very significant weight and the balance favoured refusing in principle to permit an individual to privately fund protective security.

The law

15 In *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270, the House of Lords held that, although the police were bound to provide sufficient protection to life and property without payment, if they chose to provide a special form of protection outside the scope of their public duty, they could lawfully charge for it.

16 The charging power was later codified and is now to be found in s. 25(1) of the Police Act 1996. It provides as follows:

> "The chief officer of police of a police force may provide, at the request of any person, special police services at any premises or in any locality in the police area for which the force is maintained, subject to the payment to the local policing body of charges on such scales as may be determined by that body."

17 "Special police services" are not defined. There is, however, authority on how to draw the boundary between the services the police are required to provide free of charge and the "special police services" for which they are empowered to charge. Some of it arose in the context of policing large sporting events.

18 In *Leeds United Football Club Ltd v Chief Constable of West Yorkshire Police* [2014] QB 168, Lord Dyson MR (with whom the other members of the court agreed) said this at [25]:

> "The police are under a duty to prevent crime and disorder and to protect life and property. They cannot charge anyone for the cost of discharging this duty. But they may charge for the provision of other services which they choose to provide at the request of any person. These other services are special police services."

19 Lord Dyson went on to approve a test requiring consideration of four factors identified by Neill LJ in a previous case, *Harris v Sheffield United Football Club Ltd* [1988] QB 77, at 91-92:

> "(1) Are the police officers required to attend on private premises or in a public place?… (2) Has some violence or other emergency already occurred or is it immediately imminent?... (3) What is the nature of the event or occasion at which the officers are required to attend?... (4) Can the provision

> of the necessary amount of police protection be met from the resources available to the chief constable without the assistance of officers who would otherwise be engaged either in other duties or would be on duty?"

20 Lord Dyson emphasised at [30] that the first factor was the most important:

> "Prima facie, the police are obliged to maintain law and order in public places. They are not usually obliged to do so on private premises, at any rate unless violence has actually occurred or is immediately imminent. The police may, of course, be asked to provide other services on public land. The provision of a road escort is an obvious example. But the question whether the services are provided on public or private land is plainly of central importance to whether they are special police services where those services are provided in order to promote the maintenance of law and order."

Ground 1

21 Ground 1 has two limbs. Limb (a) is that the Home Secretary's decision to delegate the issue of principle to RAVEC and RAVEC's decision to give a negative answer are *ultra vires* because s. 25(1) makes clear that any decision in relation to the provision of and charging for special police services rests exclusively with the chief officer of police. Limb (b) arises in the alternative if limb (a) fails. It is that, if RAVEC has the relevant power, it has fettered its discretion in future cases by adopting a rigid policy that it will never be appropriate to fund the provision of protective security.

22 As to limb (a), there was an issue between the parties on the proper construction of the letter of 15 February 2022. Ms Fatima submits that the letter does not support the two-stage analysis described in the Secretary of State's Summary Grounds of Resistance and showed that RAVEC was purporting to make the decision that Parliament had conferred on the chief officer of police under s. 25(1).

23 Mr Palmer for the Secretary of State accepts that any decision whether to provide and charge for special police services rests with the chief officer of police. He submits, however, that RAVEC must be assumed to be aware of the terms of s. 25(1), given that they expressly referred to it. Their decision explains why, as a matter of policy, they do not support the suggestion that a wealthy person should be able to "buy" special police services. This is not a purported exercise of the s. 25(1) power. It does not preclude any individual from applying to a chief officer of police for protective security. As to limb (b), Mr Palmer relies on the general principle enunciated in *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923, at [17], that "a policy-maker (notably central government) is entitled to express his policy in unqualified terms. He is not required to spell out the legal fact that the application of the policy must allow for the possibility of exceptions".

24 Read as a whole, the letter is, in my judgment, communicating a decision about the appropriateness of providing privately funded protective security services, on the assumption that a chief officer of police decided to provide such services under s. 25(1). This is made clear by the reference in para. 21 to the question "whether <u>the MPS</u> would have power to charge a private individual for the provision of protective security under section 25(1)" (emphasis added).

25 As I have said, there is no dispute that under s. 25(1) the decision whether to provide and charge for special police services falls to the chief officer of police and that officer alone. But the purpose of that subsection is to confer a general power to charge for "special police services", which has been left undefined and therefore encompasses a very broad range of services. The paradigm, no doubt, are the ordinary police services necessary to maintain order at sporting or entertainment events. But the conferral of a general power to provide these and other services, and to charge for them, cannot preclude requirements for special authorisations from others, such as the Home Secretary or RAVEC as her delegate, for the provision of particular services such as the protective security services provided by RaSP. Indeed, as Mr Palmer fairly pointed out, the claimant's own case in the First Claim was that RAVEC should have considered whether the offer to pay made a difference. In those circumstances, it is difficult to see how the claimant can properly be heard to complain in this claim that RAVEC should not have decided the "in principle" issue.

26 In any event, there is a conceptual difficulty with Ms Fatima's argument on limb (a). She conceded in argument that RAVEC could properly express a view on the "in principle" issue. Her complaint was that RAVEC was purporting to decide that issue. In other words, her real complaint is not that RAVEC had no business considering the issue, but that RAVEC's view should not be regarded as determinative. If she is right, it would follow that were the chief officer of police to regard RAVEC's view as determinative, his or her decision would be challengeable for surrendering or fettering his or her discretion. Even if such a claim had merit, there has been no application to the Commissioner (or any other chief police officer) to exercise his discretion under s. 25(1). The only decisions challenged in this claim are those of the Home Secretary and RAVEC.

27 I have borne carefully in mind the Commissioner's statement at para. 33 of his Summary Grounds of Defence that, should a request be made to the MPS, the answer would inevitably be "No". But this stance has been taken for a range of reasons, some of which go well beyond those relied upon by RAVEC. These other reasons include the geographical limit on the services that can be provided under s. 25(1) (i.e. within the particular force's area) and the limited standing authority for the deployment of firearms officers. The questions whether and to what extent these points constrain the use of the power in s. 25(1) might arise on a challenge to a refusal by the Commissioner to exercise that power. They do not arise in any challenge to the present decisions of the Home Secretary and RAVEC. Limb (a) of ground 1 is therefore not arguable.

28 For similar reasons, limb (b) seems to me to be directed at the wrong target. If (as the claimant says) the decision whether to provide special police services is, under the statute, that of the chief officer of police, and (as the claimant's argument logically entails) the view expressed by RAVEC should be regarded as no more than a view, it is difficult to see why there is any requirement at all for the view to be expressed in terms which permit exceptions. The rule against fettering applies to the person on whom the statutory discretion is conferred. i.e. the chief officer of police, not the Home Secretary. In any event, however, the Home Secretary has confirmed that RAVEC would consider whether to depart from its "in principle" decision if an argument that it should do so were made in an individual case; and the *West Berkshire* case is authority for the proposition that there is no need for a policy to be framed in terms which indicate a willingness to consider exceptional cases. In those circumstances, limb (b) is not arguable.

Ground 2

29 Ground 2 is that RAVEC erred in law by (a) failing to comply with its duty properly to understand the scope of the s. 25(1) power and (b) premising its conclusions on three substantive errors about that scope.

30 As to limb (a), there is no principle of law that a decision-maker must decide every conceivable legal question about the extent of his own powers, before deciding whether to exercise them. *A fortiori,* there is no duty on one public authority to decide every such question about the scope of the powers of another public authority before opining on whether it would be appropriate for that other authority to exercise its powers.

31 If RAVEC had thought that protective security should in principle be provided, it might have been necessary for it to reach a definitive view about whether that could lawfully be done under s. 25(1). But RAVEC's first, second, third, fourth and sixth reasons were all reasons of policy and moral principle against the provision of privately funded protective security. In those circumstances, a fair reading of the decision as a whole makes clear that RAVEC did not find it necessary to resolve whether protective security could as a matter of law be provided under s. 25(1). That was, in my view, a permissible approach. I do not consider that there is anything to suggest the contrary in the decision of the Supreme Court in *DB v Police Service of Northern Ireland* [2017] UKSC 7, [2017] NI 301. In that case, the complaint was not that the police force had failed to reach a definitive view on a difficult legal question, but rather that it had failed to appreciate the existence and significance of a particular statutory power: see [10] of Lord Kerr's judgment. This was another way of saying that the challenged decision was vitiated by a misdirection of law.

32 In this case, the fifth reason given by RAVEC was simply that the applicability of s. 25(1) was, at best, uncertain. There may be some circumstances where it will be an error of law to characterise a legal issue as uncertain. But in this case, given that the applicability of s. 25(1) turned on the application of the four factors identified in the *Sheffield* and *Leeds* cases to very different circumstances, it is, in my judgment, impossible to fault that characterisation.

33 As to limb (b), it is important not to read the letter as if it were a statute. When RAVEC said that there was there was "at best significant legal uncertainty as to whether the MPS would have the power to charge a private individual for the provision of protective security", it was not saying that s. 25(1) can never authorise the provision of services to a private individual. It was considering whether s. 25(1) applies to the kind of services being sought here (i.e. protective security for a private individual). As the remainder of the paragraph made clear, a principal reason for the uncertainty was that those services would be needed mainly on public land. The statement that special police services can "generally" only be provided on private land was to my mind a perfectly adequate paraphrase of the *Leeds* decision, which made clear at [30] the importance of the question whether the services were to be provided on public or private land and the presumption that services provided on public land would, in general, not fall within "special police services". It is true that the applicability of s. 25(1) to services similar to those sought here has never been considered by the courts, but that was a further reason to regard the result as uncertain.

34 The final alleged error of law was RAVEC's alleged failure to recognise that, once it had concluded that protective security services do not fall within the normal policing function, those services must necessarily be "special police services" within s. 25(1). If that were so, it would be lawful for the police to charge the residents of wealthy areas for additional police patrols on public streets in those areas. The fact that the police had determined that it was not necessary to provide those patrols pursuant to the normal policing function would be sufficient to bring them within the scope of s. 25(1). I do not think this is what Parliament intended. It seems much more likely that Parliament intended the focus to be on whether the services are <u>of a kind</u> that falls within the normal policing function. But whether that is correct or not, what is certain is that the point has never been tested; and it is sufficient for present purposes to say that RAVEC did not err by concluding that the applicability of s. 25(1) to protective security services was far from clear.

35 In any event, even if the treatment of s. 25(1) in para. 21 of the decision letter contained an error of law, the final sentence of that paragraph, read in the context of the decision as a whole, makes clear that the view reached about s. 25(1) was not necessary to the decision. RAVEC's view that the application of that provision was uncertain was a further reason not to provide privately funded protective security, which applied "even if it were otherwise acceptable (which, as reflected in RAVEC's conclusion below, it is not)". The later indication that the reasons are "cumulative" does not negate the clear import of this statement. It follows that neither limb of ground 2 supplies an arguable basis for impugning RAVEC's decision.

Ground 3

36 Ground 3 is that RAVEC failed to take account of relevant considerations and/or make reasonable enquiries in relation to (a) the proper scope of the s. 25(1) power, (b) how that power is exercised by police forces in the UK and (c) the absence of any principled or rational basis for distinguishing between individuals falling within the remit of RAVEC and others.

37 As to (a), this is simply another way of putting the complaint advanced under limb (a) of ground 2. It is unarguable for the same reason.

38 As to (b), the claimant accepts that a complaint of failure to make reasonable enquiries will succeed only if the decision-maker's approach to the scope of the appropriate enquiries was irrational: see *Balajigari v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647, [70]. A decision-maker exercising a statutory discretion is not in general under a duty to inform himself or herself of the circumstances in which the same discretion has been exercised in the past by others. Previous exercises of the discretion might plausibly be relevant (and perhaps even mandatorily relevant) if the circumstances were very closely analogous. In this case, however, it is not suggested that there is any precedent for the use of s. 25(1) to provide protective security. Nor is any of the examples relied upon by the claimant comparable. That being so, the decision to proceed without examining the circumstances of previous exercises of the power by the MPS and other forces was well within the range of procedural options open to RAVEC. The contrary is not arguable.

39 As to (c), RAVEC's remit is limited to royalty and VIPs. But that does not mean that its reasoning draws a principled distinction between those within that group and others. Its

view that it would not be justified to allow an individual to pay for protective security would logically apply to any individual. There is nothing in its decision to suggest that it considers that a different approach would apply to anyone else. Limb (c) is accordingly not arguable.

Ground 4

40 Ground 4 is that the decision is irrational for three reasons. Limb (a) challenges RAVEC's view that allowing payment for protective security would be contrary to the public interest and would undermine public confidence in the MPS. This, the claimant says, cannot be reconciled with s. 25(1), which expressly permits charging for certain police services. In my judgment, the short answer to this point is that RAVEC did not say that it would be contrary to the public interest to allow wealthy individuals to pay for any police services. It can be taken to have understood that s. 25(1), to which it referred, expressly envisages payment for some such services. Its reasoning was narrowly confined to the protective security services that fall within its remit. Those services are different in kind from the police services provided at (for example) sporting or entertainment events, because they involve the deployment of highly trained specialist officers, of whom there are a limited number, and who are required to put themselves in harm's way to protect their principals. RAVEC's reasoning was that there are policy reasons why those services should not be made available for payment, even though others are. I can detect nothing that is arguably irrational in that reasoning.

41 Limb (b) is a different way of putting limb (c) of ground 3. It is unarguable for the same reason.

42 Limb (c) is that RAVEC's second, third and fourth reasons should have been addressed at the second stage of the analysis, when it was considering whether to approve privately funded protective security in an individual case. I can certainly accept that considerations of this kind could have been addressed at the individual consideration stage. But for the purposes of this challenge, the question is whether it was irrational to take them into consideration at the "in principle" stage. In my judgment, there was nothing incoherent or illogical about taking into account at the "in principle" stage the fact that, if privately funded protective security were permitted, a less wealthy individual would feel unfairly treated, the availability of a limited specialist resource would be reduced and a precedent would have been set which it would be difficult to contain. I would go further and say that all of these matters seem to me to be applicable to any application for protective security of the kind that falls within RAVEC's remit. Logic suggests that they would therefore be of particular relevance at the "in principle" stage. Limb (c) is accordingly not arguable.

Ground 5

43 Ground 5 is that RAVEC's decision was procedurally unfair because the claimant should have been given an opportunity to make representations before the decision was made. Reliance is placed on RAVEC's Revised Terms of Reference, adopted in January 2021, which provide that RAVEC must "[u]nderstand the needs and concerns of Principals, on an annual basis or more frequently as determined by the circumstances" (para. 6) and that its Chair must "communicate the decision of the Committee to Principals and where necessary engage with them regarding their protective security …" (para. 14). Annex A sets out the process for RAVEC decision-making outside the regular meeting cycle and

it is said that "[t]he committee will work closely with members on providing ample opportunity for engagement and substantive input, a clear rationale for any decisions made and a shared approach to how decisions are communicated to individual principals".

44 In my judgment, the passages from paras 6 and 14 of RAVEC's Revised Terms of Reference require engagement with a principal when RAVEC is considering the particular protective security needs of that principal (i.e. its usual role). Annex A is also concerned with individualised risk assessments, as the numbered paragraphs in that Annex make clear. The challenged decision did not, however, consider the specific security needs of a particular principal. It was taken following a request from the Home Secretary that RAVEC should do something rather different from its usual task: i.e. to consider an issue of general policy and then, depending on the outcome of that issue, whether the claimant should be permitted to have private funded protective security. It is arguable that, had the "in principle" decision been positive, the Revised Terms of Reference would have required engagement with the claimant at the second stage. But the Revised Terms of Reference do not, even arguably, have anything to say about the procedure to be adopted at the first "in principle" stage.

45 It is true that the occasion for consideration of the issue of principle was the claimant's complaint in the First Claim that his offer to pay had not been taken into account in RAVEC's decision of 28 February 2020. But the issue of principle which RAVEC was being asked to decide was one which potentially affected anyone who might seek to pay for protective security that had not otherwise been made available. It is not obvious why fairness demanded that one particular principal be afforded the opportunity to make formal representations on that issue. In any event, RAVEC knew that the claimant considered that he should be permitted to pay for protective security from the MPS. If the issue of principle had been considered by RAVEC alongside the other issues decided on 28 February 2020, as the claimant submits it should have been, RAVEC could not have been criticised for failing to invite separate representations on it. The fact that the consideration was separate should not, logically affect the position. In my judgment, it is not arguable that the failure to invite representations on the issue of principle was a breach of natural justice.

Conclusion

46 For these reasons, I refuse permission to apply for judicial review.