



Neutral Citation Number: [2024] EWCA Civ 665

Appeal No: CA-2023-002474

Case No: AC-2022-LON-001807

IN THE COURT OF APPEAL OF ENGLAND AND WALES (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

Mr Justice Swift

Royal Courts of Justice
Stand, London, WC2A 2LL

Date: 13/06/2024

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LORD JUSTICE UNDERHILL

and

LADY JUSTICE NICOLA DAVIES

BETWEEN:

R (on the application of KATE THOMAS)

Claimant/Appellant

- v -

JUDICIAL APPOINTMENTS COMMISSION

Defendant/Respondent

Anthony Vaughan and Finnian Clarke (instructed by RNW Solicitors) for the Claimant/Appellant

Sir James Eadie KC and Robert Moretto (instructed by Government Legal Department) for the Defendant/Respondent

Hearing date: 13 June 2024

JUDGMENT

SIR GEOFFREY VOS, MASTER OF THE ROLLS:Introduction

1. We heard oral argument this morning on an application for permission to appeal Swift J's refusal to grant District Judge Katie Thomas (the appellant) permission to bring Judicial Review proceedings against the Judicial Appointments Commission (the JAC) in respect of its decision not to recommend her for appointment as a circuit judge.
2. We indicated at the outset of the argument that our provisional view, subject to oral argument, was that it would be appropriate to grant permission to appeal and to allow the appellant to bring Judicial Review proceedings in respect of her claims as to (i) the fairness of the JAC process, (ii) the alleged infringement of article 8, and (iii) the proper interpretation of Regulation 30 of the Judicial Appointment Regulations 2013/2192 (the 2013 Regulations). We said we were not inclined to grant either permission to amend or permission to advance the new ground based on discrimination under article 14. In correspondence on 10 June 2024 and again this morning we asked the appellant to address which of her 13 "amended details of the remedy sought" she wished now to pursue. We also asked both parties to address: (a) whether the Court of Appeal should exercise its power under CPR 52.8(6) to retain the application, and (b) what directions either party would be seeking as to evidence, timetabling or any other matter, in the event that permission were granted.
3. Having heard oral argument, I would give the limited permission that I have already mentioned for the brief reasons that follow. In reaching this conclusion, I have borne in mind the importance of this case and the public interest in maintaining a scrupulously fair and transparent judicial appointment process. I recognise that there is much to be said for the arguments advanced by the JAC this morning in terms of the importance of confidentiality for both references given and statutory consultation provided. But I feel that, in the exceptional circumstances of this case, the challenges brought to the process by the appellant would be better considered on all the evidence at a full Judicial Review hearing rather than being dealt with at an inevitably less detailed permission hearing. The consultation process is, as I have intimated, critical to the fairness and transparency of judicial appointments in England and Wales. There needs to be complete public confidence in it. It is better, therefore, for these challenges to be considered at a full hearing.
4. I shall now proceed to deal in outline with the factual background and procedural history, the reasons for my decision, and the directions we intend to make.

Outline factual background and procedural history

5. The appellant practised in crime at the self-employed Bar and as in-house counsel for a firm of solicitors. In 2018 she was appointed as a salaried District Judge. She sat in Walsall County Court. In 2021, the appellant applied to become a Circuit Judge in each of the jurisdictions of crime and civil in the JAC recruitment exercise. A matter which she felt could adversely affect her application was a formal complaint of bullying which she had made against a senior male judge (the Judge) in 2019. Pursuant to the formal protocol, the appellant's complaint was sent to the senior Presiding Judge of the Circuit. The complaint led to a meeting with the junior Presiding Judge and a decision was made that the appellant would not pursue the complaint as the Judge was retiring.

6. The appellant was invited for interview at the JAC's Selection Day. Three interviews were held. Two were scenario based, and the third was a competency based panel interview. The Civil Panel carried out the civil scenario based interview and the competency based interview. The Panels had before them evidence from the statutory consultee, Haddon-Cave LJ, who was then the Deputy Senior Presiding Judge, sought pursuant to Regulation 30 of the 2013 Regulations. The appellant does not recall being asked anything of a negative nature.
7. On 4 April 2022 the JAC informed the appellant that she had not been successful in the competition. She sought and received feedback in a letter from the JAC dated 6 May 2022. It related to the civil and competency aspects of her application and stated that she **was selectable** but due to the strength of the competition she had not been selected.
8. Shortly after the 6 May 2022 letter, the appellant received a memo from the Circuit Presiders encouraging people to apply for a Circuit Judge appointment due to the limited number recruited. As this conflicted with her feedback, the appellant sought clarification from the JAC. On 24 May 2022 the JAC sent a feedback letter which encompassed crime, civil and the competencies. This indicated that the appellant had produced some strong evidence but had been found **not to be presently selectable** for appointment.
9. Given this reversal, the appellant sought clarification and/or disclosure of the JAC's reasons. In a letter dated 8 June 2022, the JAC confirmed that the Selection Day Panel had determined that the appellant was a selectable candidate in both jurisdictions but stated that the final decision upon which candidates are to be recommended must be made by the Selection and Character Committee (SCC). In reviewing all the information before it, it was stated that the "SCC determined that, overall, the evidence provided against Working and Communication with Others was insufficient for the role of the Circuit Judge and that, therefore, you are not presently selectable for either jurisdiction."
10. On 13 June 2022 solicitors acting on behalf of the appellant sent a Letter before Action to the JAC. The proposed judicial review challenge was to the decision of the SCC not to recommend the claimant for appointment to the position of a Circuit Judge in either the criminal or civil jurisdiction in the 2021 competition. The JAC's detailed letter of response stated that the JAC had made its selection decision at a meeting of the SCC taking into account all the information before it including the reports of the Panels and the information provided as part of the statutory consultation. The SCC comprises all 15 Commissioners. 11 were present at the meeting on 10 March 2022. The SCC disagreed with the Panels' assessment of the appellant in respect of the Working and Communication with Others competence.
11. The Panels had assessed the appellant as a C. The SCC noted that the statutory consultation provided some negative evidence in this competency which was consistent with negative evidence identified on the Selection Day. Taking all the evidence into account, the SCC determined that the competency would be regraded from C to D. The effect of this determination was that the appellant's overall Band changed from C (selectable) to D (not presently selectable) with the result that she was no longer selectable for either jurisdiction.

12. Following receipt of the JAC's letter, the appellant issued proceedings for judicial review on 1 July 2022.
13. On 30 March 2023, Lang J refused permission to apply for Judicial Review on the basis that her claims were unarguable. On 6 December 2023, after a day-long oral hearing, Swift J refused permission to apply for Judicial Review on the basis that none of the grounds put forward was arguable. He delivered a comprehensive *ex tempore* judgment.
14. It is worth reciting in full what Swift J explained at [8] of his judgment as follows:

Before turning to the merits of the ground, it is important to note one matter. Each ground raises an in-principle challenge. One concerns the meaning of Regulation 30 of the 2013 Regulations. The other grounds rest on an assumption that the Claimant is wrong on her Regulation 30 ground and the Defendant is right on that ground. On that assumption, the Claimant's remaining grounds of challenge contend that the approach to Regulation 30 that permits consulted persons, when responding to a consultation request, to draw on the views of others, gives rise to a breach of Article 8, a breach of the principle of fairness and is an outcome that produces irrational consequences. Each of these challenges also exist at the level of principle. Although the Claimant has been prompted to raise these challenges by her treatment at the hands of the Judicial Appointments Commission, treatment which I have summarised and which was very unfortunate indeed, it is not her case, for example, that the specific decision in her case that the evidence relevant to the Working and Communicating with Others criterion was insufficient was, per se, either irrational or rested on some material factual error or was otherwise unlawful. The pleaded case does not invite adjudication on that matter but only on the in-principle approach to Regulation 30. In substance, therefore, what is in issue is the process used by the Judicial Appointments Commission when considering the claimant's applications. The grounds raised are therefore self-contained legal issues.

15. This passage is relevant to what was argued below and to the question of how this case should now proceed. The appellant explained in argument that she had not asked Swift J for more than in-principle decisions, because she did not know the basis of the decision that the JAC had made.

Outline reasons

16. I would, as I have already intimated, grant permission to apply for judicial review on each of the grounds considered and rejected by Swift J. It is not appropriate to give elaborate reasons, but I would make the following observations as to why I have reached those conclusions.

Fairness

17. It seems to me that the central issue raised by the claim is whether the JAC is right to proceed on the basis that its obligations of confidence to consultees mean that it cannot in many, if not most, circumstances give candidates the opportunity, in fairness, to comment on adverse matters raised by the consultation responses. That is the issue identified by Swift J as ground 3. I believe that it is arguable that there are circumstances in which the JAC may be obliged as a matter of fairness at least to seek

the consent of consultees to disclosure of what they have said, or to give candidates the gist of the comments in a form which does not identify the source, such that there is no breach of section 139 of the Constitutional Reform Act 2005 (the 2005 Act). Section 139(4)(a) and (5) provide, in broad terms, for confidentiality in the absence of the consent of the person providing the information. For the avoidance of doubt, I do not mean by those comments to limit the scope of the pleaded grounds, bearing in mind that ground 4 relied on essentially the same points under the heading of irrationality. Whilst that may be a less appropriate denomination, I am content to leave it open to the appellant to argue otherwise.

18. Sir James Eadie KC, counsel for the JAC, argued persuasively this morning that a requirement to disclose the statutory consultation to the candidate was not, even arguably, a pre-condition of fairness. The candidate, he said, could produce their own direct evidence about events which they thought might concern the JAC. The whole structure, he said, was inherently fair and hedged around by safeguards. All aspects could be probed at Selection Day. The judges administering the process were experienced and well able to put the points to applicants without breaching confidentiality. In this field, even more than the normal employment context, the confidentiality of consultation was essential, Sir James said, to allow the process to work.
19. These points are well made, but here the appellant was not conscious of any negative points from the statutory consultation having been put to her at the Selection Day. It could perhaps be inferred from [28]-[29] of the JAC's summary grounds of resistance that it was accepted that the matters of concern had not been put at Selection Day even in gist form. But this will be a matter that may better be considered at a full hearing. Sir James very fairly was reluctant to go beyond the boundaries of those paragraphs or to get into what he described as the "weeds" of the facts.
20. It is very much, in my judgment, in the public interest for the fairness of the JAC's procedure to be examined at a full hearing. As the judge acknowledged at [8]. Which I have set out above, the appellant's treatment by the JAC was "very unfortunate indeed".
21. I conclude, as I have said, that it is arguable that there are circumstances in which the JAC may be obliged as a matter of fairness to seek the consent of consultees to disclosure of what they have said, or to give candidates the gist of the comments without identifying the source.

Article 8

22. I am, for my part, somewhat doubtful that the characterisation of the issue of fairness that I have described as a breach of the terms of article 8 is likely to add anything of substance to the analysis. It may even serve to complicate it. But I do not think it would be right to prevent the appellant from putting her claim in that way if she is so advised, so I would also give permission on Swift J's ground 2.

Regulation 30

23. The argument on Regulation 30 is, in the briefest summary, that it does not, on its true construction, permit statutory sub-consultation: i.e. consultation by the named consultee with others. The JAC argued that this ground was hopeless, since the

Regulation itself did not limit who the named consultee could ask in any way. I see the force of that point, but I regard the challenge to the approach adopted under Regulation 30 to be sufficiently closely connected to the fairness of the process as a whole to make it desirable to allow this ground to proceed.

Article 14

24. The appellant seeks permission to add a further ground of claim based on article 14. I would refuse permission to amend. First, it is highly doubtful whether a case of prima facie discrimination could be established. Secondly, even if the prospect of doing so exists, the issues of justification would be no different from those arising under article 8 itself. Formulating the case under article 14 adds complication for no countervailing advantage. Thirdly, the appellant's proposed comparison is with the treatment of a person seeking employment on the staff of the JAC itself. It is hard to see how that comparator is analogous to the position of a person seeking judicial appointment; and also hard to see why the JAC would not treat confidential references for an employee any differently from those for a candidate for judicial appointment. Fourthly, although this would not be decisive by itself, the point was not taken below.

Directions

25. The parties thought that the substantive hearing would take between 1 and 2 days. I would estimate 2 days out of an abundance of caution. The JAC wishes to file further evidence, but we are assured that evidence will not be huge. Accordingly, I think, in the light of the delays that have already occurred in this case, we should retain the case in the Court of Appeal under CPR Part 52.8(6).
26. The JAC has properly expressed concern about the changing nature of the appellant's case. Even before us, the appellant sought to amend paragraphs 1 and 2 of her "details of the remedy sought", to add the allegations concerning gist, and to withdraw paragraphs (4)(v) and (vi), (6) and (8). Paragraph (11) anyway cannot now proceed as we will decline permission to amend to include the article 14 ground. I would direct that the appellant produces a final complete re-amended grounds of challenge and details of the remedies sought, within the confines of the permission granted in this judgment, within 14 days. The parties should then agree the remaining directions with a view to a substantive hearing being fixed in this court with an estimate of 2 days in the Michaelmas term 2024.

Conclusions

27. For these reasons, I would grant permission to appeal and would make the directions I have indicated. The parties should agree all consequential directions within 7 days of this hearing. If they cannot agree, we will deal with those matters in writing.

LORD JUSTICE UNDERHILL:

28. I agree.

LADY JUSTICE NICOLA DAVIES:

29. I also agree.

