Supreme Court dismisses appeal finding Child Sex Offender Disclosure Scheme Guidance lawful (R (on the application of A) v Secretary of State for the Home Department)

The Supreme Court has unanimously dismissed the appeal in the case of R (on the application of A) v Secretary of State for the Home Department by concluding that the Child Sex Offender Disclosure Scheme Guidance was lawful and in accordance with the European Convention of Human Rights (ECHR), article 8(2). Alexander Campbell, barrister at Field Court Chambers, comments on the case.

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R (on the application of A) v Secretary of State for the Home Department [2021] UKSC 37

Background

The appeal was concerned with the standards to be applied by a court when it was asked to conduct a judicial review of the contents of a policy document or statement of practice issued by the government.

The appellant was a convicted sex offender. As a result of his offending, his name was on the Sex Offenders Register and he was subject to the notification requirements under the Sexual Offences Act 2003 (SOA 2003) for an indefinite period. He had been convicted of no further offences. The appellant had suffered violence and harassment when people had become aware of his convictions.

The Child Sex Offender Disclosure Scheme (the CSOD Scheme) was set up by the Secretary of State in 2010 to assist in co-ordinating the approach of police forces when asked by members of the public for information about persons dealing with children, with a view to gaining information whether they have convictions for sex offences involving children. The CSOD Scheme was set out in the Child Sex Offender Disclosure Scheme Guidance (the Guidance), issued by the Secretary of State in exercise of her common law powers. The Guidance explained the approach police forces should adopt when faced with requests for such information. It had no statutory force. Police forces were free to decide whether to participate in the CSOD Scheme or not. In 2011, the South Yorkshire Police, the police force for the area where the appellant lived, had adopted the CSOD Scheme for their area. Paragraph 2.6 of the Guidance explained that the CSOD Scheme built on existing procedures, in particular those set out in the statutory multi-agency public protection arrangements (MAPPA), put in place under ss 325 to 327 of the Criminal Justice Act 2003 (CJA 2003) and pursuant to statutory guidance issued by the Secretary of State under CJA 2003, s 325(8)(the MAPPA guidance). The MAPPA regime was designed to secure co-operation between responsible authorities, including the police, the probation service and the prison service, in the assessment and management of risks posed by violent and sexual offenders.

The appellant had brought a challenge to the Guidance in 2012. The Divisional Court had held that the Guidance, as it then stood, was unlawful because it did not include a requirement that the police should consider whether any person about whom disclosure might be made should be asked whether he wished to make representations. It did not comply in that respect with the applicable legal principles and might well result in the protection afforded by art 8 of the European Convention on Human Rights (ECHR), as implemented in domestic law by the Human Rights Act 1998 (HRA 1998), being rendered nugatory. The Divisional Court was also invited to find that the Guidance was unlawful because at para 2.2 it contained a presumption in favour of disclosure. However, the court noted that the Guidance set out a detailed process to be followed. It held that, subject to giving the offender the opportunity to make representations, that was unexceptionable. Nevertheless, to avoid the risk of the

art 8 protections being rendered nugatory, the court ruled that para 2.2 should be amended to make it clear that the decision as to disclosure had to follow the procedure set out in the Guidance.

As a result of those rulings, para 2.2 of the Guidance was revised and the Secretary of State inserted a new para 5.5.4 into the scheme with effect from 5 March 2013. According to the Guidance, as amended, the CSOD Scheme allowed members of the public to make an application to the police about a person (the subject) who had contact with children for disclosure of information about previous convictions the subject might have and other material which might affect the safety of those children. The Guidance explained that a disclosure would only be made pursuant to the CSOD Scheme if a specific child or specific children were at real risk of harm.

The present proceedings involved a new challenge by the appellant to the Guidance. He maintained that para 5.5.4 did not go far enough in giving guidance regarding the circumstances in which a police force, approached by a member of the public for information about a person about whom there were concerns in the relevant sense, was obliged in law to seek representations from the subject of the request before making disclosure of information about him. The appellant's case was that the Guidance was unlawful because it gave rise to an unacceptable risk of unfairness and breach of art 8; did not meet the standards of clarity, predictability and accessibility inherent in the 'in accordance with the law' rubric in art 8(2); and failed to provide for a subject to be able to apply to be exempted from the CSOD Scheme.

The appellant was subject to the MAPPA regime, so any decision regarding disclosure of information in relation to him would be taken by the relevant MAPPA authorities, having regard to the MAPPA guidance as they were required to do under CJA 2003, s 325(8A). The appellant accepted that the MAPPA guidance was lawful. In particular, he accepted that the statement it contained at para 10.20 regarding seeking representations from the subject of a disclosure request was correct. If followed, the appellant accepted that any disclosure request relating to him should be handled lawfully. The appellant's latest challenge to the Guidance setting out the CSOD Scheme might, therefore, have been dismissed as academic. However, there were some individuals with previous convictions for relevant offences who fell outside the MAPPA regime but were covered by the CSOD Scheme.

At first instance, the judge held that although the wording of para 5.5.4 of the Guidance might be improved, it did not make the Guidance or the CSOD scheme unlawful. The appellant appealed to the Court of Appeal, Civil Division. His contentions were, first, that the Guidance was not 'in accordance with the law' within the meaning of ECHR, art 8(2) because there was no independent supervisory authority or review body outside the police to review disclosure and to consider whether a criminal subject to the CSOD Scheme should be exempted from disclosure. Second, the Guidance should include a presumption that a subject ought to be consulted and have the opportunity to make representations; and, third, para 2.2 of the Guidance was objectionable on art 8 grounds because it contained a presumption in favour of disclosure in certain circumstances.

The Court of Appeal dismissed the appeal. While dealing with the first point, it held that there was no requirement of the common law or under art 8 that a subject should have an opportunity to seek exemption from the CSOD Scheme. As regards the second point, by reference to *R (on the application of Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014] 1 WLR 4620 (*Tabbakh*), the Court of Appeal ruled that the test in domestic law for the legality of a public scheme in relation to a complaint of a failure to provide proper opportunities for affected persons to make representations was whether the scheme was inherently unfair: the Guidance was not unlawful by reference to that test. Paragraph 5.5.4 read with paragraph 5.6.15(iii) of the Guidance satisfied the legal standards the court had to apply.

The appellant appealed to the Supreme Court. The third point did not arise on the present appeal. Both sides made detailed submissions about the legal test to be applied on judicial review of a statement of policy such as that set out in the Guidance. The courts below had treated the present case as a suitable vehicle for the review of the Guidance and had addressed the appellant's challenge to it on its merits. The Supreme Court decided that the same approach would be followed.

The present appeal was heard by the same constitution of the court which had considered the appeal in [2021] All ER (D) 116 (Jul) which was also concerned with the correct approach to judicial review of policies.

Judgment

Was the Guidance unlawful?

The appellant contended that the Guidance was unlawful because: (i) it failed to recognise and reflect the importance of consulting with people who were at risk of suffering a violation of their art 8 rights by reason of disclosure; and (ii) that meant that there was a significant and/or unacceptable risk of a breach of art 8 and/or the common law. The appellant submitted that the Guidance was not sufficiently specific in the directions it gave regarding when the subject of a disclosure request should be given an opportunity to make representations before a decision was made to give disclosure. He claimed that that created a risk that a decision-maker might not provide such an opportunity when required in law to do so. That was unacceptable and meant that the Guidance was unlawful. Further, by reason of its general lack of specificity, the appellant claimed that some statements in the Guidance could be regarded as positively misleading.

It was held in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (*Gillick*) that on judicial review of a statement of policy such as that set out in the Guidance, it was only if the guidance permitted or encouraged unlawful conduct by those to whom it was directed that it could be set aside as being the exercise of a statutory discretionary power in an unreasonable way. Accordingly, it was not the role of policy guidance to eliminate all uncertainty regarding its application and all risk of legal errors by doctors. It was to be read objectively, having regard to the intended audience. It was accepted that in considering the formulation in *Gillick* of the relevant test, 'permit' should in that context mean something like 'sanction', namely, 'positively approve', not merely that a course of action was not forbidden (see paras[33] and [34] of the judgment).

Gillick set out the test to be applied. So far as the basis for intervention by a court was concerned, the correct analysis, as set out in *Gillick*, was that it was not a matter of rationality, but rather that the court would intervene when a public authority had, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it could be said that the public authority had acted unlawfully by undermining the rule of law in a direct and unjustified way. In that limited but important sense, public authorities had a general duty not to induce violations of the law by others. The test set out in *Gillick* was straightforward to apply. It called for a comparison of what the relevant law required and what a policy statement said regarding what a person should do. If the policy directed them to act in a way which contradicted the law it was unlawful. The courts were well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test did not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations (see paras [38], [41] of the judgment).

Assessed by reference to the test in *Gillick*, the Guidance (in the version in issue in the proceedings) was clearly lawful. It informed police decision-makers that before making a disclosure they should consider whether to seek representations from the subject. That was in accordance with, and in no way contradicted, their legal obligations under the common law and ECHR, art 8. The Guidance was not defective, still less unlawful, because it did not spell out in fine detail how decision-makers should assess whether to seek representations in a particular case. As in *Gillick*, so also in the present case, it was not incumbent on the Secretary of State in issuing the Guidance to eliminate every legal uncertainty which might arise in relation to decisions falling within its scope. In fact, the Guidance, including the form appended to it for recording decisions, specifically reminded decision-makers that they should satisfy themselves that a disclosure decision would satisfy the common law requirement of fairness and the requirements of art 8. Contrary to the appellant's contention, when reading the Guidance as a whole no part of it could fairly be construed as giving a misleading direction (see para [42] of the judgment).

In broad terms, there were three types of case where a policy be found to be unlawful by reason of what it said or omitted to say about the law when giving guidance for others: (i) where the policy included a positive statement of law which was wrong and which would induce a person who followed the policy to breach their legal duty in some way (namely, the type of case under consideration in *Gillick*); (ii) where the authority which promulgated the policy did so pursuant to a duty to provide accurate advice about the law but failed to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decided to promulgate one and in doing so purported in the policy to provide a full account of the legal position but failed to achieve that, either because of a specific misstatement of

the law or because of an omission which had the effect that, read as a whole, the policy presented a misleading picture of the true legal position. In a case where a Secretary of State had issued guidance to his or her own staff explaining the legal framework in which they performed their functions, the context was likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it might more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness would be assessed on that basis. In the present case, however, the police were independent of the Secretary of State and were well aware (and were reminded by the Guidance) that they had legal duties with which they had to comply before making a disclosure and about which, if necessary, they should take legal advice (see para [46] of the judgment).

In a category (iii) case, it would not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldy and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much would depend on the particular context in which it was to be used. A policy could be sufficiently congruent with the law if it identified broad categories of case which potentially called for more detailed consideration, without particularising precisely how that should be done (see para [47] of the judgment).

Was the Guidance ‘in accordance with the law' within the meaning of art 8(2) of the ECHR?

The appellant submitted that the Guidance was unlawful because it failed to comply with standards of certainty, predictability in application and accessibility which were implicit in the concept of law' as that concept was used in the ECHR, in particular, in art 8(2). That was because it did not specify for every case whether representations should be sought from a subject but was flexible to allow for adaptation depending on the facts of particular cases.

The appellant's submission was unsustainable for two reasons. First, the Guidance did not purport to replace the underlying law which governed the circumstances in which a disclosure to the public could be made, namely (so far as was relevant for present purposes) the common law duty of fairness and the requirements inherent in art 8 itself (as applied by virtue of HRA 1998 s 6(1)). That included the requirement of proportionality and the right, where appropriate, to participate in a decision-making process. Those requirements were explained fully in the case law of the European Court of Human Rights and the domestic courts. The appellant did not suggest that those legal regimes were defective by reference to the requirements of the concept of 'law' in the ECHR. Clearly they were not. A police force which sought to comply with its legal duties under those regimes, as the Guidance encouraged it to do, would act 'in accordance with the law' for the purposes of art 8(2).

Second, and in any event, the concept of law in the ECHR, including in art 8(2), did not imply a requirement that the domestic law relevant to a matter within the scope of a ECHR right should be free from doubt as to its application and effect in particular cases. No system of law could possibly achieve that, and the ECHR did not require it. The most cursory review at the relevant authorities showed that they did not support the submission the appellant made that the Guidance was incompatible with art 8 by reason of the fact that there was a limited degree of imprecision in it. The 'in accordance with the law' rubric in art 8(2) did not require the elimination of uncertainty, but was concerned with ensuring that law attained a reasonable degree of predictability and provided safeguards against arbitrary or capricious decision-making by public officials. Judged even on its own terms, the Guidance met those standards. Further, it was established that a policy could make a contribution to meeting the 'in accordance with the law' requirement in some cases, by helping to provide a degree of predictability in the application of general discretionary provisions in statute. However, it by no means followed that there was an obligation to have a policy in every case where a statute created a discretionary power (see paras [50]-[53] of the judgment).

Furthermore, the Guidance: (i) was not unlawful by reference to the test of inherent unfairness discussed in *Tabbakh*, which was to be analysed as an aspect of the *Gillick* principle; (iii) was not unlawful by reference to an obligation to avoid a real risk of treatment contrary to EHCR, art 3 as discussed in *R (on the application of Munjaz) v Mersey Care NHS Trust* [2006] 4 All ER 73; and (ii) did not create a risk of impeding access to justice and so was not unlawful by reference to the

principle discussed in *R (on the application of Unison) v Lord Chancellor* [2017] 4 All ER 903 (see para [84] of the judgment).

The Guidance in its current form was not within any of the three categories described and was therefore not unlawful (see para [54] of the judgment).

Comment

Speaking on the judgement, Alexander Campbell, barrister at Field Court Chambers, has stated the following:

'In this decision, the justices of the Supreme Court have reaffirmed the limits of legal challenges to public policies. The Court has held that the correct test to apply when deciding whether a policy is unlawful is the test laid down in the case of *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, namely that a policy is unlawful if it sanctions, positively approves or encourages unlawful conduct by those to whom it is directed.

The Supreme Court has firmly rejected the idea that the lawfulness of a policy depends on a broader assessment of whether it is “inherently unfair”. In rejecting that argument, the Court has reigned in a line of case law which had been developing over the last two decades and which was being relied on as saying that a policy would be unlawful if it were “inherently unfair”.

If the courts had to apply a test of inherent unfairness, they would risk stepping on the toes of public bodies: the courts would be required to consider when the risk of unfairness from a policy is so great that the policy is rendered unlawful. Moreover, the courts might have to resort to conducting a statistical analysis to work out how many people would be affected by unfairness in a policy. As the Supreme Court itself noted, the courts are ill-equipped to embark on such an exercise.

Public bodies publish guidance in order to give clarity and consistency in how public bodies will exercise their powers. Publishing guidance is therefore a vital part of a public body’s functions. A test of ‘inherent unfairness’ could have opened public bodies to the risk of more legal challenges to their policies. It could have required new policies to be scrutinised by lawyers line by line before publication as if they were a statute. At worst, public bodies could have been deterred from publishing new guidance for fear of being taken to court. The Supreme Court’s decision, which limits the scope for legal challenges to public policies, will therefore be welcomed by public bodies.'

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Source: R (on the application of A) v Secretary of State for the Home Department [2021] UKSC 37