Parliamentary Archives, HL/PO/JU/18/245

In re Wheeler and others

JUDGMENT

Die Jovis 25° Julii 1985

Upon Report from the Appellate Committee to whom was referred the Cause In re Wheeler and others, That the Committee had heard Counsel on Wednesday the 10th day of this instant July upon the Petition and Appeal of Peter John Wheeler of The Brackens, Ragdale, Leicestershire, William Henry Hare of Wheatholme Farm, South Clifton, Newark, Nottinghamshire, Graham George Willans of 44 Dumbleton Avenue, Leicester, Peter Herbert of 35 Rowley Fields Avenue, Leicester, Kevin Andrews of 1 Whitehall Road, Evington, Leicester and John Albert Allen of 60 Dorchester Road, Leicester praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 14th day of March 1985, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as also upon the Case of the Leicester City Council lodged in answer to the said Appeal, and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 14th day of March 1985 complained of in the said Appeal be, and the same is hereby, **Set Aside:** And it is

further Ordered, That an Order of certiorari issue to quash the decision of 21st August 1984: And it is further Ordered, That the case be, and the same is hereby, remitted back to the Queen's Bench Division with liberty to the Appellants to apply for such further relief as may be thought necessary to protect their rights: And it is also further Ordered, That the Respondents do pay or cause to be paid to the said Appellants the Costs incurred by them in the Courts below and also the Costs incurred by them in respect of the said Appeal to this House, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments if not agreed between the parties.

Cler: Parliamentor:

HOUSE OF LORDS

IN RE WHEELER AND OTHERS (ENGLAND)

Lord Roskill
Lord Bridge of Harwich
Lord Brightman
Lord Templeman
Lord Griffiths

LORD ROSKILL

My Lords,

This is an appeal by members of the Leicester Football Club ("the club") suing on their own behalf and on behalf of all other members of the club. In reality it is an appeal by the club and I shall so treat it. It is brought by leave of the Court of Appeal (Ackner and Browne-Wilkinson L.33. and Sir George Waller) [1985] 2 All E.R. 151. That court on 14 March 1985, by a majority, Browne-Wilkinson L.J. dissenting, dismissed an appeal by the club against the refusal of Forbes 3. on 27 September 1984 to grant the club judicial review of a decision by the respondents, Leicester City Council ("the council"), on 21 August 1984. That decision is recorded in minute 46 of the council's Policy and Resources Committee in the following terms:

> "RESOLVED; that the Leicester Football Club be suspended from using the Welford Road recreation ground for a period

of 12 months and that the situation be reviewed at the end of that period in the light of the club's attitude to sporting links with South Africa."

As a result of the passing of that resolution, the club applied for a judicial review of the decision for the purpose of quashing it, for a declaration that it was of no effect and for an injunction preventing (inter alia) the implementation of the resolution. On 10 September 1984 Otton J. gave the club leave to move for judicial review and, pending the hearing of the motion, granted the injunction sought. As already stated, Forbes 3. refused the relief sought and since the appeal to the Court of Appeal failed, the club has remained banned from the use of the Welford Road recreation ground save for training purposes, this last by virtue of a concession later made by the council in circumstances to which I will refer in due course.

My Lords, the background to this unfortunate dispute between a rugby football club of renown, now over a century old, and the council is fully stated in the judgments below. I gratefully adopt those statements for in truth the relevant facts are not in dispute. But some reference to the facts is essential for the proper understanding of the issues involved.

The story starts with the announcement by the Rugby Football Union ("R.F.U.") on 30 March 1984 that they had accepted and invitation to take a touring side to South Africa. On 19 April 1984, the membership of this side was announced. The membership included three well known members of the club. All

three were regular England players. It should be mentioned that the club does not have any direct representation on the R.F.U. It has one representative on the Leicestershire Rugby Union and the latter body has one representative on the main committee of the R.F.U.

On 11 April 1984 Mr. John Allen, the secretary and a former captain of the club, was telephoned by the assistant chief executive of the council and asked if representatives of the club would attend a meeting with Mr. Soulsby, the leader of the council in connection with the projected tour and the participation in it of the club's three members.

That meeting took place on 12 April 1984. Mr. Soulsby read out four questions. These four question had been recorded in writing but no copies were given to the club representatives at the meeting. Since I attach importance to the content of these four questions, both individually and collectively, I record them in full:

"1. Does the Leicester Football Club support the Government opposition to the tour?

> "2. Does the Leicester Football Club agree that the tour is an insult to the large proportion of the Leicester population?
>
> "3. Will the Leicester Football Club press the Rugby Football Union to call off the tour?
>
> "4. Will the Leicester Football Club press the players to pull out of the tour?"

Mr. Allen told Mr. Soulsby he would take the questions back to the committee of the club and would return for a further meeting on 8 May 1984. At that latter meeting it was made plain by Mr. Soulsby - Mr. Allen's affidavit was not contradicted on this matter - that "the club's response would only be acceptable if in effect all four questions were answered in the affirmative."

On 14 May 1984 Mr. Allen again wrote to Mr. Soulsby and handed him a written statement of the club's response. I set this out in full:

> "Leicester Football Club have always enjoyed cordial relations with Leicester City Council on a strictly non-political basis and seek to continue that relationship. The club join with the council in condemning apartheid but recognise that there are differences of opinion over the way in which the barriers of apartheid can be broken down. The government have not declared sporting contacts illegal or even applied sanctions against those involved in tours. Their opposition is on an advisory basis, similar to the advice to athletes at the time of the Moscow Olympics, leaving the decision to the individuals concerned. The decision by the Rugby Football Union to approve the tour was taken by a large majority of their committee, but the club had forwarded to the Leicestershire Rugby Union, the club's constituent body, the anti-apartheid case against the tour, which merits serious consideration. Rugby Union players as

> amateur sportsmen have individual choice as to when and where they play, subject only to the constraints of R.F.U. rules and club loyalty. However, the club, having read the memorandum to the R.F.U., prepared by the anti-apartheid movement, and accepting the serious nature of its contents, have supplied copies to the tour players and asked them to seriously consider the contents before finally reaching a decision whether to tour. The club are and always have been multi-racial and will continue that principle for the benefit of Leicester and rugby football."

Mr. Soulsby said he noted the club's response but added that he did not think "it would have gone far enough to satisfy the

membership of the controlling Labour group on the council."

This meeting was followed by various statements through the media and elsewhere that the council were considering sanctions against the club for what the council regarded as the club's failure to discourage its members from taking part in the South African tour.

No solution was found during the ensuing weeks. On 21 August 1984, the resolution banning the club from the use of the Welford Road recreation ground was passed in the terms which I have already mentioned. This resolution was subsequently notified to the club. Mr. Small, the club's solicitor and also one of its members, wrote on 30 August 1984 to ask whether the ban included a ban on using the recreation ground for training. A brief reply, dated 31 August 1984, indicated that the ban was intended to be total. The letter, over the signature of the assistant chief executive, included these sentences:

> "It was and is the council's intention to prevent members of the Tigers training on the recreation ground in the evenings as well as banning the use of the rugby pitch for club matches. For the ban on training the council would seek to rely on Byelaw 16 of the Parks Byelaws and would maintain that the use of the recreation ground by the Tigers would per se interfere with other use of the recreation ground."

Mr. Small, whose evidence on this matter was not contradicted, was subsequently told by Mr. Stephenson that if the club tried to train on the ground the floodlighting would be disconnected and this would be effective to prevent training.

By the time the matter was before Forbes 3. it was recognised that this reliance on Byelaw 16 was indefensible. I say no more about it save to express regret that the contention should ever have been advanced. Any defence of the council's action based on the Race Relations Act 1976, however well founded, could not possibly have extended to justify a ban on training, as Forbes 3. pointed out.

The reasons for the imposition of the ban are clearly set out in paragraph 13 of Mr. Soulsby's affidavit. I quote that paragraph in full:

> "I refute any suggestion that the purported sanction against the club was imposed in response to the actions of their

> players. I wish to make it clear that the action taken by the council was in response to the attitude taken by the club in failing to condemn the tour and to discourage its members from playing. The council has taken its steps therefore because of what the club did or did not do. It was always recognised that the club were not in the position

> of employers and could not instruct their players. However, the club is, as the applicants' evidence shows, a premier rugby football club and an influential member of the Rugby Football Union. At no time was the club asked to do anything by the city council which was beyond their powers to do. The steps taken by the city council have not been taken in order to penalise the club for having members who went to South Africa, still less, to penalise the club in order to penalise the players."

It is important to emphasise that there was nothing illegal in the action of the three members in joining the tour. The Government policy recorded in the well known Gleneagles agreement has never been given the force of law at the instance of any Government, whatever its political complexion, and a person who acts otherwise than in accordance with the principles of that agreement, commits no offence even though he may by his action earn the moral disapprobation of large numbers of his fellow citizens. That the club condemns apartheid, as does the council, admits of no doubt. But the council's actions against the club were not taken, as already pointed out, because the club took no action against its three members. They were taken, according to Mr. Soulsby, because the club failed to condemn the tour and to discourage its members from playing. The same point was put more succinctly by Mr. Sullivan Q.C., who appeared for the council - "The club failed to align themselves whole-heartedly with the council on a controversial issue." The club did not condemn the tour. They did not give specific affirmative answers to the first two questions. Thus, so the argument ran, the council, legitimately bitterly hostile to the policy of apartheid, were justified in exercising their statutory discretion to determine by whom the recreation ground should be used so as to exclude those, such as the club, who would not support the council's policy on the council's terms. The club had, however, circulated to those involved the powerfully reasoned and impressive memorandum which had been sent to the R.F.U. on 12 March 1984 by the anti-apartheid movement. Of the club's own opposition to apartheid as expressed in its memorandum which was given to Mr. Soulsby, there is no doubt. But the club recognised that those views, like those of the council, however passionately held by some, were by no means universally held, especially by those who sincerely believed that the evils of apartheid were enhanced rather than diminished by a total prohibition of all sporting links with South Africa.

The council's main defence rested on section 71 of the Race Relations Act 1976. That section appears as the first section in Part X of the Act under the cross-heading "supplemental." For ease of reference I will set out the section in full:

> "71. Without prejudice to their obligation to comply with any other provision of this Act, it shall be the duty of every local authority to make appropriate arrangements with

> a view to securing that their various functions are carried out with due regard to the need - (a) to eliminate unlawful racial discrimination; and (b) to promote equality of opportunity, and good relations, between persons of different racial groups."

My Lords, it was strenuously argued on behalf of the club that this section should be given what was called a "narrow" construction. It was suggested that the section was only concerned with the actions of the council as regards its own internal behaviour and was what was described as "inward looking." The section had no relevance to the general exercise by the council or indeed of any local authority of their statutory functions, as for example in relation to the control of open spaces or in determining who should be entitled to use a recreation ground and on what terms. It was said that the section was expressed in terms of a "duty." But it did not impose any duty so as to compel the exercise by a local authority of other statutory functions in order to achieve the objectives of the Act of 1976.

My Lords, in respectful agreement with both courts below, I unhesitatingly reject this argument. I think the whole purpose of this section is to see that in relation to matters other than those specifically dealt with, for example, in Part II, employment, and in Part HI, education, local authorities must in relation to "their various functions" make "appropriate arrangements" to secure that those functions are carried out "with due regard to the need" mentioned in the section.

It follows that I do not doubt that the council were fully entitled in exercising their statutory discretion under, for example, the Open Spaces Act 1906 and the various Public Health Acts, which are all referred to in the judgments below, to pay regard to what they thought was in the best interests of race relations.

The only question is, therefore, whether the action of the council of which the club complains is susceptible of attack by way of judicial review. It was forcibly argued by Mr. Sullivan Q.C. for the council, that once it was accepted, as I do accept, that section 71 bears the construction for which the council contended, the matter became one of political judgment only, and that by interfering the courts would be trespassing across that line which divides a proper exercise of a statutory discretion based on a political judgment, in relation to which the courts must not and will not interfere, from an improper exercise of such a discretion in relation to which the courts will interfere.

My Lords, the House recently had to consider problems of this nature in Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 WLR 1174. In his speech at p. 1196 of the report, my noble and learned friend Lord Diplock classified three already well established heads or sets of circumstances in which the court will interfere. First, illegality, second, irrationality and third, procedural impropriety. If I may be forgiven for referring to my own speech in the case, a similar analysis appears on p. 1200 of the report. Those three heads are not exhaustive, and as

Lord Diplock pointed out, further grounds may hereafter require to be added. Nor are they necessarily mutually exclusive.

- 5 -

To my mind the crucial question is whether the conduct of the council in trying by their four questions, whether taken individually or collectively, to force acceptance by the club of their own policy (however proper that policy may be) on their own terms, as for example, by forcing them to lend their considerable prestige to a public condemnation of the tour, can be said either to be so "unreasonable" as to give rise to "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 KB 223) or to be so fundamental a breach of the duty to act fairly which rests upon every local authority in matters of this kind and thus justify interference by the courts.

I do not for one moment doubt the great importance which the council attach to the presence in their midst of a 25 per cent, population of persons who are either Asian or of Afro-Caribbean origin. Nor do I doubt for one moment the sincerity of the view expressed in Mr. Soulsby's affidavit regarding the need for the council to distance itself from bodies who hold important positions and who do not actively discourage sporting contacts with South Africa. Persuasion, even powerful persuasion, is always a permissible way of seeking to obtain an objective. But in a field where other views can equally legitimately be held, persuasion, however powerful, must not be allowed to cross that line where it moves into the field of illegitimate pressure coupled with the threat of sanctions. The four questions, coupled with the insistence that only affirmative answers to all four would be acceptable, are suggestive of more than powerful persuasion. The second question is to my mind open to particular criticism. What, in the context, is meant by "the club?" The committee? 90 playing members? 4,300 non-playing members? It by no means follows that the committee would all have agreed on an affirmative answer to the question and still less that a majority of their members, playing or non-playing, would have done so. Nor would any of these groups of members necessarily have known whether "the large proportion," whatever that phrase may mean in the context, of the Leicester population would have regarded the tour as "an insult" to them.

None of the learned judges in the courts below have felt able to hold that the action of the club was unreasonable or perverse in the Wednesbury sense. They do not appear to have been invited to consider whether those actions, even if not unreasonable on Wednesbury principles, were assailable on the grounds of procedural impropriety or unfairness by the Council in the manner in which, in the light of the facts which I have outlined, they took their decision to suspend for 12 months the use by the club of the Welford Road recreation ground.

I greatly hesitate to differ from four learned judges on the Wednesbury issue but for myself I would have been disposed respectfully to do this and to say that the actions of the Council were unreasonable in the Wednesbury sense. But even if I am wrong in this view, I am clearly of the opinion that the manner in which the Council took that decision was in all the circumstances unfair within the third of the principles stated in the case of Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 WLR 1174. The Council formulated those four questions in the manner of which I have spoken and indicated that only such

affirmative answers would be acceptable. They received reasoned and reasonable answers which went a long way in support of the policy which the Council had accepted and desired to see accepted. The views expressed in these reasoned and reasonable answers were lawful views and the views which, as the evidence shows, many people sincerely hold and believe to be correct. If the club had adopted a different and hostile attitude, different considerations might well have arisen. But the club did not adopt any such attitude.

In my view, therefore, this is a case in which the court should interfere because of the unfair manner in which the Council set about obtaining its objective. I would not, with profound respect, rest my decision upon the somewhat wider ground which appealed to Browne-Wilkinson L.J. in his dissenting judgment.

Since preparing this speech I have had the advantage of reading in draft the speech of my noble and learned friend Lord Templeman with which I find myself in complete agreement.

I would, therefore, allow the appeal and order certiorari to issue to quash the decision of 21 August 1984, the terms of which I have already set out. I do not think that the declaration or the injunction sought is necessary at this juncture, but lest they become so, I would remit the matter to the High Court with liberty to the club to apply for such further relief as may be thought necessary to protect their rights. The Council must pay the costs in this House and both courts below.

LORD BRIDGE OF HARWICH

My Lords,

For the reasons given in the speeches of my noble and learned friends, Lord Roskill and Lord Templeman, with which I agree, I would allow this appeal.

LORD BRIGHTMAN

My Lords,

I agree that this appeal should be allowed for the reasons given in the speeches of my noble and learned friends, Lord Roskill and Lord Templeman.

LORD TEMPLEMAN

My Lords,

In my opinion the Leicester City Council were not entitled to withdraw from the Leicester Football Club the facilities for training and playing enjoyed by the club for many years on the council's recreation ground for one simple and good reason. The club could not be punished because the club had done nothing wrong.

The 1984 Rugby Tour of South Africa was organised by the Rugby Football Union which invited individuals, including three members of the club to join the tour. There were two views about the tour amongst the opponents of apartheid. The view taken by the council, a view which I share, was that the tour would endorse the racist policies of the South African Government. The opposite view was expressed by Mr. Dodge, who was one of the three members of the club who participated in the tour and who gave sworn evidence in these proceedings as follows:

> "I personally deplore apartheid as being morally wrong. It is nevertheless my genuine belief that maintaining sporting links with South Africa does help break down the evil social barriers of apartheid, a personal belief which has been strengthened by observing in 1984 the improvement since 1980."

The council agree that this belief was sincerely held not only by Mr. Dodge but by other opponents of apartheid. The Government had subscribed to the Gleneagles agreement but did not take steps to ban the tour, leaving the decision to each individual invited to take part. The club does not practice racial discrimination, does not support apartheid, has not been guilty of any infringement of the Race Relations Act 1976, did not support the decision of the three members to join the tour and sought to discourage them from joining the tour by sending them copies of the reasoned memorandum published by the opponents of the tour. The council does not contend that the club should have threatened or punished the three club members who participated in the tour or that the club could properly have done so. Nevertheless, the club has been punished by the council according Mr. Soulsby for "failing to condemn the tour and to discourage its members from playing." My Lords, the laws of this country are not like the laws of Nazi Germany. A private individual or a private organisation

cannot be obliged to display zeal in the pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority.

The club having committed no wrong, the council could not use their statutory powers in the management of their property or any other statutory powers in order to punish the club. There is no doubt that the council intended to punish and have punished the club. When the club were presented by the council with four questions it was made clear that the club's response would only be acceptable if, in effect, all four questions were answered in the affirmative. When the club committee made their dignified and responsible response to these questions, a response which the council find unsatisfactory to the council, the council commissioned

a report on possible sanctions that might be taken against the club. That report suggested that delaying tactics could be used to hold up the grant of a lease then being negotiated by the club. It suggested that land could be excluded from the new lease as it was "thought that this could embarrass the club because it had apparently granted sub-leases ..." It was suggested that the council's consent, which had already been given for advertisements by the club's sponsors, could be withdrawn although according to the report "the actual effect of this measure on the club is difficult to assess." It was suggested that "a further course is to insist upon strict observance of the tenant's covenants in the lease. However, the City Estate's Surveyor, having inspected the premises, is of the opinion that the tenant's convenants are all being complied with." Finally, it was suggested that "the council could terminate the club's use of the recreation ground." This might cause some financial loss to the council and might "form the basis of a legal challenge to the council's decision. The club may contend that the council has taken an unreasonable action against the club in response to personal decisions of members of its team over which it had no control." Notwithstanding this warning the council accepted the last suggestion and terminated the club's use of the recreation ground. In my opinion, this use by the council of its statutory powers was a misuse of power. The council could not properly seek to use its statutory powers of management or any other statutory powers for the purposes of punishing the club when the club had done no wrong.

In Congreve v. Home Office [1976] 1 Q.B. 629, the Home Secretary had a statutory power to revoke television licences. In exercise of that statutory power he revoked the television licences of individuals who had lawfully surrendered an existing licence and taken out a new licence before an increase in the licence fee was due to take effect. Lord Denning M.R. said at p. 651:

> "If the licence is to be revoked - and his money forfeited - the Minister would have to give good reasons to justify it. Of course, if the licensee had done anything wrong - if he had given *a* cheque for £12 which was dishonoured, or if he had broken the conditions of the licence - the Minister

> could revoke it. But when the licensee has done nothing wrong at all, I do not think the Minister can lawfully revoke the licence, at any rate, not without offering him his money back, and not even then except for good cause. If he should revoke it without giving reasons, or for no good reason, the courts can set aside his revocation and restore the licence. It would be a misuse of the power conferred on him by Parliament: and these courts have the authority - and, I would add, the duty - to correct a misuse of power by a Minister or his department, no matter how much he may resent it or warn us of the consequences if we do."

Similar considerations apply, in my opinion, to the present case. Of course this does not mean that the council is bound to allow its property to be used by a racist organisation or by any organisation which, by its actions or its words, infringes the letter or the spirit of the Race Relations Act 1976. But the attitude of the club and of the Committee of the club was a perfectly proper attitude, caught as they were in a political controversy which was not of their making.

For these reasons and the reasons given by my noble and learned friend Lord Roskill, I would allow the appeal.

LORD GRIFFITHS

My Lords,

For the reasons given in the speeches of my noble and learned friends, Lord Roskill and Lord Templeman, I would allow this appeal.