

When are government policies enforceable by way of judicial review? (*R (Good Law Project) v Prime Minister*)

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Public Law analysis: This claim concerned the use of non-governmental communication systems (particularly WhatsApp and private email) for government business. The Good Law Project ('GLP') contended that the use of such systems meant that public records that should be retained were instead deleted or otherwise not available to be preserved for the public record. It argued that this was unlawful because it was incompatible with a statutory duty under section 3(1) of the Public Records Act 1958 (PRA 1958) and because it amounted to an unjustified breach of policy. Its claim failed in the Divisional Court, whose judgment was upheld by the Court of Appeal. The Court of Appeal held that there is no legal duty, enforceable by judicial review, to create and maintain records so that they are available for posterity, such that it is unlawful to use some modern methods of communication. It further held that the eight so called policies identified by GLP were not enforceable as matter of public law. Written by Jonathan Lewis, barrister at Henderson Chambers.

R (on the application of the Good Law Project Ltd) v Prime Minister and others [\[2022\] EWCA Civ 1580](#)

What are the practical implications of this case?

The broader significance of this decision lies in the analysis of when government guidance or policies will be enforceable by citizens by way of judicial review. A duty to comply with policies has been described in terms that the executive should comply with its policies unless there was good reason not to do so. However, not every failure by the executive without good cause to comply with every policy made by it is un-lawful. This is because some policies, especially internal administrative policies, will be relevant only to the executive (at para [55]). Policies are different from law in that they do not create legal rights as such (constitutionally, the executive cannot create laws by making policies). The fact that a policy directly affects the public will be a relevant factor to consider when deciding whether there was a duty to comply with it (at para [58]). The analysis of the policies in question in this case gives a clear sense of how courts will approach an attempt to enforce a government policy which appears more directed at the internal workings of government.

A salutary message from the Court of Appeal was the importance of clearly formulating the relief that the claimant seeks (even if it is difficult to do so when the claim is first issued). GLP had sought declaratory relief without specifying the terms of that relief until the second day of the hearing. The Court of Appeal suggested that 'The fact that a claimant is unable or unwilling to particularise the relief that they seek, may be an indication that the claim should not be pursued' (at para [71]).

What was the background?

The Secretary of State for the Department of Digital, Culture and Sport has responsibility for supervising the care and preservation of public records. The Minister for the Cabinet Office has policy responsibility for the [Freedom of Information Act 2000](#) and for government records management. Ministers, special advisors and other civil servants in the Cabinet Office are provided with government computers, tablets, smart phones and email accounts. Emails are automatically exported to a repository. The authorised Cabinet Office instant chat app automatically deletes messages after 24 hours.

It was common ground that some ministers, civil servants, and unpaid government advisors had used private email accounts and instant messaging platforms for government business. For example, the then Prime Minister had used a private email account to edit speeches, and after editing would send the speeches to a government email address so that the changes could be actioned. Further, he was in a WhatsApp group in which the government's initial coronavirus (COVID-19) response was discussed (at para [16]).

GLP sought to persuade the Court of Appeal that there had been an actionable failure to comply with eight guidance notes/policies (some of which had not in fact been made public). It argued that there was uncontested evidence that Ministers and officials had violated the clear injunction in the policies against the use of private emails/communications, and the policy that if, exceptionally, there were such communications, they should be transferred to, and retained on, an official government system. GLP sought a declaration that the eight policies ‘were enforceable as a matter of public law, in that a public body subject to one or more of those policies [was] required to comply with them absent good reason not to do so’. It also sought specific declarations of unlawfulness as to 27 breaches of those policies by ministers and officials (including the use of the WhatsApp group).

What did the court decide?

[PRA 1958, s 3\(1\)](#) establishes a duty on ‘every person responsible for public records...to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping’. The Court of Appeal held that this duty is only to make arrangements for the selection of records, not to make arrangements for the preservation of records before they are selected (at para [50]). Parliament did not impose any general duty in [PRA 1958, s 3\(1\)](#) to retain public records and did not specify that any records were to be retained pending their selection. The absence of any such implied duty to retain public documents does not undermine the scheme of the PRA (at para [51]). Such an implied duty would have to apply to all records, which would overwhelm the Departments of State and the National Archives. If it did not apply to all records, it is not possible to discern a principled basis from the PRA for limiting the implied duty to only some classes of the documents. The Court of Appeal noted the ‘large measure of discretion’ provided to those making the arrangements under [PRA 1958, s 3\(1\)](#) (at para [52]).

In the Court of Appeal, the focus of GLP’s arguments was that the eight policies (described at paras [29]–[44]) were legally enforceable (at para [5]). The key authorities on this issue were the Supreme Court’s decisions in *R (A) v Secretary of State for the Home Department* [\[2021\] UKSC 37](#), [\[2021\] 1 WLR 3931](#) and *Mandalia v Secretary of State for the Home Department* [\[2015\] UKSC 59](#), [\[2015\] 1 WLR 4546](#), which the Court of Appeal applied. It made the following observations about the policies (paras [46]–[47]). First, they are directed to ministers and civil servants. Second, it was apparent that some of them were expressed to be ‘guidance’ and other policies might more reasonably have been described as ‘arrangements’ within the meaning of [PRA 1958, s 3\(1\)](#). Third, the policies had developed at different times and had attempted to deal with new media. Fourth, it was not possible to read the eight policies as a coherent whole.

The Court of Appeal decided that there was no duty to comply with the eight policies broadly for the reasons given by the Divisional Court, which were summarised as follows (at paras [7] and [10]). First, the policies govern the internal administration of government departments and did not involve the exercise of public power. They were not, in any sense, about individual cases or the rights of an individual. Second, the contention that the policies were legally enforceable did not sit easily with the fundamental principle of public law that guidance need not be slavishly followed. Third, Parliament itself often sets out the extent to which policies and guidance must be taken into account by a public authority and making such policies legally enforceable would make no sense of such provisions. Fourth, there were a raft of other measures which could be taken to provide appropriate accountability. Fifth, the risk that, if such policies were regarded as legally enforceable, public authorities would be deterred from adopting them. Sixth, enforceable policies should be only those that are the epitome of government policy as is required by the principle of legal certainty.

The Court of Appeal held that ‘it is not the constitutional role of the courts to attempt to micromanage how the executive conducts its affairs in the selection and preservation of documents, or in the use of communications technology by ministers and officials’ (at para [60]). It said that ‘to conclude that there is a duty to comply with the eight policies would be incongruous in the absence of any such provisions in the PRA or in other legislation’ (at para [61]). It noted that there are a series of other measures which could be taken to provide appropriate accountability in this context (at para [62]).

Case details:

- Court: Court of Appeal, Civil Division
- Judges: Sir Geoffrey Vos MR, Dingemans and Laing LJ
- Date of judgment: 1 December 2022

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