Neutral Citation Number: [2024] EWHC 2637 (Admin)

Case No: AC-2022-LON-000592

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/10/2024

Before

MR JUSTICE SWIFT

- -

Between

The KING

on the application of

CAMILA BATMANGHELIDJH **Claimant**

MICHAEL-KARIM KERMAN **Applicant**

- and -

CHARITY COMMISSION FOR ENGLAND AND WALES **Defendant**

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- -

Alex Goodman KC and Natasha Jackson (instructed by **Leverets**) for the **Applicant**

Tom Hickman KC and Faisel Sadiq (instructed by **the Charity Commission**) for the **Defendant**

Hearing date: 10 October 2024

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Approved Judgment

This judgment was handed down remotely at 2pm on Friday 18 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE SWIFT

A. Introduction

1. This is an application by Michael-Karim Kerman to be substituted as the claimant in judicial review proceedings started by Camila Batmanghelidjh.

2. The proceedings were issued on 6 May 2022. They challenge a report published by the Charity Commission on 10 February 2022 ("the Report") on the management of Keeping Kids Company, a well-known charity that went into liquidation in August 2015. Ms Batmanghelidjh had been the chief executive officer of the charity having founded the organisation in 1996. In July 2015 allegations were made that some clients of the charity had sexually assaulted other clients. These allegations turned out to be entirely unfounded, but their effect was that the donations that were the charity's main source of income quickly dried up. On 15 August 2015 the trustees decided to apply for a winding-up order because the charity was unable to pay its debts.

3. The grounds of claim are to the effect that the Report is legally flawed in that there is no evidential basis for the conclusions reached, and in that the findings in the Report rest on insufficient enquiry and/or a mis-evaluation of information and/or are inadequately reasoned. The grounds of claim further contend that the Charity Commission failed to approach its task with an open mind. Relief is sort in the form of a declaration that the Report is unlawful and in the form of an order requiring the Charity Commission to withdraw the Report.

4. The Report considered the following matters: allegations that some of the charity's employees (not the trustees) had destroyed documents shortly before the charity went into liquidation; whether the charity should have published, in its annual reports or elsewhere, the method it had used to identify the number of people it provided assistance to; whether the charity should have made greater provision for reserve funds; whether late payments made to some creditors (including HMRC) in the period after July 2014 amounted to mismanagement; and whether the board of trustees provided effective scrutiny of the charity's operations.

5. Most if not all of the ground the Report covered had already been addressed in a judgment of Falk J handed down on 12 February 2021 ([2021] EWHC 175 (Ch)). That judgment was in disqualification proceedings issued by the Official Receiver under section 6 of the Company Directors Disqualification Act 1986 against Ms Batmanghelidjh and those who had been trustees of the charity. In a comprehensive judgment, Falk J dismissed the Official Receiver's applications. The Report is a relatively short document. Those proceedings and that judgment may in part explain the nature and extent of the Charity Commission's report, which is short, containing only brief conclusions.

6. Neither the merits of the Report nor of the claim itself are matters for me today. It is sufficient to say that on 8 December 2022 Bourne J granted permission to apply for judicial review. The Charity Commission filed and served Detailed Grounds of Resistance on 10 February 2023. In March 2023, on the Claimant's application, the claim was stayed because she was unwell. The Claimant died on 1 January 2024. Mr

Kerman is a joint executor of Ms Batmanghelidjh's estate. He made the present application to be substituted as claimant on 13 June 2024.

B. The power to order substitution of a claimant.

7. The parties have referred to a number of cases where the court has considered applications for substitution in public law proceedings. I have had regard in particular to three judgments: the judgment of Underhill J in *R(River Thames Society) v First Secretary of State* [2006] EWHC 2892 (Admin); a further judgment of Underhill J in *R(SDR) v Bristol City Council* [2012] EWHC 859 (Admin); and the judgment of the Northern Ireland Court of Appeal in *Re Rosaleen Dalton* [2020] NICA 27. All these cases have considered situations in which the applicant sought to be substituted for the claimant in public law proceedings.

8. The judgment in *River Thames Society* was the first in time and set a framework followed in the later cases. Underhill J's conclusion was that the power at CPR 19.2(4) to permit a person to be substituted for an existing party had no application to public law claims. His reasoning was as follows.

> "3. On the face of it, the rules governing such an application are those set out under Section 1 of Part 19 of the Civil Procedure Rules. But, as both Mr Drabble QC for Lady Berkeley and Miss Cooke for the fourth defendant pointed out — though for very different reasons — the language of the relevant provisions is hard to apply to public law proceedings. Looking in particular at the wording of Rule 19.2 (4), which governs substitution and is in the following terms
>
> > "The court may order a new party to be substituted for an existing one if —
> >
> > (a) the existing party's interest or liability has passed to the new party; and
> >
> > (b) it is desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings",
>
> The concept of the original claimant having an "interest" which has "passed" to the would-be claimant is inapt. While in one sense claimants in public law proceedings — whether in the form of conventional judicial review proceedings or other statutory challenges of the kind with which we are here concerned — are of course required to have an "interest" in the dispute, it is an interest of a very different kind, and the term is used in a very different sense, from a private law interest; and it is hard to see how such an interest can be "passed" to another person. Nor, I might add, does a defendant in public law proceedings normally have a "liability" which can be passed. It is fairly clear to me that what the draftsman had in mind was private law rights and obligations, which are indeed capable of being "passed" by being devolved or assigned.

> 4. Yet if it followed that a claimant could never be substituted in public law cases it is not difficult to envisage circumstances in which the result would be most unjust. Take the example of an unincorporated pressure group where judicial review proceedings have been taken in the name of a particular individual, say the chairman, but while the proceedings are pending he dies: it seems to me inconceivable that another member of the group would not be permitted to be substituted as a party. Indeed, the same in my view would be the case even if the original claimant simply had second thoughts and no longer wished to be involved but other members of the group wished to pursue the challenge originally made in his name. I am told, and it comes as no surprise, that there are many instances in public law cases of such substitution taking place, although I have been referred to no authority where the formal basis of the substitution has been discussed save *Eco Energy*, to which I refer below. It is, I suppose, arguable that cases of this kind could be accommodated within the provisions of Section 1 of CPR 19 by a benign construction of the concept of the passing of an interest. But in my view, that would be stretching language beyond breaking point. I prefer — accepting Mr Drabble's eventual submission — to conclude that Part 19 is, though no doubt by oversight, simply not intended to cover public law cases and that the power of substitution which I believe must exist depends on the inherent jurisdiction of the court — it being understood that such jurisdiction would be exercised, so far as possible, in accordance with the principles appearing in Part 19 and the cases relation to it and its predecessor Rules."

In that case, the River Thames Society, which appears to have been an unincorporated association, had made an application under section 288 of the Town and Country Planning Act 1990 challenging a grant of planning consent, but then decided it did not wish to continue the proceedings. The vice-chairman of the society applied to be substituted as claimant. She had participated in the prior planning enquiry. The submission made in opposition to that application was that to allow substitution would undermine the purpose behind section 288 of the 1990 Act as it would permit a person, like the applicant who could have started proceedings under 288 in her own right, to circumvent the requirement that any such application had to be made within a six-week period hence undermining the statutory object of finality. Underhill J allowed the application. He concluded that the purpose of section 288 of the 1990 Act was not impaired when there was a "sufficient identity of interest between the original claimant and the person seeking to be substituted" (judgment at paragraph 7). On the facts of the application, Underhill J continued.

> "… It seems to me that there can be no bright line indicating exactly where there begins to be a sufficient identity of interest between the original claimant and the person seeking to be substituted so that the policy of Section 288 can be said not to be being substantially undermined. Here, while the case is not as strong as in the paradigm discussed above [at paragraph 4 of

> his judgment], it is still very far from being a case of a stranger who has failed to apply in time seeking to take opportunistic advantage of someone else's claim. Lady Berkeley was a vice-chairman of the Society and, on the evidence, the proceedings were taken at her instigation. It is reasonable to assume that if the Society had not taken them she would have done. The Society is, as I have mentioned, helping to fund the claim, at least to a modest extent. The relationship in those circumstances could hardly be closer, and in my view, it suffices. The case is different to that considered by Lord Justice Buxton in *Eco Energy*, because there the original claimant had no locus. In such a case the defendant would indeed suffer a real prejudice by having a claimant who did have locus substituted after the six-week period for a claimant against whose claim he had a complete answer. It is not so here."

9. In *R(SDR) v Bristol City Council* Underhill J again considered an application for substitution. This time the application was made in the course of judicial review proceedings. *SDR* had commenced the proceedings and permission to apply for judicial review had been granted. *SDR* then filed a notice of discontinuance with the court. *SDR's* solicitor disputed the effectiveness of the notice of discontinuance, but went on both to file an application on behalf of another person, ABC, to be substituted as claimant, and to file a new set of proceedings also in ABC's name. Underhill J's overall conclusion was that the notice of discontinuance had been effective and had brought proceedings to an end before the substitution application had been made, rendering that application futile. However, he said that had the claim remained on foot he would have allowed the substitution application. He referred to his judgment in *River Thames Society* as authority for the proposition that:

> "16. … the Court can permit an individual claimant in judicial review proceedings who is recognised as bringing the proceedings on behalf of a wider group to be substituted by another such claimant if in the course of the proceedings the original claimant for one reason or another does not wish to proceed."

As to the circumstances before him, Underhill J continued:

> "18. … I see the force of the argument that substitution in judicial review proceedings should not be permitted simply on the basis of a community of interest, in the broad sense, between a claimant who no longer wishes to proceed and a new claimant who wishes to pick up the baton; and I am prepared to accept for the sake of argument that substitution is only permissible where it is apparent that the original claimant was from the start bringing the claim for the benefit of a wider group which was in some sense associated with him in doing so. But I do not think that that further element needs to be

> established by the use of any particular formula. It is enough that it should be apparent to the defendant and any interested parties. In the present case, it was, and certainly should have been, apparent to all concerned that SDR was indeed claiming to be acting with the support of others who associated themselves in the claim. …"

10. Thus, he considered that the situation before the court in *SDR* was of a piece with the situation that had been considered in the *River Thames Society* case. He would have allowed the application for substitution because the claimant had started the proceedings "for the benefit of a wider group which was in some sense associated with him". I note that in *SDR* there was no suggestion that ABC lacked standing to bring the claim. In fact, later in his judgment, Underhill J granted ABC permission to apply for judicial review on the materially identical claim that he had commenced.

11. The decision of the Northern Ireland Court of Appeal in *Re Rosaleen Dalton* also arose in the context of judicial review proceedings. Dorothy Johnson had commenced proceedings seeking an order for a fresh inquest into the death of her father. That claim was dismissed at first instance and Ms Johnson appealed. She died before the hearing of the appeal and her sister, Rosaleen Dalton, applied to be substituted as a party in her place. The Northern Ireland Court of Appeal considered the application on the basis of its inherent jurisdiction (see its judgment at paragraphs 44 and 45). The court allowed the application because it accepted Ms Dalton's evidence that her sister had commenced the proceedings to give effect to the decision of the whole family to seek a fresh inquest.

12. In all these cases the court's decision on whether to substitute the applicant as claimant was taken in exercise of its inherent jurisdiction. In *River Thames Society* and *SDR* this rested on Underhill's conclusion that the requirement at CPR 19.2 (4)(a) was not apt to apply to a public law claim. In *Re Rosaleen Dalton*, the Northern Ireland Court of Appeal reached the same conclusion by reference to the requirements in Order 15 Rule 7 of the Rules of the Court of Judicature (Northern Ireland).

13. When Underhill J considered the matter, the word "and" appeared between subparagraphs (a) and (b) of CPR 19.2(4) so that the sub-paragraphs contained cumulative requirements. That position has now changed. Regulation 12(2) of the Civil Procedure (Amendment) Rules 2023 removed the "and" between sub-paragraphs (a) and (b) and the requirements in those sub-paragraphs are now alternatives. In the premises, it no longer follows that CPR 19.2(4) has no application to Part 54 claims. Since the obstacle to the application of CPR 19.2(4) has been removed, it is clearly preferable that the court should apply the express substitution provision rather than have resort to an inherent jurisdiction. It follows that the question to be considered on Mr Kerman's application in this case is the one presented by CPR 19.2(4)(b), is it "… desirable to substitute the new party so that the court can resolve the matters in dispute in the proceedings". Nevertheless, since Underhill J's approach in *River Thames Society* and in *SDR* was that the inherent jurisdiction should be applied to give effect to the principles embodied in CPR Part 19, his approach in those cases will continue to provide important guidance when questions of substitution arise in public law claims.

14. None of the reasoning in the cases I have referred to calls into question a requirement that the proposed substitute claimant must have standing to pursue the claim. On the facts of the cases it is evident that in each, the proposed new claimant could have made the claim in question in his/her own right. Mr Hickman KC who appears for the Charity Commission, contends that any decision to substitute a claimant must be consistent with the requirement for standing in public law cases. He refers to section 31(3) of the Senior Courts Act 1981, the provision that is the basis for the standing requirement. By that provision the court may not grant permission to apply for judicial review "… unless it considers that the applicant has a sufficient interest in the matter to which the application relates". He submits that the power at CPR 19.2(4)(b) to permit substitution of a claimant ought not be exercised so as to circumvent the requirement in section 31(3) of the 1981 Act.

15. I accept that submission. Mr Goodman KC, counsel for Mr Kerman, made the point that what might be necessary for the purpose of section 31(3) might vary depending on the stage of the proceedings when an application for substitution was made. He submitted that were an application to be made at a late stage, say after the final hearing had taken place and judgment was pending, what was needed to satisfy section 31(3) of the 1981 Act might be different to what might be needed in a situation such as the present when the application was made after the grant of permission to apply for judicial review but before the final hearing. That may be so; the court must take each such application on its own terms. But that does not detract from Mr Hickman's general point that when the power at CPR19.2(4)(b) falls to be exercised in public law cases, it should be exercised consistently with the principles and requirements that apply to such claims, one of which is the requirement for sufficient interest at section 31(3) of the 1981 Act.

16. One further matter that emerges from the judgments in *River Thames Society* and in *SDR* is the need for what Underhill J referred to as "a sufficient identity of interest between the original claimant and the proposed substitute". This consideration recognises the importance attaching to time limits in public law claims. The times limits are notoriously short and recognise the particular public interest in finality when it comes to matters of public administration. Underhill J's, notion that there must be a sufficient identity of interest between the original claimant and the proposed new claimant guards against the risk that substitution based only on whether the proposed substitute would have had a sufficient interest to start the claim would circumvent the policy that requires claimants to start proceedings promptly – it would permit a form of opportunism allowing the substitute taking advantage of another person's claim. In this way, the notion also allows fair weight to be given to the interest of any public authority defendant in finality.

17. The paradigm suggested by Underhill J in *River Thames Society* was where a claim had been commenced by a claimant as member of an unincorporated group and the proposed substitute was another member of the group. In his judgment in *SDR*, Underhill J returned to this matter at paragraph 18, set out above at paragraph 9 of this judgment. I consider the power to substitute a claimant ought not to be exercised in judicial review proceedings unless the criterion for a sufficient identity of interest with the original claimant is met.

18. Over and above this, the class of matters that might be relevant to where the substitution is desirable is not closed. All matters should be considered and their significance assessed in the context of the case in hand.

C. Decision

19. The Charity Commission's objection to Mr Kermen's application is both that he lacks standing to pursue the claim commenced by Ms Batmanghelidjh and, that the identity of interest criterion is not met because Ms Batmanghelidjh did not commence the claim for the benefit of a wider group, or at least not for the benefit of any such group that included Mr Kermen, who was not a trustee of the charity.

20. I am satisfied that Mr Kerman does have sufficient interest for the purposes of section 31(3) of the 1981 Act. He was Clinical Director at the charity from 2008 until its closure in 2015, and a member of the charity's senior management team reporting to Ms Batmanghelidjh. He was interviewed by the Charity Commission in the course of its investigation which led to the report. His evidence in support of his application to be substituted explains that in his professional life he was and continues to be affected by his association with the charity. He considers that the circumstances which the charity closed and the fact that the charity was then subject of investigation and report by the Charity Commission did and may continue to affect how he is regarded, for example by employers.

21. Mr Hickman does not dispute the generality of these points but submits they are no more than matters of public misperception. He submits that the general impact on Mr Kerman of the closure of the charity is not such as to give him standing to challenge a report that deals with discrete issues and does not, for example, consider any matter arising from Mr Kerman's work as Clinical Director or criticise or comment upon him either expressly or by implication.

22. It is correct that some parts of the report are concerned with matters relevant to the charity's trustees rather than the charity's employees (even senior employees such as Mr Kerman). But I do not consider this is decisive for present purposes. In a case like this one, whether or not a person meets the sufficient interest requirement involves consideration of the whole as well as the sum of the parts. I am satisfied that as a former senior employee of the charity, Mr Kerman is sufficiently identifiable with the charity as to be materially affected by this Report, which criticises the way in which the charity was operated and was run.

23. On the point of standing, Mr Hickman submitted that the trustees of the charity, who have been Interested Parties in the proceedings since they were commenced, would be more obvious substitute claimants. That would be so, or at the least they too would have sufficient interest. But of itself, this does not require the conclusion that Mr Kermen lacks sufficient interest. In some cases, the circumstances are such that the existence of a more suitable claimant is a matter that demonstrates the actual claimant lacks standing. One example is the circumstances considered by the Divisional Court in *R(Good Law Project) v Prime Minister* [2022] EWHC 298 (Admin): see per Singh LJ at paragraphs 28 and 55 – 59. In that case one claimant (the Runnymede Trust) did have standing, but the other claimant could point only to the most general of interest in the legality of the decisions challenged. The other claimant was held not to have standing. However, when deciding whether the claimant before the court has a

sufficient interest, the existence of a "better placed claimant" is only one consideration. The weight attaching to it must depend on context. In this case the fact that the trustees have not sought to present themselves as substitute claimants does not detract from Mr Kerman's contention that he has a sufficient interest. Although I do not consider that it goes to the merits of Mr Kerman's position, I have seen evidence from Alan Yentob the former chairman of trustees. He describes himself and the other trustees as "exhausted" by the litigation that followed the closure of the charity, in particular the disqualification proceedings which were the subject of a 10-week hearing, and "traumatised" by the various legal and statutory enquires. All this is entirely understandable. I can see good reason why Mr Yentob has not put himself forward as a substitute claimant.

24. The next matter is the notion of sufficient identity of interest explained in the judgments of Underhill J. It is clear from the passage in his judgment in *SDR* set out above at paragraph 9, that what this notion requires is sensitive to circumstances. Underhill J accepted (or at least saw "the force of the argument") that the simple existence of a common interest would not suffice. I too see the force of that argument. If mere common interest in the subject matter of the claim were sufficient it would be a licence for a very general interchangeability of claimants, which would be wrong in principle. Instead, Underhill J's reasoning focused on a qualitative notion of the claim having been started by the claimant "for the benefit of a wider group … in some sense associated with …" the claimant when he started the claim. Hence the focus must be on the nature and extent of the connection between the original claimant, the claim and the proposed substitute.

25. Mr Kerman relies on several matters. First, he relies on his close personal relationship with Ms Batmanghelidjh and the fact that he is a joint executor of her estate. I do not place weight on the personal relationship or Mr Kerman's position as joint executor. Given the nature of public law claims, see the judgment of Underhill J in (*River Thames Society)* at paragraphs 3 and 4 (set out above at paragraph 8), it is not significant that Mr Kerman is Ms Batmanghelidjh's executor. His responsibilities as executor do not touch upon any matter relevant to whether he should be substituted as a claimant in these public law proceedings.

26. Mr Kerman then refers to Ms Batmanghelidjh's statement dated 5 May 2022, made in support of the claim when it was issued. That statement says something about her reasons for bringing the proceedings albeit it does not expressly address the question that now arises. It is apparent from what is said in the statement that the position in this case is not the same either, for example, as the situation in the *River Thames Society* case, where the substitute claimant as vice-chairman of the society had been party to the society's original decision to commence the litigation, or the situation considered in *Re Rosaleen Dalton* where Ms Johnson (Ms Dalton's sister) had started the proceedings following a decision by the family to press for a new inquest into her father's death. The circumstances in this case are not as strong. Nevertheless, Ms Batmanghelidjh explains that she commenced the claim because her reputation and the reputations of those associated with her had been "tarnished". Later in her statement she says that the charity's staff had been "profoundly shamed, to the extent of not being able to put Kids Company on their CV". This is sufficient to make it clear that in bringing the claim Ms Batmanghelidjh not only sought vindication of the charity for her own sake but also for the sake of those, such as Mr Kerman, who had been closely associated with the charity. I consider this does establish an identity of

interest between Mr Kerman and Ms Batmanghelidjh and the circumstances of the claim's commencement as to establish Mr Kerman's claim to be an appropriate substitute claimant.

27. There is one further matter to consider. The Charity Commission contends that the claim is "stale" and that this is a further reason why it is not desirable to permit the application for substitution. The Charity Commission points out that significant time has passed since the proceedings were issued in May 2022, primarily as a result of the stay that came into force in March 2023; and that in accordance of its policy of "withdrawing" reports two years after publication the Report was withdrawn from the Commission's website in February 2024 and is marked as "withdrawn" on that website. I do not consider these matters decisive. In the circumstances of this case, the passage of time does not present any particular obstacle to the fair determination of the issues the case raises. I can see no prejudice to the Charity Commission. The Commission's policy also makes no difference to the outcome of this application. So far as I understand it, the policy seems little more than a matter of administration. The Report has not been withdrawn in any substantive sense. The Commission has not ceased to maintain the Report or the conclusions in it. Although the Report is marked "withdrawn" on the Commission's website, it remains publicly available through the "*.gov.uk*" website.

28. In the premises, Mr Kerman's application to be substituted as claimant is allowed.
