



Neutral Citation Number: [2009] EWCA Civ 25

Case No: C1/2008/2388

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION, ADMIN COURT
MR JUSTICE WILKIE
[2008] EWHC 2313 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE DYSON
and
LORD JUSTICE JACKSON

Between :

THE QUEEN ON THE APPLICATION OF KENNEDY	<u>Appellant / Claimant</u>
- and -	
THE HEALTH AND SAFETY EXECUTIVE and ABLE UK LTD	<u>Respondent / Defendant Interested Party</u>

Mr David Wolfe (instructed by Public Interest Lawyers) for the Appellant/Claimant
Mr Sam Grodzinski (instructed by Treasury Solicitors) for the Respondent/Defendant
Mr Javan Herberg (instructed by Nabarro LLP) for the Interested Party

Hearing date : Thursday 13th November

Judgment Approved by the court
for handing down
(subject to editorial corrections)

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Insert Judge name and Title here :

1. The claimant in these proceedings, Jean Kennedy, here the appellant, seeks judicial review of the Health and Safety Executive's decision to grant to Able UK Limited an exemption under the Health and Safety Control of Asbestos Regulations 2006 to import into the United Kingdom for the purposes of dismantling a decommissioned French naval vessel, an aircraft carrier, once called the *Clemenceau*, now also referred to as Q790. The reason why the exemption was necessary was because the *Clemenceau* contained substantial quantities of asbestos estimated at some 690 or 770 tonnes. The Health and Safety Executive (the "HSE") is the defendant and here the respondent. Able UK Limited ("Able UK") has a yard at Hartlepool where it intends to dismantle the *Clemenceau*, having won a contract, subject to certain licences such as the HSE exemption itself, from the French ministry of defence to do so. It is an interested party in these proceedings and in this court the second respondent. Wilkie J refused permission to seek judicial review, but, on application for permission to appeal to this court against such refusal, Laws LJ granted permission and retained the application for judicial review in this court. I shall therefore refer to Jean Kennedy as the claimant.

2. The essential issue is whether the HSE properly followed its own declared policy in its approach to its decision in this case. The policy was only to grant exemptions "where there are no reasonably practicable alternative ways of complying with the statutory provision concerned". That policy was the HSE's own: it did not derive from statutory language. The applicable statutory language is to be found in the Health and Safety Control of Asbestos Regulations 2006 (the "Regulations"), of which regulation 27 prohibits the importation of asbestos or of any product to which asbestos has been intentionally added, while regulation 32 permits the HSE to exempt any person from such prohibition provided it is "satisfied that the health or safety of persons who are likely to be affected by the exemption will not be prejudiced in consequence of it". In coming to its decision to grant an exemption in this case the HSE has concluded that that condition was satisfied. That is not challenged. What is challenged is the HSE's alleged failure to consider whether there were reasonably practicable alternatives to the importation of the *Clemenceau* into the United Kingdom, for instance because it could be dismantled in France or perhaps elsewhere.

3. Wilkie J held that the policy quoted had to relate to the individual applicant, here Able UK, so that for these purposes the question with which the HSE was concerned was whether there were reasonably practicable alternatives for Able UK other than the importation of the *Clemenceau*. Since Able UK's dismantling yard was in Hartlepool and it had won the *Clemenceau* contract in open competition with other European companies under the European Union's procurement procedures, it was not easy to see what alternatives were open to Able UK – other than to decline the contract it had won. The claimant's submission was that the HSE's policy required it to consider the position not so

far as it affected the applicant, Able UK, but in general: so that the HSE had to ask itself whether a French or European yard, or perhaps a yard anywhere in the world, was capable of performing the same work. If so, the HSE's own policy required it to decline any exemption.

The factual background

4. Able UK is part of a group of companies whose expertise includes the demolition and dismantling of large engineering plants and marine structures, as well as waste removal and disposal. It claims to be the European market leader in the receiving and dismantling of offshore oil and gas platforms. For these purposes it owns a large drydock on Teesside at Hartlepool, said to be the largest in the world. Wastes it has dealt with include not only asbestos but also radioactive waste, mercury and arsenic. Large coal-fired power stations which it has demolished typically have between 2000 to 4000 tonnes of asbestos materials in them. Its operations at Hartlepool have been the subject of debate and enquiry over a number of years. It has previously been granted an exemption by the HSE under the Regulations for the purpose of bringing a number of US naval vessels to its Hartlepool facility. That exemption has not been challenged. Its Hartlepool facility is called Teesside Environmental Reclamation and Recycling Centre (or TERRC for short).
5. The French ministry of defence has had considerable difficulty in securing the dismantling of the *Clemenceau*. An earlier plan to send it to India for that purpose had to be aborted due to a campaign of opposition by environmental pressure groups. It was thought wrong that the industrialised world should look to the developing world for the decommissioning of its own redundant plant.
6. The French ministry of defence then set about a tender process, conducted in accordance with European law regarding government procurement contracts, in order to find a European contractor to whom the dismantling of the *Clemenceau* could be awarded. The result of that process was the award of the contract to Able UK, albeit that contract is subject to Able UK obtaining necessary permits and licences.
7. There is evidence before the court, coming in the main from the French ministry of defence itself, but not exclusively so, about the availability of other facilities in France or Europe which could successfully receive and dismantle the *Clemenceau*. It begins with the claimant's solicitor, Mr Gavin Sullivan of Public Interest Lawyers, who conducted a telephone interview on 1 September 2008,

with the help of an interpreter, with M Jean-Paul Hellequin, a representative of the Seaman's Division of the Confédération Générale de Travail (the CGT), one of five main confederations of French trade unions. The CGT has an active membership in Brest where the *Clemenceau* has been docked, and was involved in the earlier campaign to prevent the French government from sending the vessel to India for dismantling. M Hellequin is also the president of an organisation known as the Mor-Glaz Association, formed by French citizens for the purpose of a campaign to have the *Clemenceau* dismantled in Brest. M Hellequin stated that a number of French consortia had submitted tenders to dismantle the vessel, specifically naming the Veolia Clean Group with facilities at Bassens in Bordeaux, the SUEZ France Group with facilities at Cherbourg, and the Van Heyghen Group, a Franco-Belgian company with facilities in Ghent in Belgium. M Hellequin considered that facilities might also exist at Brest. M Hellequin's contention was that France should be responsible for the safe disposal of its own waste and that there were adequate facilities within France at which the *Clemenceau* could be safely dismantled.

8. This evidence led to Able UK's solicitors, Nabarro LLP, writing to the French ministry of defence to obtain its comments on this evidence. Thus in a letter dated 26 September 2008 signed on behalf of the ministry by Jean-Michel Labrande, the Engineer General of the French fleet, he stated in translation as follows:

"The choice of the holder of the contract was made through two criteria:

- a technical criterion, assessing in particular the respect of the rules for environmental protection and safety of workers,
- a financial criterion.

The company Able UK Ltd has been recognised as the candidate with the best guarantees on the technical front and with the best financial performance."

9. He went on to refer to the four other consortia of which M Hellequin had spoken, as follows:

"I want to stress that the consortium Brest Force Plus, created for the occasion in France and whose technical and financial capabilities have been deemed inadequate, was not allowed to continue the consultation process to qualify for this contract.

The proposals from the three other candidates, some of which could not moreover rely on proven experience in the field of dismantling shipyard, have not reached the level of excellence proposed by Able UK Ltd in the light of the two criteria mentioned above. Their bids were [closed (*sic*), French *classées, sc*] classed after that of Able UK Ltd. Then the contract could not be assigned to them."

10. As a result of a submission made before Wilkie J that this letter confirmed, because it did not deny, the availability of suitable facilities in France, more specific details were sought on this point. A further letter from Engineer General Labrande dated 5 November 2008 distinguished between the position in France and in the rest of Europe. As for France –

“Among the facilities identified in France during the procurement process for the dismantling of the hull Q790, none has been or is now in physical condition to undertake a dismantling of this magnitude and complexity.”

11. The letter went on to explain that alone of the French candidates, the Veolia consortium (based at Bassens) provided a theoretical solution, but even that required prior investment and organisation to meet the ministry’s requirements and that “Technically, the use of this facility is not possible in the immediate future”. Meanwhile, the consortium had only been put together for the procurement process and was no longer assured.

12. As for the rest of Europe, M Labrande explained that already in March 2006 the Prime Minister of France had created a special Interministerial Mission to investigate the dismantling of ships (MIDN), the objectives of which were both to identify the validity of a dismantling industry in France and in Europe and to create a regulatory regime for such an industry. As a result the Mission toured facilities in Europe and around the world: its report was available on the internet. (No evidence from the MIDN report was put before the court by any party.) In sum:

“...there are already many naval dismantling yards in Europe, durable and capable to proceed to the dismantling of military and civilian vessels using the best practices...Able UK Ltd is listed among the identified sites.

Accordingly, in accordance with EU directives and regulations regarding public procurement, the procurement process used for the dismantling of the hull Q790 was conducted at a European level (publication in the OJEU)...

Thus, as stated in my letter of 26.9.2008...the proposals of other candidates for the dismantling of the hull Q790 have not reached the level of excellence proposed by Able UK Ltd. The contract was awarded to Able UK Ltd and other bids were rejected.”

13. Regulation 11 puts upon employers the duty to reduce the exposure of employees to asbestos to the lowest level reasonably practicable and to ensure that the number of employees exposed to asbestos is as low as is reasonably practicable. Regulation 27 states that “the importation into the United Kingdom of asbestos or of any product to which asbestos has intentionally been added is prohibited”. Regulation 32, however, allows the HSE by a certificate in writing to grant an exemption from the prohibitions contained in inter alia regulation 27 to “any person or class of persons or any product containing asbestos or class of such products”. However, by regulation 32(4):

“32(4) The Executive shall not grant any exemption under paragraph (1)...unless having regard to the circumstances of the case and in particular to

- (a) the conditions, if any, which it proposes to attach to the exemption; and
- (b) any other requirements imposed by or under any enactments which apply to the case,

it is satisfied that the health and safety of persons who are likely to be affected by the exemption will not be prejudiced in consequence of it.”

14. For the purposes of such an exemption, regulation 31(1) also provides that

“31(1) Where under an exemption...granted pursuant to regulation 32...asbestos is used in a work process or is produced by a work process, the employer shall ensure that the quantity of asbestos and materials containing asbestos at the premises where the work is carried out is reduced to as low a level as is reasonably practicable.”

15. Thus, the Regulations as a whole require that where work with asbestos is carried out, its level, and the exposure of employees to it, is reduced as much as is reasonably practicable. Moreover, asbestos is not to be imported save under a specific exemption, in respect of which health and safety is the vital consideration.

The HSE policy

16. The HSE is concerned with a whole host of regulations, governing not only work with or the importation of asbestos, but also matters such as genetically modified

organisms (the Genetically Modified Organisms (Contained Use) Regulations 2000) and hazardous substances (the Control of Substances Hazardous to Health Regulations 2002). For all these purposes the HSE has designed and published its policy, which first came into effect on 1 November 2005, called "*Granting Exemptions to Health and Safety Legislation*" (the "policy"). Its introduction states that the procedure set out in it describes the generic process to be followed when an exemption from complying with health and safety legislation is requested of the HSE. The purpose of the document is to provide a "default" procedure to be followed when considering the issue of exemptions for which no specific instruction or guidance exists. The policy is stated in these terms:

"Policy

HSE **cannot** grant exemptions unless satisfied:

- that all express conditions on the exercise of the power of exemption have been complied with, **and**
- granting the exemption would be consistent with Parliament's purpose in the legislation

In addition, it is HSE's policy only to grant exemptions where:

- there are no reasonably practicable alternative ways of complying with the statutory provision concerned, **or**
- the law is out of date and overly prescriptive, **or**
- provision should be made for innovation/technical progress, **and**
- it would be in the overall public interest to do so."

17. The reference in the last line of that policy to the "overall public interest" is a new and broad consideration which appears to go beyond the statutory requirement of no prejudice to health and safety. It is not suggested that as such this requirement is outside the HSE's discretion to impose as a condition of granting any exemption.
18. Just as there is no challenge in this application for judicial review to the HSE's decision that there is no prejudice to health and safety, so there is no challenge to its view likewise that the public interest is served by the exemption it has granted. The claimant's opposition, therefore, is entirely technical.
19. The policy document also describes "a series of tests" (in fact 9 so-called "steps") which an application must pass through before an exemption is issued. "Failure of any of these should normally result in the rejection of the application".

20. The 9 steps are described as follows: (1) Initial screen; (2) Coordination; (3) Legal advice; (4) Policy input; (5) Health and Safety test; (6) External consultation; (7) HSE decision; (8) Applicant response; (9) Internal review. If at the end of that process the HSE's provisional decision in favour of exemption has survived the last two remaining steps, then the provisional view will be confirmed as its public decision. For present purposes, the two important stages are steps 1 and 7, for it is at these points that the "no reasonably practicable alternative" test is applied. Thus at step 1 the policy document provides:

"Examine the circumstances of the application to see whether there may be a prima facie case for an exemption, which will include considering:

- have they shown that there are no reasonably practicable alternatives available that comply with the existing law?

Note: not all legislation is qualified by 'sfaipr' and therefore compliance with the law cannot always be assured by use of reasonably practicable measures."

Similarly, at step 7 the policy document reads as follows:

"Taking into account the responses from the consultees, including the HSE Board where appropriate, decide:

- whether the proposed exemption would be **lawful**

Only if this is so:

- decide whether an exemption complies with the HSE's policy and hence should be granted..."

The exemption application process in this case

21. Able UK applied to the HSE for an exemption by letter dated 7 January 2008. The application was handled by Chris Gillies, a principal inspector for the HSE with particular responsibility for ship building and repair including work with asbestos. He spoke to Greg Haywood, the head of HSE's asbestos licensing unit, for advice, and on 9 January Mr Haywood e-mailed Mr Gillies *inter alia* as follows:

"The first point is we need to be clear that it is not an exemption to import French asbestos for disposal in the UK (which we would not permit). The situation is that Able UK have been successful in winning a tender from the French Ministry of Defence for the dismantling of the French Naval Vessel (i.e. a UK business was successful etc.)"

22. On behalf of the claimant, Mr David Wolfe has relied on this e-mail to submit that the application was precisely one “to import French asbestos for disposal in the UK” and that the answer should have been “we would not permit” it. I do not understand where that submission fits in to the claimant’s case. There is no challenge on the ground of irrationality or perversity. As I have already remarked, there is no challenge on the grounds of health and safety or the public interest. In any event, what Mr Haywood is saying is obvious enough: the application was not as straightforward as dumping asbestos in the UK; it arose out of a technical and competitive challenge to dismantle a French naval vessel. The first would be unlikely to pass a public interest test, the second would raise more serious issues about the public benefit. In his evidence Mr Gillies has confirmed that that was the sense in which he and Mr Haywood had discussed the matter.
23. Mr Gillies next reviewed the papers with Mrs Pam Waldron, HSE’s head of operations for Yorkshire and the North East who also had extensive experience in the asbestos policy and enforcement field. They considered together whether there were any reasonably practicable alternative ways of Able UK complying with the law other than the granting of an exemption. They concluded that the only alternative would be if all the asbestos could be completely removed before the *Clemenceau* was brought into the UK for dismantling. They knew however that that was not a practical possibility. They knew from their collective knowledge and experience that asbestos in such vessels is found within the structure of the ship, so that it would not have been possible to remove it all without dismantling the vessel to such an extent as to render it unseaworthy. The nature of asbestos in the vessel meant that its safe removal and disposal was an intrinsic part of the dismantling work that Able UK was contracted by the French ministry to do. Of course, without removing all the asbestos, an exemption would still be necessary. Mr Gillies’ evidence continues:

“We did not consider whether the ship could simply be left in France or dismantled in France or somewhere else in the world by another company because we considered that the policy required us to consider the application that had been made by the applicant and the circumstances of that application.”

24. The upshot was the conclusion for the purposes of the HSE’s policy and step 1 of its process that there were no reasonably practicable alternative ways to comply with the law other than an exemption. This result of the initial screening had been achieved by 27 February when Mr Gillies sent Mrs Waldron an e-mail in the following terms:

“An initial screening has taken place and there appears to be a prima facie case for an exemption. The reasons for this include

- (1) There are no reasonably practicable alternatives that comply with existing law. The asbestos is part of the fabric of the vessel and fittings of the vessel and the contract is to dismantle and recycle the whole vessel. The contract was won in open competition in compliance with EU contract law.
- (2) The health and safety of affected persons would not be prejudiced. The work is able to take place in full compliance with relevant asbestos legislation by a Licensed Contractor using trained and competent employees.
- (3) There are evident and sensitive matters associated with the work, particularly relating to environmental concerns but these have been fully examined and other relevant agencies including the EA are content with the proposed work.
- (4) There is a directly relevant precedent when a similar application was granted in 2003.”

25. What the judge described as the high point of Mr Wolfe’s case on behalf of the claimant came in a later e-mail from Mr Gillies to Able UK dated 20 March 2008 in which he made a request for further information “To assist our decision making process”. The sixth item mentioned in that e-mail was –

“6. Information, if known, relating to the capability of the country of origin to undertake this work within that country. You may wish to put this into the context of your potential contract conditions. For example, whether subject to EU contract law and in compliance with all EU Directives.”

Mr Wolfe relies on this e-mail to support his basic and essential submission that the “no reasonably practical alternative ways” aspect of the HSE’s policy *should* be construed and *was* operated by the HSE itself as embracing a consideration of not only what might be practical alternatives (to an exemption) for the applicant itself, here Able UK, but also what might be theoretically practical for other parties elsewhere in the world (and particularly in the country of origin of the imported product).

26. The judge had to deal with that submission in advance of any evidence being filed by the HSE, on the oral consideration of a paper application. He said:

“Counsel for the HSE has informed me on instructions that the enquiry in that letter was by way of an enquiry for background information to inform him in his substantive decision making. It seems to me that it was, on any view, a rather inopportune question to be raised at that subsequent stage. Certainly Mr Wolfe uses it as a lever to suggest that his construction of step 1 is the correct one because, he says, the question whether someone in the country of origin

could undertake the work rather suggests that the scope of the initial enquiry should be wider than, in my judgment, it requires, namely that it is limited to what it is reasonably practical for the applicant to achieve rather than whether the applicant should be involved with the business of doing that work at all because someone somewhere else can undertake the work. Whilst this letter, posing this question, does raise a question mark as to whether the construction put forward for step 1 is the correct one, in my judgment, considering it properly, the construction argued for by HSE is plainly correct and the question posed on 20th March 2008 is a somewhat eccentric question posed by someone who was not thinking of the forensic consequences.”

I suppose one way of expressing those conclusions by the judge is that he was there accepting the force, such as it was, of Mr Wolfe’s submission about this “inopportune” and “eccentric” question, but that all this was outweighed and ultimately made irrelevant by the more limited construction of the HSE policy advanced by the HSE which was “plainly correct”.

27. Mr Gillies has now prepared his evidence about this e-mail. In his witness statement he says:

“18. This was not part of the initial screen to determine whether there was a prima facie case (it post dated that decision by a number of weeks). The previous application for an exemption by Able UK to import 13 US Naval ships had been a controversial exemption with a great deal of coverage in the media and I was aware the US had cited the fact they did not have sufficient capacity to handle their ships as a reason for sending the ships to the UK. I thought I might be asked about French capability as background information on a potentially controversial issue.

19. However at the time I asked the question I doubted whether Able UK could obtain accurate information about dismantling facilities in France...This is reflected in the way I worded the question to Able where I asked, for “information, if known, relating to capability (emphasis added). I was not at all surprised when they did not respond but assumed they were not in a position to answer this question.

20. I did not pursue the issue of capability in France for two reasons. Firstly, because objectively assessing the issue of capability in another country seemed to be something we were not able to do and secondly, I did not consider this to be a significant factor for the Decision Maker to take into account when exercising HSE’s discretion as to whether to grant an exemption to Able.

21. Even if we had been told there were French facilities it would not have affected our decision in relation to Step 1...Nor would it have changed the

outcome of our later considerations...Thus we would still have granted the Exemption.

22. Had it been clear that there were no French facilities to decommission the hull, that might have been another reason in favour of a decision to allow the work to be done in the UK. This is because the UK had signed up to the Basel Convention and had committed to the principle that OECD countries should not send their hazardous waste to developing countries. We were aware that this ship had been previously destined to be dismantled in India...However as there was no clear evidence regarding dismantling facilities in France the issue was not a factor considered by the Decision Maker.”

28. I regard that evidence as essentially to the following effect. The policy question of reasonably practicable alternatives was confined to the position of the applicant and had already been considered as part of step 1. The enquiry made on 20 March was not directed to that policy question, but was of a much more general nature, reflecting in part the history and potential controversy of such importations as well as media considerations. In other words, the question was not designed so much to confound the application as to tease out whether there were other matters which could be said in favour of it, at any rate in terms of public controversy. As such, the question was not one that needed to be pursued, if, as was anticipated, it could not readily be answered. This evidence draws internal support from the facts that the enquiry was sixth out of seven items, and the seventh item was also designed to particularise possible benefits, viz “Could you provide some indication of the economic or other benefits liable to accrue from the current application.” There is no reason for this evidence to be disbelieved. Whether the HSE has got its own policy wrong or not, there is no evidence that it has in fact been applying it in a way different from that in which it has represented it to the court. In these circumstances, I would be inclined to say that the judge, who did not have the advantage of this evidence, was too critical in describing the e-mail enquiry as inopportune or somewhat eccentric.

29. In accordance with step 6 of its process the HSE consulted widely: internally, with other government departments such as the Ministry of Defence, DEFRA, the Environment Agency, and the Department of the Environment, and then more widely and locally as well, such as with 12 local MPs, Friends of the Earth, Greenpeace, TUC Northern, the General Municipal and Boilermakers Union, the Ports Authority, Hartlepool Borough Council, the North East Assembly, One North East and the Government Office North East. The majority were broadly in favour of the exemption or neutral. Friends of the Earth and Greenpeace who were invited to respond made no reply. A small number of individual members of the public resident in Hartlepool, of whom the claimant was one, were in opposition, as was an umbrella organisation of residents known as Friends of Hartlepool. The dominant theme of their opposition was that the dismantling of the *Clemenceau* in Hartlepool was not safe.

30. The claimant has suffered from cancer in the past and has unfortunately lost five relatives to that disease. She ascribes the incidence of cancer in Hartlepool to polluting industries based there. She feels that the dismantling of the *Clemenceau* would only add to that pollution; and that an exemption would allow France to “dump their toxic waste” in Hartlepool, in opposition to a principle whereby peoples should look after their own waste. She now states: “neither the HSE nor Able UK have asked why France cannot look after its own waste and break the *Clemenceau* in one of its own ports as they are required to do under HSE’s own policies”.
31. The HSE’s decision is dated 17 June 2008. Previously an e-mail dated 5 June 2008 from Sandra Caldwell, HSE’s Director of Field Operations Directorate, who was the “Accountable Person” under step 7 to take the provisional (“minded to grant”) decision, concluded that an exemption would be lawful and complied with the HSE’s policy. Among the reasons listed for granting the exemption were the following:

“5. HSE inspectors have visited the TERRC site and discussed the asbestos removal work. Their opinion is that Able UK has the competency and capability to carry out the work safely and in full compliance with the relevant legal requirements without prejudicing the health of workers or members of the public...

7. The project will secure existing jobs and create many new ones, and contribute towards the regeneration of the area. Able UK Ltd have identified 213 jobs relating to ship decommissioning activities and the full site development is targeted to secure 749 jobs...

12. Public and government perception has changed since the 2003 exemption was considered. Current thinking is that developed countries have an obligation to assist in recycling ships in a responsible way – this has led to the development of a UK ship recycling strategy.”

Discussion

32. Ultimately, the claimant’s submission raises a short point of construction: whether the HSE policy requiring there to be “no reasonably practicable alternative ways of complying with the statutory provision concerned” is directed, as the HSE and Able UK submit, to the position of the applicant itself, or, as the claimant submits, to the world at large (albeit including the applicant).

33. Like the judge, I have no doubt that the former and more limited submission is the correct one.
34. For these purposes, I am happy to accept that this question of construction is ultimately an essentially objective one and does not depend on what the policy maker intended the policy to mean, or on what the decision maker under the policy could reasonably interpret the policy to mean. I say this because this court has been provided with evidence from the HSE in the form of a witness statement from Peter Sullivan, who in 2004/5, when he was a principal inspector based in the Operational Policy and Support Division of the HSE, was asked to develop a clear, generic, exemption procedure to apply across the whole of the HSE's remit. He was the author of the HSE policy document with its 9 steps towards final decision making. He describes this as intended to be a piece of internal rather than external guidance. He also describes step 1 as being merely a filtering process to eliminate at an opening stage all applicants who did not need an exemption because they had a reasonably practicable alternative open to them. He says ("quite categorically") that it was not the intention to ask whether there were reasonably practicable alternatives available in the world in general. He says that such an interpretation would lead to wide ramifications across the areas which the HSE regulates with potentially far reaching consequences. He gives some real examples. A textile manufacturer in the UK has an exemption under the Control of Substances Hazardous to Health Regulations 2002 to use a prohibited chemical to test for chemical contamination of dyes used in its textiles. If there was another non-prohibited chemical available to the manufacturer, he would not need an exemption, and his application would fail at step 1. On the claimant's construction, however, the question would be whether there was another manufacturer anywhere in the world which could manufacture the textile in question (or possibly a substitute for it) whether or not using the prohibited substance. He next points to an exemption for the importation of two carcinogens otherwise prohibited under the same 2002 Regulations for the purpose of medical research. Such an exemption would have to be refused on the claimant's approach if the medical research could be carried out anywhere in the world. These refusals of exemptions would be required as a matter of policy even if the health and safety and public interest questions were determined favourably to the applicants.
35. This is interesting evidence, but it seems that the HSE's policy document has been published on its web site and I am satisfied that the test which should be applied can be taken for present purposes from the decision of this court in *Regina (Raissi) v. Secretary of State for the Home Department* [2008] EWCA Civ 72, [2008] 2 WLR 375. The judgment of the court was given by Hooper LJ. Mr Wolfe was happy to take the following statements of the test for the construction of a policy from the material discussed and accepted in that judgment. Thus in *R v. Criminal Injuries Compensation Board, Ex p Webb* [1987] QB 74 at 78 Lawton LJ put the matter thus:

“The Government has made funds available for the payment of compensation without being under a statutory duty to do so, it follows, in my judgment, that the court should not construe this scheme as though it were a statute but as a public announcement of what the Government was willing to do. This entails the court deciding what would be a reasonable and literate man’s understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence.”

36. In *Raissi* it was submitted that such an approach was in conflict with what Lord Bingham of Cornhill had said in *In re McFarland* [2004] 1 WLR 1289, as contrasted with what Lord Steyn had there said in a dissenting speech (at para 24) cited by Hooper LJ at para 114. Lord Steyn there said:

“Such policy statements are an important source of individual rights and corresponding duties. In a fair and effective public law system such policy statements must be interpreted objectively in accordance with the language employed by the minister...And on such a question of law it necessarily follows that the court does not defer to the minister: the court is bound to decide such a question for itself, paying, of course, close attention to the reasons advanced for the competing interpretations. This is not to say that policy statements must be construed like primary or subordinate legislation. It seems sensible that a broader and wholly untechnical approach should prevail. But what is involved is still an interpretative process conducted by a court which must necessarily be approached objectively and without speculation about what a particular minister may have had in mind.”

37. Hooper LJ also cited from Sedley LJ’s judgment in *R (Sainsbury’s Supermarket Ltd) v. First Secretary of State* [2005] EWCA Civ 520 at para 16:

“the interpretation of policy is not a matter for the Secretary of State. What a policy means is what it says. Except in the occasional case where a policy has been ambiguously or unclearly expressed (see *R v Derbyshire County Council, ex p Woods* [1997] JPL 958), so that its maker has to amplify rather than interpret it, ministers are not entitled to thwart legitimate expectations by putting a strained or unconventional meaning on it. But what ministers do both have the power and the obligation to do – and Miss Lieven [for the minister] readily acknowledged that this is her real point – is to apply their policy from case to case, keeping in balance the countervailing principles (a) that a policy is not like a rule but a guide and (b) that like cases ought to be treated alike.”

Hooper LJ commented:

“121. We have some doubt as to whether Lord Steyn was right to interpret Lord Bingham’s words in *In re McFarland* [2004] 1 WLR 1289 as adopting the reasonable range of meanings approach...

123. We have reached the conclusion that *In re McFarland* [2004] 1 WLR 1289 does not prevent this court from deciding what the policy means. To that extent we disagree with the Divisional Court. We shall use the *Ex p Webb* [1987] QB 74 text, whilst accepting that it could be worded in a more modern way.”

38. Applying that text (or perhaps test), therefore, I have no doubt that the objective construction to be preferred is that put forward by the HSE and Able UK in their submissions, as adopted by the judge below. The question is what are reasonably practical alternatives for the *applicant*, not for the world. That is because: first, the whole context is a specific application for a specific exemption by a specific applicant. Secondly, that is emphasised by the language in which the same point is expressed in its reprise where the document discusses step 1 and asks: “have they shown that there are no reasonably practicable alternatives available that comply with the existing law”. “They” of course are the applicant and what they have to show is that there are no reasonably practicable alternatives *available*. Available to whom? Plainly to the applicant, not to the world (or here, perhaps, to the French ministry of defence). The alternatives are alternatives to obtaining an exemption: it is no alternative to Able UK to obtaining an exemption to be told that it should simply forgo its competitively winning tender so that a less compelling candidate can be assessed as providing an alternative foreign facility for the dismantling of the vessel. Thirdly, the claimant’s construction would be an impossible one to police, or at least an extremely difficult one. The HSE, which is concerned with its responsibilities in the UK, would have to assess the position potentially anywhere in the world: and the applicant would have to prove a world-wide negative. This is all to my mind highly improbable and improbable to consider to have been intended. Fourthly, the HSE, whose statutory duty, it will be recalled, is to concentrate on the health and safety of those likely to be affected, is not to be supposed, by reason of its additional, non-statutory, policy test, to have undertaken to survey the world for an alternative disposal or at any rate to reject any applicant out of hand who fails to show that what he seeks to do in Britain could not be undertaken or provided anywhere in the world. Nor does it help to say that this policy, so understood, should be confined to an investigation in the country of origin, for which restriction there is in any event no logical basis.
39. Fifthly, this conclusion is fortified by the examples which Mr Peter Sullivan cites with respect to the Control of Substances Hazardous to Health Regulations 2002. Mr Wolfe for his part cites counter-examples: for instance, he refers to the Genetically Modified Organisms (Contained Use) Regulations 2000 which

prescribes “containment measures”, such as laboratory suite isolation and “negative pressure relative to the pressure to the immediate surroundings”, to be undertaken by anyone working with genetic modification of micro organisms. An applicant he supposes might seek an exemption on the ground that it could not afford such expense, and he posits that the HSE’s construction of its policy might permit an exemption to be given on the ground of expense even though “there was a facility just down the road operated by someone which could offer the specified containment levels”. In my judgment, an example which posits an exemption grounded on the unwillingness of an applicant to undertake the expense necessary for the prescribed containment measures and an alternative facility “just down the road” (it is not clear whether that alternative would be available to the applicant, or simply that the benefits of such a facility might be available to society at large) hardly does justice to the interests and arguments concerned. For it must be doubtful whether a case for an exemption can be based merely on expense, at any rate that has nothing to do with the current case, and the presence of a facility “just down the road” (whatever that is intended to signify in terms of its availability) again does not match the present problem.

40. Sixthly, Mr Wolfe is unable to show that anyone has ever before interpreted the HSE policy in the way he submits is the correct way to do so. That difficulty was behind the importance for him of Mr Gillies’ e-mail of 20 March 2008, for he submitted that it showed that the HSE itself was adopting his construction of its policy. However, I have dealt with that above: it shows no such thing. It does not undermine a clear preference for the HSE’s construction of its policy over that of the claimant; and in any event, on the evidence, the e-mail was not addressed to the same point. I would merely observe in passing that, quite independently of the policy concerning “no reasonably practicable alternative ways”, it might (I put it no more strongly) be legitimate in certain circumstances for the HSE to consider whether facilities abroad could make it unnecessary for anything to be imported into the UK. I am contemplating no particular scenario, but I am cautious about positing that such a scenario could *never* arise. However, it also needs to be said that such a consideration could plainly involve the danger of discouraging international co-operation, especially where, as here, the applicant had won an international competition, conducted according to rules binding on all EU states, on the ground that it provided the most efficient technical solution to the problems involved. Such an attitude would plainly be inconsistent with European Union procurement policies, and also with the apparently growing international consensus that what is needed is the development of centres of excellence for the disposal of waste in the developed nations rather than the exploitation of cheaper but more hazardous ways of doing things in the developing world.
41. Moreover, in as much as Mr Wolfe has concentrated on alternative facilities in France, as the country of origin, there is force in the HSE’s and Able UK’s reliance on the evidence provided by the French ministry of defence to the effect that there is in any event no available alternative facility in France (see paras 10/11 above). Once one goes beyond the country of origin, which in theory on Mr

Wolfe's construction, it would be necessary to do, there is no stopping place for the difficulties of investigation and assessment which the policy as suggested would involve. In any event, given the rules governing the procurement of state contracts, it can hardly be said that an alternative site for the dismantling of the *Clemenceau* was "reasonably practicable".

42. However, one strand in the evidence and submissions on behalf of the HSE did not strike me as particularly cogent, and that was the suggestion that in any event the policy test of reasonably practicable alternatives only applied at step 1. It appears to me, on the contrary, that the test comes back as part of step 7 (see above at para 20); and of course what is introduced as the HSE's policy even before the nine steps are elaborated must in theory remain for consideration as part of the central decision making as well as at the initial screening stage. Therefore it comes as no surprise that the policy is mentioned again at step 7. There is no evidence, however, that the policy, as the HSE and I have understood to be, was not again applied at that later stage: and there is the Sandra Caldwell e-mail of 5 June 2008 (see above at para 31) to confirm that it was. In any event, once the policy is to be construed as it was construed and as I would construe it, then it follows that the answer, which is that an exemption was, if appropriate, also necessary because the applicant had no reasonably practicable alternative way of complying with the law, remained the right answer both initially and finally.

An alternative ground?

43. A second ground on which judicial review was sought by the claimant was based on regulation 31(1) and the submission that in any event the grant of any exemption should have been limited to such amount of asbestos as could not have been safely removed from the *Clemenceau* prior to its leaving France. However, the evidence from Mr Gillies is that this question was specifically considered by him and Mrs Waldron, and the answer was that it was not safe nor possible to attempt the removal of asbestos prior to the vessel's leaving France. In the event, and following this evidence, Mr Wolfe did not press his second ground orally. It seems to me that in any event, regulation 31 applies only after exemption has been granted: that is what regulation 31(1) says: "Where...an exemption is granted...the employer shall ensure..." etc. Moreover, it seems to me to be on the whole unlikely that the intent of regulation 31(1) is that which Mr Wolfe has ascribed to it. It is simply not concerned with the granting of an exemption or of the imposing of conditions under an exemption: it rather presupposes such a grant and then imposes on the employer a duty to ensure that the quantity of asbestos used in a work process is reduced to as low a level as is reasonably practicable.

Discretion

44. A number of submissions were presented to the court by the HSE and in particular Able UK to the effect that, whatever might be the answer to the claimant's main ground, the court should decline to grant judicial review as a matter of its discretion.

45. Thus Able UK submitted that there had been delay following the publication of the HSE's decision at the latest on 2 July 2008 until the claimant's issue of proceedings on 2 September 2008, during which period Able UK had incurred expense. Moreover, the HSE submitted that judicial review should in any event be refused in the light of its evidence that, if perchance its policy were to be construed by the court in a way in which it had not been intended, then the HSE would directly amend its policy to bring it into line with its stated intentions: so that the decision would ultimately be no different. Both respondents submitted that in any event, seeing that the claimant's complaint was at best highly technical, since there was no challenge to the health and safety or public interest conclusions of the decision, and furthermore academic, because of the HSE's stated intention to amend its policy if necessary, and in the light also of the dangers and difficulties of delay, both for the towing of the *Clemenceau* to Hartlepool in winter, and for the possible loss of the contract as a whole, the court should exercise its discretion to refuse judicial review.

46. It is unnecessary to decide these issues and they were not debated in oral argument. I would merely say that the issue of delay by itself would not have persuaded me to refuse relief under section 31(6)(b) of the Supreme Court Act 1981. I refer to the chronology of events leading up to the issue of proceedings set out by Mr Wolfe. However, there is clearly some force in the other submissions, if only because, despite the lack of challenge on the critical aspects of health and safety and public interest, it is difficult to escape the conclusion that the claimant's main concern has been and remains her scepticism about those aspects of the matter. I have the greatest sympathy for the claimant's point of view, especially in the light of the unfortunate experiences of her family. Her feelings are understandable. Nevertheless, in the absence of a challenge on health and safety or public interest grounds, the concentration in these proceedings on the HSE's policy has the hall-mark of a lawyer's point. In circumstances therefore where first, the point is made academic by the HSE's determination, if necessary, to render its policy consistent with its intentions, secondly, there is no suggestion of anyone being misled by the policy, thirdly, further delay could have serious consequences for the venture, and fourthly, there remains in the background the fact that the award of the French ministry's contract to Able UK was carried out under EU procurement rules and represents a determination in open competition as to where the dismantling of the *Clemenceau* could best be carried out, there is

obviously much to be said for the respondents' case. As it is, I need not determine it.

Conclusion

47. At the conclusion of the hearing in this court, we gave our immediate decision on its outcome, so that there should be no delay for the parties about its consequences. This judgment sets out the reasons for that decision. In sum, judicial review is refused because the claimant's argument, in favour of a broad construction of the HSE's policy such as would extend it beyond reasonably practical alternatives available to the applicant itself, lacked merit.

Lord Justice Dyson :

48. I agree.

Lord Justice Jackson :

49. I also agree.