

PF 244 – ADMINISTRATIVE COURT

Application Notice (Part 23)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT LIST

Claim No: CO/5148/2010

Claimant: ☒ (on the application of Haneefa Sarwar)

Defendant: Secretary of State for Transport

Interested Party: British Airports Authority

APPLICATION NOTICE

Part A - We, the Equality and Human Rights Commission, Apply for permission to intervene in the above case.

Part B - We wish to rely on ☐ the attached Witness Statement/Affidavit
☒ our statement of case
☐ the evidence in Part C on the reverse of this application.

Dated --6 June 2012-----

Signed [REDACTED] (name)----- [REDACTED]

position or office held -----Senior Lawyer (Solicitor)---on behalf of the Equality and Human Rights Commission-----

-
- (1) State full name of Claimant or his/her Solicitor
 - (2) State title of party e.g. Claimant, Defendant etc.
 - (3) State briefly the nature of the order sought and the reason it is sought including the material facts relied on and identifying any rule or statutory provision.

PF 244 - Administrative Court (Continued)

Part C - Evidence

Please see attached Statement of Case in support of the application to intervene in these proceedings.

Statement of Truth (to be signed when part C is completed)

*I believe that the facts stated in this application notice are true.

Full name-----[REDACTED]

Name of Claimant's Solicitor's firm -Equality and Human Rights Commission--

Signed [REDACTED] Position or office held --Senior Lawyer
(Solicitor)-on behalf of the Equality and Human Rights Commission (the
proposed intervener)-----

To: Defendant/Defendant's Solicitor's
address, DX or e-mail

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Lawyer
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Treasury Solicitor's Department
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CO/5148/2010

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

BETWEEN -

THE QUEEN (on the application of HANEEFA SARWAR)

Claimant

-and-

SECRETARY OF STATE FOR TRANSPORT

Defendant

and

BRITISH AIRPORTS AUTHORITY

Interested Party

and

EQUALITY AND HUMAN RIGHTS COMMISSION

Proposed Intervener

STATEMENT OF CASE ACCOMPANYING FORM PF244:
APPLICATION BY THE EQUALITY AND HUMAN RIGHTS COMMISSION
FOR PERMISSION TO INTERVENE


Doughty Street Chambers

Counsel for the Proposed Intervener, the Equality and
Human Rights Commission


Senior Lawyer (Solicitor)

Solicitor for the Proposed Intervener, the Equality and
Human Rights Commission

31 May 2012

1. OVERVIEW

- 1.1 This Application Notice is filed on behalf of the Equality and Human Rights Commission ('the Commission'). The Commission seeks permission to intervene in these proceedings before the Divisional Court.
- 1.2 These proceedings concern the rights to privacy and freedom from discrimination of a large number of air travellers who travel through, or wish or need to travel through, any of three major UK airports: Heathrow, Manchester and Gatwick airports. Between them these three airports cover the majority of travelling passengers, according to the Defendant (53% of passengers: Defendant's Amended Summary Grounds of Defence, para. 43(5), p. 90 of Application Bundle). The proceedings concern the UK government's introduction between 2010 and 2011 of full body scanning equipment at those airports, and directions made by the Defendant which amount to the imposition of a 'no scan, no fly' policy (i.e. a passenger who refuses to be scanned using the equipment in question is not permitted to fly, and no alternative form of search is available).
- 1.3 The proceedings raise both substantive and procedural concerns regarding the introduction and deployment of this equipment. They reach beyond the individual Claimant's particular circumstances and have implications for the interplay between fundamental human rights and equality principles and maintenance of security at UK ports.
- 1.4 For the reasons set out below, the Commission respectfully submits that it is uniquely well placed to assist the Court in the determination of these proceedings, and to "*provide [it] with a more rounded picture than it would otherwise obtain*" when considering the Claimant's application for judicial review (per Lord Hoffmann, *E v. The Chief Constable of the Royal Ulster Constabulary (Northern Ireland Human Rights Commission intervening)* [2008] UKHL 66, [2009] 1 AC 536, at para. 2). The Commission summarises below how its statutory role as the UK's national human rights institution allows it to place these proceedings in full context. Further, as the Commission is mindful of the need for interveners to 'add value,' rather than duplicating submissions of other parties, a brief summary is provided below of specific issues which the Commission intends to develop in greater detail in order to assist the Court.
- 1.5 Permission is sought for the Commission to intervene in the present claim by way of both written submissions and brief oral submissions. The Commission confirms its willingness to comply with

any time restrictions imposed by the Court, such as a maximum one hour time limit on any oral submissions.

- 1.6 The Commission has sought the views of the parties prior to making this application (letters attached). The Claimant's solicitors have confirmed that they have no objection to the Commission's proposed intervention (email attached). The Defendant's view is that it would be for the Court to decide upon the merits of such an application and reserves the right to comment further when it sees the application. The Defendant advises that if the intervention is permitted by the Court, it should be kept to written submissions or, if oral submissions are permitted, they be no more than one hour in length (letter attached). The Interested Party, the British Airports Authority, has also been given notice of this application and has not responded.

2. THE EQUALITY AND HUMAN RIGHTS COMMISSION

- 2.1 The Equality and Human Rights Commission is a statutory body established pursuant to the Equality Act 2006 ('the EA 2006'). Its statutory remit indicates its interest in the present proceedings:

2.1.1 First, the Commission is under a general duty, contained in s. 3 of the EA 2006, to conduct its functions with a view to encouraging and supporting the development of a society in which (among other goals) human rights and equality are respected and protected;

2.1.2 Second, under s. 8 of the EA 2006 the Commission has specific duties in relation to equality and diversity, which include promoting understanding of, and encouraging good practice in relation to, equality and diversity;

2.1.3 Third, pursuant to s. 9 of the EA 2006 the Commission has various duties in relation to the promotion of human rights, including in particular those rights protected under the Human Rights Act 1998 ('the HRA').

- 2.2 The Commission seeks to intervene in these proceedings pursuant to s. 30, EA 2006. This provision confers upon the Commission a power to either institute or intervene in legal proceedings, whether for judicial review or otherwise, if *"it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function."* Parliament plainly intended that the Commission should have considerable freedom in choosing to

initiate, or intervene in, legal proceedings considered relevant to the discharge of its statutory functions.

- 2.3 In light of its statutory functions, and pursuant to s. 30, the Commission regularly institutes and intervenes in cases raising important issues in relation to equality and human rights. In the first few months of 2012 there have already been three judgments (including two from the Court of Appeal) in cases in which parties were represented by the Equality and Human Rights Commission. During 2010-2011 the Commission intervened in over 30 cases in a range of domestic courts and tribunals. In the vast majority of those cases the courts have welcomed such interventions. For example, the Supreme Court explicitly thanked the Commission for "well-made" submissions on proportionality which impacted directly upon the judgment in *Manchester City Council v. Pinnock* [2010] UKSC 45, [2010] 3 W.L.R. 1441, per Lord Neuberger at para. 64.

3. THE PRESENT CLAIM

- 3.1 This is a claim for judicial review arising from the Defendant's decision, announced publicly in Parliament on 1st February 2010, to require the airport operators of Heathrow and Manchester airports to deploy body scanners. This was said to be a response to the attempted bombing on Christmas Day 2009 of an airliner flying from Amsterdam to Detroit ('the Christmas Day attempted bombing'). It now appears that there were between 29th January 2010 and 10th July 2010 a series of directions made by the Defendant, pursuant to Part II of the Aviation Security Act 1982; and subsequent directions were made on 3rd October 2011, 21st November 2011, and 5th December 2011.

- 3.2 The cumulative effect of the now applicable directions is:

- (a) To require airport operators at Heathrow, Manchester and Gatwick airports to ensure that security scanner equipment is deployed at their airports;
- (b) To provide that where this equipment is deployed, it be operated in accordance with both a public and a restricted Operational Protocol (the restricted form containing security-sensitive information);
- (c) To require the airport operator to ensure that the Defendant's November 2011 *Code of Practice for the Acceptable Use of Security Scanners in an Aviation Security Environment* be followed when the scanners are used (this has now replaced the *Interim Code* which was previously in place for an almost two-year period, between 29th January 2010 and 20th November 2011);

- (d) To provide that a passenger who refuses to be scanned using the body scanning equipment is not permitted to fly (the 'no scan no fly' policy).

3.3 The Claimant is an unmarried Muslim woman who works part-time as a nurse and part-time as a campaigns officer for the Islamic Human Rights Commission, the latter role requiring regular travel. She issued judicial review proceedings in April 2010, for protective reasons, but the parties agreed to stay proceedings whilst a consultation took place on the *Interim Code of Practice for the Acceptable Use of Security Scanners in an Aviation Security Environment*, which is itself under challenge in these proceedings. The Claimant was on 15th December 2011 given permission to amend her Grounds to include any challenge in respect of the Defendant's 'no scan no fly' policy confirmed in the terms of the Defendant's Written Statement of 21st November 2011 and the Directions issued pursuant to the 1982 Act on 5th December 2011. Amended Grounds (dated 14th December 2011) were lodged with the Court on 19th December 2011.

3.4 In the 14th December 2011 pleadings the Claimant challenges four decisions/ actions of the Defendant:

- (a) The introduction of the Interim Code;
- (b) *"The ongoing use of such scanners at Heathrow, Gatwick and Manchester airports, on the basis of the interim Code"*;
- (c) The issuing by the Defendant of the 29th January 2010 and 29th April 2010 directions;
- (d) The Defendant's decision as set out in her 21st November 2011 Written Statement and the directions of 5th December 2011, *"to confirm and continue the 'no scan no fly' policy."*

3.5 The Claimant has three grounds of challenge:

- (i) Breach of the right to privacy – violation of Article 8 ECHR and the Data Protection Act 1998 ('DPA');
- (ii) Breach of EU law (decisions said to be ultra vires Article 6 EU Regulation 300/2008 and in violation of the EU Charter of Fundamental Rights); and
- (iii) Failure to comply with general equality duties under s. 71, Race Relations Act 1976 ('RRA'), s. 49A Disability Discrimination Act 1995 ('DDA'), or s. 75A, Sex Discrimination Act 1975; or since 5th April 2011 with the public sector equality duty under s. 149, Equality Act 2010 ('EA 2010').

3.6 The Defendant strongly contests all three grounds of challenge, in Summary Amended Grounds of Defence dated 25th January 2012.

3.7 Permission was granted by Mr. Justice Wyn Williams on 4th May 2012. He described the Defendant's Summary Grounds as *"a powerful document"* but nonetheless concluded that the permission threshold was passed, *"especially given the very important issues which are raised."* He directed that the substantive hearing should take place before the Divisional Court in the circumstances.

4. BACKGROUND TO THE COMMISSION'S INTEREST IN THE PRESENT CLAIM

4.1 Over the past two and a half years, from the outset of the introduction of body scanners in UK airports, the Commission has expressed both substantive and procedural concerns: substantive concerns regarding the right to privacy, and there being a serious risk of direct or indirect discrimination in the implementation of the technology; and procedural concerns regarding the Defendant's decision-making, the absence of any consultation or detailed analysis regarding the privacy and equality impact of those decisions at an early stage, prior to the introduction of the *Interim Code*, and the consultation process. The Commission has consistently argued that there are inadequate safeguards to guaranteed protection of the right to privacy, ensure respect for individuals' dignity, and avoid potential direct or indirect discrimination. A summary of the Commission's involvement in these issues since January 2010 is provided below.

4.2 Following the Christmas Day attempted bombing in December 2009, the then Home Secretary, Alan Johnson MP, announced in the House of Commons on 5th January 2010 that the government intended to introduce body scanners at airport security checkpoints in response to a perceived increased terrorist threat.

4.3 The Chair of the Commission wrote to the Home Secretary by letter dated 15th January 2010, outlining the Commission's initial concerns regarding body scanning. A copy of the letter is attached to this application. In summary, the Chair explained that whilst the Commission recognises the urgent need to take effective steps to protect against terrorism and enhance airport security, in the Commission's view effective counter-terrorism policies and practices must be non-discriminatory, fully respect human rights, and work to enhance rather than damage community relations. Concern was also expressed regarding the likely negative impact of the body scanning proposals on individuals' right to privacy, particularly members of groups such as disabled people,

transgendered people, children, women and certain religious groups. The question of profiling was also raised. This letter was sent to the Defendant, the Secretary of State for Transport.

- 4.4 By letter dated 12th February 2010 (also attached), the Commission wrote to the then Secretary of State for Transport, reiterating concerns regarding the introduction of body scanners, questioning the way in which the decision had been reached, and expressing concerns regarding the absence of safeguards to ensure that the system was operated, in practice, in a lawful, fair and non-discriminatory manner.
- 4.5 On 29th March 2010 a public consultation was launched by the Defendant. This was accompanied by an Equality Impact Assessment, also dated 29th March 2010. The Commission submitted a response to this consultation, which was critical of the lack of information provided in the *Interim Code* about the manner in which the use of body scanners are to be implemented and monitored, and the lack of robust equality impact assessing of the *Interim Code* and the actual deployment of the scanning equipment.
- 4.6 The consultation period was initially due to run until 31st June 2010, but was subsequently extended to 19th July 2010 (to take account of the general election). By the time of drafting of the Defendant's Summary Grounds of Defence on 25th January 2011, some six months later, there had been no response from the Defendant to the consultation, although it was said that the then Secretary of State, Philip Hammond MP, was *"currently considering [the] responses and [was] planning to publish a formal response shortly"* (Summary Grounds of Defence, para. 10). Following a change of Secretary of State on 14th October 2011, to the present incumbent, a Written Statement was made on 21st November 2011. She stated that the responses to the consultation had now been analysed, and outlined the continuation of the 'no scan no fly' policy. Directions were made on 21st November 2011 and 5th December 2011 which confirmed this policy, and attached to those Directions was the *Code of Practice*, no longer described as 'interim' although in very similar terms to the *Interim Code*.
- 4.7 It is clear from the 21st November 2011 Ministerial statement that the majority of the circa 6,000 responses received during the consultation period were critical of this policy:

"Most responses to the consultation expressed discomfort with the idea of having an image of their body captured for analysis, and they indicated that – if selected for a security scan – they would prefer to opt for an alternative method of screening. I have considered this

carefully. However, I have decided against it, on security, operational and privacy grounds."

This concern has been reflected in communications regarding body scanners received by the Commission from concerned members of the public.

5. THE PROPOSED INTERVENTION

5.1 The Commission wishes to intervene to assist the Divisional Court in these proceedings. In conformity with its statutory obligations under sections 8 and 9 of the EA 2006, this will include making submissions on broader human rights and equality issues than those raised by the Claimant's own particular circumstances. However, as noted above, the Commission seeks permission only to make brief oral submissions and is content to comply with any time restrictions which the Court considers it appropriate to impose, and in any event some of the broader issues have been touched upon in the parties' submissions to date – e.g. the impact upon groups other than Muslim women are referred to in the Claimant's Amended Grounds (see e.g. paras. 48, 50, 51). For these reasons the Commission does not consider that its intervention will cause case management difficulties for the Divisional Court.

5.2 The Commission's submissions are likely to be in broad agreement with the three grounds of challenge advanced by the Claimant, namely breach of the right to privacy, breach of EU law, and failure to comply with equality duties. In brief outline, the Commission's principal concerns are:

- (a) The practice of body scanning impacts upon the right to privacy protected by Article 8 ECHR, and the protection of 'personal data' and 'sensitive personal data' in the DPA. The equipment's use has a potentially greater impact upon certain groups, and there are particular concerns in relation to child protection issues. The Commission is significantly concerned regarding the intrusive impact of these measures on a wide range of people, and notes that on the Defendant's own evidence the affected airports process the majority of the total number of UK air travellers;
- (b) The policies and practices challenged in these proceedings amount, in the Commission's submission, to an unjustified infringement of the right to privacy under Article 8. The Commission does not consider that the infringement is necessary, proportionate and non-discriminatory.

(c) The Commission is of the firm view that any selection criteria for body scanning or other enhanced security measures must be on the basis of a specific, evidence-based assessment of an individual against known risks, rather than any discriminatory or stereotypical prejudices. The Commission does not believe that either the *Interim Code of Practice* (in place for a 2-year period, from January 2010 – November 2011) or the current *Code of Practice* (dated 21st November 2011) provides sufficient detail or guidance to protect against unlawful direct or indirect discrimination in the selection process;

(d) The Commission has not seen sufficient evidence to demonstrate that the body scanning regime has been implemented in compliance with the public sector equality duty, and has ongoing concerns (expressed to successive governments and the Defendant since January 2010) regarding the absence of safeguards and / or a proper monitoring mechanism to ensure that the deployment of this technology is non-discriminatory in practice.

5.3 The Commission is mindful of the need for interveners to 'add value,' rather than duplicating submissions of other parties. There are five ways in which the Commission intends to develop submissions beyond those advanced to date by the parties:

5.3.1 First, the Claimant's Amended Grounds of 14th December 2011 continue to focus upon the *Interim Code of Practice*, introduced in January 2010 and in place until 20th November 2011 (Gatwick¹ and Manchester² airports) / 4th December 2011 (Heathrow airport³). The Commission will provide detailed submissions concerning the *Code of Practice*, no longer described as 'interim' (although drafted in very similar terms to the *Interim Code* and in many places a verbatim repeat of the January 2010 document). The Commission will submit that the additional provisions contained in the new and apparently final version in relation to privacy, data protection and selection criteria fail to meet the Claimant's grounds of challenge, or the concerns of the Commission.

¹ Direction to the Airport Operator of Gatwick Airport, under the Aviation Security Act 1982 relating to Security Scanners 2011, dated 21st November 2011.

² Consolidation Direction (No. 3) to the Airport Operator of Manchester Airport under the Aviation Security Act 1982 relating to Security Scanners 2011, dated 21st November 2011.

³ Direction (No. 3) to the Airport Operator of Heathrow Airport under the Aviation Security Act 1982 relating to Security Scanners 2011, dated 5th December 2011.

5.3.2 Second, the Commission intends to provide a broader comparative analysis of approaches to the issues raised by the use of body scanners. Comparative analysis can assist the Court in relation to analysing proportionality under Article 8(2) in particular, as is evident from European Court of Human Rights' decisions concerning, for example, transsexual rights or prisoners' voting. Reference is already made in the Claimant's Amended Grounds to North America and Canada, and in particular their 'opt out' provisions whereby a passenger may choose an alternative form of enhanced security check (a 'pat down' search) if s/he is unwilling to undergo body scanning (paras. 55-57, Amended Grounds, 14th December 2011). The Commission also notes that formal trials of such equipment have also been undertaken at airports in Finland, the Netherlands, France, Italy, Germany, and Australia, under a patchwork of different national operational procedures and standards, with differing results. In Finland, for example, the Civil Aviation Authority discontinued the use of body scanning equipment after an 18-month trial, primarily due to privacy concerns; and in Italy a decision was taken to discontinue their use following a six-month test. It is also understood that Dubai airport authorities have rejected the use of body scanners at the Emirates' airports on the basis that they violate ethical principles relevant to Islamic culture.

5.3.3 The Commission's comparative analysis will summarise the following aspects of body scanning equipment deployment in other common law, EU and Council of Europe jurisdictions:

- (a) Any substantive final measures adopted;
- (b) Operation of airport-specific trials and interim measures;
- (c) Whether alternatives to the body scan are offered and if so in what circumstances;
- (d) Consultations and impact assessments;
- (e) Monitoring and governance;
- (f) Use of privacy-enhancing technologies and other safeguards.

5.3.4 Third, the Commission's submissions will address the particularly intrusive and / or potentially discriminatory impact on groups other than Muslim women, including disabled people; transgendered people; intersex people; those from other religious traditions, including Orthodox Judaism (referred to in the EU Fundamental Rights Agency's Q&A on body scanners, July 2010) and Catholicism (in light of public criticism of the equipment by the Pope in 2010); those with medical implants or

concealed equipment, such as breast implants or colostomy bags; and children (whose right to privacy is also protected by Article 16 of the UN Convention on the Rights of the Child, 'UNCRC,' and for whom specific issues may arise under the Protection of Children Act 1978 regarding the creation of images or pseudo-images of nude children).

5.3.5 Given the revelation by body scanning equipment of aspects of the human person usually reserved for the private sphere – including their detailed body shape outline, sexual organs, deliberately concealed physical features and medical information, of particular concern to the above-named groups – the Commission considers the Defendant's submissions to the effect that Article 8(1) is not even engaged (paras. 16 and 17, Grounds of Resistance) to be wholly unsustainable, and intends to robustly challenge this assertion. The Commission will submit that the case of *PG and JH v. UK* (2008) 46 EHRR 1272, concerning the monitoring of *publicly visible* activity by individuals in a public place, is plainly distinguishable from the present situation, and the Defendant's reliance upon it (para. 16(2), Grounds of Resistance) is misplaced. Unlike *PG and JH*, or the *Friedl v. Austria* scenario (in which Vienna police took photographs of publicly visible activity, in the course of a public demonstration, in a public place: Comm. Rep. 19th May 1994), the information revealed by, and images produced through, body scanning necessarily concern aspects of the human body hidden from view, and these cases have no real relevance in analysing whether or not Article 8(1) is engaged.

5.3.6 Fourth, the Commission intends to make submissions regarding an inherent contradiction in the Defendant's Written Statement of 21st November 2011 and the justification for the continuation of the 'no scan no fly' policy. The Defendant states on the one hand that the vast majority of passengers, if given a choice between body scanning and an alternative form of search, would choose the body scan:

"I have considered carefully whether there are alternative screening methods which might deliver equivalent levels of security to a security scan. A full private search – involving the loosening and/or removal of clothing in the presence of security staff in a private room – would deliver a reasonable level of assurance. However, I believe that this is likely to represent a greater intrusion of privacy than a security scan, and that nearly all passengers, if they fully understand the procedures, would be unlikely to opt for this alternative."

She also refers to the Government only being aware of 12 refusals to date, out of over a million scans. However, on the other hand she goes on to state that her rejection of the provision of an alternative is based on the significant operational disruption (diversion of trained staff from the main search area, longer queues, and so on). These arguments directly contradict each other: if the objections are considered to be likely to be minimal, and the numbers of passengers likely to choose an alternative to the body search if available are considered to be minimal, it is irrational to go on to conclude that there will be serious operational disruption caused. This, again, goes to the question of proportionality pursuant to Article 8(2) ECHR.

5.3.7 Fifth, and finally, the Commission has concerns regarding the Defendant's characterisation of the restrictions imposed at the three airports as being imposed by an occupier of private property pursuant to his common law right to impose conditions upon visitors. The Commission agrees with the Claimant's criticism of this as a mischaracterisation of the context in which the restrictions have been imposed, and notes that the very first sentence of the Defendant's Summary Grounds indeed recognise that her directions "require" the relevant airport operators to deploy the scanning equipment in the manner prescribed by the Defendant. Further, the Commission considers that it may be of assistance to the Court to consider the case law concerning operation of the ECHR rights on private premises, and the gradual shift over the past decade away from the approach in *Appleby v. UK* (2003) 37 EHRR 783 (concerning the right to protest in a privately run shopping centre – which the Commission in any event considers to be distinguishable from the present context).

5.4 In summary, the Commission respectfully submits that it has a distinctive role to play in these proceedings as the UK's national human rights institution, and given its previous involvement in the issues. The proceedings raise issues which have general implications for the upholding of human rights and equality principles, and for public confidence in the Government's security measures. The Commission is in a unique position to assist the Court in relation to human rights and equality issues arising. Further, in the five respects detailed above (para. 5.3) the Commission can add real value to the detailed submissions already advanced by the Claimant and Defendant.

5.5 For the above reasons, the Commission seeks permission to intervene by way of written submissions, supplemented by brief oral submissions at the forthcoming hearing before the Divisional Court.


Doughty Street Chambers

6 June 2012

CO/5148/2010

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

BETWEEN:-

THE QUEEN (on the application of HANEESA SARWAR)
Claimant

-and-

SECRETARY OF STATE FOR TRANSPORT
Defendant

and

BRITISH AIRPORTS AUTHORITY
Interested Party

and

EQUALITY AND HUMAN RIGHTS COMMISSION
Proposed Intervener

STATEMENT OF CASE ACCOMPANYING FORM PF244:
APPLICATION BY THE EQUALITY AND HUMAN RIGHTS COMMISSION
FOR PERMISSION TO INTERVENE

Equality and
Human Rights
Commission

equalityhumanrights.com

The Rt Hon Alan Johnson MP
Home Secretary
Home Office
2 Marsham Street
London
SW1P 4DF

Our ref: TP/NB/091Johnson
Date: 15 January 2010

Dear Alan,

Re: body scanning, privacy and profiling

I am writing to you regarding the Government's proposals to introduce body scanning equipment at airports in response to the recent terrorist attack, as announced by you in the House recently.

Can I say at the outset that the Equality and Human Rights Commission recognises the significant threat posed by terrorist activities, in particular in relation to air transport, and the need for the government to take urgent and effective steps to protect the travelling public. We are sure that the Government shares the Commission's view that counter terrorism policies must be justifiable, non-discriminatory, fully respect human rights, and work to enhance, not damage community relations.

The Commission has a formal statutory remit to promote and protect human rights in Britain, to work towards the elimination of discrimination, and to promote good relations between groups. We note that concerns have been raised, both in the House and elsewhere, not least by yourself, at the impact of these measures, in particular in relation to privacy rights and discrimination.

**Equality and
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In relation to the potential impact of these measures on privacy rights, the Commission is concerned that these proposals are likely to have a negative impact on individuals' rights to privacy, especially members of particular groups including disabled people, transgendered people, children, women and religious groups. Under the Human Rights Act, any infringement of the right to privacy must be justified, necessary and proportionate. We welcome that you acknowledged these concerns in your statement to the House and have made some commitments as to how the Government will seek to ensure that these proposals meet them. We would welcome further details from you as to what measures will be put in place and how you will evidence that implementation is compliant with the right to privacy.

In your statement to the House, you also raised the issue of profiling. In the absence of evidence that we have seen, we remain to be convinced that the proposals are an effective response to the current threat, and are therefore justifiable.

We have serious concerns that the practice of profiling is, in its operation, likely to be discriminatory, contrary to domestic legislation and international standards, and harmful to community relations. We note that you recognise these concerns and the need for further careful consideration of these issues. We consider that the Government should proceed with the utmost caution in relation to any policy of profiling and fully evaluate whether implementation of such policies can be carried out in a way that does not amount to unlawful discrimination. We are not convinced that if the proposals are implemented profiling can occur in a way that will not amount to unlawful discrimination and following the House of Lords decision in *R(European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] we are of the view that there is a real risk that such policy of profiling would not amount to a lawful, or proportionate response to the current threat.


**Equality and
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Commission officers will be happy to talk to your officials in the next few days to discuss how best we can deal with these issues.

Yours sincerely,



Trevor Phillips
Chair, Equality and Human Rights Commission

Cc: The Rt Hon Lord Adonis, Secretary of State for Transport

The Rt Hon John Denham MP, Secretary of State for Communities
and Local Government

The Rt Hon Harriet Harman QC MP, Leader of the House of
Commons, Lord Privy Seal and Minister for Women and Equality

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Commission

equalityhumanrights.com

The Rt Hon Lord Andrew Adonis
Secretary of State for Transport
Department of Transport
Great Minster House
76 Marsham Street
London
SW1P 4DR

12 February 2010

Dear Andrew,

Full body Scanning at Heathrow and Manchester Airports

Thank you for your letter of 2 February 2010 in response to my letter to the Home Secretary of 15 January 2010. In which I outlined the Equality and Human Rights Commission's concerns about the implications of the proposed introduction of full body scanning equipment at UK airports. I made clear that the Commission recognises the significant threat posed by terrorist activities, in particular in relation to air transport, and the need for the government to take urgent and effective steps to protect the travelling public.

However, in light of the Government's decision to introduce body scanning at Heathrow and Manchester Airports on 1 February 2010 and its intended roll-out to all UK airports by the end of this year, I must repeat the Commission's concerns about the need to ensure that counter terrorism policies are justifiable under the law and work to enhance, not damage community relations, while reiterating our recognition of the acute safety and security issues at stake.

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The Commission is particularly concerned by the apparent absence of safeguards to ensure the body scanning system is operated in a lawful, fair and non-discriminatory manner. The Commission also has serious doubts that the decision to roll this system out in all UK airports complies with the law or properly assesses the impact it may have. I hope that by setting out the Commission's view at this early stage we can ensure these concerns are addressed.

We are yet to see sufficient evidence that this decision complies with the general or specific equality duties under the Race Relations Act 1976, the Sex Discrimination Act 1975 or the Disability Discrimination Act 1995. These duties require a Secretary of State, in the performance of his or her functions, to give "due regard" to both the elimination of unlawful discrimination and the promotion of equality of opportunity and good relations between members of different racial groups.

Without careful and formal consideration of the equality implications of this decision, for example through a full equality impact assessment, there is a serious risk that a measure introduced to protect the travelling public will have unintended discriminatory consequences. If these risks had been considered, and steps taken to guard against them, then the Commission believes that an Interim Code of the sort we now have would not have been introduced.

The Commission is also concerned about the implications of the introduction of body scanners for the right to privacy under in Article 8 of the European Convention on Human Rights. While we acknowledge that there is a legitimate aim for this invasion of privacy, which at the present time we are inclined to accept is proportionate, we remain seriously concerned whether the intrusion is in accordance with the law.

The Government has not made public the selection criteria for body scanning, for national security reasons, which the Commission understands. However, we consider that it is very likely that some criteria, for example, religious dress, destination, nationality or national origin, would also have an unlawful directly or indirectly discriminatory effect. There is also not a proper monitoring mechanism to ensure that this is non-discriminatory in practice. As things stand, there is too little

**Equality and
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Commission**

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transparency and too much scope for arbitrariness and wrongful discrimination for the Interim Code to be capable of complying with the law.

The Commission considers that greater openness on the part of Government is vital to demonstrate fully how it is intending to comply with the law, specifically within the framework of its equalities and human rights duties, and to ensure appropriate accountability and transparency in the roll-out of the use of body scanners to UK airports.

I attach a more detailed account of the Commission's legal and policy concerns and would be happy to meet with you to discuss these further, with a view to securing an informed solution to ensure that measures put in place to protect the travelling public are in compliance with equalities and human rights law.

Yours sincerely



Trevor Phillips
Chair

**Equality and
Human Rights
Commission**

3 More London
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Equality and
Human Rights

[Redacted]
[Redacted]
25 St John's Lane
London
EC3M 4AF

21 March 2007

Dear [Redacted]

Barwar v SST: CO/5148/2011

I have read your letter dated 15 March 2007 and the information you have provided to me.

I write to inform you that your complaint has been referred to the Commission for Equality and Human Rights (the Commission) for consideration. The Commission will seek to resolve your complaint as quickly as possible.

The Commission has a duty to promote equality and to protect and promote the rights of individuals who are disadvantaged or discriminated against. The Commission will consider your complaint in the context of the Equality Act 2006.

The Commission will also consider the impact of your complaint on the wider community and the need to promote equality and human rights.

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Equality and
Human Rights
Commission

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Joley Street
London SE1 1DA

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020 700 7000

020 700 7000

The Equality and Human Rights Commission is established by the Equality Act 2006. The Commission for Equality and Human Rights

supporting the development of a society in which (among other goals), human rights and equality are respected and protected,

- in addition, the EHRC has specific statutory duties *inter alia*:
To promote understanding of the importance of equality and diversity, encourage good practice in relation to equality and diversity, and to enforce the equality enactments s.8(1), 2006 Act. This case would provide a useful opportunity for the Commission to conduct its functions to ensure compliance with equalities legislation.

Background to the Commission's interest

1. On 5 January 2010, the then Secretary of State for the Home Department, Alan Johnson, announced in the House of Commons that the government intended to introduce body scanners at airport security checkpoints in response to the perceived increase in the threat of a terrorist attack after the attempted bombing of a plane on 25 December 2010.
2. The Chair of the Commission wrote to Alan Johnson by letter dated 15 January 2010 outlining our concerns about body scanning. The letter explained that though the Commission recognises the urgent need to take all effective steps to enhance airport security and protect against terrorist threat, to be effective, counter terrorism policies and practices must be non discriminatory, fully respect human rights, and work to enhance, not damage, community relations.
3. The Commission expressed its concern that body scanning proposals were likely to have a negative impact on individuals' right to privacy, especially members of particular groups including disabled people; transgendered people, children, women and religious groups. The letter also expressed concern about the potential use of profiling.
4. The Commission also wrote to the then Secretary of State for Transport by letter dated 12 February 2010, which was made publicly available along with Counsel's advice. The letter reiterated our continuing concerns about

the introduction of body scanners, particularly the way in which the decision had been reached, and the lack of safeguards that had been introduced to ensure that the system is operated, in practice, in a lawful, fair and non-discriminatory manner.

5. The Commission submitted a response to the Department of Transport's consultation on the Interim Code of Practice for the use of body scanners. The response was critical of the lack of information provided in the Interim Code of Practice about the manner in which the use of body scanners will be implemented and monitored and the lack of robust equality impact assessing of the Interim Code and the actual introduction of the scanners. These concerns remain.
6. The Commission has received a number of communications from concerned members of the public about the use of body scanners, particularly relating to breach of privacy.

Key issues for the Commission

In conformity with its statutory obligations under sections 8 and 9 of the Equality Act 2006, the Commission wishes to intervene to assist the Court by making submissions on the broader issues relating to the human rights and equality issues raised by the use of body scanners and the UK Government's approach to these issues. By way of summary:

1. The Commission is concerned that the practice of body scanning impacts on a person's right to privacy under Article 8 of the Human Rights Act. The use of scanners may have potentially greater impact on certain groups, for example transgendered people, women, (particularly women of certain religions or of certain beliefs, such as Muslim women) and disabled people. There are also particular concerns around child protection issues.
2. The right to privacy is not an absolute right; but any infringement must be justified, necessary and proportionate - and non-discriminatory. We would argue that the manner in which the body scanners have been introduced, and aspects of the scanning technology itself, do not amount to an infringement that is proportionate, necessary and non-discriminatory in

relation to the right to privacy. The Government's continuing refusal to deviate from a 'no scan, no fly' policy only serves to compound concerns about the Government's approach to body scanning.

3. The Commission has consistently argued that there is not sufficient protection in the current manner in which the scanners are deployed to adequately guarantee people's privacy.
4. In relation to selection criteria, the Commission is of the firm view that any selection for body scanning or other enhanced security measures should be on the basis of a specific evidence based assessment of an individual against known risks, and not on the basis of discrimination or stereotypical prejudices.
5. The Commission does not believe that the current Code of Practice provides sufficient detail and guidance in terms of avoiding potential direct or indirect discrimination in relation to the selection process. The Commission is significantly concerned about the intrusive and/or potentially discriminatory impact on a wide range of people.
6. The Commission is concerned that any perceived discrimination against particular groups may have an adverse effect on good relations, in particular on those of different racial or religious groups. We are also concerned that there is not a proper monitoring mechanism to ensure that this is non-discriminatory in practice and we are yet to see sufficient evidence that the body-scanning regime has been implemented in compliance with public sector equality duty obligations.
7. The Commission is in a unique position to assist the Court by providing a broader comparative analysis of approaches to the issues raised by the use of body scanners in an international context.

Conclusion

The Commission has a distinctive part to play in such proceedings as the National Human Rights Institution in the UK. This case raises issues that reach beyond the Claimant's particular circumstances and have implications for upholding fundamental human rights and equality principles. The implications for public confidence in the Government's

Page 1

I understand that you have been advised that the Department of Justice is not a law enforcement agency for the purposes of the Data Protection Act 1998.

[illegible]

Equality and Human Rights Commission
The Equality and Human Rights Commission
the Commission for Equality and Human Rights

- The Commission is also under a general duty, contained in s.3 of the 2006 Act, to conduct its functions with a view to encouraging and supporting the development of a society in which (among other goals), human rights and equality are respected and protected.
- In addition, the EHRC has specific statutory duties *inter alia*:
To promote understanding of the importance of equality and diversity, encourage good practice in relation to equality and diversity, and to enforce the equality enactments (s.8(1), 2006 Act. This case would provide a useful opportunity for the Commission to conduct its functions to ensure compliance with equalities legislation.

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Conclusion

The Commission has a distinctive part to play in such proceedings as the National Human Rights Institution in the UK. This case raises issues that

reach beyond the "claimant's" de facto "home" ties and have implications for identifying times of flight, and the "safe" and "secure" principles. The implications for the "safe" and "secure" principles and security measures would be more complex and needs to be put in the full context.

The Commission intends to accept written submissions and brief oral submissions. While the Commission would not make submissions on the particular facts of this case, it would provide an opportunity for the Commission to argue that that the situation afforded by extradition and human rights legislation must be taken into account.

I would be grateful if you could respond in writing, whether or not you consent to our application being made, by 11pm on Monday 28 May 2012.

I am the officer with day-to-day responsibility for this matter and can be contacted on [REDACTED] or [REDACTED] if you have any queries.

Yours sincerely

Senior Lawyer

1. 100

[illegible]

- * The Commission is also under a general duty, contained in s.2 of the 2006 Act, to conduct its functions with a view to encouraging and supporting the development of a society in which (among other goals), human rights and equality are respected and protected
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 - to promote understanding of the importance of equality and diversity,
 - encourage good practice in relation to equality and diversity, and to
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7. The Commission is in a unique position to assist the Court by providing a broader comparative analysis of approaches to the issues raised by the use of body scanners in an international context.

Conclusion

The Commission has identified a number of potential policy issues arising from the National Human Rights Institution Law and the case related issues that reach beyond the Claimant's particular circumstances and have implications for upholding fundamental human rights and equality principles. The implications for public confidence in the Government's security measures cannot be understood and need to be put in the full context.

The Commission intends to approve more written submissions and brief oral submissions. Whilst the Claimant would not make submissions on the particular facts of this case, it provides an opportunity for the Commission to argue that such measures are required by countries and human rights institutions are to be taken.

I am the officer with day-to-day responsibility for this matter and can be contacted on [REDACTED] or at [REDACTED] if you have any queries.

Yours sincerely

Senior Lawyer

[REDACTED]

From: [REDACTED]
Sent: 30 May 2012 17:26
To: [REDACTED]
Subject: RE: Intention to apply to intervene - Sarwar

[REDACTED]
From: [REDACTED]
Sent: 30 May 2012 16:48
To: [REDACTED]
Subject: RE: Intention to apply to intervene - Sarwar
Importance: High

Hello [REDACTED]

I was just hoping to receive a response to my letter re: our intention to apply to intervene in Sarwar. We are keen to get our application filed tomorrow at the latest. Is there any particular issue I can help you with?

Thanks
regards

[REDACTED]
Senior Lawyer (Solicitor)
Equality and Human Rights Commission
3 More London Riverside
Tooley St
London SE1 2RG
Tel: [REDACTED]

From: [REDACTED]
Sent: 28 May 2012 13:22
To: [REDACTED]
Subject: RE: Intention to apply to intervene - Sarwar

[REDACTED]
From: [REDACTED]
Sent: 21 May 2012 14:17
To: [REDACTED]
Subject: Intention to apply to intervene - Sarwar

Hello [REDACTED]

Please find attached a letter seeking your views on the Commission's intention to apply to intervene in the Sarwar matter. We have asked for a response by midday Monday 28 May 2012.

Regards
[REDACTED]
[REDACTED]

Senior Lawyer (Solicitor)
Equality and Human Rights Commission
3 More London Riverside
Tooley St
London SE1 2RG
Tel: [REDACTED]

Our recent Human Rights Review identified ten areas of improvement where legislation, institutions, policy or services could protect human rights better. To find out more, visit www.equalityhumanrights.com/humanrightreview

Our vision

A society built on fairness and respect. People confident in all aspects of their diversity.

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The Equality and Human Rights Commission was established by the Equality Act 2006 as the Commission for Equality and Human Rights.

If you have a moment, do take a quick look at our [Annual Report](#) which we hope will provide an insight into some of our most challenging and innovative cases.

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View the report for [12/1/2006](#)
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PLEASE THINK ABOUT THE ENVIRONMENT BEFORE PRINTING THIS EMAIL

Equality and Human Rights Commission
3 More London
Riverside Tooley Street
London
SE1 2RG

By fax to [REDACTED]

28 May 2012

Dear Sirs

Re: Haneefa Sarwar v Secretary of State for Transport CO/5143/2010

I write further to your letter dated 21 May and confirm that I act for the Secretary of State for Transport.

I note that your client intends to apply to the Court for permission to intervene in the above matter. My client is of the view that it would be for the Court to decide upon the merits of such an application and I reserve my client's rights to comment further when we have seen your application. If your application were granted permission you may be aware that the current time estimate is three days. In order to keep the time estimate for the hearing manageable my client would suggest that such an intervention, if permitted by the Court, should be kept to written submissions or, if oral submissions were to be permitted, they be no more than one hour in length.

Yours faithfully,

[REDACTED]
[REDACTED]
For the Treasury Solicitor

Litigation and Employment
Group

Treasury Solicitors
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Please Quote: [REDACTED]

Your Reference: [REDACTED]

