CO/10390/2006

Neutral Citation Number: [2008] EWHC 385 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 14 February 2008

B e f o r e:

MR JUSTICE HOLMAN

Between:

THE QUEEN ON THE APPLICATION OF HA

Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

MS S HARRISON (instructed by Bhatt Murphy) appeared on behalf of the **Claimant**
MISS J RICHARDS (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

1. MR JUSTICE HOLMAN: For an appreciable time there has been before this court a number of cases which have become known as the "Disputed Children Litigation". They all concern aspects of the approach taken by the Secretary of State for the Home Department in relation to people who are asylum seekers and who claim to be children (ie under the age of 18), but whose age or status as children the Secretary of State, or his officials, disputes.

2. The background and the history and course of the litigation is appropriately summarised and described in paragraphs 2 to 18 of the judgment of Munby J of 1 November 2007. Munby J has case-managed all these cases for a considerable period, and that judgment was given in explanation of decisions and orders made by him on 15 October 2007. Within paragraphs 16 and 17 of that judgment Munby J refers to an application in the case of HBH (CO/7677/2007). In that particular case, to which I will later again refer, permission has not yet been granted even to apply for judicial review. As I understand it, by an order made on 15 October 2007, specifically in relation to the case of HBH, it was effectively hived off and kept separate from the cohort of cases that comprised the Disputed Children Litigation.

3. Of all the cases comprising the Disputed Children Litigation (ie accordingly excluding HBH), only the present case of HA now effectively remains. All the other cases, except apparently two, have been completely settled and disposed of. The issue in the excepted two relates to the lawfulness, or otherwise, of detention of the children concerned, which is not in issue within the scope of the present hearing at all.

4. Even the case of HA himself has been settled. HA is in fact, on any view, now adult and there are no continuing issues between him and the Secretary of State. Nevertheless, by the order of Munby J 15 October 2007, as explained in his judgment of 1 November 2007, the case of HA has remained in being. It exists not so much as a "lead case", since there are no other cases for it now to "lead", but as a form of "test case". At paragraph 17 of his judgment of 1 November 2007, Munby J said that:

> "... there were a number of generic issues which required to be resolved and … in principle HA's case and HBH's case were, other things being equal, appropriate vehicles for resolving them."

5. One of those issues was relatively briefly mentioned by Munby J in the last sentence of paragraph 14 of his judgment where he said:

> "There is also an issue in relation to the true meaning and effect of paragraph 352 of HC 395."

6. HC 395 is the Immigration Rules. As a result, paragraph 2 of the order of 15 October 2007 provides:

> "The case of HA is to continue for the purpose of considering the following generic issues:"

7. The judgment which I am currently giving does not relate at all to generic issue (a). Paragraph 2 continues by identifying and defining generic issue (b) as follows:

> "Whether HC 395 para 352 applies to any interview to determine the age of an applicant for asylum who claims to be a child and must be conducted in the presence of a parent, guardian, representative or another adult who for the time being takes responsibility for the child".

8. Paragraph 2 of the order continues by saying:

> "For the avoidance of doubt, this paragraph of this order does not prevent the defendant from arguing at the final hearing of this matter that the claim and/or issues are academic and/or should not be determined and/or that relief should not be granted."

9. As a preliminary issue point at the present hearing, which has been listed as the "final hearing", Miss Jenni Richards, on behalf of the Secretary of State, has argued that generic issue (b) has become totally academic and is a point which the court should not determine within, at any rate, the context of this case of HA and the Disputed Children Litigation. I mention that Miss Richards further argues that generic issue (a) is also academic, but I have not yet heard the argument in relation to generic issue (a), and this judgment and ruling is concerned solely with generic issue (b).

10. In order to put the argument and my decision in context it is, I think, necessary to read paragraph 352 of HC 395 in the form in which it was expressed during the factual course of these cases, and indeed up to, and including, October 2007 when Munby J identified generic issue (b). At those times paragraph 352 provided as follows:

> "An accompanied or unaccompanied child who has claimed asylum in his own right may be interviewed about the substance of his claim or to determine his age and identity. Where an interview is necessary it should be conducted in the presence of a parent, guardian, representative or another adult who for the time being takes responsibility for the child and is not an immigration officer, an officer of the Secretary of State or a police officer. ..."

Paragraph 352 went on to include other important safeguards for young people, but it is not necessary to quote them for the purposes of this judgment.

5. The essence of the argument on behalf of HA, and in support of the contention that paragraph 352 did apply to an interview, the purpose of which was itself to determine the age of the applicant for asylum, is as follows. Ms Stephanie Harrison, on behalf of the claimant, fastens on the specific reference within the first sentence of paragraph 352 to "... or to determine his age ...". In essence, she submits that if an interview is taking place at all "to determine his age", it must be on a hypothesis at least that the person concerned is a child. So the argument, which she strongly buttresses by wide ranging reference to many other sources of English, European and international law, is that the protection afforded by paragraph 352 must necessarily apply also to an interview, the purpose of which is "to determine his age".

12. However, Miss Richards submits that the whole argument in this case has become completely academic. She makes that submission for two reasons. First, she says in relation to HA himself that he has no private interest in the matter. She relies, in particular, on paragraph 33 of a statement made as long ago as 4 April 2007 by HA's solicitor, Mark Scott, in which he says:

> "It is common ground between the parties that HA has no private interest in these further proceedings. The defendant has withdrawn the potentially unlawful decision to subject him to third country proceedings and conceded that his detention for these purposes was unlawful."

In any event, HA is now definitely 18. Linked with the position of HA himself, Miss Richards stresses in relation to all the other cases within the Disputed Children Litigation that they have now either been settled, or the two remaining ones do not involve this particular point.

13. The second reason why she submits that the generic issue is now entirely academic is that the relevant paragraph of the Immigration Rules has now been radically changed.

14. I do comment that it is surprising that at the hearing before Munby J in mid October 2007 his attention was not drawn to an imminent and radical change in the Immigration Rules, which was shortly due to be laid before Parliament and was in fact laid on 19 November 2007. I stress that I do not doubt for one moment that Miss Richards personally was completely unaware of the forthcoming change; and maybe those who instruct her were also unaware. However, certainly the Secretary of State and her department must surely have known by 15 October that change was in the air, since the Statement of Changes to which I will shortly refer is an elaborate and profound document and one which is based on a European Directive dated as long ago as 1 December 2005. One wonders at least whether generic issue (b) would have been identified in the way it was if Munby J had been aware of the forthcoming changes.

15. At all events, there was laid before Parliament on 19 November 2007, under section 3(2) of the Immigration Act 1971, a Statement of Changes in Immigration Rules. The statement prescribes that the changes shall take effect on 1 December 2007. The explanatory memorandum, which was also laid before Parliament on 19 November 2007, makes plain that the Statement of Changes:

> "…in part implements Council Directive 2005/85/EC of 1 December 2005 laying down minimum standards on procedures in member States for granting and withdrawing refugee status…"

The explanatory memorandum goes on to say that that directive was adopted in 2005:

> "as part of the first stage of the Common European Asylum System (CEAS) and applies to the UK and all member States, with the exception of Denmark…"

16. So far as is relevant to the present case, paragraph 25 of the Statement of Changes deletes the whole of existing paragraph 352, which I have quoted above, and which underlaid generic issue (b). That paragraph 352 is replaced with a new paragraph 352. The explanatory memorandum describes that the new paragraph 352 has been inserted to give effect to Article 17(1) of the Directive. It will be seen that the new paragraph 352 is in very markedly different terms from the old paragraph 352. It now provides as follows:

> "Any child over the age of 12 who has claimed asylum in his own right shall be interviewed about the substance of his claim unless the child is unfit or unable to be interviewed. When an interview takes place it shall be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. ..."

17. The new paragraph then continues with similar, but increased, safeguards for the protection of the child being interviewed, in particular, the interview must now have "specialist training in the interviewing of children." It will be seen at once that there is now no reference at all within paragraph 352 to an interview: "to determine his age", rather the paragraph focuses on the obligation to interview any child over the age of 12 about the substance of his claim, and then to build in safeguards as to the form of the interview.

18. So the very phrase within the first sentence of the old paragraph 352, upon which the whole argument of Ms Harrison is ultimately founded, has now simply gone. It is not necessary, or appropriate, for the purposes of this judgment and decision to quote at all exhaustively from numerous authorities touching on the question of a court hearing academic issues. Miss Richards has quoted in her skeleton argument passages from decisions of the House of Lords in R v Secretary of State for the Home Department, ex-parte Salem [1999] 1 AC 450 and Rushbridger and Her Majesty's Attorney General [2003] UKHL 38. The passage which she quotes from the Salem case is to the effect that any discretion to hear disputes, even in the area of public law, must be:

"exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so..."

Examples are then given, including:

> "when a discrete point of statutory construction arises which does not involve detailed consideration of facts **and** [my emphasis] where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

19. It does not seem to me that the situation as it now is in the present case falls at all within that example, recognising that it is only an example. So far as I am aware, no large number, or indeed any number, of similar cases now exists, save the case of HBH to which I will shortly refer. Further, it is unlikely that any further cases can be anticipated

as to the meaning and effect of the old paragraph 352, since that paragraph ceased to exist on 1 December 2007, and we have already reached mid February 2008.

20. Apart from those two matters, which are particularly relied upon by Miss Richards, there is a third matter and it relates to the case of HBH. It will be recalled that in October 2007 Munby J hived off, or separated out, that case. It is thus now a completely free-standing case. Further, it is a case in which permission has not yet even been granted to apply for judicial review. I have been told this morning (although I did not appreciate this fact until I was in court this morning) that the case of HBH has itself been listed for hearing before me tomorrow, not as part of the current hearing in relation to HA, but to follow on in the light of any decision in the case of HA. I stress that HBH is listed tomorrow purely for consideration of permission and not for substantive hearing.

21. What I am about to say may contain some inaccuracies. My understanding from Ms Harrison and Miss Richards, each of whom are instructed in the case of HBH, is that the underlying issue in that case is a complaint by HBH that the Secretary of State unlawfully took certain steps which have led to the prosecution and conviction of HBH for an immigration offence. As I understand it, the ultimate argument is that antecedent steps to the prosecution are so tainted by illegality that the prosecution itself was illegal and the conviction should be set aside. Of course, I say nothing at all about the merits, or otherwise, of that chain of reasoning today as the case of HBH is not currently before me.

22. However, I understand from Ms Harrison that the beginning of the chain of reasoning in HBH is the fact that the Secretary of State, or one of his officials, did interview HBH "to determine his age" without a parent, guardian or other appropriate adult being present. It may be (and I express no view whatsoever) that the application for permission in HBH may founder on later stages of the chain of reasoning. If that is so, then the question whether or not there was breach of the old paragraph 352 would become just as academic in the case of HBH as it is in the case of HA, or any of the other children involved in the Disputed Children Litigation.

23. If, on the other hand, Ms Harrison's chain of reasoning in HBH is viewed as arguable so that permission is granted, then it seems to me that the issue of the meaning and effect of the old paragraph 352 will necessarily fall for consideration within the substantive judicial review in the case of HBH. Miss Richards has said today that the issue as to the meaning and effect of the old paragraph 352 is indeed a pleaded issue in that case.

24. I, for my part, would have been clear that I should no longer consider generic issue (b) even if the case of HBH was not listed tomorrow and did not fall for consideration. It seems to me, leaving HBH aside, that so far as one can tell this whole question as to the meaning and scope of the old paragraph 352 has become completely academic. It has no continuing or future interest either for any of the cases in the disputed children litigation cohort, or for any other known or predictable case.

25. I would thus have struck out generic issue (b) for further consideration even in the absence of HBH, but my decision to do so is considerably fortified by the knowledge that the case of HBH will be before this very court (and as it happens, before myself)

tomorrow. If (I stress if) there is any present, or continuing, need for this court ever to consider the meaning and scope of the old paragraph 352, then it seems to me far better that it should consider it in a fact-specific context, which HBH will provide. I stress again that I am not in any way prejudging the issue of permission in the case of HBH. There may be a range of reasons, some of them quite unconnected with the construction of paragraph 352, why permission should not be granted.

26. For all those reasons, notwithstanding the decision and order of Munby J made on 15 October 2007, which was clearly made in ignorance of the imminent change in the Immigration Rules, I order that the generic issue identified in paragraph 2(b) of the order of Munby J made on 15 October 2007 is struck out for any further consideration in this case, or these proceedings.

27. MR JUSTICE HOLMAN: Are there any obvious factual corrections, or anything like that?

28. MISS RICHARDS: The only correction I would note is that your Lordship refers to the Secretary of State as "his officials" when it should be "her officials".

29. MR JUSTICE HOLMAN: It depends on the period of time to which I was referring.

30. MISS RICHARDS: That is true, my Lord.

31. MR JUSTICE HOLMAN: I try, when one is talking about past actions, not to identify the current female Secretary of State with the decisions of her predecessors.

32. MISS RICHARDS: When it arose your Lordship was talking about what was and was not known--

33. MR JUSTICE HOLMAN: It is a very minor point.

34. MS HARRISON: There is only one point. I think that at the very beginning--

35. MR JUSTICE HOLMAN: Does not the principle of statutory construction apply even to judgments?

36. MS HARRISON: I think you referred at the beginning of the decision to "rule 353", and it should be "352" throughout.

37. MR JUSTICE HOLMAN: If I said "rule 353" then that was a slip.

38 MR JUSTICE HOLMAN: It is relevant and important to note that I am now considering a separate and discrete issue in light of developments and argument since I gave the first judgment. I will not repeat anything from that judgment.

39. .I did not quote this morning, but will now quote generic issue (a) identified in paragraph 2 of the order of Munby J of 15 October 2007, namely:

> "Whether the Secretary of State's policy and/or practice of treating as adults,

asylum applicants who claim to be under 18 years of age, for the purposes of third country proceedings, on the sole basis that an Immigration Officer considered (by way of his/her own brief assessment and/or a brief assessment by a social worker) that the applicant's appearance and/or demeanour strongly suggested that they were 18 or over, is lawful."

40. Even at the time that that generic issue was formulated in October, it did not refer right back to the published policy of the Secretary of State which was actually in place and operable at the time of the events concerning this applicant, HA, and, I believe, any other of the applicants in the Disputed Children Litigation. However, what was not appreciated in October, and indeed only seems to have emerged as recently as yesterday, is that the underlying policy had been further amended during 2007.

41. As I understand it, the asylum instruction in its present form, so far as is material, was amended and dates from 20 August 2007. On that date two amendments were made to the general statement of policy contained in the "Introduction" of the relevant asylum instruction. The first amendment was to insert the word "very" (and the word is itself underlined in the policy document) within the broad statement of policy as addressed by generic issue (a). In other words, since August 2007 the BIA will only dispute the age of an applicant who claims to be a child if that person's physical appearance, and/or general demeanour "very strongly" suggests that they are aged 18 or over. The second amendment was the addition of an additional paragraph within the policy to the following effect:

"If the applicant's physical appearance/demeanour very strongly suggests that they are **significantly** over 18 years of age the applicant should be treated as an adult and be considered under the process instructions for adults. These cases **do not** fall within the aged dispute process." [Emphasis as in the published document]

42. It is not immediately obvious how the first and second paragraphs of the policy interrelate and impact on each other.

43. An integral part of the policy is a series of more detailed prescribed procedures, including, for instance, a procedure headed "Disputing Age: Formal Procedures To Be Followed". That has also undergone some amendment and alteration since the policy that was under consideration when Munby J made his order of 15 October 2007. It thus transpires that even at the time that generic issue (a) was identified and defined, the policy actually in place was different from and, on the face of it, more protective of the child than the policy that Munby J, and all present in court at that time, believed to be in place.

44. Even more recently, namely only over lunchtime today, another significant development has become apparent. I mention that counsel, and those who instruct them, only became aware of this because of a question from me just before the lunch break. I myself was only able to ask that question because, purely coincidentally, I had been engaged in a case concerned with age assessment by local authorities only the day before yesterday. On such slender threads, it seems, our legal system sometimes

lurches.

45. The development is that on 31 January 2008 the Minister for State in the Home Office, Mr Liam Byrne, made a Written Ministerial Statement to Parliament and placed in the libraries of both Houses of Parliament a consultation paper and draft Code of Practice under a heading "Keeping Children Safe from Harm". That Ministerial Statement itself was based on, and is the product of, an extensive process of public consultation which, it transpires, actually began in March 2007. I draw that date from the forward by the Minister to the published document: "Better outcomes: the way forward improving the care of unaccompanied asylum children", which was also published by the Home Office on 31 January.

46. It is not, I think, necessary, for the purpose of this judgment, to quote in any detail at all from that document. What is absolutely apparent is that the government has already been engaged for many months in a consultation process concerned with the whole area of improving the arrangements and procedures for dealing with the claims of unaccompanied asylum seeking children.

47. Among the "Key Reforms" identified in that document are: putting in place better procedures to assess age in order to ensure children and adults are not accommodated together; putting in place better procedures for identifying and supporting unaccompanied asylum seeking children who are the victims of trafficking; and locating unaccompanied asylum seeking children with specialist local authorities to ensure they receive the services they need. Specifically in relation to better procedures to assess age, the government has described under "Key Reform 4", on page 11 of that document, proposed methods and procedures to ensure speedy, objective and specialist assessment of age.

48. At page 13 of the document, under a heading "Next Steps - Timetable For Reform", the government set out a timetable which includes in spring 2008:

49. "Negotiations begin on the setting up of new specialist authorities."

50. and in summer of 2008:

51. "Publication of guidance on the operation of new age assessment procedures.

52. It thus appears, first, that the existing policy is already not only different from the policy in force at the time that the case of the claimant, HA, was dealt with, but different even from the policy wrongly believed to be still in force when generic issue (a) was identified last October. Secondly, and to my mind very significantly, it is quite clear that unless they are very disingenuous indeed, the government have already identified that policies and procedures in this area need improvement. I stress that they do not accept or acknowledge that their existing policy is necessarily unlawful, but they certainly clearly accept that the policies and procedures need to be changed and improved. It seems to me, therefore, that the situation with which I am now faced is way outside the sort of situation in which the House of Lords described in the Salem case that it may be appropriate, and in the public interest, for a court such as this to

consider "academic issues".

53. So far as this claimant HA is concerned, the issues are now totally academic. Already the system has moved on and the facts surrounding him would not afford a reliable factual basis for considering the issue. So far as the public generally are concerned, it is quite clear that we are in an era of very considerable change. It does not seem to me that there is much, if any, future public interest in any view that I might have come to on generic issue (a), as currently defined.

54. This morning Ms Harrison opposed that I should strike out generic issue (b). This afternoon, however, in relation to generic issue (a), and after full consultation with her instructing solicitors who are clearly very experienced indeed in this field, she has not sought to dissuade me from striking out also generic issue (a).

55. For all those reasons, it does seem to me that it is no longer appropriate, nor indeed wise in a factual vacuum, that I should consider generic issue (a), and that also will be struck out.

56. Apart from the issue of directions and transfer, and so on, which we will think about tomorrow, do any other issues arise in relation to this case which is listed before me today? In other words, issues that we need discuss or I need to rule on? The costs are all dealt with.

57. MS HARRISON: That is right. Costs were agreed to be no order for costs, but I just put this on the record now, that in light of the fact that essentially this whole case has been prepared on an erroneous basis because we were not provided with the relevant material, we will at least make representations to the Secretary of State to consider whether he wants to maintain the position that the correct order is no order for costs. At this stage there is nothing that your Lordship needs to resolve.

58. MR JUSTICE HOLMAN: You are not applying to me in some way to say that after all the Secretary of State should pay some costs? I would have to look at Munby J's order. I do not even know if it would be open for you now to do so.

59. MS HARRISON: That may be the case which is why I have indicated to your Lordship that it is something we can raise between the parties. It does seem to me, speaking on behalf of the Legal Services Commission, unfair that they should have paid the costs of the preparation of this case when in fact had we known the full picture we probably would never have got beyond 15 October. As I have said, I do not think that is a matter that I can canvass any more before your Lordship, because of the terms of the order that we agreed.

60. MR JUSTICE HOLMAN: As between you and the Secretary of State, I am a great believer that if you do not ask you do not get. Why not ask and good luck to you. As between you, the Secretary of State and the Court today, at the very latest tomorrow would be your last opportunity to seek an order of the court. That is quite clear. It may be that you are at the mercy of the Secretary of State in the light of the orders that have already been made. I do not know.