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

C1/2008/1524 and 1531

Neutral Citation: [2008] EWHC 1364 (Admin)
Administrative Court Ref: CO/2130/2007 CO/2334/2008

BETWEEN:

THE QUEEN

on the application of

M (1)
A (2)

Appellants / Claimants

and

THE COUNCIL OF THE LONDON BOROUGH OF LAMBETH (1)
THE COUNCIL OF THE LONDON BOROUGH OF CROYDON (2)

Respondents / Defendants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT (1)
LIBERTY (2)

Interested Parties/Interveners

LIBERTY'S WRITTEN SUBMISSIONS

WHETHER ARTICLE 6(1) IS APPLICABLE TO A DISPUTE ABOUT AN INDIVIDUAL'S AGE FOR THE PURPOSE OF SECTION 20 OF THE 1989 ACT

1. As Bennett J rightly held (at [59][1]), "an absolute duty [to provide accommodation for an individual] does indeed arise" under section 20(1) or (3) of the Children Act 1989 if the relevant conditions are satisfied. A child provided with accommodation under these provisions is one "looked after" by that authority and the authority is also required to maintain him in other respects[2].

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1 See also ***R (M) v. Gateshead MBC*** [2006] EWCA Civ 221, [2006] QB 650, at [33].

2 see sections 22(1) and 23(1) of the 1989 Act.

2. Notwithstanding the fact that he regarded section 20(1) as imposing an absolute duty to provide accommodation and a right to be provided with it for a person who satisfied the relevant conditions, Bennett J nonetheless held (at [89]) that "article 6(1) [of the ECHR] is not engaged" by a dispute about whether an individual satisfies one of the conditions of entitlement, namely whether he is a "child". He did so for three (albeit stated to be four) separate reasons in [86]-[88], namely (i) that the determination of individual's age was merely "a staging post" in determining whether an individual had any right under section 20; (ii) that the conditions that had to be satisfied for an individual to have that right involved "evaluative judgments"; and (iii) that a right "to a benefit such as that conferred by section 20" was not civil in character. It is submitted that none of these points has any relevance or merit in determining whether article 6 applies to the determination of a dispute about whether an individual satisfies the conditions which entitle a person to accommodation under section 20(1).

(i) the "staging post" argument

3. Article 6(1) covers all genuine disputes the result of which are directly decisive for civil rights and obligations. Mere tenuous connections or remote consequences are not sufficient: the right must be at least one of the objects of the dispute. The dispute may relate to the existence, scope or value of the right or to the manner in which it may be exercised: see eg ***Benthem v Netherlands*** [1985] 8 EHRR 1 at [32]. The relevant right under section 20 is to the right to accommodation. There are a number of conditions which have to be satisfied before the duty to provide it arises. But any dispute about whether one or more of those conditions is satisfied is one directly determinative of whether the relevant right exists. A finding that an individual is not a child, for example, determines that the authority has no duty to provide accommodation for him and that he has no right to it under section 20. The fact that more than one dispute about those conditions may arise is irrelevant to the application of article 6 to their resolution (just as it would be irrelevant that more than one dispute may arise in respect of a

person has a right to, or a liability to pay, any amount of damages in negligence). Bennett J thus erred in considering that article 6 was not engaged in this case on the ground that a dispute about the age of the claimants was merely "a staging post" in determining whether a person had a right under section 20(1).

(ii) whether section 20(1) of the 1989 Act creates any right: the significance of "evaluative judgments"

4. Article 6 draws no distinction between the type of questions which may have to be determined in the disputes to which it applies. If there is a dispute over or about a civil right or obligation and its outcome is directly decisive for such a right or obligation, it matters not whether the dispute involves (a) dispute as to the applicable law, (b) a dispute over "fact" or (c) a dispute whose resolution involves "evaluative judgment". Thus Article 6 applies, for example to disputes involving whether the criteria to be satisfied for a right to exist have been met[3] or about the proportionality of measures which may interfere with it[4], in the resolution of each of which "evaluative judgments"may be involved.

5. Indeed a dispute to how a discretion should be exercised will engage article 6 if its outcome is directly decisive of a person's civil rights, such as (for example) a dispute about whether planning permission or authorisation to acquire land compulsorily should be granted (as in the *Alconbury* cases). The only significance of the fact that the exercise of a discretion may be involved is for the purpose of determining whether the

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[3] See eg ***Ringeisen v Austria (No 1)*** [1971] 1 EHRR 455 at [15], [19]-[20], [94] (whether transaction corresponded with certain general public interests); ***Benthem v Netherlands*** [1986] 8 EHRR 1 at [20], [26], [36], [41]-[44] (whether activity would result in danger, damage or serious nuisance and whether any such danger could be sufficiently averted by the imposition of conditions).

[4] there was thus a breach of article 6 when the relevant tribunal could not review the merits including the facts and the proportionality between the fault and the sanction imposed: ***Le Compte Van Leuven & De Meyere v Belgium*** [1981] 4 EHRR 1 at [46] (Govt submission), [51(b)], [61] ***Albert and Le Compte v Belgium*** [1983] 5 EHRR 533 at [28(a)] [36]-[37].

person affected cannot claim to have any arguable *right* at all before the discretion is exercised in his favour and thus has at best a hope that he will obtain a right[5].

6. It is sufficient if there are criteria satisfaction of which establishes a right even if deciding whether those criteria are met may involve evaluative judgment[6] or the right is defeasible in circumstances involving the exercise of such judgment (such as whether there are exceptional circumstances justifying refusal[7]). Article 6 applies to disputes about whether a right exists in such cases. There is thus no reason, for example, why a claim for damages in negligence does not give rise to the determination of the civil rights and obligations of those involved merely because the determination whether there was a duty of care, whether the defendant was negligent and the assessment of any damages (including any question about contributory negligence) may all involve 'evaluative judgments'. Indeed disputes about entitlement to pecuniary social security benefits (to which article 6 indisputably applies) may often have conditions of entitlement that involve evaluative judgements in determining whether or not they are satisfied[8].

7. None of the conditions that have to be satisfied before an authority has a duty under

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5 For example a duty to award compensation if and to the extent that a court is of "the opinion that there are reasons in equity to do so" in substance creates a mere discretion to award, rather than any right to receive, compensation: see ***Masson and von Zon v Netherlands*** [1996] 22 EHRR 491 at [27] and [51]-[52].

6 See eg the cases referred to in footnote 3 above and 8 below and ***Obermeier v Austria*** [1990] 13 EHRR 290 at [46]-[47], [69]-[70] (whether dismissal of disabled person was socially justified having regard to the interests of those involved).

7 See the decision of the ECtHR in plenary session in ***H v Belgium*** [1987]10 EHRR 339 at [38], [39], [41]-[43].

8 See eg the nature of the criteria that had to be satisfied in ***Mennitto v Italy*** [2002] 34 EHRR 48 at [15], [18]-[19] where the ECtHR found the dispute engaged a civil right; ***Mihailov v Bulgaria*** (2005) July 21st App No 52367/99 at [15] and [34]; and the criteria for the award of housing benefit, including whether there was "good cause" for a late claim: ***Tsfayo v UK*** at [21] and [40].

section 20(1) gives the authority concerned a discretion whether or not to provide accommodation. The fact that an evaluative judgment may be required to ascertain whether or not those conditions are satisfied is thus irrelevant.

(iii) whether the right created by section 20(1) of the 1989 Act is a "civil" right

8. Bennett J held (at [86]) that in these cases "no civil right arises" as

> "there is no European an domestic authority which has extended the concept of a civil right to a benefit such as that conferred by section 20. The considerable hesitation of the House of Lords in *Begum* concerning whether the appellant had a civil right is both instructive and compelling."

9. As the ECtHR has often stated[9]

> "As to the "civil" character of the right asserted by the applicant, the Court reiterates that the concept of "civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law. Article 6 § 1 of the Convention applies irrespective of the status of the parties, the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter.... In ascertaining whether a case concerns the determination of a civil right, *only the character of the right in issue is relevant*..." (emphasis added)

10. The fact that the dispute concerns a right to a welfare benefit does not mean that the dispute does not concern a "civil right". It is now well established, as the ECtHR has stated (for example in ***Tsfayo v the UK*** at [40]), that "disputes over entitlement to social security and welfare benefits generally fall within the scope of Article 6 § 1". It is irrelevant whether the benefits are contributory or (as in *Tsfayo* itself) non-contributory.

11. The proposition that disputes over entitlement to a social security or welfare benefit fall within article 6 if that benefit is provided in money but not when it is provided in some other form, in this case in the form of accommodation and maintenance, (which

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[9] See eg ***Wos v Poland*** (2005) March 1st App. N° 22860/02, Admissibility decision, at [87].

appears to be the distinction adopted by Bennett J) is devoid of any basis in principle. The form in which the benefit is provided does not alter the *character* of the right to it as a civil right. In each case the right concerns "an individual, economic right flowing from specific rules laid down in a statute"[10]. Were it otherwise, irrational distinctions would be created between (i) a right to an amount of money (a civil right), (ii) a right to a voucher entitling the recipient to obtain goods or accommodation and to receive services (which, on this basis, may or may not be a civil right) and (iii) a right to such goods, accommodation or services (which would not be a civil right), all of which may have the same value to the person entitled to them. Each is a right "of an economic nature" that an individual has. It assists him to maintain himself. It is thus a civil right[11]. Thus it cannot be supposed that a *contractual* or *charitable* obligation to provide accommodation and maintenance for a specific individual would not give rise to a civil right. The fact that in this case the obligation is *statutory* makes no difference to the character of the right, any more than it does in the context of pecuniary benefits.

12. In fact, contrary to what Bennett J assumed, the ECtHR has found that article 6 can be engaged if the right is one to accommodation[12]. Similarly it has regarded a complaint about a decision on status that gave rise to rights to benefits in kind as well as in cash

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10 Cf ***Salesi v Italy*** [1998] 26 EHRR 187 at [19].

11 See ***Mennitto v Italy*** [2002] 34 EHRR 48 at [15], [18]-[19], [28].

12 see eg ***Teteriny v Russia*** (2005) June 30th App N° 11931 ("a separate well equipped flat or house" not less than a certain size) at [5]-[7], [41]-[44]; ***Shpakovskiy v Russia*** (2005) July 7th App N° 41307/02 (right to flat "in accordance with applicable housing standards") at [5]-[9], [28]-[31]; ***Tarasov v Russia*** (2006) Sept 28th App N° 13910/04 at [5], [20]-[23]; ***Sypchenko v Russia*** (2007) March 1st App No 38368/04 at [6]-[14], [36]-[45]; ***Nagovitsyn v Russia*** (2008) Jan 24th App No 6859/02 at [5], [15]-[22], [42]-[45], [51]-[58]. These cases involved orders recognising the rights in question. But, whilst it may be argued that this affects the legal basis for the rights in question (namely that they stem from the court order rather than the legislation), it cannot alter the character of the rights in question as *civil* rights. Non enforcement of a court order which does not relate to civil rights does not engage article 6: see ***Kanayev v Russia*** (2006) July 27th App N° 43726/02.

as engaging article 6[13]. Nor is it correct (as Bennett J stated) that there is no domestic authority that the right to a benefit in kind may not be a civil right. The right to asylum support, which was provided in the form of accommodation and vouchers to meet an individual's other essential living needs, has been found to be a civil right[14]. Similarly the Court of Appeal has found that a determination whether a social services authority was obliged to make arrangements for the provision of residential accommodation for a person in need of care and attention engaged article 6[15].

13. The *dicta* in the House of Lords in ***Runa Begum*** do not compel the conclusion reached by Bennett J. Although the Court of Appeal had held that Article 6 was engaged by a dispute about whether the duty to secure the provision of suitable accommodation had been performed in that case[16], the Appellate Committee did not determine that question. Nor do the *dicta* in the Appellate Committee support Bennett J's conclusion. In considering these *dicta*, it is necessary to distinguish the points which concerned different members of the Committee, in particular whether they were concerned with (a) whether there was *any* right at all as opposed to (b) whether, if there was such a right, it was *civil* in character.

14. There was a clear majority that the duty to provide suitable accommodation gave rise to a right to be provided with it. As Lord Bingham stated:

> "Section 193(2) imposed a duty on the authority to secure that accommodation was available for occupation by Runa Begum. This was a duty owed to and enforceable by her... Although section 206(1) permitted the authority to perform its duty in one of several ways, and although performance called for the exercise of judgment by the authority, I think it plain that the

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13 See ***Nestorovych v Ukraine*** (2007) Oct 23rd App N° 20889/02.

14 in ***R (Husain) v Asylum Support Adjudicator*** [2001] EWHC 852 (Admin).

15 see ***Secretary of State for Health v Beeson*** [2002] EWCA Civ 1812 at [28]

16 See [2002] EWCA Civ 239, [2002] 1 WLR 2491, at [25]-[26].

> authority's duty gave rise to a correlative right in Runa Begum, even though this was not a private law right enforceable by injunction and damages."

Similarly Lord Hoffmann (with whom Lord Hope agreed) stated[17] that found persuasive Hale LJ's view that article 6 applied to the determination whether there was such a duty because

> "Once the local authority are satisfied that the statutory criteria for providing accommodation exist, they have no discretion. They have to provide it, irrespective of local conditions of demand and supply. Hence this is more akin to a claim for social security benefits than it is to a claim for social or other services, where the authorities have a greater degree of discretion and resource considerations may also be relevant."

That is the position here, as Bennett J recognised when he held that there was an absolute duty to provide accommodation when the relevant conditions were satisfied. By contrast it appears that Lord Millett was concerned with whether there was any right at all given that questions of judgment were involved in determining whether it had been satisfied[18] and Lord Walker doubted whether an individual had "a quantifiable right" given the need for evaluative judgments[19]. With respect to the latter two members of the Committee, the provision of suitable accommodation was not a mere discretion: it plainly involved a duty which had to be performed (and which a court could require to be performed) in the case of those who satisfied the relevant conditions of being homeless and in priority need. The fact that deciding whether those conditions were satisfied and whether the accommodation secured was suitable involved "evaluative judgments" was irrelevant to whether there was a right to such accommodation.

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17 at [66] and [69].

18 See at [91]-[92].

19 See [114] and [115].

15. It is not clear why members of the Committee entertained any doubt about whether that right was civil in character. Lord Millett did not suppose that the fact that the dispute was concerned with a benefit in kind was of itself significant[20]. Lord Walker did not address that issue. Lord Hoffmann's only reservation appears to have been that recognition of the right as civil might involve consequences under article 6 in terms of judicial review which he would not have considered acceptable[21]. But that has nothing to do with the character of the right as a civil right. Lord Bingham appears to have been concerned[22], as Lord Hoffmann was also, that there were no decisions of the ECtHR of which the Committee were aware relating to benefits in kind and he did not want to preclude the Secretary of State from arguing the point in Strasbourg that article 6 did not apply to such benefits. But that, as indicated above, is no longer the case. Nor is it a reason of itself for not recognising that such rights may be civil in character.

(iv) Lambeth's approach

16. Although purporting to adopt Bennett J's conclusions, in its outline submissions Lambeth does not now (at [25]) support the "staging-post" argument and it advances two different arguments in support of the conclusion that article 6 does not apply to a dispute about whether an individual is entitled to accommodation under section 20(1).

17. Lambeth does not contend that a right to a benefit in kind cannot be a civil right. That is not the "dividing line" it propounds. Its first argument is that section 20(1) does not create "a personal economic right flowing from specific statutory rules"[23]. In support of that contention Lambeth fails to distinguish between the question whether

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20 see [91], [92].

21 See [69].

22 See [6].

23 See its outline submissions at [2.2] and [21].

section 20(1) creates *any* right and the question whether any right it creates is *civil* in character. (i) For the reasons given above, section 20(1) does not confer a discretion: it creates a right. The fact that determining whether the conditions of entitlement are satisfied may involve questions of judgment is irrelevant. (ii) Lambeth appears to contend that the right is not one that an individual has of an economic nature on the ground that "the Children Act scheme is part of a service provided to the community overall, in the interests of (and to meet the moral expectations of) society. It is not aimed at providing a personal, economic benefit"[24]. The relevant question, however, does not relate to the Children Act 1989 as a whole but to the character of the rights conferred by section 20 of it. The rights created by that section are personal rights that specific individuals may have: as Baroness Hale has stated when giving the reasons of the Appellate Committee in ***R (M) v Hammersmith LBC*** [2008] UKHL 14, [2008] 1 WLR 535, at [18], the "specific duties in section 20...are owed to the individual child". In fact the duties to provide accommodation and maintenance are imposed to promote the welfare of the individual children concerned, just as rights to pecuniary social security benefits are imposed to promote the welfare of those entitled to them. But, even if that was not the case and the motive for (or purpose of) conferring such rights was social or moral, that would be irrelevant. It is the character of the right, not why it exists, that is relevant.

18. Lambeth's second argument for disputing that article 6 applies is that "a civil right comes into existence only if and when the authority reaches a conclusion that the applicant is within the statute"[25]. This argument does not show that article 6 does not apply to a dispute about whether the conditions of entitlement are satisfied: it is directed at what the conditions of entitlement are and thus to what disputes there may be to the resolution of which Article 6 may apply. Nonetheless this argument is equally

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[24] See its outline submissions at [22.3]. It also submits (at [21.3(c)]) that identifying the dividing line involves "an element of comparison with private law rights", ultimately derived it would appear from the decision in ***Salesi v Italy*** *supra*. That was not the basis of that decision.

[25] See its outline submissions at [2.2] and [22.5].

flawed.

19. First Parliament has not in fact made the duty imposed dependent on a local authority being satisfied, or it appearing to the authority, that an individual is a child in need within an authority's area. It has imposed a duty on the authority to provide accommodation for such an individual if it appears to that authority that that individual requires it for certain reasons. There is no general principle that a statutory duty only arises if the person who may be subject to it considers that the conditions for it arising have been met, whether or not that person is a public authority. On the contrary, in cases of dispute it is for the court to determine whether or not a person has a duty to perform unless the legislation imposing the duty provides otherwise. But in any event, where (as here) the legislation imposing the duty itself expressly distinguishes between those conditions which depend on the views of authority concerned and those which do not, it is for the court (not the authority) to determine if the latter are satisfied in the case of any dispute[26].

20. But second, in any event, in order to secure compliance with article 6, section 20(1) must be interpreted (if such an interpretation is possible, as it is) so that the relevant condition of entitlement is that an individual is a child, not that the authority is satisfied (or it appears to the authority) that he is, given section 3 of the Human Rights Act 1998. Making the view of the authority concerned itself a condition of entitlement by law is incompatible with Convention rights. Article 6 does not determine what the substantive

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[26] See eg ***R v the Secretary of State ex p the Alliance against the Birmingham North Relief Road*** [1999] Env LR 447. Bennett J (at [148]) and Lambeth in its outline submissions (at [15.3]) confuse the (irrelevant) question whether an authority should consider whether it is under a duty, and thus whether the conditions giving rise to it are satisfied (which plainly they should) with the separate (relevant) question whether their opinion is determinative of whether a condition is satisfied. Thus, quite apart from the Human Rights Act 1998, courts have had no difficulty themselves finding that a child without accommodation is one in need in respect of whom there is a duty to provide accommodation: see eg ***R (G) v Barnet LBC*** [2004] 2 AC 208 at [19], [23]-[24], [98]-[100], [137].

conditions may be on which any civil right, any civil obligation or criminal liability may depend. But States cannot evade the requirement for the determination of any dispute about civil rights and obligations and of any criminal charges to be made by an independent and impartial tribunal imposed by article 6 by framing the law so that the ingredients of the offence or the conditions of entitlement or obligation are defined in terms of what a person who is not independent or impartial may think. For example it would be incompatible with article 6 for a criminal offence to be defined as occurring when the police or a Minister consider that a person has done something. So equally it is incompatible with article 6 for a law to make the existence of a civil right or obligation depend on whether it appears to an authority that certain conditions are satisfied: see eg ***Tinnelly & Sons Ltd v UK*** [1999] 27 EHRR 249 at [45], [77]. Such legislation is (in substance) a procedural provision as to who is to determine whether the conditions have been satisfied upon which a substantive civil right, or substantive civil or criminal liability may exist which the law creates, providing a limitation on access to a tribunal, a matter article 6 itself regulates: see below.

COMPLIANCE WITH ARTICLE 6

21. If article 6 was engaged, Bennett J stated (at [117]) that, "even on the assumption that the social workers [involved in these cases] were not independent I decline to rule that they are incapable of being seen to be impartial" and that a court on a claim for judicial review could adequately resolve the merits of any such dispute (presumably on the basis that it would be for the claimant to show that the authority's conclusion was one no reasonable person could have reached). It is submitted that he was wrong on both matters.

(i) whether the children's services authority or its employed social workers are an independent and impartial tribunal and (if not) why not

22. There are a number of ways in which a decision-maker may fail to satisfy the

requirements of article 6(1). The decision maker may not be, or may not appear to be, (i) independent of the executive or (ii) independent of the parties to the relevant dispute or (iii) impartial.

23. Bennett J identified no reason for his conclusion (at [117]) that "even on the assumption that the social workers were not independent, I decline to rule that they are incapable of being seen to be impartial". In its Respondent's Notice Lambeth do not go so far but assert that "professional social workers have professional obligations that give them a *degree* of independence and impartiality". The Codes of Practice on which Lambeth rely appear at most to require social care workers to declare "issues that might create conflicts of interest and make sure that they do not influence your judgment or practice".

24. In these cases decisions were taken on behalf of the children's services authorities (who would be liable to provide any accommodation and maintenance for a child in need under the relevant provisions) by social workers employed by those authorities. They did not satisfy the requirements of independence or impartiality. They were not independent of the executive (namely the authority who employed them). Nor were they independent of one of the parties to the dispute, namely the authority who employed them which would itself be financially affected by its outcome. They also for that reason lacked objective impartiality.

25. As the ECtHR stated in ***Tsfayo v the UK*** about the members of a local authority's Housing Benefit Review Board,

> "the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded"

In the Court's view this involved a "fundamental lack of objective impartiality".

26. Whether an authority owes a duty to accommodate a child under section 20 likewise involves financial consequences for that authority. As Baroness Hale stated in a speech with which all the other members of the Appellate Committee agreed, in ***R (M) v Hammersmith and Fulham*** *supra* at [24], given the additional burden that is involved in "looking after" a child, "it would...not be surprising if some local authorities took steps to avoid this". An employee of the authority is no more capable of being independent and objectively impartial in a matter involving financial consequences for his employing authority than a member of that authority is. Indeed, as an employee, he is less independent of the authority than a member of the authority which employs him and which pays his wages from a social services budget which is notoriously limited.

27. Social workers taking decisions on behalf of their employing authority which affect its financial position lack structural or organisational independence and impartiality. As the ECtHR stated, for example in ***Bryan v the UK*** [1995] 21 EHRR 342 at [37],

> "In order to establish whether a body can be considered "independent", regard must be had, inter alia, to the manner of appointment of its members and to their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence."

Those who may take decisions on behalf of children's services authorities have no term of office in respect of the taking of such decisions. Their employing authority may withdraw decisions from them, take them itself or overrule them. Nor are there procedural rules of any relevance governing the taking of such decisions with which they must comply requiring (for example) a public hearing or indeed any hearing at all. Even if they are professionals, they thus do not even have the degree of independence required to constitute them as a 'tribunal'[27]. But, even if a person has sufficient security of remaining in his office and even if the law prohibits instructions being given to him,

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[27] See eg ***Mihailov v Bulgaria*** (2005) July 21st App No 52367/99 at [19]-[21], [36]-[37] (medical professionals); ***Wos v Poland*** [2007] 45 EHRR 28 at [93]-[94].

as the ECtHR has stated in plenary session[28],

> "where a person...is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence."

Similarly a lawyer who was a municipal civil servant, not subject to orders in the exercise of his powers which he had to exercise in a personal capacity and not subject to dismissal, was nonetheless a person about whom an applicant (whom that person's employer was prosecuting) "could legitimately have doubts as to [his] independence and organisational impartiality" as he was "a senior civil servant who is liable to return to other departmental duties. The ordinary citizen will tend to see him as a member of the police force subordinate to his superiors and loyal to his colleagues", notwithstanding an oath he had to take and his responsibility to discharge his duties in person diligently, conscientiously and loyally[29]. Even a judicial oath is no substitute for structural or organisational independence from one of the parties.

28. Social workers do not have the structural or organisational guarantees which are sufficient to exclude legitimate doubt about their independence and impartiality with respect to their own employing authority in respect of decisions that may affect it financially. The fact that there is a Code of Conduct applicable to social care workers does not cure or obviate the patent lack of structural independence and impartiality.

(b) what is the nature of the jurisdiction which the court must exercise to secure compliance with article 6

29. In relation to civil rights and obligations there may be cases in which, prior to the resolution of any dispute by a body that does provide the guarantees required by article

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[28] See ***Sramek v Austria*** [1984] 7 EHRR 351 at [38], [41] and [42].

[29] See ***Belilos v Switzerland*** [1988] 10 EHRR 466 at [16]-[19], [65]-[67].

6(1), the intervention of administrative or professional bodies may be justified[30]. But, in order to have the full jurisdiction required by article 6(1), the independent and impartial tribunal concerned must be able to deal with any dispute on the merits, whether it engages questions of fact or law[31]. Nonetheless, as the ECtHR has often stated[32],

> "The right of access to a court is not, however, absolute, but may be subject to limitations....the Court..must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved".

30. Matters which may be relevant in considering such restrictions include not only the reason for any limitation but also the subject matter of the decision, the manner in which any initial decision may have been taken, the content of the actual dispute and also (as the Court of Appeal has held following the ECtHR[33]) the reason why the body taking any initial decision may have not have complied with the requirements of article 6(1). This is necessary in order to ascertain whether any limitation imposed on the

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30 In ***Le Compte van Leuven & de Meyere v Belgium*** [1981] 4 EHRR 1 the ECtHR stated (at [50(a)] that Article 6(1) "does not oblige Contracting States to submit 'contestations' (disputes) over 'civil rights and obligations' to a procedure conducted at each of its stages before 'tribunals' meeting the Article's various requirements. Demands of flexibility and efficiency, which are fully compatible with the protection of human rights, may justify the prior intervention of administrative or professional bodies which do not satisfy the said requirements in every respect." But, as the EctHR made plain in ***Albert and Le Compte v Belgium*** [1983] 5 EHRR 533 (at [29], in cases where there was such prior intervention,"the Convention calls for one of the two following systems: either the jurisdictional organs themselves comply with the requirements of Article 6(1), or they do not so comply but are subject to control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6(1)."

31 cf ***Le Compte van Leuven & de Meyere v Belgium*** [1981] 4 EHRR 1 at [51(b)], ***Albert and Le Compte v Belgium*** [1983] 5 EHRR 533 at [29], [36]; ***Terra Woningen v Netherlands*** [1996] 24 EHRR 456 at [52] and footnote 42; ***Capital Bank AD v Bulgaria*** [2007] 44 EHRR 48 at [98]-[101].

32 See eg ***Wos v Poland*** [2007] 45 EHRR 28 at [98].

33 See ***R (Wright) v the Secretary of State*** [2008] QB 422 at [102], [105].

jurisdiction of the independent and impartial tribunal impairs the very essence of the right conferred by article 6(1) in any particular case.

31. The essence of the right conferred by Article 6(1) in the case of civil rights and obligations is that the relevant dispute is decided not only after a fair hearing but also that it is decided by a tribunal of a particular character, namely one which is not merely independent of the executive but also (and more important in many cases) independent of, and impartial as between, the parties. In respect of limitations on the power of review that may be imposed on the only independent and impartial tribunal to consider a case, it is one thing (for example) for a body taking an initial decision not to be independent of the executive when that body is not itself directly affected by its own decision or when the hearing it has held has not been held in public. But it is another if that body fails to act fairly or hold a fair hearing or if it is not independent of the parties or if it is not otherwise impartial.

32. In the *Alconbury* cases[34] the House of Lords held that the nature of the decision taken by the Secretary of State in those cases following a public inquiry before an Inspector, a policy decision in the exercise of a discretion as to what the general interest required in a particular case, justified limiting the powers of an independent and impartial tribunal to a power to review the fairness, legality and reasonableness of the initial decision. In those cases the House of Lords thought that (what Lord Hoffmann referred to as) the 'democratic principle' required respect for the decision of a democratically accountable body on such questions of expediency. Section 20 of the 1989 Act does not involve making broad judgments of policy or expediency as to what the public interest requires which (it may be said) are for a democratically accountable authority to take. The nature of the judgments involved are ones that a fully independent and impartial tribunal may make (as Parliament has itself recognised elsewhere in the Children Act

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[34] See [2003] 2 AC 295.

1989[35]).

33. In other cases there may also be good reasons in terms of ensuring flexibility, efficiency and expertise in decision making for entrusting decisions initially to a body that is not one whose composition or mode of operation complies fully with the requirements of article 6(1). But that does not of itself mean that judicial review as normally applied in this country necessarily provides an adequate standard of subsequent review: it was found not to by the ECtHR, for example, in respect of an exercise of the discretion which Parliament had given a local authority to permit or refuse a parent access to his or her child who is in the authority's care, as such an approach to judicial review was inadequate to enable the merits of the authority's decision to be adequately reviewed[36].

34. Many decisions under regulatory schemes which are to be operated to promote the public interest are ones in respect of which there may be good reasons in terms of ensuring flexibility, efficiency and expertise in decision making for entrusting decisions initially to a body that is not one whose composition or mode of operation complies fully with the requirements of article 6(1). Where the regulatory decision is taken by a specialist regulatory body which is not itself directly affected by its own decision after a fair (but not a public) hearing, it may not be necessary for an independent and impartial tribunal to hold a full hearing on facts and law: it may suffice[37] for the tribunal

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35 See eg the questions that a court may have to consider under section 31 of the 1989 Act (which include not merely questions about age but also about whether a child is suffering or likely to suffer significant harm as defined in subsection (9)).

36 ***W v UK*** [1987] 10 EHRR 29 at [47], [76]-[79], [82] (parent's right of access to child dependent on the exercise of discretion by a local authority; judicial review inadequate as it did not provide for the decision to be reviewed on its merits); cf also ***Obermeier v Austria*** [1991] 13 EHRR 290 at [70].

37 See eg the dicta in ***Kingsley v UK*** [2001] 33 EHRR 13 at [53] (in that case, apart from apparent predetermination, the only respect in which the Gaming Board itself appears not to have complied with the requirements of article 6(1) was that the 7½ day hearing held was not held in

merely to review whether any findings made were reasonable given the reasons provided by the regulator for them.

35. But social security and welfare benefit schemes are often different: the bodies responsible for decisions whether or not an individual has a right to a benefit are often themselves directly affected adversely by their own decisions. Their decisions may have financial or other adverse consequences for the authority itself. In such a case the body lacks objective (ie apparent) impartiality as it is itself directly affected adversely by the outcome of the dispute (as *Tsfayo* shows).

36. Limiting the jurisdiction of the only independent and impartial tribunal involved in such a case so that it cannot itself determine the merits of any dispute involving fact or judgment when the initial decision making body is not itself apparently impartial impairs the very essence of the right that article 6(1) confers. The concept of "full jurisdiction" accordingly requires the independent and impartial tribunal in such a case either (a) to remit its resolution to an impartial body or (b) to determine the dispute on the merits itself[38]. It matters not whether the lack of objective impartiality arises from apparent predetermination by an initial decision maker in respect of "a classic exercise of administrative discretion" in determining whether an individual was a fit and proper person (as in ***Kingsley v the UK***) or from the decision maker's lack of objective

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public. The ECtHR did not reject the Government's claim (at [32]) that the Gaming Board was structurally independent and impartial.)

[38] The Grand Chamber of the ECtHR has approved the view "that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of "full jurisdiction" involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body": see ***Kingsley v UK*** [2001] 33 EHRR 13 at [58], subsequenly approved by the Grand Chamber in the same case at [2002] 35 EHRR 10 at [34].

impartiality stemming from the financial consequences of the decision for it or those with whom it is associated on questions of judgment and fact (as in ***Tsfayo v the UK*** *supra* on whether there was good cause for a late claim or as in ***BH v the UK*** on whether a claim was vitiated by fraud[39]). Judicial review on grounds of *Wednesbury* unreasonableness was insufficient in such cases: as Moses J (as he then was) has recognised, a lack of independence and impartiality can infect the findings and judgments made which may not be discernable or easily discernable[40].

37. Indeed, even where a body making decisions on the right to benefits is merely not independent of the executive and is only concerned with the distribution of funds donated to it by others, the ECtHR has found that that cannot justify limiting the jurisdiction of any independent and impartial tribunal so that it cannot determine disputes as to the assessment of the facts underlying an applicant's claim to be entitled to a benefit[41].

38. It is submitted, therefore, that it is for the court itself, as the only independent and impartial tribunal to which any dispute as to the age of any individual for the purpose of section 20(1) may currently be referred, to determine that dispute itself on its merits and that it is not sufficient for it merely to consider if the conclusion on that issue was one which a reasonable person could have reached, whether that conclusion was reached either (a) by any social worker employed by the local authority or (b) by a member or members of that authority.

39. Lambeth suggest that article 6 "is fully complied with by...the existing statutory procedure for resolution of complaints by special dispute panels" contained in the Local

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39 As HMG admitted and the ECtHR found: see (2007) Sept 25th App N° 59580/00.

40 See ***R (Bewry) v Norwich City Council*** [2001] EWHC Admin 657 at [62]-[64].

41 See ***Wos v Poland*** [2007] 45 EHRR 28 at [73], [88], [100], [109].

Authority Social Services Complaints (England) Regulations 2006[42]. The Regulations do not provide the claimants with a reasonable alternative means to protect their right under the Convention to an independent and impartial determination of their claims effectively[43]. They provide for a procedure which, following an informal review and an internal investigation producing a report on any complaint that a duty has not been discharged, may result in the appointment of a review panel (on which a member of the authority concerned may sit) to "decide whether the local authority dealt adequately with the complaint" in its investigation and report. (It is unclear whether that is the same as deciding whether or not the authority has failed to discharge a relevant function.) The process is conducted in accordance with time scales that may well be inordinately and unreasonably lengthy for a person in the position of the claimants in these cases[44]. The authority's final response may only become available some 135 working days or more after a complaint is initially made and the procedure cannot be used if the complainant has stated in writing that he intends to take legal proceedings in relation to the substance of his complaint. The Regulations contain no procedural protection or requirement for a hearing before the review panel. But in any event there is no obligation on the local authority to do anything in the light of the review panel's decision or even to accept its findings. The review panel is thus not even a "tribunal" for the purpose of article 6: see ***Benthem v NL*** *supra* at [40]. But, even if it had been, it is not necessarily independent and impartial given its composition: see eg ***Langborger v Sweden*** [1990] 12 EHRR 416 at [30]-[36]. Given that it does not appear to be suggested (unsurprisingly) that this procedure provides a suitable alternative remedy to judicial

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42 See Lambeth's outline submissions at [2.3], [33]-[34].

43 Cf ***Waite and Kennedy v Germany*** [2000] 30 EHRR 261at [59]; ***Wos v Poland*** [2007] 45 EHRR 28 at [108].

44 The informal procedure may last up to 20 working days; the investigation if requested may take up to 65 working days to produce a report; the review panel must be appointed and convened within a further 30 working days of a request to do so and its decision must be notified within 5 days of its being convened. The authority thereafter has a further 15 working days to decide what action (if any) to take. Moreover some of these periods may be extended.

review, its existence cannot alter the obligations on the court as the only independent and impartial tribunal to consider the merits of the dispute in these cases.

CONCLUSION

40. It is submitted that it is for the court itself on these claims to determine whether the claimants are in fact children as the only independent and impartial tribunal to resolve that dispute. The local authorities express a concern that the analysis leading to this result will lead to "over-judicialisation of social welfare schemes". That concern (which could equally have been expressed about social security benefits) is misconceived. An independent and impartial tribunal may resolve disputes about entitlements under such schemes without "over-judicialisation" (as is done in the case of social security disputes). If the Administrative Court is not an ideal venue for their resolution, that is an argument for providing access to a more suitable independent and impartial tribunal, not for curtailing the rights which article 6 confers.

John Howell QC

Thursday, 11 September 2008 *Blackstone Chambers*

C1/2008/1524 and 1531

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

BETWEEN:

THE QUEEN

on the application of

M (1)
A (2)
Appellants / Claimants

and

THE COUNCILS OF THE LONDON BOROUGHS OF LAMBETH (1)
CROYDON (2)
Respondents / Defendants

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