

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

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Case Nos:
CO/6277/2005
CO/8977/2005
CO/3671/2005
CO/6830/2005
HQ05X01611
HQ06S00063
HQ04S01310
HQ06X01331
HQ06X01510
HQ06X01104
5CL5244
5CL11701
5CL50851



R
on the application of A and others
(Disputed children)

Claimants

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defendant

ORDER

UPON hearing Counsel for the Claimants and for the Defendant

AND BY CONSENT

IT IS ORDERED THAT

1. This Order applies to claims for a declaration that the Claimants were unlawfully detained and damages as a consequence of the Defendant's

decision to dispute age and treat the individual Claimants [unaccompanied child asylum seekers] as adults.

2. The cases of ██████████ (HQ06X01331), ██████████ (CO 3671/2005), ██████████ (CO 8977/2005) and ██████████ All (not yet issued) have been selected as "lead cases" in order to seek to resolve the following "generic issues":-

(i) the legality of the policy adopted by the Defendant to dispute age and determine whether the applicant is an adult on the basis that "appearance [and/or demeanour] strongly suggests that [the applicant] is over 18"¹ for all immigration purposes including the:

- a) the fast tracking of claims for asylum² ; [cases of ██████████ ██████████] or
- b) refusal of claims for asylum on third country grounds³; ██████████ and/or
- c) in either case detention during the processing of the claim.⁴

(ii) alternatively the legality of a practice of reliance on an assessment of physical appearance and/or demeanour which is a non – Merton⁵ assessment for

¹ Contained within chapter 38 of the first two versions of the Operational Enforcement Manual [OEM] from 21 December 2000 [50,55] before superceded by the current chapter 38 of the OEM (the precise date of this current version is unclear though it has certainly been in existence in the current form since at least October 2005), see also Written answer by Baroness Scotland of Asthal on age determination, Lords Hansard, 7 September 2004 [55A], Information Note on Unaccompanied Asylum Seeking Children [81] (the word strongly is not underlined), Operational Processes Chapter 5 2nd Edition January 2005 [129] and 3rd Edition from August 2005 to date [142], (the word strongly is not underlined but is bolded).

² contained in the chapter 38 OEM [54], in the current OEM [62], Fast Track Suitability List from November 2004 [71] (in both the latter two cases the word strongly is not underlined) before changed in 30 November 2005 during the course of the litigation in D & Z revised policy now contained in present Detained Fast Track Suitability List of February 2006 [72 – 73]. The word demeanour is not contained within the earlier policy documents but it is understood that it is the Defendant's practice to consider this when disputing age.

³ This policy is still the basis for Third Country proceedings see Screening Officer's report Disputed Age Contention [77]

⁴ This has now though been withdrawn as a basis for detention see Screening Officer's report Disputed Age Contention [77]

⁵ The reference to Merton is a reference to the decision of Mr Justice Stanley Burton in the case of R(B) v London Borough of Merton [2003] All ER 280 which sets out the requirements for lawful assessments in

determining age for the purpose of all age dispute cases and where the consequences are:-

(A) detention and/or fast tracking [Group A cases] [cases of ██████████ ██████████].

(B) detention and/or Third Country proceedings [Group B cases] [case of ██████████].

(iii) whether there should be a distinction in Group A and/or Group B where the assessor is an Immigration Officer [sub group i] [cases of ██████████] a Social Worker [sub group ii] [cases of ██████████].

(iv) the legality of a practice of an Immigration Officer determining age in the absence of a responsible adult and whether this is ultra vires of the immigration rule 352 ⁶ [cases of ██████████].

3. Nothing be published that shall identify the lead Claimants and they shall be known henceforth in these proceedings as 'HA', 'EM', 'MM' and 'VK'.
4. The Claimants and prospective Claimants are those individuals whose names are set out in the table marked Schedule 1 to this Order, all of the Claimants in the said Schedule are currently represented by Bhatt Murphy solicitors of 27 Hoxton Square, London N1 6NN.
5. Any further prospective Claimants shall be notified by the Claimants' solicitors, Messrs Bhatt Murphy, of 27 Hoxton Square, London N1 6NN to the Treasury Solicitors by 31 December 2006 and will include the following information:

the context of Local Authorities determining age for the purposes of assessing eligibility for support and assistance under the Children Act 1989.

⁶Rule 352 Immigration Rules

- 5.1 the full name, address and postcode of each Claimant and the litigation friend (if appropriate);
 - 5.2 the date of birth of the Claimant (as allocated by Social Services or the Home Office);
 - 5.3 the claim number of the Claimant's case, if issued and the date of issue;
 - 5.4 if not Bhatt Murphy the names and addresses of the solicitors on record;
 - 5.5 if known, each Claimant's Home Office and Port reference number, the date of the relevant age assessment and dispute, the Port in which the age was assessed and disputed, the dates and locations of any relevant periods of detention.
6. In the respect of any Claimant who has not issued a claim, but has notified the Defendant in accordance with paragraph 5, the limitation period for any claim under the Human Rights Act 1998 shall be extended until 3 months after judgment is given.
 7. In respect of any Claimant who has issued a claim in any court, the claim be stayed or remain stayed until further order of the Administrative Court.
 8. All Claimants in the table marked Schedule 1 to this order and all further prospective Claimants notified to the Defendant shall be bound by any

judgments or orders made in respect of the generic issues unless the Court orders otherwise.

9. Save as otherwise ordered:

9.1. The liability of each party for and each party's entitlement to recover costs shall be several and not joint.

9.2. Individual costs are those costs and disbursements incurred for and/or in respect of any individual Claimant in relation to matters which are personal to each such Claimant, excluding costs and disbursements incurred for and/or in respect of any claims which may hereafter be selected as lead cases.

9.3. Common costs are all costs and disbursements other than individual costs.

9.4. The common costs incurred in any month by the Claimants and the Defendant are to be divided by the number of Claimants pursuing their claims on the first day of the month.

9.5. If in any month a Claimant compromises his/her claim with the Defendant on terms which provide for the Defendant to pay that Claimant his/her costs then that Claimant shall be entitled to recover his/her individual costs and his/her several share of the common costs incurred by the Claimants up to the last day of that quarter.

- 9.6 If in any month a Claimant discontinues his/her claim against the Defendant or it is dismissed by an Order of the Court whereby that Claimant is ordered to pay the Defendant's costs, then he/she will be liable for his/her individual costs incurred by the Defendant up to the last day of that quarter; liability for common costs and disbursements to be determined following the trial of common issues, with permission to apply if such trial does not take place.
- 9.7 Each of the Claimants shall for the purposes of this Order be treated as if he/she had been a Claimant in the actions as from the date of this Order.
10. The claim of [REDACTED] HQ06X01331 be transferred to the Administrative Court forthwith.
11. Permission to proceed to judicial review be granted on each of the lead cases.
12. The Official Solicitor, having consented to act, to be appointed as Litigation Friend on the cases of J [REDACTED] and E [REDACTED] (not lead cases) and V [REDACTED] (lead case.)
13. The Defendant shall as soon as practicable or in any event by 4.30pm on 20 November 2006 provide disclosure of the following categories of documents, to the extent that such documents are (a) relevant to the issues identified in paragraph 6 and (b) not subject to privilege or any other applicable exemption from disclosure :-

- 13.1 all documentation in each lead case relating to the decisions to detain, age dispute, fast track or Third Country.
- 13.2 Documentation relating to the Defendant's policy or practice in relation to age disputing, detention and/or fast tracking of age dispute cases, [including but not limited to documentation relating to the change in policy on 30 November 2005], and detention and/or Third Country proceedings.
- 13.3 any documents relating to the training of Immigration Officers on age assessments.
- 13.4 any documents concerning the review of age dispute policy and practice as set out at paragraph 37 of the of the Defendant's skeleton argument filed in the case of Z.
14. The Claimants to serve on the Defendant and file at Court by 4.30pm on 8 December 2006 judicial review claim forms and detailed statement of facts and grounds or any amendments thereto.
15. The Defendant to serve on the Claimants and file at Court by 4.30pm on 22 December 2006 detailed grounds of resistance and evidence in support.
16. The Claimants have liberty to serve any further witness evidence in reply by 8 January 2007.

17. Mr Justice Munby shall be the Managing Judge in this matter. Any applications by the parties to be made in the first instance in writing to the Judge's Clerk.
18. The Claimants to file and serve the skeleton argument by 4 pm on 12 January 2007.
19. The Defendant to file and serve his skeleton argument by 4 pm on 18 January 2007.
20. The judicial review of these actions to be listed on 24 January 2007 with a time estimate of 3 days, before Mr Justice Munby, if available
21. Costs in the case.

By the Court

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R
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 (Disputed children)

Claimants

and

THE SECRETARY OF STATE
 FOR THE HOME DEPARTMENT

Defendant

SCHEDULE

No	Claimant's name	Home Office/ Port Reference number	Stage of proceedings and Claim Number (if relevant)	Date of detention	Length of detention	Age at time of detention*
1.	[REDACTED]	A1275553/2 ASC/778883	Pre-issue	26.08.05	4 days	16
2.	[REDACTED] (by his Litigation Friend)	DEU/859480	Pre-issue	26.10.05	9 days	15

3.	[REDACTED]	O1076751/2	Issued case in Central London County Court. Proceedings served and stayed pending the outcome of <u>R (D) v SSHD</u> before particulars of claim have been filed (5 CL5244)	24.06.04	16 days	16
4.	[REDACTED]	STD/896740	Pre-issue	27.11.05	10 days	16
5.	[REDACTED]	TN3/412241	Pre-issue	07.02.04	16 days	16
6.	[REDACTED]	STD/890808	Pre-issue	22.11.05	11 days	16
7.	[REDACTED] (by his Litigation Friend)	DEU/544269	Issued case in the Administrative Court. Proceedings stayed pre permission pending the outcome of <u>R (on the app of D and Z) v SSHD</u> (CO/3671/2005)	20.03.05	10 days	15
8.	[REDACTED]	CEU/359849 L1089466	Issued case in High Court. Particulars of claim filed and proceedings stayed pending the outcome of <u>R (on the app of D and Z) v SSHD</u> before defence is filed (HQ05X01611)	10.09.03	7 days	15
9.	[REDACTED] (by her Litigation Friend)	TN2 523/082	Issued case in the High Court. Proceedings served and stayed pending the outcome of <u>R (on the app of D and Z) v SSHD</u> before particulars of claim have been filed.	13.01.05	12 days	16

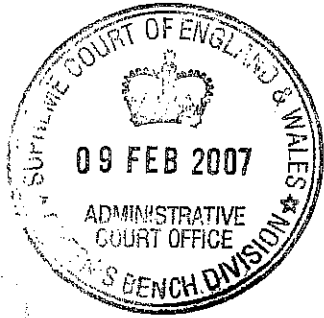
			(HQ06S00063)			
10.	[REDACTED]	DEU 319/096	Issued case in the High Court. Particulars of claim filed, defence filed and proceedings stayed pending the outcome of <u>R (D) v SSHD</u> (HQ04S01310)	10.05.03	16 days	17
11.	[REDACTED]	ASC558096	Issued case in the High Court. Proceedings stayed pending the outcome of the application for GLO before particulars of claim have been filed. (HQ06X01331)	06.05.05	5 days	16
12.	[REDACTED]	GAT/425883	Pre-issue	13.03.04	13 days	15
13.	[REDACTED]	DEU/779004	Issued case in the County Court. Particulars of claim filed, defence filed. Proceedings initially stayed pending the outcome of <u>R (on the app of D) v SSHD</u> (5CL11701)	23.04.04	3 days	16
14.	[REDACTED] (by his Litigation Friend)	ASC/581690	Issued case in High Court. Proceedings served and an application to be made for a stay pending the outcome of the application for GLO (HQ06X01510)	17.06.05	11 days	15
15.	[REDACTED]	ASC/455390	Issued case in the County Court. Particulars of Claim filed and proceedings stayed	16.06.04	16 days	16

			pending the outcome of <u>R (on the app of D) v SSHD</u> before defence filed (5CL50851)			
16.	[REDACTED]	ASC/562830 T1108511	Pre-Issue.	17.05.05	18 days	17
17.	[REDACTED]	ASL 1016789	Pre-Issue	07.04.06	74 days	17
18.	A [REDACTED]	L1114375/ ASL/536788	Issued case in the High Court. Proceedings served and stayed pending the outcome of the application for GLO before particulars of claim have been filed (HQ06X01104)	15.04.05	25 days	17
19.	[REDACTED]	N1112565/ DEU/799004	Pre-issue	05.09.05	51 days	16
20.	[REDACTED] (by his Litigation Friend)	EME/563843	Issued case in the Administrative Court. Proceedings stayed pre permission pending the outcome of <u>R (on the app of D and Z) v SSHD</u> (CO/6277/04)	19.05.05	20 days	15
21.	[REDACTED] M [REDACTED]	M1289241/2 SP/769111	Issued case in the Administrative Court. Proceedings stayed pre permission pending the outcome of <u>R (on the app of D and Z) v SSHD</u> (CO/8977/05)	08.08.05	17 days	17
22.	[REDACTED] (by his	A1273647 DEU/756122	Issued case in the Administrative Court.	28.07.05	35 days	15

	Litigation Friend)		Proceedings stayed pre permission pending the outcome of <u>R (on the app of D and Z) v SSHD</u>			
23.	██████████	N1115106 ASC/875685	Pre-issue	10.11.05	21 days	15

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW



R

(on the application of A and others)

(Disputed children)

and

THE SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Defendant

O R D E R

Before MR JUSTICE MUNBY
26 January 2007

UPON the Defendant acknowledging the imperative of compliance with directions made by the court for the expeditious resolution of this litigation

AND IT BEING HEREBY RECORDED that as a consequence of the Defendant's conduct of the litigation to date any failure by the Defendant to comply with the directions set out in paragraphs 3, 4, 7 and 10 below is very likely to result in the imposition of debarring orders to ensure compliance with the directions forthwith (Any application made by the Claimants for such orders shall be heard as soon as practicable by the case managing Judge)

AND UPON hearing Counsel for the Claimants and for the Defendant

AND THE DEFENDANT ACCEPTING AND THE JUDGE BEING SATISFIED that for the reasons set out in the Schedule to this Order the Claimants are entitled to the following declaration

IT IS DECLARED THAT:

1. The Secretary of State's policy and/or practice of detaining (as adults) asylum applicants who claim to be under 18 years of age for the purposes of proceedings for the fast track or removal to a third country 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 was unlawful (but for the avoidance of doubt this declaration does not affect or apply to the policy and/or practice adopted by the Secretary of State in age dispute detention cases with effect from 30 November 2005, nor does this declaration affect or apply to decisions made for purposes other than detention).

AND IT IS ORDERED THAT:

2. The case management of the litigation up to but not including any final hearing is reserved to and will be conducted by Munby J, unless he is unavailable (and for this purpose he is not to be treated as being unavailable merely because he is sitting on Circuit or in another Division).

Disclosure

3. The Defendant shall disclose any further documents which are (a) relevant to the remaining issues and (b) not subject to privilege or any other applicable exemption from disclosure by 4 pm on 12 February 2007. If the Defendant asserts that any relevant documents cannot be disclosed such documents should be identified and reasons for the claimed exemption provided at the same time.

Defendant's service of Defence and evidence

4. The Defendant shall file and serve detailed grounds of defence and evidence in response to the remaining issues in the lead Claimants' claims by 4 pm on 28 February 2007. Such evidence to also include the arrangements for liaison between IND and social work departments of local authorities in the major ports and ASU's in relation to the following policy provisions:
 - a. The commitment set out in OEM (version February 2006) that unaccompanied children must only ever be detained in the most exceptional circumstances and then normally only overnight, with appropriate care, whilst alternative arrangements for their safety are made.

- b. Paragraph 5.2 of the API on Children published in April 2006, comprising the provisions concerning the referral of children.
 - c. The principles set out at section 5 and the aims set out in section 6 of the Age Assessment Joint Working Protocol.
 - d. The stipulation in Chapter 29 of the Current Operational Enforcement Manual Chapter 29.2: "Social services should be asked for an age assessment in age dispute cases wherever possible and at the earliest opportunity."
5. The Defendant shall file and serve detailed evidence concerning the following issues by 4 pm on the 12 February 2007:
- a. The steps that have been taken to effect arrangements for social workers to attend the major ports and Asylum Screening Units (ASUs) as set out in paragraph 10 of the statement of Mr Heatley dated 28 November 2005. Such evidence to include the current position in respect of each of the major ports and ASUs, the planned future arrangements and details of the timescale involved to affect any arrangements in contemplation. ~~If the anticipated arrangements cannot be effected, indication as to whether or not the Defendant has formulated alternative arrangements and if so what they entail.~~
 - b. The matters raised in paragraphs 6.1.5.2, 6.1.5.3 and 6.1.16 of the statement of Mark Scott dated 8 December 2006.

Claimants' service of evidence in reply

6. The Claimants shall file and serve any evidence in reply by 4 pm on 21 March 2007.

Defendant's response on the lead cases

7. The Defendant shall indicate by 4 pm on 31 January 2007 whether liability is admitted, in relation to detention only, in each of the four lead cases and if liability is not admitted provide reasons.

Defendant's response on the non-lead claims

8. In relation to the other (non-lead) Claimants, the Claimants' solicitors shall confirm in writing to the Defendant by 4pm on 31 January 2007 whether or not they have current instructions to pursue each claim.
9. In relation to the Claimants identified at paragraph 8, the Defendant shall indicate by 4 pm on 28 February 2007 whether liability is admitted, in relation to detention only, and if liability is not admitted provide reasons. If compliance with this deadline is not possible, the Defendant is to file and serve an application for an extension of time, prior to the expiry of the deadline, providing evidence of the steps taken to attempt to meet the deadline, and a detailed explanation for the further time required to complete this task.

Resolving the detention claims for compensation

10. The Defendant shall by 4 pm on 28 February 2007 set out a proposal concerning compensation in the cases where it is agreed detention was unlawful, including any proposal as to mediation.
11. The Claimants will respond to the Defendant's proposals concerning compensation and/or mediation within 7 days of receipt.
12. In the event that there are compensation issues that cannot be resolved by agreement or mediation, there be liberty to apply for a hearing for directions for expeditious resolution of the outstanding matters by the court.

Hearing to resolve the outstanding issues

13. There shall be a hearing listed to resolve the remaining contested issues in the four lead cases, to be listed on a date to be fixed on or after 28 March 2007 with a time estimate of 2 days.

Limitation under the Human Rights Act

14. In respect of any Claimant who has not issued a claim, but has notified the Defendant pursuant to paragraph 5 of the order herein dated 16th November 2006, the limitation period for any claim under the Human Rights Act 1998 which relates to detention, shall be extended until 3 months after the date that the Defendant admits liability or provides reasons as to why liability is not admitted, pursuant to paragraph 9 of this order. The extension of the limitation period for any other claim under the Human Rights Act will continue to be as per paragraph 6 of the order dated 16th November 2006.

Management of the non-lead cases

15. In respect of any Claimant who has issued a claim in any court, the claim remains stayed until further order of the Administrative court.

Anonymity

16. Nothing shall be published that shall identify any of the Claimants in this case.

Costs

17. There be detailed assessment of the Claimants' costs in accordance with Regulation 107 of the Civil Legal Aid (General) Regulations 1989 pursuant to the Community Legal Service (Funding) Order 2000.
18. Upon recording the Defendant's agreement that it shall pay the Claimant's costs in relation to detention issues up to and including 22nd December 2006, the issue of the costs of the litigation is reserved until further order.

19. The Claimants have liberty to apply for such further order as to costs upon clarification of the Defendant's position concerning the lead cases.

20. The costs incurred between 22 December 2006 and 26 January 2007 in consequence of the Defendant's concession and in respect of the consequential hearing for further directions are to be paid by the Defendant.

THE SCHEDULE
(STATEMENT OF REASONS)

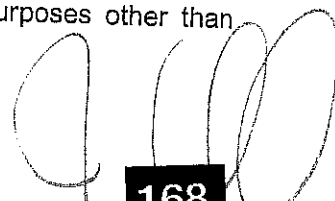
Individuals may falsely claim to be under 18 years old for a variety of reasons but primarily to benefit from the more generous asylum policies and support arrangements which are applied to children. In the interests of firm and fair immigration control, the Secretary of State does not unquestioningly accept at face value every claim by an individual to be under 18 years old. However, the Secretary of State also recognises that it is his policy that unaccompanied children must only ever be detained in the most exceptional circumstances, whilst alternative arrangements are made, and normally just overnight.

The Secretary of State has concluded that his approach to detention in disputed age cases (prior to a change in policy on 30 November 2005) did not strike the right balance between, on the one hand, the interests of firm and fair immigration control and, on the other hand, the importance of avoiding the detention of unaccompanied children save in exceptional cases and the limited circumstances set out above.

For the avoidance of doubt this declaration does not affect or apply to the policy and/or practice adopted by the Secretary of State in age dispute detention cases with effect from 30 November 2005. This policy states that IND will accept an individual as under eighteen, (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:

- there is credible and clear documentary evidence that they are eighteen years of age or over.
- a full "Merton-compliant" age assessment by social services is available, stating that they are eighteen years of age or over. (Note that assessments completed by social services Emergency Duty Teams are not acceptable evidence of age.)
- their physical appearance/demeanour very strongly indicates that they are significantly over eighteen years of age and no other credible evidence exists to the contrary.

Nor does this declaration affect or apply to decisions made for purposes other than detention.


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MR JUSTICE MUNBY