



IN THE COURT OF APPEAL

[2008] EWCA Civ 1445

B E T W E E N

Ward & Maurice Kay LJJ & Sir John Chadwick on 18th December 2008

M v Lambeth LBC

and

A v Croydon LBC

MAN OR BOY? Precedent Fact and Human Rights

1. The Court of Appeal has dismissed the appeals brought against two local authorities. The judgment is important in limiting the ability of claimants to challenge certain social welfare decisions made by local authorities and other public service providers.
2. The applicants sought asylum in the UK and claimed to be children eligible for services under s20 of the Children Act 1989. The local authorities assessed the applicants as adults and hence found them not eligible for support under the Children Act. The applicants judicially reviewed the local authorities and alleged that:
 - a) The court should determine the ages of the applicants as a 'precedent fact'.
 - b) If local authorities decided the applicants' ages then under the European Convention of Human Rights:
 - Article 6 (right to a fair trial) and
 - Article 8 (right to respect for private and family life)were engaged and breached.
3. The High Court dismissed the applicants' arguments in July and the Court of Appeal has now dismissed their appeals. The government intervened and supported the local authorities' arguments. The Court of Appeal ruled as follows.

Precedent fact

4. It is for social workers and not the courts to decide whether a person who claims s20 support is a child. The nature and process of the decision requires the implication of words into s20 so that it reads:

‘Every local authority shall provide accommodation for any *person whom the local authority have reasonable grounds for believing to be a child in need ...*’

The scheme of the Act compels this conclusion because Part 3 (Local Authority Support for Children and Families) is concerned with administrative functions of the local authority. This is in contrast to Part 2 (Residence and Contact orders etc) and Part 4 (Care and Supervision) which involve decisions being made by the court. Parliament must have intended the local authority to take all relevant decisions under Part 3 (§30-31).

Human rights – Article 6

5. Article 6(1) provides:

‘In the determination of his civil rights and obligations ..., everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law.’

s20 is not concerned with civil rights

6. The Court of Appeal found that Article 6 was not engaged because decisions under s20 do not amount to *civil rights* for two reasons:
- a) The decision-making process has the character of exercising a discretionary power. Although a child may have a right to *some* accommodation under s20, he has no right, or enforceable claim to any particular type of accommodation. The local authority has a wide discretion to decide exactly what accommodation is appropriate. This discretionary decision making process destroys the notion that a right is involved (§53).
 - b) The nature of accommodation that may be provided under s20, when read with s23, can range from a flat with a licence to occupy to, at the other end of the spectrum, accommodation with foster parents or in the family home (§58-59).

Social welfare schemes: judicial review provides sufficient compliance with Article 6

7. Furthermore, although the Court found that Article 6 was not engaged because s20 is not concerned with civil rights, it went on to say that Article 6 would not have been breached because judicial review would provide sufficient compliance. The Court came to this conclusion after considering the independence and impartiality of social workers (noted below) and the nature of the decisions to be taken. Applying the approach of the House of Lords in *Runa Begum v Tower Hamlets LBC*

[2003] 2 AC 430, which was concerned with accommodation for the homeless under the Housing Act 1996, decisions under Part 3 of the Children Act relate to social welfare issues which are properly entrusted to local authorities rather than 'independent' bodies (§84).

Social workers are impartial

8. Social workers making decisions under s20 are not *independent* because they are employed by the local authority that may have to fund any services that are provided (§61). However, social workers do *not* lack *impartiality*. They are professional people, fully qualified and subject to the code of practice issued by the General Social Care Council (§68). The reasonable member of the public was unlikely to be unduly perturbed by the close connections between social workers and their employers who have to foot the bill for their decisions. The lack of independence and impartiality arising from no more than the organisational structure of the employment does not so infect the social workers' decisions as to be incapable of cure by judicial review (§71).

Human rights – Article 8

9. The Court did not accept that age determination by itself engages Article 8 (§88). Furthermore, any procedural protections that Article 8 may afford, are unlikely to go beyond what Article 6 may require (§89)

Cases are due to return to the High Court

10. Now that these issues of law have been resolved in the local authorities' favour these two cases, and a third involving Kent CC, are due to return to the High Court. The applicants with the aid of expert evidence from paediatricians are challenging the lawfulness of the local authorities' decisions that each applicant was not a child. One of the issues that remains to be determined is:

For the purposes of assessing whether a person is a child, is paediatric evidence of the sort produced by Dr Michie and/or Dr Birch scientifically ill-founded and of no evidential value?

Counsel in these two cases from 2-3 Gray's Inn Square were:

Lambeth LBC: Jon Holbrook (junior counsel)

Croydon LBC: Bryan McGuire and Peggy Etiebet