Neutral Citation Number: [2024] EWHC 1676 (Admin)

Case No: AC-2023-MAN-000410

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

Before :

FORDHAM J

- -

Between :

THE KING (on the application of SAMER ALABBOUD ALHASAN)	**Claimant**
- and -	
1) DIRECTOR OF LEGAL AID CASEWORK 2) LORD CHANCELLOR	**Defendant**

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J :

1. This is a claim for judicial review for which I granted permission (21.12.23), the two-day substantive hearing of which has been listed before me (10 and 11.7.24). The claim challenges (1) a decision of the Director of Legal Aid Casework not to grant an application for Exceptional Case Funding to fund legal representation at the Claimant's substantive asylum interview and (2) actions of the Lord Chancellor in not making provision for legal aid for legal representation at asylum interviews for those who arrived in the UK as unaccompanied asylum seeking ("UAS") children but have turned 18 prior to the interview.

2. The Lord Chancellor's grounds of defence and witness statement evidence describe the origin of the legislative policy, back to a Department of Constitutional Affairs consultation in relation to a proposal to introduce maximum fee limits (June 2003), to which the Constitutional Affairs Committee responded (31 October 2003), after which the DCA adopted a policy position (March 2004), with Regulations and a Direction. The CAC response is reference "HC 1171-I". It is exhibited in the bundles for this case. It lists the evidence which the CAC had considered, citing (at §56) and publishing a Joint Legal Opinion written for the Refugee Legal Centre by me (as Michael Fordham of Counsel) with David Pievsky (1.8.03).

3. By a careful and comprehensive 4 page letter dated 14.6.24, the Government Legal Department (for the Lord Chancellor) wrote to me, and to the other parties, raising the question of whether I should recuse myself from hearing the present case. The letter explained that, as part of the 2003 Joint Opinion, consideration was given to a proposal to exclude funding for legal representation at any asylum interview from the scope of legal aid. The letter told me that the Lord Chancellor and his representatives had given careful consideration as to whether the existence of the prior legal Opinion, on a topic related to the issues raised in the current proceedings, gives rise to an appearance of bias such that recusal from these proceedings should be necessary. Having done so, they had concluded that it did not and that no recusal was necessary. Nevertheless, they had decided that in circumstances where the Joint Opinion is in the public domain and is referred to in evidence filed in the current proceedings, it was appropriate that they draw the matter to my attention, and set out the reasons for their conclusion that the existence of the Joint Opinion does not give rise to an appearance of bias.

4. By emails (14.6.24 and 17.6.24), GLD (for the Director of LAC) and the Greater Manchester Immigration Aid Unit (for the Claimant) communicated that they had reviewed and considered GLD's letter; that they too did not consider that the matters set out in that letter give rise to any issue of apparent bias; and that they too had no objection to my determining the substantive application for judicial review.

5. I was thus invited to consider, in light of what had been raised, the questions of apparent bias and possible recusal from hearing the case. For the purposes of doing so, the Lord Chancellor invited me to read the Joint Opinion. It was written 21 years ago. It was not being included in the bundles for the present case. But the invitation that I read it was in view of the fact that it is in the public domain, and that the test for whether or not it gives rise to apparent bias turns on whether its existence would lead a fair-minded and informed observer to conclude that there was a real possibility of

bias. Nobody opposed my reading the Joint Opinion and I have taken that course, as invited.

6. It was right and proper that the parties have raised this question with the Court. I have reviewed the pleadings in the case. I have read the Joint Opinion. My conclusion, which is the same as that of all parties and their representatives, is that my having written and given the Joint Opinion – and it having been published by the Constitutional Affairs Committee – would not lead a fair-minded and informed observer to conclude that there was a real possibility of bias in my hearing and deciding the present case.

7. I accept the correctness of the following propositions identified by the Lord Chancellor's representatives, as regards apparent bias and the prior expression of opinion (in the context of extra-judicial writings, judicial opinions and legal opinions given as counsel): (1) The fact that a judge has taken a judicial oath is an important protection but not a sufficient guarantee to exclude all legitimate doubt; in particular there is a danger of unconscious bias where someone has given public voice to what are clearly very firmly held views relevant to the case before them: Higgs v Farmor's School [2022] EAT 101 at §48. (2) A judge's employment background, or previous instructions to act for or against any party engaged in the case before them, will not usually give rise to an appearance of bias: Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at §25, Siddiqui v University of Oxford [2016] EWHC 3451 (QB). (3) A judge's previous judicial decisions will not usually give rise to an appearance of bias: Locabail at §25. Adherence to an opinion expressed judicially in an earlier case does not denote a lack of open-mindedness: Davidson v Scottish Ministers (2004) SLT 895 at §10. The issue will only arise where prior involvement might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must be made; relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced: Stubbs v The Queen [2018] UKPC 30 at §16. For example, where a judge at a pre-trial hearing has unnecessarily made findings on issues to be determined at trial, without inserting an appropriate qualification that they were provisional views; or expressed criticism in absolute terms, that may give rise to an appearance of bias: Mengiste v Endowment Fund for the Rehabilitation of Tigray and others [2013] EWCA Civ 1003. (4) A judge's prior legal opinion, given as counsel, on a legal matter, will not ordinarily give rise to an appearance of bias: Kartinyeri v Commonwealth of Australia cited in Davidson. (5) It is not inappropriate for judges to write extra-judicially and to express opinions on legal issues. What matters is the tone in which opinions are expressed and whether that is such as to give the impression that the judge has preconceived views which are so firmly held that it may not be possible for them to try a case with an open mind: Locabail at §§88-89 and Hoekstra (No 3) (2000) JC 391.

8. What follows are observations which have been made on behalf of the Lord Chancellor. None of them is the subject of any disagreement between the parties. I agree with them. (1) There is a degree of overlap between the issues addressed in the Joint Opinion and the present claim. For example, the Joint Opinion considered the function of the asylum interview in the asylum process and the role of the legal representative at interview. It gave a view on the strength of the evidence relied upon by the DCA in June 2003 to justify the general exclusion of legal representation at the

asylum interview from the scope of legal aid. (2) The Joint Opinion was concerned with the introduction of maximum fee limits. It did not consider the different provision of legal aid funding for legal representation at asylum interviews for adults and children or any reasons for the difference. It did not address the relevant legal issue raised by the present claim: whether the difference in treatment between children and former UAS children, as regards legal aid for asylum interviews is justified. It considered the function of the asylum interview in the asylum process and the role of the legal representative at that interview. But it did not express a concluded view or give a settled view on the need for or role of legal representatives at an asylum interview. (3) The Joint Opinion was given in 2003. There have been a number of developments since then, including the introduction of recording of asylum interviews. The period of elapsed time between the provision of the Joint Opinion and the current matter before the Court is, in and of itself, significant. (4) Overall, the Joint Opinion did not set out a final view, expressed in absolute terms, on any legal issue requiring determination in the judicial review claim, such as to give the impression to a fair minded observer that there is the possibility that I would not try the present case with an open mind.

9. In these circumstances, and for these reasons, I will proceed to hear the substantive hearing of this claim. I had raised with the parties whether the ventilation of this issue should itself be in the public domain, through the medium of a written judgment. The Lord Chancellor's position was that it would be appropriate that a judgment record the fact that the issue had been raised and the reasons for any conclusion as to recusal and whether it is necessary. No party argued against that course. The values of open justice, facilitating public scrutiny of what the Courts do, and why they do it, are immense and well-recognised. I was and remain satisfied that it is in the interests of justice and the public interest to ventilate in the public domain the question that was raised, how I dealt with it, and why; ahead of the substantive hearing of this claim.

1.7.24