



IN THE COURT OF APPEAL, CIVIL DIVISION

REF: C4/2019/1583/PTA



THE QUEEN ON THE APPLICATION OF MA & BB -v- SSHD

**ORDER made by the Rt. Hon. Lord Justice Bean**

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

**Decision:** Permission to appeal refused.

RECEIVED  
08 AUG 2019

**Reasons**

I do not consider that there is any realistic prospect of success in the proposed appeal against the carefully reasoned judgment of May J.

*Power to compel witnesses*

I do not accept that the effect of the judgment below will be (as the SSHD's skeleton argument suggests) that there will have to be a similar inquiry in all comparable cases where there is a "real risk" that witnesses will not attend, irrespective of the views of the investigator as to whether such oral evidence was likely to be critical or not. The decision of May J is fact-specific. It is difficult to see how a satisfactory investigation could be carried out in the present case without the alleged perpetrators of the abuse being required to give evidence. Since at least one of them (in MA's case) has been dismissed it is highly unlikely that he, at least, would attend unless compelled to do so. I do not see why the Special Investigation would be turned into a "vastly expensive" inquiry simply by reason of the investigator being given the power, to be exercised only when he/she thinks fit, to compel witnesses to attend. Of course it is right to say that, in contrast with an Article 2 case, the complainants will be able to attend and give their account. But this does not mean that an Article 3 investigation can never necessitate a power to compel the attendance of witnesses. I agree with the judge that for the reasons she gives in paragraph 62 of the judgment an effective inquiry into the allegations of abuse of MA and BB at Brook House should have the power to compel the attendance of witnesses and I do not consider that the contrary is reasonably arguable.

*Hearing in public*

All that the judge decided is that the PPO should have the power to hold hearings in public to the extent that she thinks fit. The judge found, and I agree, that significant public scrutiny of the Special Investigation will be required. Again, this will not be required in every case. I share the concerns expressed by the judge about the prospect of key witnesses in the case being asked questions by the PPO privately.

*Representation*

I do not consider it arguable that the judge was in error in deciding that the claimants must be afforded properly funded representation "at least to enable them to review and comment on witness evidence and to direct lines of enquiry for the PPO to follow up; the judge went on to hold that it will be a matter for the PPO to decide the extent to which she permits the Claimants' representatives to assist her by asking questions of witnesses themselves. I also emphasise that all the judge was deciding is that these two claimants should have representation. It does not follow from her judgment that if more ex-detainees at Brook House come forward with allegations they too should be allowed to be represented. It will also be for the PPO, if indeed she does permit representatives of MA and BB to ask questions of witnesses, to control the proceedings so as to avoid repetition or duplication of questioning.

*Wait and see?*

I do not accept the submission on behalf of the SSHD that the judge was bound to adopt a "wait and see" approach to the case. Reference is made in the skeleton to the observation of Lord Rodger in *R (L) v Secretary of State for Justice* that "it is very much up to the investigator to decide how to proceed in order to achieve the objectives for which it [the inquiry] was set up". But the judge's orders will not prevent the investigator from doing exactly that. The judge's reasons for rejecting the "wait and see" approach were given briefly but in my judgment they are plainly correct.

There is no other compelling reason for an appeal to be heard by this Court. The Special Investigation should be permitted to proceed without further delay.



**Information for or directions to the parties**

**Mediation:** Where permission has been granted or the application adjourned:

Does the case fall within the Court of Appeal Mediation Scheme (CAMS) automatic pilot categories (see below)? Yes/No (delete as appropriate)

Pilot categories:

- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• All cases involving a litigant in person (other than immigration and family appeals)</li><li>• Personal injury and clinical negligence cases;</li><li>• All other professional negligence cases;</li><li>• Small contract cases below £500,000 in judgment (or claim) value, but not where principal issue is non-contractual;</li></ul> | <ul style="list-style-type: none"><li>• Boundary disputes;</li><li>• Inheritance disputes.</li><li>• EAT Appeals</li><li>• Residential landlord and tenant appeals</li></ul> |
|--|--|

If yes, is there any reason not to refer to CAMS mediation under the pilot? Yes/No (delete as appropriate)

If yes, please give reason:

Non-pilot cases: Do you wish to make a recommendation for mediation? Yes/No (delete as appropriate)

**Where permission has been granted, or the application adjourned**

- a) time estimate (excluding judgment)
- b) any expedition

Signed: *Dina Ben*  
Date: *2nd August 2019*  
*By the Court*

**Notes**

- (1) Rule 52.6(1) provides that permission to appeal may be given only where –
  - a) the Court considers that the appeal would have a real prospect of success; or
  - b) there is some other compelling reason why the appeal should be heard.
- (2) Where permission to appeal has been refused on the papers, that decision is final and cannot be further reviewed or appealed. See rule 52.5 and section 54(4) of the Access to Justice Act 1999.
- (3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 14 days of the date of the Listing Window Notification letter and seek to agree the bundle within 49 days of the date of the Listing Window Notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **C4/2019/1583/PTA**

DATED 2ND AUGUST 2019  
IN THE COURT OF APPEAL

**ORDER**

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