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CO/7677/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 15th February 2008

B e f o r e:

MR JUSTICE HOLMAN

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Between:
THE QUEEN ON THE APPLICATION OF HBH

Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Ms S Harrison appeared on behalf of the **Claimant**
Miss J Richards (instructed by the Secretary of State) appeared on behalf of the **Defendant**
Mr C Shroff (instructed by the CPS) appeared as an **Interested Party**

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J U D G M E N T

1. MR JUSTICE HOLMAN: I have been very grateful to all three counsel for their considerable practical assistance and sustained argument during the course of today. This is an application for permission to apply for judicial review. It arises in the wider context of some litigation which has become described as "the disputed children litigation".

2. The brief factual situation in relation to this claimant is as follows. It is now agreed or accepted as an objective fact that he was born on 30th April 1988. He is Chinese and arrived at Stansted airport on 30th July 2005 and immediately claimed asylum. In light of the acceptance that he was born on 30th April 1988, it follows that on that date he was aged about 17 and a quarter. He did not have any travel documents of any kind with him. He has later described that he was in any event travelling on false documents and that he tore the false passport up during the course of the flight and left it in a litter bin on the aeroplane.

3. It appears that on his first arrival, on 30th July, immigration officials accepted his asserted age of 17. The following day, 31st July 2005, a screening interview took place. Because until that time he had been treated as a child, arrangements were made for a social worker, Keith Newman, to be present at that interview. It is apparent from the notes of the screening interview, now at bundle page C22, that when the claimant stated he was aged 17 and that he was born on 30th April 1988, that age and that date of birth were disputed by the interviewing officer. A record by Keith Newman, the social worker, now at bundle page C52, records that:

> "During the interview, it became evident that HBH is an adult ... this person was not taken by this team as an unaccompanied asylum seeking child."

4. Because the claimant did not present or have with him any immigration documents at all, he had prima facie committed an offence under section 2(1) of the Asylum and Immigration (Treatment of Claimants et cetera) Act 2004.

5. The immigration officials took two steps. First, they detained him in exercise of their immigration powers. Second, they "reported" him, and the fact that he had or may have committed an offence under section 2 of the 2004 Act, to the Essex police based at Stansted airport. There was clearly early liaison between the police and the Essex CPS; and on 1st August 2005, he was formally charged by a police officer, Darren Bruce, whose witness statement is now at bundle-page C77, with an offence under section 2(1) of the 2004 Act.

6. The following day, the claimant was taken to the north west Essex Magistrates' Court, sitting at Harlow. It is interesting to note that the record of the clerk of that court, now at bundle page C84, records his date of birth as 30th April 1988. However, he pleaded guilty to the offence in question and was committed by the magistrates to Chelmsford Crown Court for sentence. The formal warrant of commitment to the Crown Court for sentence, now at bundle page C85, states, "Date of birth: deemed by court to be over 18 - D.O.B given by defendant was 30.04.88."

7. Today, Mr Cyrus Shroff, who appears on behalf of the CPS as interested party, has managed to obtain the case file record of the CPS lawyer, Araluen Barker, who seems to have appeared before the Magistrates' Court on 2nd August 2005. Expanding obvious shorthand, her brief note appears to record "Defendant produced. Says 17 years but deeming exercise and court say 19 or 20 years. Guilty plea. Committed to Chelmsford Crown Court for sentence."

8. It is important to note that he was represented before the Magistrates' Court by a solicitor, who appears to have been a duty solicitor, but at all events, he had that degree of legal representation.

9. The Chelmsford Crown Court sentenced him on 8th September 2005 to 8 months' detention in a Young Offender Institution. It is quite clear from documents now at bundle page C92 and C93 that the formal record of the Crown Court clearly treated him as a young person under the age of 18 and gave as his date of birth, without qualification, 30th April 1988.

10. A note prepared by the CPS for the purpose of applying to intervene as an interested party in these proceedings records that the circuit judge, "Was of the view that HBH was 18 years old and not 17 years, as claimed." It is, of course, difficult to reconcile that with the document at bundle page C93, which is clearly headed "Custodial order for persons under 18 years old." The CPS are in the process of obtaining a transcript of the whole sentencing hearing on 8th September 2005. That may later prove to be very illuminating, but unfortunately it is not available for this hearing today.

11. The claimant duly served the custodial term to which he was sentenced by the Crown Court; and upon release from that sentence, a further period of detention by the Secretary of State in exercise of his immigration powers before the Secretary of State finally accepted that he was, even then, still a child and released him.

12. Within the disputed children litigation, Munby J, who was case managing that litigation, made a detailed order on 15th October 2006, sealed by the Court on 16th November 2006, and now at page A45 to 57 of a separate bundle in a related case concerning a child, HA. Paragraph 5 of that order required that the solicitors, Messrs Bhatt Murphy, who act for all the complainants in the disputed children litigation and also for this applicant, must notify the Treasury Solicitor by 31st December 2006 of "Any further prospective claimants". The notification had to include details set out in a subparagraph to paragraph 5. Paragraph 6 of that order provided that:

> "In 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 three months after judgment is given."

That was a reference to judgment on certain generic matters which was ultimately given by Munby J, by his declaration and reasons in a further order made in the disputed children litigation on 26th January 2007, now at the HA bundle, page A58.

13. During December 2006 (the precise date does not matter) Bhatt Murphy sent to the Treasury Solicitor a schedule headed "List of claims forwarded to the Treasury Solicitor pursuant to the order of Munby J dated 15th November 2006." This document is, accordingly, the notification to the Treasury Solicitor of "Any further prospective claimants" pursuant to paragraph 5 of the order of 15th October 2006.

14. The schedule is divided into three groups. The first group is headed, "Fast-tracking claims with a perfunctory assessment by an immigration office alone." The second group is headed, "Third country and other cases with a perfunctory assessment by an immigration office alone and a non-Merton compliant social work assessment." The third and fourth groups related to third country cases with a perfunctory assessment.

15. The case of this applicant, HBH, was listed only under the first group, namely, "Fast-tracking cases with a perfunctory assessment by an immigration office alone." At that stage the claim was limited only to a period of seven days' detention beginning on 30th November 2005. That was the period of immigration detention, to which I have referred, after he was released from serving his custodial sentence until finally released from detention when the Secretary of State accepted that he was a child. There was, and is, nothing at all in that schedule in any way to alert the Secretary of State or the Treasury Solicitor to even the possibility of a claim under a completely different head, not relating to "Fast-tracking cases" as such at all, nor relating to the period of seven days' detention beginning on 30th November 2005.

16. On 3rd September 2007, this claimant, HBH, formally issued his application for judicial review. Section 3 of the claim form describes the decision to be judicially reviewed as "The decision of the defendant to age dispute, detain, and to instigate criminal proceedings on and after 30th July 2005."

17. Section 6 of the formal form lists five areas upon which the claimant seeks declarations. Of those areas, (iii), which relates to the period of detention pursuant to the sentence of the Crown Court, is no longer pursued against the Secretary of State; (iv), which relates to the period of immigration detention for seven days on and after 30th November 2005 is conceded by the Secretary of State; and(v), which claims damages for false imprisonment and/or for the unlawful detention of the claimant solely under the Immigration Act between 31st July and 1st August 2005, and again between 30th November and 7th December 2005, is also conceded in principle by the Secretary of State. The claim includes a claim for aggravated and exemplary damages and that will, no doubt, be rigorously contested.

18. So the nub of the claim for judicial review, which is strongly contested by the Secretary of State in principle, is under paragraph (ii) of section 6, namely that:

> "The policy and/or any reliance on the summary age assessment for the purpose of investigation or prosecution of a criminal offence under section 2 of the 2004 Act was unlawful."

19. What really lies behind that limb of this application for judicial review is that the claimant, now most expertly advised by Bhatt Murphy, wishes to challenge in the

Magistrates' Court the appropriateness of his conviction. He has issued an application in the Magistrates' Court, pursuant to section 142(2) of the Magistrates' Court Act 1980, which provides that:

> "Where a person is convicted by a Magistrates' Court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may ... so direct."

20. The essential case of the applicant in support of the proposition that the interests of justice require that his case be heard again is as follows. He says that he was wrongly deemed by the magistrates on the date of conviction, namely 2nd August 2005, to be an adult. He relies in particular on the provisions of section 99(1) of the Children and Young Persons Act 1933 and section 164(1) of the Powers of Criminal Courts (Sentencing) Act 2000. The first provision places upon a court a duty "to make due inquiry as to his/her age, and for that purpose to take such evidence as may be forthcoming at the hearing of the case." The second provision provides that for the purpose of any provisions of the 2000 Act which require the determination of the age of a person by the court, "his age shall be deemed to be that which it appears to the court ... to be after considering any available evidence." Ms Harrison on behalf of the applicant intends to submit to the Magistrates' Court, putting it bluntly, that there was a lamentable failure by the justices on 2nd August 2005 properly to discharge those duties upon them.

21. The significance of that is that section 2(4)(c) of the 2004 Act provides that it is a defence for a person charged with an offence under subsection (1):

> "to prove that he has a reasonable excuse for not being in possession of a document of the kind specified in subsection (1)."

Further elaboration of that defence is contained in particular in the provisions also of section 2(7). The submission is that in deciding whether or not he had a reasonable excuse for not being in possession of an immigration document, it would have been highly relevant to take account of his age and of the pressures that he says he was under from the agent or agents who arranged his travel here.

22. It does seem to me that there may be considerable difficulties in the way of that argument in that he was clearly represented at the hearing on 2nd August 2005. There was clearly an opportunity then to plead not guilty and later to rely on the defence. It is not self-evident that the justices can be criticised for failing to anticipate a defence that appears not to have been suggested or advanced at all. On the other hand, he seems certainly to have asserted to the court that he was only aged 17. The court dealing with him on that day was apparently an adult court and not a youth court, and there may be an argument that, altogether, justice was not done to this particular person.

23. But as part of her ultimate argument to the Magistrates' Court, Ms Harrison wishes to submit that the whole process which led to him being before the Magistrates' Court was in any event tainted with, as she submits, illegality. The alleged illegality is that the Secretary of State acted in a way that was unlawful in ever "reporting" this person to

the police and CPS on 31st July and/or 1st August 2005. That submission is grounded in the then-current IND guidance document issued in September 2004 in relation to the operation of the recently enacted Asylum and Immigration (Treatment of Claimants et cetera) Act 2004.

24. Paragraph 2.3.1.2 of the guidance refers to the situation of unaccompanied minors. It makes the point that in principle minors may be criminally liable over the age of 10; but continues, "However, there will be clearly be a number of particular considerations for cases involving minors." It then in particular identifies:

> "It is important in cases involving children who say they have destroyed or disposed of their passport at the behest of another person [which, at any rate now, is exactly the case of this applicant] to take account of subsection 7(b)(iii) [of the Act], where in the circumstances of the case, it may be unreasonable to expect non-compliance with the instructions or advice of that person. It would be unreasonable to expect the same level of understanding from minors as we do from adults. Not only could some children not be expected to challenge the advice ... but they may not understand that they need a passport or the consequences of destroying or disposing of it en route to the United Kingdom."

So the guidance continues:

> "Children have different levels of maturity, which might relate to age or other factors, and this needs to be taken into account in assessing the merits of a child's defence."

There then follows the following vital sentence:

> "Unaccompanied minors who have committed the offence would need to be considered on a case by case basis, which should be referred to a chief immigration office and the local prosecution unit as necessary."

25. Pausing there; as I understand it, there is now considerable uncertainty as to whether the case of this person was or was not referred "to a chief immigration officer" on the issue of whether or not he should be reported for prosecution. As I understand it, there is no evidence that he was; but, equally, there is currently no evidence that he was not.

26. The Secretary of State has accepted an appreciable time ago in the disputed children litigation that for the purpose of a decision to <u>detain</u> a person who claims to be a child but whose age is disputed, the Secretary of State must first obtain a "Merton compliant" age assessment. In other words, he has accepted that it is not adequate, and indeed, not lawful, actually to detain somebody who claims to be a child merely on the basis of age assessment by an immigration officer, at any rate unless the appearance or demeanour of the person very strongly suggests that he is adult.

27. Ms Harrison submits that a decision to <u>report</u> a person, who claims to be a child, to the police and/or the CPS with a view to potential prosecution is scarcely any less grave than a decision actually to <u>detain</u> such a child. The essential thrust of her submission is

that to report the person for prosecution sets in train a series of events which predictably may result in his conviction and sentence, as occurred to this person in this case. So she submits that, just as a decision to detain a person who claims to be a child will ordinarily require a proper Merton compliant age assessment, so also should a decision to report with a view to prosecution. She submits that, objectively, this person was a child. By disputing his age during and as a result of the screening interview on 31st July 2005, the Secretary of State denied to him the special protection afforded by the guidance document to which I have referred. His case was not given special consideration "on a case by case basis". His case was not considered from the perspective of him being a child, and it was not referred to a chief immigration officer.

28. Ms Harrison submits that that case and these arrangements raise issues which are most suitable for determination by the administrative court; and that it is important that the legality of the underlying referral to prosecutors should be determined by this court before the Magistrates' Court considers the application under section 142 of the Magistrates' Court Act 1980.

29. She relies upon the case of Adimi and Others [2000] 3 WLR, 434. She points out that her own client in that case, the applicant Sorani, was somebody who had been convicted and had served his sentence but who sought ultimately to attack the validity of his conviction. The Divisional Court in Adimi thought it entirely appropriate to consider the issues of the lawfulness of the process within proceedings for judicial review. I have to say that it does seem to me that the case of Adimi is a considerable distance from the circumstances of the present case. There, as emerged from the decision of the Divisional Court, there had been wholesale failure by the Secretary of State as the responsible government department to see that this state adhered at all to our obligations under article 31 of the Convention and Protocol Relating to the Status of Refugees (1951) and (1967).

30. On behalf of the Secretary of State, Miss Richards has two discrete lines of defence. First, she submits that there is, or has been, very long delay in this case which should in any event preclude judicial review. She relies on the fact that this case was one of the cases notified in the schedule to which I have referred, which was sent to the Treasury Solicitor in December 2006. As I have described, that schedule says nothing at all to alert the Treasury Solicitor or the Secretary of State to any of the arguments which are now being raised. Rather, it focuses solely on the treatment by the Secretary of State of this applicant as a fast tracking case and his detention for seven days from 30th November 2005.

31. Miss Richards submits that paragraph 6 of the order of Mr Justice Munby of 15th October 2006, which I have already quoted, only extends the limitation period for the purpose of any claim under the Human Rights Act 1998, and that the current proposed claim is not a claim falling within the ambit of section 6 of that order.

32. Further, the witness statement of the solicitor, Mark Scott, of 3rd September 2007, now to be found within the HA bundle at page D21 onwards, gives a chronology and an account of the present case at paragraphs 26 and 27, in that bundle at pages 27 to 29. That chronology indicates that the solicitor first took instructions from HDH as long

ago as March 2006. There is a very detailed description of the various steps taken to obtain further information and documents, and the solicitor clearly had considerable difficulty, amongst other things, in chasing the previous criminal solicitor for production of his file.

33. He shows that an individual public funding certificate was applied for on 15th March 2007, shortly after the defendant had denied liability for the period of detention claimed in the schedule that had been sent in December 2006. Public funding was only actually granted on 29th August 2007, namely only about a week before the claim was issued.

34. At paragraph 27 of his statement, Mr Scott says:

> "Given that liability was denied by the defendant in the case of HBH, there has now been more detailed consideration of his case by this firm. This has disclosed that the generic issue before the court on the general legality of the age dispute policy has a context and consequences which gives rise to a matter of very significant public importance. These issues are not presently directed before the court in the case of HA, nor have they been before the court in any of the other lead cases. The issues raised in the case of HBH concern the extent to which the age dispute policy can lawfully be used to make a conclusive determination of age for the purposes of referral for a criminal prosecution and the extent then to which the criminal prosecution can be used as "evidence" of age for fast tracking and detention."

35. Miss Richards places some reliance on that paragraph as really indicating that it was only at a very late stage, and way out of time, that the solicitors gave to the case of HBH "more detailed consideration" and discerned within it the issue that is now taken about application of the age dispute policy to a decision to refer an immigrant for criminal prosecution.

36. Miss Richards submits that if they had applied their minds to the point, the solicitors could have raised this long ago, certainly not later than the schedule in December 2006. Further, she submits that there is real prejudice by delay in this case. It has indeed been obvious at various times during the course of today that there are a number of areas of factual uncertainty. It is not at all clear who made the disputed age decision. Was it the immigration official or was it the social worker? It is not at all clear what, if anything, was said by immigration officials to the police or CPS on the issue of age dispute. The various witness statements made by immigration officials, namely that of Michael Chew at bundle page C45, Guy Mitchison at C46, Annette Rampley at C47, Chun Jin at C50, and Steve Rankin at C76, make reference from time to time to his date of birth as being 30th April 1988 but nowhere make any mention of any dispute to that age. So Miss Richards asks, amongst other questions, what evidence, if any, flowing from any official for whom the Secretary of State was responsible, reached the eyes or ears of the magistrates that there was any dispute about age? It is now not at all easy to know.

37. Ms Harrison says that it is quite wrong of the Secretary of State to raise the issue of delay at all. She submits, first, that paragraph 2 (i) of the order of Mr Justice Munby of

15th October 2006 identified a generic issue relevant to all these cases "for all immigration purposes". It is true that the paragraph goes on to say "including" fast tracking of claims, refusal of claims on third country grounds, and in either case detention during the processing of the claim; but she submits that that does not derogate from the generality of the phrase "for all immigration purposes" and that, therefore, the generic issues identified in these cases were and are wide enough to include the "immigration purpose" of reporting someone to the police and CPS for alleged breach of the 2004 Act.

38. Further, she relies upon the response of the Secretary of State to the claim advanced on behalf of this applicant in the schedule of December 2006. The Secretary of State, or rather the Treasury Solicitor, responded by letter dated 7th March 2007, now at bundle page E5, in which he (wrongly) adverted to the fact that the claimant served his sentence in an adult prison, and (rightly) referred to the fact that "the court deemed the defendant to be over 18 despite his claimed date of birth ..."

39. Ms Harrison says that it was that reliance by the Secretary of State on the deeming decision of the Magistrates' Court that triggered the process of Mr Scott giving "more detailed consideration to the case." In effect, Ms Harrison says that if the Secretary of State was going to rely on the fact that the court had deemed him to be an adult, then that at once pushes the argument back to consideration of why he was before the court in the first place.

40. Apart from her opposition based on delay, Miss Richards submits as her second line of defence that in any event there was no illegality in this respect by the Secretary of State. She submits that there is a considerable difference between a decision to detain, and a decision to do no more than report someone to the police and prosecuting authority, who should then exercise their own independent discretion in the matter. She submits that insofar as the magistrates treated this person as adult, that was their decision; and that the proper place for this person to dispute his age was, indeed, before the Magistrates' court. She submits that the whole argument that the Secretary of State set a process in train here by his own unlawful act, is completely misconceived. He, the Secretary of State, and his officials took no part in the actual decision to prosecute. There is no evidence that any official was present at the Magistrates' Court.

41. On behalf of the CPS, who have been joined as an interested party, Mr Shroff takes no particular position on whether or not permission should be granted to apply for judicial review. However, the document that has been prepared by the CPS for today does say that the application for judicial review "raises an important policy issue for the CPS. It has been suggested by solicitors for the defendant that the CPS cannot rely on the information provided by the Border and Immigration Agency."

42. That ties in with the Code for Crown prosecutors published by the CPS, now in generic bundle 4, page 23. That makes particular provision at paragraph 8.8, now at bundle page 39, for considering the interests of a youth when deciding whether it is in the public interest to prosecute him. So Ms Harrison submits that part of the vice of the disputed age decision taken by the Secretary of State is that it led the CPS not to consider the matters that 8.8 requires them to consider. Mr Shroff says that if this

judicial review proceeds, it will be important for the CPS to obtain at least guidance from this court as to the extent to which the CPS may, or should, rely on any age assessment emanating from the immigration officials.

43. Although this case has now occupied an appreciable period of time today, and indeed this judgment is disproportionately long, I have at this point to remind myself that today I am considering the issue of permission. So far as the underlying merits of the proposed judicial review are concerned, I need to see whether there is an arguable case. The existence or otherwise of an arguable case is clearly not the end of the matter, for there is a general discretion whether or not to give permission, even if there is an arguable case. Further, I must, of course, consider firmly the objection taken on the grounds of delay.

44. I do not find the decision at all an easy one. I have, however, concluded that there is an arguable case here that the Secretary of State acted in a way that led him to breach the requirements of his own guidance document of September 2004 from which I have quoted. Clearly, a decision to report someone in the circumstances of this applicant to the police and/or CPS is a very significant step. It may not itself involve detention, but it predictably sets in train a series of events which may lead to prosecution. So it seems to me that at the heart of this application, a serious and arguable issue has been raised by Ms Harrison.

45. I next have to consider, however, whether it is not an issue that may be appropriately raised and considered within, and by, the Magistrates' Court in the context of the application under section 142(2) of the 1980 Act. I have to say that it does seem to me that this applicant may already have very considerable force and arguments to that application. As I understand it, the objective fact that at the material time he was only 17 and a quarter would not now be disputed but would be conceded by the CPS; so it will be possible to demonstrate that although he was only 17, his case was, as it turns out, wrongly heard in an adult court, and that an incorrect deeming exercise was carried out. It may well be possible to demonstrate that that deeming exercise appears to have been performed on a perfunctory basis, and that the real possibility of a defence under section 2(4)(c) of the 2004 Act was overlooked. As I have said, however, that may ultimately face the very great difficulty that this applicant was represented at that hearing and these points seem not to have been taken on his behalf.

46. I have very carefully considered whether I should refuse to grant permission, despite the arguability of the merits of the case, on the basis that they can be deployed and considered within the proceedings before the Magistrates' Court.

47. Miss Richards relies upon Kebiline [1999] 3 WLR 972, and in particular a passage in the speech of Lord Steyn at page 985 E to G. That is to some extent balanced, however, by the approach of the Divisional Court in Adimi.

48. It seems to me that it is not for me ultimately to assume that the case to the magistrates is anyway so strong that the issue of the actual legality or illegality of steps taken by the Secretary of State need not be faced up to; and it seems to me that those issues involve

some quite complex issues of policy and law which are better considered in this court than in the Magistrates' Court.

49. As to delay, I have considerable sympathy with the argument on behalf of the Secretary of State. But it does seem to me that, in the end, this is but an aspect of this generic litigation which has been going on a long time now and of which, in general terms, the Secretary of State has, of course, been very well aware. As the order of Mr Justice Munby of 15th October 2006 indicates, the legality of the policies of the Secretary of State had clearly been in issue for a whole range of immigration purposes, wide enough, in my view, to include referral by immigration authorities to the prosecution authorities for prosecution under the 2004 act.

50. For all those reasons, I have concluded that I should, in the end, exercise a discretion to extend, if necessary, the time for commencing these proceedings for judicial review, and to grant permission to the claimant to apply for judicial review in the terms of paragraph (ii) of section 6 of his claim. I will also formally permit him to apply for judicial review in the terms of paragraphs (iv) and (v), but only for the purpose of ultimately obtaining an assessment of damages if they cannot be agreed.

51. Are there any other matters with which I must now deal at this hour?

52. MS HARRISON: My Lord, I cannot think that there is anything else that your Lordship needs to deal with. We I think had enough of a discussion about the form of any order that myself and Miss Richards can agree that between us for Monday.

53. MR JUSTICE HOLMAN: That is very good news.

54. MS HARRISON: And I just say obviously I am grateful for the care with which your Lordship has addressed this issue.

55. MR JUSTICE HOLMAN: Anything you wish to raise Mr Shroff?

56. MR SHROFF: No thank you.

57. MR JUSTICE HOLMAN: I am sorry you have had such a very long day in a peripheral role, but you have been an enormous help to me and I am grateful for your attendance, and of course you will remain in as an interested party to the extent that you wish.

58. Anything else, Miss Richards?

59. MISS RICHARDS: No, my Lord.

60. MR JUSTICE HOLMAN: So you are going to be able to work out an order?

61. MS HARRISON: Yes, my Lord.

62. MR JUSTICE HOLMAN: Good.

63. MS HARRISON: My Lord, I will need to have that yellow bundle back which was my solicitors'. When I come to check it I may or may not need to look at it.