Neutral Citation Number: [2020] EWHC 1346 (Fam)

Case No: ZW20C00036

**IN THE HIGH COURT OF JUSTICE**
**FAMILY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2020

**Before** :

**MR JUSTICE MOSTYN**

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**Between :**

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|---|---|
| **A Local Authority** | **Applicant** |
| **- and -** | |
| **AG** | **1st Respondent** |
| **- and -** | |
| **DG** | **2nd Respondent** |
| **- and -** | |
| **SG, GG & AG (through their Children's Guardian)** | **3rd Respondents** |
| **-and-** | |
| **The Secretary of State for Foreign and Commonwealth Affairs** | **Intervener** |

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**Ms Hannah Markham QC & Ms Kate Tompkins** (instructed by **HB Public Law**) for the **Applicant**
**Ms Gemma Taylor QC & Ms Gemma Farrington** (instructed by **Astrea Law**) for the **1st Respondent**
**Mr Damian Woodward-Carlton QC & Ms Jennifer Youngs** (instructed by **Corper Solicitors**) for the **2nd Respondent**
**Professor Jo Delahunty QC, Ms Lucy Logan Green & Mr Chris Barnes** (instructed by **Creightons**) for the **3rd Respondents**
**Sir James Eadie QC, Professor Vaughan Lowe QC, Ms Joanne Clement, Mr Jason Pobjoy & Ms Belinda McRae (instructed by the Government Legal Department) for the Intervener**

Hearing date: 18 May 2020
The hearing was conducted remotely by Zoom

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This judgment was given in public but is subject to a reporting restriction order. The children, their parents, the local authority and the foreign government may not be identified in any report. Breach of this order will be a contempt of court. In any report this case should be referred to as *A Local Authority v AG (No. 2)*.

# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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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MR JUSTICE MOSTYN

**Mr Justice Mostyn:**

1. Since my first judgment given on 16 March 2020 (*A Local Authority v AG and others* [2020] EWFC 18) a lot has happened. I do not repeat the background facts; anyone unfamiliar with the factual detail should perhaps pause and read my first judgment at this point.

2. At paragraph 49 of my first judgment I referred to the potential remedy of a declaration of incompatibility pursuant to section 4(2) of the Human Rights Act 1998. That remedy had not by then been sought by the local authority. I expressed some very provisional views on the question of incompatibility but explained that they could hardly be regarded as definitive given that I had heard no argument on the subject.

3. The care proceedings have moved on. An interim care order has been made by me in respect of A; she is in foster care. G and S have returned with their parents to their homeland. Nonetheless, the local authority, supported by the Guardian, wishes to make and pursue an application for a declaration that the Diplomatic Privileges Act 1964 is incompatible with (at least) article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. This is opposed by the Secretary of State and the parents. The application, if made, would be "academic" as the diplomatic immunity which I recognised in my first judgment has come to an end.

4. The declaration application has not yet been made by the local authority. This is because, given its now academic status, an understanding has been reached between all parties that I should in effect conduct a permission hearing to decide whether it should be allowed to proceed.

5. The relevant facts leading to this state of affairs are as follows:

    i) On 19 March 2020 the Secretary of State invited the foreign government to waive the immunity of the father and his family from the civil jurisdiction of the UK courts in respect of proceedings under Part IV of the Children Act 1989 both to allow the family's participation and to allow the local authority to seek and enforce care orders in respect of the children.

    ii) On 27 March 2020 the foreign government stated to the Foreign & Commonwealth Office that it refused to waive the immunity of the father and his family but had formally recalled the father with immediate effect (albeit that the family's departure would not occur until lockdown was lifted).

    iii) Although conditions in the home initially improved following my first judgment things seriously deteriorated after a short time. On 2 April 2020 D (18) sent an email to the local authority social worker attaching a photograph of a bloody wound to the back of his head. He explained that his father inflicted this with a shoe. He sent a further email attaching a video of the wound. In that video an adult can be heard shouting in the background.

    iv) On 6 April 2020 the Secretary of State informed the foreign government that, in accordance with article 9(1) of the Vienna Convention on Diplomatic Relations ("VCDR"), the father and his dependent family members (including

the mother and all of their six children) were *personae non gratae* and were required to leave the UK at the first opportunity. That first opportunity was on 18 April 2020 via the outbound leg of a charter flight arranged for the purpose of bringing British nationals home from the foreign country.

v) On 7 April 2020 the local authority social worker was able to speak to D who said that it was horrible living at home with his parents as they are both verbally and physically abusive; that he had decided to leave the home soon with his sister E; and that they planned to seek asylum.

vi) On 8 April 2020 I transferred the care proceedings and the claim for a declaration of incompatibility to the High Court and joined the Secretary of State as a party to the proceedings.

vii) On 9 April 2020 D and E (18) left the family home and sought asylum.

viii) On 11 April 2020 N (17) and A (14) also left the family home and sought asylum.

ix) On 14 April 2020 I held that by virtue of article 9(2) of the VCDR the family was to be given a reasonable period of time to leave the country; that period had not yet elapsed; and that accordingly diplomatic immunity continued to endure.

x) On 16 April 2020 a certificate pursuant to section 4 of the Diplomatic Privileges Act 1964 was issued by the Foreign & Commonwealth Office recording the diplomatic exchanges mentioned above.

xi) On 18 April 2020 the parents, together with G (9) and S (5), returned to their homeland on a repatriation flight.

xii) On 20 April 2020 I made an interim care order in respect of A and gave directions for the hearing of the permission issue.

xiii) On 18 May 2020 I heard the permission issue and reserved judgment. I granted the local authority permission to withdraw the care proceedings in respect of G and S. I gave directions for the final disposal of the care proceedings in respect of A.

6. I have received extensive submissions on the law about academic claims although there is not any dispute about what it says.

7. Up until 1999 the law set its face against hearing any academic claim: see the decisions of the House of Lords in *Sun Life Assurance Co. of Canada v Jervis* [1944] AC 111, 113-114; and *Ainsbury v Millington (Note)* [1987] 1 WLR 379, 381. In the latter case Lord Bridge stated that it was a fundamental feature of the judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.

8. However, in *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450, the House of Lords stipulated an exception to this absolute rule. Lord Slynn of Hadley stated at 456-457:

> "My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v. Millington* (and the reference to the latter in Rule 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

9. Although I have had cited to me many subsequent authorities, all of them seem to me to be no more than illustrations of the *Salem* principle. This is straightforward. The court should exercise its discretion to hear an academic application in the public law field with caution. It should only hear such an application where there is a good reason in the public interest to do so.

10. It is clear to me that the exception is strictly confined to the public law field, and that in the private law field the prohibition endures. One of the cases cited to me (*Hutcheson v Popdog Ltd (Practice Note)* [2012] 1 WLR 782) suggests that, provided that the respondent is fully indemnified in costs, a private law academic appeal can be heard. I do not understand how this is consistent with the scope of the exception formulated in *Salem*. The case before me is, however, a public law case and falls potentially within the scope of the exception, so I do not need to grapple with that particular problem.

11. Lord Slynn gives as an example the situation where a discrete point of statutory interpretation arises which does not involve detailed consideration of facts and where a large number of similar cases are anticipated. In such circumstances there will be little difficulty in deciding that there is a good reason in the public interest to hear the academic claim. That seems obvious. However, I do not deduce from that illustration a rule that a good reason in the public interest for hearing the claim can only be shown if a large number of cases would be thereby affected. It all depends on the context.

12. In this case it is certainly true that there have not been many reported cases of proceedings under Part IV of the Children Act 1989 involving the children of serving diplomats. But so what? If the resolution of the academic issue helps to protect even one such child in peril, then that surely is a good reason in the public interest to hear it.

13. Sir James Eadie QC submits that the court should be "particularly cautious" when the sole purpose of an academic claim is to obtain a declaration of incompatibility under section 4(2) of the Human Rights Act 1998. He cites Lord Hoffmann in *Secretary of State for the Home Department v Nasseri* [2009] UKHL 23, [2010] 1 AC 1, at para 19 where he said that "such cases, in which the declaration is, so to speak, an obiter dictum not necessary for the decision of the case, will … be rare.". That seems to me to be no more than a classic application of the *Salem* principle (which was in fact not cited). A cautious exercise of the discretion to hear an academic claim on the ground that there is a good reason in the public interest will, by definition, only happen rarely.

14. Sir James goes on to submit that the discretion should be exercised "especially cautiously" in this case because if the claim is allowed to go forward, and if it succeeds, then the:

> "...conclusion that provisions of the VCDR are incompatible with the ECHR could have far reaching implications, particularly in the context of the UK's diplomatic relations. The VCDR operates on the basis of reciprocity and is the foundation of the legal framework for the conduct of international relations. The practical impact of a divergence in the interpretation of the VCDR in this jurisdiction cannot be overstated. The likelihood is that any such interpretation by the UK will simply place the UK out on a limb in relation to the other 190 states."

15. That does not seem to me to be a good reason in the public interest not to hear the claim. If the claim succeeds it may leave the Government and Parliament in a dilemma, the resolution of which might only be capable of being achieved by providing for an amendment to the Human Rights Act 1998 which excepts its reach to the children of serving diplomats. But will it succeed? Sir James has already prefigured powerful arguments as to why there is in fact no incompatibility. Moreover, he has alluded to an international law solution to the "virtually insoluble dilemma" to which I referred in paragraphs 44 and 45 of my first judgment.

16. All of these arguments are, in my judgment, for another day. They should be heard and considered on their merits, irrespective of the momentousness of their consequences.

17. I exercise my discretion cautiously, but I nonetheless conclude that there are good reasons in the public interest why the declaration of incompatibility application should be allowed to proceed. These are the reasons:

    i) The subject matter is of the utmost importance. The protection of children at risk is one of the first and foremost obligations of the organs of the state. This obligation is not merely a feature of domestic law. It is a treaty obligation of this country under the 1990 United Nations Convention on the Rights of the Child.

    ii) As explained in my first judgment, there are now conflicting authorities at High Court level as to whether the Diplomatic Privileges Act 1964 prevents

local authorities from exercising its powers and duties under Part IV of the Children Act 1989 in respect of the children of serving diplomats.

iii) The cohort of such children is not insignificant. There are about 23,000 people protected by diplomatic immunity in this country. That will include many children. But even if it were only a handful that would not be a good reason not to hear the claim.

iv) The consequences of the claim, were it to succeed, are not relevant in determining whether it should be heard.

18. That is my judgment.