Case No: CO/7854/2010

Neutral Citation Number: [2011] EWHC 1216 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: : Monday 7th March 2011

Before:

THE HONOURABLE MR JUSTICE BLAKE KT

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Between:

The Queen (on the application of) A

Claimant

- and -

Cardiff County Council and Others

Defendant

- -

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Miss Shu Shin Luh appeared on behalf of the **Claimant**.

The Defendant did not appear and was not represented.

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Judgment

Mr Justice Blake:

1. This is a renewed application for permission to bring judicial review proceedings. The only live claim that the applicant now seeks to continue with is to bring a claim against the Secretary of State for the Home Department, who was the third defendant in these proceedings, and the relief sought is declaratory judgment and/or ancillary relief such as damages that the applicant was unlawfully detained for a period from 7 to 20 July 2010. The background to this application is as follows.

2. The applicant is an Afghan national, who entered the United Kingdom on 8 October 2008 and then claimed asylum as an unaccompanied minor. He claimed he was 14 years old then, which would suggest that his year of birth was approximately 1994, but he had no supporting documentation when he arrived and made that claim. He was referred to Hampshire Social Services for age assessment by the Secretary of State and on 9 October, the following day, Hampshire Social Services made an age assessment that he was over 18 That assessment was signed by one social worker, but the body of the assessment says it was conducted by two, who concurred in the result. The assessment was on a *pro forma* age assessment form, a form that had been designed to capture all the areas of inquiry that need to be examined in order for local authority assessments of the age of disputed asylum seekers to comply with the guidance given some years ago by Stanley Burnton J (as he then was) in the case of R (B) v London Borough of Merton [2003] EWHC 1689 (Admin).

3. Following that referral it appears that there was communication between the Border Agency and social services at the time, and the social services represented that their assessment had been a Merton compliant assessment. It is presently unclear whether the full assessment was made available to the Secretary of State at that time or whether it was asked for. Thereafter the applicant was assigned accommodation and told to report for interview on his case when called upon to do so. He left that accommodation and, effectively, absconded from the authorised place of residence and remained at large until he re-emerged in August 2009. The court is told he was then detained until December 2009 until, following representations, he was released again, but this time he was within the geographical locality of Cardiff County Council.

4. Returning to the main events in this case, on 8 November 2008 the applicant's application for asylum was rejected and it was noted that he had absconded and had not co-operated with the investigating process. It seems that when he re-emerged in 2009 an appeal was lodged against the refusal of asylum or any other form of subsidiary protection, and that appeal was heard at Newport by an immigration judge of the First Tier Tribunal in February 2010. The applicant was not legally represented at that hearing. He had, it appears, been unsuccessful in getting legal aid to fund solicitors.

5. It is also of note that there had been no challenge to the previous age assessment in this case from October 2008. It is a little unclear what was known to the immigration

judge in respect of the age assessment, whether it was the outcome of Hampshire Social Services' assessment or whether the Immigration Judge may have had the full document that had been prepared at that time.

6. In the event the Immigration Judge did not find the applicant's account of why he left Afghanistan and why he feared return there to be consistent or credible and the Immigration Judge also reached his own conclusions on the material before him, saying that he was satisfied that the applicant was over 18. He noted the previous assessment of the Hampshire Social Services on 9 October and noted also what his own conclusions were from hearing the applicant give evidence before him.

7. Thereafter there was an unsuccessful application for permission to appeal from the decision of the First Tier Tribunal to the Upper Tribunal and that application was ultimately refused on 7 July 2010. In the meantime, in or about March or April 2010, the applicant had come to the attention of the Welsh Refugee Council, who referred him to his present solicitors, South Wales Law, who were initially concerned with the social support arrangements and they had raised doubts about the adequacy of the Hampshire age assessment. The Home Office were made aware by letter in April 2010 that the applicant's solicitors were investigating with a view to challenging that age assessment, but for one reason or another Cardiff Social Services did not reach a fresh age assessment until after the institution of these proceedings on 20 July.

8. On 7 July 2010, the date in which an application for permission to appeal to the Upper Tribunal was refused, the applicant was detained served with removal directions for Afghanistan, to be effected on 20 July 2010. On that date this present application was lodged with applications for urgent relief, to stay the removal and to release the applicant from detention. Those applications were granted. There then was a fresh age assessment by Cardiff Social Services. Cardiff reached a different conclusion to that reached by Hampshire and concluded that there was no sufficient basis to assign a different assessment of age to that which had been identified in an Afghan-issued identity document known as a Taskera. That document had come to light some time after the original asylum application and age assessment of October 2008 and the hearing before the Immigration Judge in February 2010. The applicant's own account in evidence before the Immigration Judge was that he had applied for it before he left Afghanistan, approximately six months before he arrived in the United Kingdom and therefore around about April 2008 if that evidence is accurate, but it was only in fact issued after he left Afghanistan and someone had to send it to him after his arrival here.

9. That document appears to have been issued about May 2008 converting to the Christian calendar from the Islamic year originally given in it and under the section “date of birth and age”. The translation of the document says this:

> "According to his facial appearance, he is identified as 15 years old in 1387 converted to 2008."

10. There is a photograph attached to that document and a thumbprint. There is perhaps some uncertainty as to whether that information was assessed from a photograph in

May or from a prior personal observation of the applicant before he had left Afghanistan.

11. Following the directions by the judge on 20 July and following the new decision of Cardiff Social Services, permission to apply for judicial review was refused on 4 October on the grounds that there was no longer any live issue to which the permission could be directed, since a material part of the claim form was seeking a fresh determination of an age assessment. Subsequently the proceedings were settled as against the Cardiff Social Services on the basis of their fresh decision and discontinued with respect to Hampshire Social Services on the basis of Cardiff's fresh decision but maintained against the Secretary of State on the basis that, as this applicant has now been assessed as a matter of fact to have been under 18 in July 2007, he should not have been detained with a view to removal in the way that he was, with the consequence, it is submitted, that his detention was unlawful.

12. Ms Luh, who appears for him this afternoon, puts the case in this way :
(1) In disputed age assessment cases the ultimate question of how old a person is, is a question of fact rather than a judgment for reasonable assessment and opinion.
(2) In the event of a dispute it is the court that has to make the best judgment that it can on all the available material.
(3) To that extent age is a question of precedent fact rather than a discretionary judgment for the decision maker to be reviewed only on Wednesbury principles.
(4) It is the Secretary of State's policy and was the policy at the material time, July 2010, not to exercise statutory powers of detention with a view to removal if a person was a child in the absence of exceptional circumstances. (5) Applying the policy to what had now been determined to be the facts, there was a misapplication of a policy that makes this detention unlawful.
(6) The Secretary of State had been alerted by the letter of April 2010 to the fact that the Hampshire Social Services assessment of the 9 October 2008 was not accepted to be adequate and in that respect it was submitted it was not compliant with the guidance issued by Stanley Burnton J in the case of London Borough of Merton already cited.

13. In my judgment none of those submissions amount to an arguable basis to challenge the decision to detain the applicant at the time that he was detained for the reasons relied upon by the Secretary of State. The claimant is here intermingling matters of policy and the requirements of the statutory regime for detention. The statute does permit detention of children and there is no statutory prohibition against detention of children if an assessment is made but that such detention is appropriate or necessary. Clearly there are strong policy reasons against such detention unless necessary in all the circumstances. Insofar as the applicant relies upon policy, then in my judgment the application of policy depends upon the assessment of facts made by the decision maker at the material time. At the time this applicant was detained the Secretary of State knew that Hampshire had assessed him to be over 18 in an assessment which they claimed was Merton compliant. Secondly he knew that the Immigration Judge, acting on all material available to him in February 2010, had reached a similar conclusion not entirely dependent upon the approach of Hampshire. Thirdly, no

discrete submissions had been made to the Secretary of State as to why the Immigration Judge and/or Hampshire assessment was wrong in fact. There was an averral in the letter that the Merton guidance had not been complied with, but no demonstration that that was the case and no fresh evidence was pointed to in that letter as amounting to a change in the factual position.

14. In my judgment the Secretary of State has to apply a policy on the facts as she either knows them to be or reasonably believes them to be in the light of reasonable inquiries and addressing all relevant issues. I would accept that those reasonable inquiries must specifically direct themselves to the age of the person to be detained and, if the Secretary of State by making those reasonable inquiries, has any reason to believe that a person is or may well be under 18, no doubt further inquiries need to follow, but if there is nothing or insufficient to alert the Secretary of State that a conclusion reached by two other independent authorities is flawed I cannot see that it is irrational for the Secretary of State to act upon that information in implementing the policies and applying them to the particular case before her.

15. Indeed there is a powerful case to suggest that where the Secretary of State has participated in proceedings before the Immigration Judge and the Immigration Judge not only rejects the applicant's credibility and narrative but also makes incidental findings such as the age in the case, the Secretary of State should not depart from such findings absent good reason to do so. The contrary proposition, where the facts are favourable to the claimant, was established long ago in the case of R v Secretary of State for the Home Department ex p Daniae [1998] Imm ArR84; (1998) INLR 124). That of course it is not to suggest that the Immigration Judge's observations on age assessment are *in rem* findings of fact binding upon the world at large or indeed a social services authority who is not party to such an appeal: see in that context the decision of Hickinbottom J in R (PM) v Hertfordshire County Council [2010] EWHC 2056.

16. Ms Luh submits that policy in this particular context is underwritten by the duty on the Secretary of State to act compatibly with the welfare of the child imposed by Section 55 of the Borders Act 2009 as of 1 October 2009 and the principles of the best interests of the child spelt out in the Convention on the Rights of the Child, the importance of which have been brought to judicial attention more recently in the Supreme Court decision in ZH v SSHD [2011] UKSC 4. Certainly due regard to the welfare of the child is a well established principle and must be applied to questions of detention as well as other administrative decisions that may affect such welfare, but that is not to require the Secretary of State to predict events that were not known to her at the material time or to impose a duty of perfection in terms of how to assess whether the person was a child or not. On the facts known to and reasonably known to the Secretary of State at the time of this decision, the Immigration Judge had rejected this applicant's case to remain here. There had been adverse findings on the applicant's credibility. His own immigration history in absconding was not a good one and the applicant was to be removed to Afghanistan where, because of the findings of the judge, no issue as to suitable reception facilities arose.

17. None of that was fixed in stone if good reason to reopen the question of age had been produced by the time of the relevant decision but, in the absence of such material, there was no reason in my judgment for the Secretary of State to have reached a conclusion contrary to that of the other authorities. It is not necessary in this judgment to examine the criticisms made of the Hampshire County Council decision. Certainly the content of the investigation is not over full and Ms Luh is able to point out to inconsistency in the approach of the age of the child assessed to be 19 but a date of birth is assessed which would make the child 15. It is perhaps not a document entirely free from ambiguity, but the reasoning suggests that at least the authors thought they were applying their mind to a range of information material as required to do so. But the fact is that it had not been the subject of legal challenge. Its defects had not been the subject of legal exposition in any letter before action of any substance. And the social services' conclusions on age had been independently supported by the decision of the IJ.

18. For all those reasons in my judgment it is not arguable that the Secretary of State acted unlawfully in applying the policies on the basis of what after reasonable inquiry appeared to be the facts. Therefore there are no reasonable prospects if this permission application was granted that the applicant would seek the relief sought.

19. I therefore dismiss this application.

20. It is a little more extensive than a permission application but thank you for your submissions.
    MISS LUH : My Lord could we just have an order in relation to the detailed assessment of the claimant's publicly funded costs?
    MR JUSTICE BLAKE : You can certainly have that. Anything else arising?
    MISS LUH : No, my Lord.
    MR JUSTICE BLAKE : No, well thank you very much.