Case No: C4/2011/0621

Neutral Citation Number: [2012] EWCA Civ 1383
IN THE COURT OF APPEAL (CIVIL DIVISION)
IN AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2012

Before :

LADY JUSTICE ARDEN
LORD JUSTICE DAVIS
and
MRS JUSTICE BARON

- -

Between :

THE QUEEN ON THE APPLICATION OF AA	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Stephen Knafler QC & Miss Shu Shin Luh (instructed by **South West Law**) for the **Claimant**
Miss Susan Chan (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing date : 17 July 2012

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Judgment

Lady Justice Arden:

1. The issue in this matter is the lawfulness of the decision by the Secretary of State to detain the claimant, Mr AA, for immigration purposes. Mr AA is a citizen of Afghanistan. He arrived in the United Kingdom unaccompanied by an adult. Before his detention he had unsuccessfully claimed asylum, and had exhausted all routes of appeal against the decision of the Secretary of State to refuse asylum and permission to remain. The Secretary of State then exercised her power to detain him with a view to his removal from the United Kingdom.

2. At the time of the Secretary of State's decision, Mr AA was under the age of 18 years, although the Secretary of State did not appreciate this; and, had this been appreciated, he would not have been placed in detention. The Secretary of State has a policy under which unaccompanied children are not detained for immigration purposes save in exceptional circumstances, which are agreed not to have been present here. Following an order of the court, the Secretary of State released Mr AA, and the Secretary of State now accepts that Mr AA was a child at the time of detention. However, by the date of his release, he had been detained for thirteen days.

3. Blake J rejected Mr AA's challenge to the decision to detain him and his consequent claim for compensation. In my judgment, for the reasons which I shall give in this judgment, the judge was correct to do so. My reasons may be summarised as follows:

   (1) At the date of his detention it had not been established that AA was a child as his age had been assessed as that of an adult.

   (2) The Secretary of State's statutory power of detention was wide enough to permit the detention of a person not established to be a child, and her duty to treat the best interests of a child as a primary consideration did not apply.

   (3) The policy of the Secretary of State permitted the detention of a person not established to be a child, and the principle giving an individual the benefit of the doubt did not apply in the circumstances of this case.

4. I will explain more about the facts of the case and the judgment of the judge as I develop my reasons. However, I shall first give some background about unaccompanied children seeking asylum and about age assessment.

GENERAL BACKGROUND ABOUT CHILD ASYLUM SEEKERS

(1) Unaccompanied children as asylum seekers

5. Every year, children arrive in this country, unaccompanied by an adult, and claim asylum. They may have been brought here by traffickers, or sent or left here by their parents, or they may simply have become separated from their families in the course of travelling from their country of origin. In 2011, some 1,275 unaccompanied child asylum seekers arrived in the UK and were accepted to have been children (*EU Commission Memo* 12/716, 28 September 2012). Accordingly, the number of unaccompanied children seeking asylum is not insignificant.

6. Some persons who arrive in this country and claim asylum contend that they are children when they are not. A person may wish to do this as they will then, under the

policy of the Secretary of State, be given discretionary leave to remain until they are 17½ years of age, when the position will be re-assessed. In addition they will by law be given accommodation and, very importantly, access to education. Accordingly, it is important to have a procedure for age assessment.

(2) Age assessment

7. Some asylum seekers are not able to establish their age. Their papers may have been lost or destroyed. Their births may never have been registered, and indeed there may be no system of registration of births in their country of origin. They may not know their precise age if they come from a country where birthdays are not celebrated. Alternatively, they may simply tell an untruth about their age, or be disbelieved when they state their age. It may not be easy to tell their age if they come from a war zone, or a society where children marry, or bear responsibility, at a younger age than they would in the United Kingdom. In those circumstances they may appear to be more mature than a person of equivalent age in this country. It follows from all this that it may be difficult to determine a person's age and the evidence may be imperfect. I will call a person in respect of whom there is a dispute as to age an "age-dispute individual".

8. The Secretary of State does not carry out any age assessment of an age-dispute individual but asks a local authority to do so. The general policy of the Secretary of State is to act on an age assessment only if it is carried out by the local authority in accordance with the guidelines laid down by Stanley Burnton J (as he then was) in *B v Merton LBC* [2003] EWHC 1689 (Admin). It is not necessary to go into those guidelines for the purpose of this case. Put shortly, there has to be a reasoned decision based on all the available evidence, including an interview with the age-dispute individual. An age assessment which complies with the guidelines is called a "*Merton*-compliant assessment".

9. The assessment of the age of a child is not, however, a matter which can be finally determined by the Secretary of State or a local authority. In *R (A) v Croydon LBC* [2009] 1 WLR 2557, the Supreme Court held that the question whether an asylum seeker was a child, in that case for the purposes of section 20(1) read with section 105(1) of the Children Act 1989, was a question of fact which, in the event of dispute, ultimately had to be determined by the court as an objective fact. It was not enough that an age assessment had been made by a local authority in accordance with its procedures, or, it would follow in this case, that the Secretary of State wrongly believed that he or she was a child. The *Croydon* decision means that, if there is a dispute as to age, it must be resolved by a court. It is not finally resolved by a decision of the executive subject only to judicial review on conventional grounds.

10. With that introduction I will now develop my reasons for rejecting Mr AA's application for judicial review.

REASONS FOR REJECTING THE APPLICATION

(1) *NO CONTEMPORARY DETERMINATION AS A CHILD*

11. The particular features of this case are (a) that Mr AA's age has been assessed more than once, including on one occasion by an incidental finding of fact in a final

decision of the First-tier Tribunal, and (b) that, as at the date of his detention, Mr AA had not been established to be a child.

12. Initially Mr AA's age was accepted by the Secretary of State on receipt of an assessment made by Hampshire Social Services ("Hampshire"). Hampshire had assessed his age as that of an adult. Mr AA's claim for asylum was rejected by the Secretary of State, and he was refused leave to remain. Mr AA appealed that rejection and refusal, but he was unsuccessful.

13. In its decision rejecting his appeal, the First-tier tribunal made an incidental finding of fact that it was satisfied that he was over 18 years of age and the position rested there. The First-tier tribunal took into account, but did not consider conclusive, a copy of a *taskera*, or identity document, issued in Afghanistan which appeared to confirm his age. Mr AA was refused permission to appeal and so the decision became a final decision. He gave no indication to the Secretary of State that he would seek to place further evidence before the Secretary of State (as he was entitled to do), though his solicitors did indicate that they were making further inquiries. The Secretary of State decided to, and did, detain him for the purposes of his removal. There was some evidence of prior absconding, and the decision to detain is not challenged as unreasonable.

14. Mr AA then issued an application for judicial review. Initially the defendants were Hampshire, Cardiff County Council ("Cardiff"), in whose area Mr AA was now living, and the Secretary of State. Mr AA claimed that the age assessment carried out by Hampshire, the refusal by Cardiff to carry out a fresh one and the decision to detain him were all unlawful. On the day on which the proceedings were issued, HHJ Bidder QC granted an urgent application for an order for Mr AA's release. The Secretary of State immediately released him, and Cardiff prepared a further age assessment. Cardiff took the *taskera* into account and determined that Mr AA had been a child at the date of his claim for asylum. The Secretary of State accepted Cardiff's assessment, withdrew her decision to refuse asylum and agreed to consider Mr AA's claim afresh. Mr AA withdrew his proceedings against Hampshire and Cardiff but sought to continue with his claim against the Secretary of State, challenging the lawfulness of the decision to detain him and seeking damages for unlawful detention.

15. Following a refusal on paper of permission to bring this claim, Mr AA renewed his application in open court before Blake J. The judge refused permission. He rejected the argument that the Secretary of State had no power to detain him as he was a child. His reasoning turned on the ambit of the Secretary of State's statutory power to detain and her policy. In his judgment dated 7 March 2011, he held:

> "[13]…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 … 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…
>
> [16] …[The s 55 duty does not] 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."

16. The present application seeks to overturn that decision. Mr AA was given permission by Sir Richard Buxton to apply for judicial review limited to the question whether his detention had been unlawful having regard to the decision in *Croydon*. However, Mr AA was refused permission to apply for judicial review on the ground that the Secretary of State had acted unreasonably, first by Sir Richard Buxton and then by myself when the application was renewed in open court. Sir Richard Buxton directed that the application for judicial review should be heard in this court.

17. The only point that I need to make at this stage is that, at the date of his detention, it had not been established that Mr AA was a child. There was (i) an age assessment by Hampshire and (ii) an incidental finding by the First-tier tribunal, in each case that he was not a child.

18. As I shall explain below, the lawfulness of Mr AA's detention has to be assessed against that crucial fact.

(2) THE SECRETARY OF STATE'S POWER TO DETAIN FOR IMMIGRATION PURPOSES PERMITTED THE DETENTION OF A PERSON NOT ESTABLISHED TO BE A CHILD AND HER DUTY TO TREAT THE BEST INTERESTS OF A CHILD AS A PRIMARY CONSIDERATION DID NOT APPLY

19. The Secretary of State has an extremely wide power to detain an unsuccessful asylum seeker under paragraph 16(2) of schedule 2, part 1 to the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999, section 140(1)) (for short, "the statutory detention power"). This provides:

> "(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions."

20. I need not set out the specific paragraphs referred to in this provision because it is common ground that, if Mr AA had been an adult, he could certainly have been detained under this power.

21. It will be immediately recognised that the statutory detention power interferes with the liberty of a person, a freedom which English courts guard jealously. The importance attributed to personal freedom can be traced back at least to *Magna Carta*.

22. Moreover, a high degree of caution is applied because the detention is authorised by the executive, and not by the court, as is required in some other European countries, for example, by article 104 of the *Basic Law* of Germany. As Lord Bridge held in the landmark case of *R(o/a Khawaja) v Home Secretary* [1984] AC 74 at 122:

> ".. we should… regard with extreme jealousy any claim by the executive to imprison the citizen without trial…The fact that detention is preliminary and incidental to expulsion from the country in my view strengthens rather than weakens the case for a robust exercise of the judicial function in safeguarding the citizen's rights…"

23. The burden of showing that the detention was lawful falls on the Secretary of State. If the decision to detain is unlawful, it is not a defence that the Secretary of State made some reasonable error as to the law (see *R (o/a Evans) v Governor of Brockhill Prison* [2001] AC 19). Nor is it a defence that the decision could lawfully have been taken on some other basis, although that fact may mean that the person detained has suffered no loss: *R (WL (Congo)) v Home Secretary* [2012] 1 AC 245.

24. The influence of *Magna Carta* can today be seen in article 5 of the European Convention on Human Rights, which guarantees to the individual freedom of the person. Article 5 starts as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty…"

25. Thus, as the claimant rightly submits, the issue on this application engages an important point of principle. Any incursion into the right to personal freedom has to be closely scrutinised and justified by cogent reasons.

26. However, article 5 recognises that there are circumstances in which an adult at least may be deprived of his or her freedom, for example where a power of detention is exercised for immigration purposes, as here. Article 5 (1) quoted above continues:

> "save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> 1. (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

27. Moreover, the European Court of Human Rights ("the Strasbourg court") recognises that, in the context of detention for immigration purposes, there is another consideration to be weighed in the balance, namely the right of a contracting state to

control its own borders: see *Saadi v UK* (Application No 13229/03, 25 January 2008).

28. Similarly, European Union law recognises that detention may take place for such purposes: *Alexandre Achughbabian v Préfet du Val-du-Marne Case C-239/11*.

29. However, detention for immigration purposes cannot be indefinite: see *R (o/a Hardial Singh) v Governor of Durham Prison* [1984] 1 WLR 704. The important principles established in that case, known as the *Hardial Singh* principles, were restated by Dyson LJ in *R(I) v Home Secretary* [2003] 1 INLR 196 and thereafter approved by him in *WL(Congo)* as follows:

> "(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal."

30. The Strasbourg court has considered the effect of article 5(1)(f) of the Convention in the light of the United Nations Convention on the Rights of the Child ("UNCRC") and other international instruments. The Strasbourg court has held that children should not be detained for immigration purposes save as a measure of last resort and then only in suitable conditions. Thus, the detention of a child in an adult facility may violate article 5: *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application no 13178/03, 12 October 2006).

31. In the light of the developments in Strasbourg jurisprudence, France, for instance, is in the process of amending its law to prohibit the detention of unaccompanied minors and other children. Children are treated differently from adults because they are more vulnerable than adults to harm if they are detained.

32. In England and Wales, the statutory detention power now has to be considered in conjunction with the duty ("the section 55 duty") imposed on the Secretary of State to treat a child's interests as a primary consideration. This is imposed by section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act"). It requires the Secretary of State to make arrangements to ensure that those who take decisions about children for immigration purposes have proper regard to the welfare of children:

> "**55 Duty regarding the welfare of children**
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;…
>
> (6) In this section—
>
> i) "children" means persons who are under the age of 18; …"

33. Section 55 of the 2009 Act applies to decisions taken in a particular case with respect to the detention of a child for immigration purposes. The decision-maker must treat the child's interests as a primary consideration: see *ZH (Tanzania) v Home Secretary* [2011] 2 WLR 148 at [24].

34. Mr Stephen Knafler QC, for Mr AA, submits that section 55 of the 2009 Act creates a *statutory precondition* to the power to detain. Accordingly, on his submission, section 55 requires the functions of the Secretary of State in relation to immigration to be discharged in a way which treats the best interests of the child as a primary consideration or alternatively takes those interests into account. Therefore, on Mr Knafler's submission, following the commencement of section 55 of the 2009 Act, the opening clause of the statutory detention power has to be treated as if it conferred a more restricted power of detention. While words do not have actually to be read into the statutory detention power, the statutory detention power is now to be interpreted as if it included the following words in italics (which were drafted by Mr Knafler): "If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given *if, where that person is a child, detention is justified despite the child's best interests, …"*.

35. Furthermore, on Mr Knafler's submission, for the purposes of section 55, the question of whether a person is a child is one of objective fact ultimately to be determined by the court: see *Croydon*. Accordingly, if a person is established to be an adult, the Secretary of State would only have to show reasonable grounds for her suspicion before becoming entitled to exercise her statutory detention power. However, if the person is established to be a child, the Secretary of State would have to show that she had treated or had taken into account the interests of the child as a primary consideration in accordance with her section 55 duty. She could not, of course, do that in relation to Mr AA as he had been assessed to be an adult.

36. Mr Knafler draws an analogy with *Al-Khawaja*, where there was a power to detain an "illegal entrant", and the House of Lords held that the question whether a person was an illegal entrant was a question of fact which ultimately had to be determined by a court and which the Secretary of State could not conclusively determine. Mr Knafler draws a further analogy with the mistaken but wrongful detention of a prisoner following expiry

of his sentence. This cannot be justified by reference to the view of the executive: see *Evans*, above.

37. Mr Knafler likewise relies on *R (Nasseri) v Home Secretary* [2010] 1 AC 1 at §12-14, in which Lord Hoffmann held that, when the question is whether a Convention right was violated, it is no defence to say that the correct procedure was followed.

38. I would reject Mr Knafler's submission as to the effect of section 55 of the 2009 Act. If, when enacting section 55 of the 2009 Act, Parliament intended to amend the statutory detention power, it would have done so. The statutory detention power works perfectly well without the suggested amendment. The law requires the Secretary of State to perform her section 55 duty if she exercises her statutory detention power. What matters is the ambit of that duty and power. The power can only lawfully be exercised if the section 55 duty is performed.

39. Miss Susan Chan, for the Secretary of State, submits that the section 55 duty is exhausted by making arrangements set out in a policy. I do not accept this submission. As *ZH (Tanzania)* makes clear, the section 55 duty must be performed also when consideration is given to detaining a person.

40. However, as Ms Chan further submits, the crucial words in the statutory detention power are the opening words, namely "If there are reasonable grounds for suspecting". In my judgment, this is correct and these words are unequivocal. They mean that the statutory detention power is exercisable when the Secretary of State forms the view that there are reasonable grounds for suspicion. It is not necessary for her also to show that the matters which she suspects are in fact as she reasonably suspects them to be.

41. The opening words of the statutory detention power were not present in the detention power considered in *Al-Khawaja.* The detention power in that case required the fact that the person in question was an illegal entrant to be proved as an objective fact. However, the House of Lords made it clear that the position would have been different if the question whether a person was an "illegal entrant" was not a question of that kind. Thus Lord Scarman, for instance, referring to section 3 of the Habeas Corpus Act 1816, stated that "it was the beginning of the modern jurisprudence the effect of which is to displace, unless Parliament by plain words otherwise provides, the *Wednesbury* principle [the principle that the acts of the executive are not reviewable unless unreasonable] in cases where liberty is infringed by an act of the executive." (page 110C, underlining added) (see also per Lord Fraser at 97E and per Lord Bridge at 123A to 124C).

42. By including the opening words of the statutory detention power in issue in this case, Parliament has clearly displaced the need for precedent facts to be established objectively. It follows that there was no need under the statutory detention power for it to be established that at the time of its exercise Mr AA was not a child.

43. As regards the Convention, I do not consider that the detention of a person, wrongly thought to be a adult, as if they were an adult would for that reason violate article 5(1)(f) of the Convention. We have not been shown any decision of the Strasbourg court that deals with this issue. Some support for my conclusion can be obtained from a case not cited to us, in which there was a dispute as to the age of a child, but the Strasbourg court did not suggest that the executive in that case could not rely on an age assessment, even

though it was disputed by the applicant: *Salah Sheekh v Netherlands* (Application no 1948/04, 11 January 2007).

44. The detention of Mr AA would, however, be unlawful if, as Mr Knafler submits, the section 55 duty applies to a person, who is subsequently determined to be a child, in the period prior to that determination. Mr Knafler submits that a person's age and the lawfulness of his detention are "hard-edged" questions of law, that is, questions of law for the court to decide: see *Croydon* and *Al-Khawaja*. Thus, whatever the policy of the Secretary of State says, the age of Mr AA would have to be determined by a court. In the circumstances, this court would have to make that determination since the finding of the First-tier tribunal cannot stand in the light of the Cardiff assessment, which both parties accept. Furthermore, on Mr Knafler's submission, this court would be bound to conclude that in law Mr AA was a child when he sought asylum.

45. As an auxiliary argument, Mr Knafler contends that the question whether a person is a child is also a hard-edged question of law for the purposes of determining whether the *Hardial Singh* principles are satisfied. This submission, however, adds nothing to the submission already summarised. Accordingly I need not mention it further.

46. In my judgment, the application of section 55 does not depend on whether Mr AA is *subsequently* found to be a child but on whether the statutory detention power, circumscribed by the EIG, permitted his detention *at the time his detention took place*. Mr AA's detention was in accordance with those provisions: for the reasons given above, *Al-Khawaja* is distinguishable. The effect of *Croydon* is that age assessment of an age-dispute individual is ultimately a matter for the court *if there is a dispute*. In this case, however, at the date of his detention, Mr AA's age had in fact been assessed as above that of a child, and any dispute was then at an end. That therefore was then his age in law. He was detained while this state of fact persisted. He was in law an adult and outside the reach of section 55 at that time.

47. Since the hearing, Lang J has held that the detention of a person mistakenly thought to be an adult would violate the section 55 duty: see *Re AAM (acting by F) v SSHD* [2012] EWHC 2567 (QB) at [120]. We have had detailed written submissions on this decision. It turned on materially different facts and the point just mentioned did not directly arise for decision. In my judgment, section 55 cannot be read as rendering an act a breach of that section with the wisdom of hindsight. That is what would be necessary to render detention in a case such as this a breach of section 55.

48. That leaves the question whether the detention of Mr AA was within the terms of the policy issued by the Secretary of State.

2. *(3) THE SECRETARY OF STATE'S POLICY PERMITTED THE DETENTION OF A PERSON NOT ESTABLISHED TO BE A CHILD AND THE PRINCIPLE GIVING AN INDIVIDUAL THE BENEFIT OF THE DOUBT DID NOT APPLY IN THE CIRCUMSTANCES OF THIS CASE*

49. The policy of the Secretary of State with regard to children and detention is set out in Chapter 55 of the *Enforcement Instructions and Guidance* ("EIG") issued by the United Kingdom Border Agency, which must of course be read against the general law. There is no challenge to the lawfulness of this Chapter of the EIG on conventional

judicial review principles, and it is common ground that the Secretary of State must follow her own policy unless there is good reason not to do so.

50. The basic principle of the EIG is that children should only be detained for immigration purposes in exceptional circumstances:

> "**55.9.3. Young Persons**
>
> Unaccompanied children must not be detained other than in the circumstances below:
>
> As a general principle, unaccompanied children (i.e. persons under the age of 18) must only ever be detained in the most exceptional circumstances (for example, where it is necessary to establish the identity of an unaccompanied child and pending suitable alternative arrangements being made for their care and safety, such as whilst awaiting collection by family/friends). They should normally only be detained for the shortest possible time, with appropriate care though where necessary this may include detention overnight. This includes age dispute cases where the person concerned is being treated as a child.
>
> In those exceptional circumstances where there are no relatives or appropriate adults to take responsibility for the child and alternative arrangements need to be made for their safety a period of very short term detention will also be appropriate to prevent them absconding (i.e. going missing) pending the arrangement of a care placement. Again, this includes age dispute cases where the person concerned is being treated as a child.
>
> Detention of unaccompanied children must take account of the duty to have regard to the need to safeguard and promote their welfare; this must be demonstrable in line with the statutory guidance issued by the Secretary of State under section 55 of the 2009 Act."

51. The EIG also sets out the procedure which the Secretary of State adopts to age-dispute individuals. If an asylum seeker claims that he or she is a child, the principle contained in the policy is that they will be given the benefit of the doubt pending assessment of their age: this is consistent with the principles of international refugee law. If their age is assessed by the procedure described above, they will be treated as having the age so assessed. The EIG provides among other matters that:

> "Where an individual detained as an adult is subsequently accepted as being aged under 18, they should be released from detention as soon as appropriate arrangements can be made for their transfer into local authority care.

55.9.3.1 Persons claiming to be under 18

Sometimes people over the age of 18 claim to be children in order to prevent their detention or effect their release once detained. …
UK Border Agency will accept an individual as under 18 (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:

- there is credible and clear documentary evidence that they are 18 years of age or over;

- a full "*Merton*-compliant" age assessment by Social Services is available stating that they are 18 years of age or over. (Note that assessments completed by social services emergency duty teams are not acceptable evidence of age);

- their physical appearance/demeanour **very** strongly indicates that they are **significantly** over 18 years of age and no other credible evidence exists to the contrary.

…

Where an applicant claims to be a child but their appearance very strongly suggests that they are significantly over 18 years of age, the applicant should be treated as an adult until such time as credible documentary or other persuasive evidence such as a full "Merton-compliant" age assessment by Social Services is produced which demonstrates that they are the age claimed…

In borderline cases it will be appropriate to give the applicant the benefit of the doubt and to deal with the applicant as a child.

…However, where the applicant's appearance **very strongly** suggests that they are an adult and the decision is taken to detain it should be made clear to the applicant and their Enforcement Instructions and Guidance representative that:

- we do not accept that the applicant is a child and the reason for this (for example, visual assessment suggests the applicant is 18 years of age or over), and

- in the absence of acceptable documentation or other persuasive evidence the applicant is to be treated as an adult." (emphasis in the original)"

52. Mr Knafler submits that the whole of the EIG has to be read against the fundamental statement of general principle in it that unaccompanied children should not be detained save in exceptional circumstances. In the light of the section 55 duty, the Convention jurisprudence and the UNCRC, and other international instruments and guidelines, this statement was, on his submission, clearly intended to be the governing rule. It followed that there is no power to detain an unaccompanied child in any other situation. Mr AA

was in fact a child at all times. On that basis, the Secretary of State had no power under the EIG to detain an adult if that adult subsequently turns out to be a child.

53. Alternatively, submits Mr Knafler, if the EIG allowed the Secretary of State to detain an age-dispute individual because he or she was thought to be an adult, then under Convention jurisprudence it failed to attain the degree of certainty required in law to authorise a derogation from the right to liberty. The criteria authorising detention of an age-dispute individual were not purely objective. It followed that the exception in article 5(1)(f) for detention for immigration purposes did not apply.

54. I do not accept these arguments. The EIG clearly contemplates the detention of persons believed to be adults even though they are subsequently accepted to be children. This can be seen most clearly from the paragraph that immediately precedes **55.9.3.1 Persons claiming to be under 18,** which reads**:**

> "Where an individual detained as an adult is subsequently accepted as being aged under 18, they should be released from detention as soon as appropriate arrangements can be made for their transfer into local authority care."

55. If Mr Knafler's interpretation were correct, the EIG would be unworkable. It would render automatically unlawful detention in circumstances where it was necessary for the performance by the Border Agency of its functions. The Secretary of State would have to go to the court to obtain a determination of the age of every age-dispute individual before they could be detained. Even then, the Secretary of State would not be saved from a breach of the EIG if further evidence came to light which led to a revision of the court's assessment.

56. Accordingly, in my judgment, the judge's construction of the policy was correct.

57. The detention of Mr AA was in accordance with the EIG. The EIG sets out three specific criteria for the detention of age-dispute individuals: see **55.9.3.1 Persons claiming to be under 18,** paragraph 51 above. It states that the Border Agency will accept a person who claims to be under 18 as a child unless one or more of three criteria apply. These criteria for detention are: (1) credible and clear documentary evidence, (2) a full *Merton*-compliant assessment and (3) strong physical evidence, in each case showing that the age-dispute individual is an adult. No specific reference is made to the possibility of a court ruling but in this case there was in any event an age assessment on which the Secretary of State was entitled to rely.

58. As to legal certainty, the EIG clearly anticipates that a child may be mistakenly detained as an adult (see the first paragraph quoted in paragraph 51 above). That paragraph applies to a child who may not be an age-dispute individual. The EIG also plainly contemplates that an age-dispute individual can be detained if he or she falls within one of the three specified criteria for detention mentioned in the last paragraph. The Secretary of State may subsequently accept that an age-dispute individual who has been detained should be treated as a child, as she did in the case of Mr AA, but until that happens the individual may under the EIG be detained.

59. In my judgment, these criteria are sufficiently certain to authorise detention for immigration purposes. The key issue is whether the criteria could be operated by the

Secretary of State in an arbitrary way without an adequate remedy. It is inescapable that the first and third criteria at least involve an element of judgment by the Border Agency. However, the court has to consider the context in which the EIG is intended to operate. A rule which involves a measure of discretion may nonetheless be sufficiently certain for the purposes of the Convention: see *Gillan v United Kingdom* (Application no 4158/05, 12 January 2010) at [77]. As to the context here, it is difficult to see how the EIG could set out more specific criteria, and Mr Knafler does not identify any way in which it could do so. Nor does Mr Knafler point to any specific ambiguity.

60. Mr Knafler correctly points out that the EIG is only a statement of policy (unlike the position in France and Germany). The Secretary of State could therefore depart from it for good reason. However, under public law she has to act consistently with it. It would not be consistent with the EIG for the Secretary of State to deny the status of child to a person whom the criteria for detention made it clear was intended to be treated as a child. There is very little scope for departure.

61. Furthermore, in my judgment, the EIG tells a person in simple language in what circumstances detention may take place if he or she is an age-dispute individual. Whether detention actually takes place will depend on the circumstances of the case, such as whether there is a history of absconding. The scope for any exercise of discretion in this respect is also greatly circumscribed. In addition, remedies in conventional judicial review lie if the power is exercised perversely.

62. Accordingly in my judgment, the challenge to the EIG on the grounds of legal certainty fails.

Conclusion

63. For the reasons given above, I would dismiss Mr AA's application for judicial review.

Lord Justice Davis:

64. I agree.

Mrs Justice Baron:

65. I also agree.