Trinity Term
[2013] UKSC 49
On appeal from: [2012] EWCA Civ 1383

JUDGMENT

R (on the application of AA) (FC) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lord Clarke
Lord Wilson
Lord Carnwath
Lord Toulson

JUDGMENT GIVEN ON

10 July 2013

Heard on 7 and 8 May 2013

Appellant	*Respondent*
Stephen Knafler QC Shu Shin Luh (Instructed by SouthWest Law)	Robin Tam QC Susan Chan (Instructed by Treasury Solicitor)

LORD TOULSON (with whom Lord Neuberger, Lord Clarke and Lord Wilson agree)

1. The Immigration Act 1971, Schedule 2, paragraph 16(2) ("paragraph 16"), gives power to immigration officers acting on behalf of the Secretary of State to detain a person if there is reasonable ground to suspect that he is liable to be removed as an illegal entrant, pending a decision whether to give removal directions or the implementation of removal directions.

2. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55") imposes duties regarding the welfare of children on the Secretary of State and on immigration officers in all immigration matters.

3. The issue on this appeal is the effect of section 55 on the legality of the appellant's detention under paragraph 16 over a period of 13 days. At the time of the detention the Secretary of State acted in the mistaken but reasonable belief that he was aged over 18. It is now an agreed fact that he was born on 1 February 1993 and so was aged 17. If his true age had been known he would not have been detained, because his detention would have been contrary to the Secretary of State's policy in relation to minors. The appellant's case is that the fact of his age made his detention unlawful on the proper construction of section 55, and that the Secretary of State's reasonable belief that he was over 18 is no defence to his claim.

Facts

4. The appellant was born in Afghanistan. He arrived in the United Kingdom on 8 October 2008, concealed in a lorry. He was caught and arrested. He said that he was aged 14 and claimed asylum. On the next day an age assessment was carried out by social workers from the children's services department of Hampshire County Council ("Hampshire"). They concluded that he was over 19 and so reported to the Secretary of State. Thereafter the appellant was granted temporary admission and released from immigration detention.

5. On 6 November 2008 the Secretary of State refused the appellant's asylum claim and made a decision to remove him as an illegal entrant. On 1 March 2010 the First Tier Tribunal (Immigration and Asylum Chamber) dismissed the appeal. In his determination the immigration judge found that he was satisfied that the appellant was aged over 18.

6. In April 2010 solicitors for the appellant wrote to the Secretary of State stating that they were instructed to challenge Hampshire's age assessment, which they did not consider had complied with the guidance on the conduct of age assessments given by Stanley Burnton J in *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280. The solicitors also asked Hampshire to re-assess the appellant's age. Since the appellant was then living in the Cardiff area, Hampshire suggested that Cardiff City Council ("Cardiff") should be asked to carry out a re-assessment. Cardiff agreed but there was a period of delay.

7. On 7 July 2010 the appellant was detained under paragraph 16. On the same day the Secretary of State set directions for his removal to Afghanistan on 20 July 2010.

8. On 20 July 2010, in the High Court at Cardiff, the appellant issued a claim form for judicial review against Cardiff, Hampshire and the Secretary of State. Among other forms of relief the appellant claimed:

i) an order quashing Hampshire's age assessment carried out on 9 October 2008;

ii) an order requiring Cardiff to carry out an age assessment;

iii) an order requiring Cardiff to provide suitable age-appropriate support and accommodation to the appellant, pursuant to the Children Act 1989, pending completion of the age assessment and the judicial review proceedings;

iv) a declaration that the Secretary of State's detention of the appellant and issue of removal directions were unlawful;

v) an order staying the implementation of the removal directions until further order;

vi) damages.

9. On the same day Judge Bidder QC, sitting as a deputy High Court judge, granted temporary relief to the appellant. He ordered that his removal should be stayed, pending the outcome of his application for permission for judicial review,

and that in the meantime he should be released from immigration detention and provided with support and accommodation by Cardiff.

10. On 6 August 2010 Cardiff notified the Secretary of State that its social services asylum team had carried out a fresh assessment in accordance with the *Merton* guidelines and accepted that his date of birth was 1 February 1993. The Secretary of State in turn accepted the fresh assessment.

11. The appellant's application for permission to apply for judicial review against Hampshire and Cardiff was withdrawn by consent on terms that Cardiff agreed to treat him as a child under the Children Act 1989, so providing him with accommodation under section 20 and associated support under sections 22 and 23.

12. The appellant continued with his application for permission to apply for judicial review against the Secretary of State. On 7 March 2011 Blake J dismissed the application after an oral hearing: [2011] EWHC 1216 (Admin). He described the appellant's argument as intermingling matters of policy with the requirements of the statutory regime for detention. Paragraph 16 permitted the detention of children if the statutory conditions were met, but there were strong policy reasons against such detention unless it was necessary in all the circumstances. He continued at para 13:

> "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 dependant 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."

13. He held that in the circumstances the Secretary of State had no reason to have reached a conclusion contrary to that of the other authorities.

14. The appellant applied for permission to appeal to the Court of Appeal. After considering the application on paper, on 14 June 2011 Sir Richard Buxton granted the appellant limited permission to apply for judicial review, and directed that the case should be retained in the Court of Appeal, on the following ground:

> "It is … arguable that, on the basis of the approach of the Supreme Court in *Croydon*, the lawfulness of the Secretary of State's decision should be assessed on the basis that, whatever the understanding at the time, the applicant was a child and should have been treated as such, including not being removed from the United Kingdom and therefore not being detained pending removal."

15. The reference to *Croydon* was to *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557. Sir Richard Buxton agreed with Blake J that it was not arguable that the Secretary of State had acted unreasonably in proceeding on the basis that the appellant was over 18, and he refused permission to apply for judicial review on that wider ground. A subsequent oral application by the appellant to widen the grounds of challenge was refused by Arden LJ. His substantive claim was dismissed by the full court for reasons given in a judgment by Arden LJ, with which Davis LJ and Baron J agreed: [2012] EWCA Civ 1383.

Section 55 of the 2009 Act

16. Section 55 provides:

> "(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; …

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

…

(6) In this section

'Children' means persons who are under the age of 18; …"

17. Section 55 came into force on 2 November 2009. In the same month guidance was published by the Home Office, jointly with the Department for Children, Schools and Families, under the title "Every Child Matters". Its stated object was to set out the key arrangements for safeguarding and promoting the welfare of children, as they apply both generally to public bodies who deal with children and specifically to the UK Border Agency. Its language was the language of general principles rather than particular rules. Among the general principles it stated:

"2.6 The UK Border Agency acknowledges the status and importance of the following:

The European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.

2.7 The UK Border Agency must also act according to the following principles:

- Every child matters even if they are someone subject to immigration control.

- In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children. …"

18. The document recognised that the guidance contained in it could not cover every situation and that staff would need to use their judgment and refer to detailed operational guidance applicable to specific areas.

19. Operational guidance on the use of detention powers is contained in Enforcement Instructions and Guidance ("EIG") published by the Secretary of State. Paragraph 55.9.3.1 states:

> "Sometimes people over the age of 18 claim to be children in order to prevent their detention or effect their release once detained. Information on the policy and procedures concerning persons whose ages have been disputed is available on the website at [reference omitted].
>
> 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.

…

> It is UK Border Agency policy not to detain children other than in the most exceptional circumstances. …"

20. More detailed directions and guidance on assessing age are given in a departmental document entitled "Assessing Age" (June 2011). This sets out the policy and procedures to be followed when an applicant for asylum claims to be a child, with little or no supporting evidence, and the claim is doubted by the Border Agency.

21. The document emphasises the need to consider all the evidence, since no single assessment technique or combination of techniques is likely to determine the applicant's age with precision. It states that at the stage of the initial age assessment, if there is little evidence to support the applicant's claimed age and if their physical appearance/demeanour very strongly suggests that they are significantly over 18, they are to be treated at that stage as an adult, but the decision must be reviewed if there is relevant new evidence. All other applicants are to be treated as children until a careful assessment of their age has been completed.

22. The document contains particular guidance on the use of local authority age assessments. It explains that local authorities will often have a duty to provide accommodation and support to an unaccompanied asylum seeking child under provisions of the Children Act 1989. As part of its duties, the local authority will normally conduct an assessment of the applicant's age in order to determine eligibility for children's services. The document summarises the *Merton* guidelines and states:

> "5.2 Case owners should give considerable weight to the findings of age made by local authorities, recognising the particular expertise they have through working with children. In cases where the local authority's assessment is the only source of information about the applicant's age – their assessment will normally be accepted as decisive evidence.
>
> Nevertheless, case owners should carefully consider the findings of the local authority and discuss the matter with them in appropriate circumstances, such as where the findings are unclear; or do not seem to be supported by evidence; or it appears that the case is finely balanced and the applicant has not been given the benefit of the

doubt; or that it appears the general principles set out in the *Merton* judgment were not adhered to."

23. Where there is new evidence after an initial assessment, the document states:

> "8.2 Case owners will normally need to review a decision on age if they later receive relevant new evidence (including in the grounds of an appeal). Where the original decision on the applicant's age was based on a local authority assessment, the local authority should normally be made aware of the new evidence and be invited to review their earlier decision. The local authority's view should be considered by the case owner before they reconsider the decision on age.
>
> If appropriate, the original decision should be administratively withdrawn, and a fresh decision issued to the applicant's legal representative or, if the applicant is not represented, to the applicant."

24. Under the heading "Section 55 duty and the assessing age policy", the document sets out the department's reasons for believing that the policy complies with the requirements of the statute:

> "2.2.1 The assessing age policy has in-built safeguards to ensure it is compliant with the new duty, for example, applicants whose age has not been accepted by the Agency, will initially be afforded the benefit of the doubt and treated as children unless their physical appearance/demeanour very strongly suggests they are <u>significantly</u> over 18. It is appropriate to give these applicants the benefit of the doubt until a further assessment of their age has been made, because it ensures that such applicants are not exposed to risks which might compromise their safety or welfare in the meantime. In particular, they will be provided with a responsible adult for the substantive interview, and will not be accommodated with adults. This is a safeguard to allow for the possibility that these applicants may produce evidence showing that they are a child or a local authority age assessment, according to *Merton* guidelines, later assesses them to be a child.

> The policy applied to applicants whose physical appearance/demeanour very strongly suggests that they are significantly over 18 is consistent with the new duty because the Agency has had regard to the need to safeguard and promote the welfare of children when making the initial age assessment. Having given the applicant the benefit of the doubt, they have found them to be an adult. The duty does not compel the Agency to treat these applicants as children. Thus, the same safeguards are not necessary.
>
> Furthermore, the Agency's policy to rely on *Merton*-compliant age assessments when making a decision on an applicant's disputed age, is consistent with the section 55 duty because the *Merton* guidelines ensure that proper safeguards and standards of enquiry and fairness are adhered to. Local authorities who are bound by section 11 of the Children Act 1989 (upon which the section 55 duty is based) also rely on their own *Merton*-compliant age assessments unless and until they receive further evidence indicating that the applicant is a child."

R (A) v Croydon London Borough Council

25. As already mentioned, Sir Richard Buxton's reason for giving the appellant permission to apply for judicial review was so that the question could be argued whether the approach of the Supreme Court to the assessment of age in *Croydon* was equally applicable in determining the legality of the appellant's detention. That case concerned section 20(1) of the Children Act 1989, which provides:

> "Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation …"

26. The appellants arrived in the United Kingdom and applied for asylum. They claimed to be aged under 18 but were assessed as over 18 by immigration officers. They were referred to the social services departments of the appropriate local authorities and interviewed by social workers, who also concluded that they were over 18. The local authorities therefore refused to provide accommodation for them under section 20 of the 1989 Act. They challenged the local authorities' decisions. The issue before the Supreme Court was whether the question of their age was one for the decision of the court or was for the decision of the local authority, subject to review on standard public law grounds. The court decided that it was the former.

27. The court arrived at that conclusion as a simple matter of construction of the language of section 20. The court declined to read the words "who appears to them" as applying not only to the question of the applicant's need for accommodation, but also to the question whether the applicant was a child, because that was not how the section was drafted. On the face of the wording of the section, the question whether the applicant was a child was a question of fact for determination by the court in the event of a dispute. Faced with what appeared to the court to be clear wording, it was not impressed by other arguments put forward by the local authorities, based on the wider structure of the Act and practical considerations.

28. *Croydon* was considered by Lang J in *AAM v Secretary of State for the Home Department* [2012] EWHC 2567 (QB). The claim was for damages for false imprisonment and breach of article 5 of the European Convention on Human Rights. The defendant conceded that the detention had been unlawful because immigration officers had wrongly applied a presumption that an asylum seeker who arrived clandestinely should be detained, but it disputed other grounds on which the claimant alleged that his detention was unlawful. The judgment was concerned with that dispute, which was thought to have a potential bearing on the assessment of compensation. The case bears some resemblances to the present case but there were also factual differences.

29. The police were called when the claimant went into a petrol station asking for food. He told the police through an interpreter that he was 15 years old and came from Iran. He was detained and the police notified the social services department of the local county council. A social worker conducted an age assessment and concluded that he was over 18. The police called the Border Agency and an immigration officer took the decision that he should be detained.

30. The immigration officer gave evidence before Lang J. The judge found that the decision to detain was unlawful because the immigration officer failed to ask herself the right questions or to take reasonable steps to acquaint herself with the information needed to make her decision. She did not know the requirements of a *Merton*-compliant assessment. A later re-assessment by social services concluded that the appellant was 17. At the trial it was accepted as a fact that he was 15 and that the way in which the first assessment had been carried out was defective.

31. As to the proper interpretation of the policy set out in EIG paragraph 55.9.3.1, Lang J accepted the defendant's submission that it was not to be read as imposing a pre-condition that a *Merton*-compliant age assessment had been carried out. Rather, an immigration officer was required to make an independent evaluation and exercise his judgment in deciding whether or not the criteria in the paragraph were met. On the judge's findings, the immigration officer lacked the

training to have done so and failed the test. Her factual findings were sufficient to justify the conclusion that the decision to detain was unlawful.

32. However, Lang J went on to consider a further argument based on section 55. The argument in short was that since the claimant was under 18 and his welfare had not been taken into account when making the decision to detain, his detention was therefore in breach of section 55. It is not entirely clear whether this part of her judgment was intended to be read in the light of the factual findings which she had already made or was intended to apply whether or not the immigration officer had approached the matter properly in terms of the guidance in EIG 55.9.3.1.

33. There are a number of strands to Lang J's reasoning under this head. First, she laid stress on the word "ensuring" in section 55(1). If the policy in EIG 55.9.3.1 authorised an immigration officer to make a decision on a "reasonable belief" that the person was an adult, and thereby allowed for the possibility of the immigration officer being mistaken, then the policy did not "ensure" that the welfare principle was complied with, as required by section 55. The alternative was that the policy only authorised an immigration officer to treat a person as an adult if he was in fact an adult. On that basis the policy complied with section 55, but, if the immigration officer made a mistake, there would then have been a breach of the policy.

34. I have some difficulty in following how this part of the judgment fits with the earlier part. The judge had previously concluded that EIG 55.9.3.1 required the immigration officer to make an independent evaluation and exercise his judgment in deciding whether the criteria of the paragraph were met. The later passage appears to make a *Merton*-compliant age assessment a precondition of a valid decision under paragraph 55.9.3.1, which the judge had earlier rejected as a proposition.

35. Secondly, Lang J referred to the guidance in Every Child Matters with its stress (as the title of the document suggests) on the need to take into account the welfare of the child in every case involving a child.

36. Thirdly, she referred to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, at paras 23 to 25, where Lady Hale emphasised the requirement in article 3.1 of the United Nations Convention on the Rights of the Child 1989 ("UNCRC") that in all actions concerning children taken by public authorities, including courts, the best interests of the child shall be a primary consideration.

37. Fourthly, Lang J referred to a number of decisions in the Administrative Court where failures by decision makers to have regard to the welfare principle when individual decisions were made had led to successful legal challenges.

38. Lang J concluded:

> "128 Unfortunately, the immigration officers did not have regard to the claimant's status as a child, and the need to safeguard and promote his welfare as a child, when they made the decision to detain him, because they were under the mistaken belief that he was not a child.
>
> 129 However, he was in fact a child, within the meaning of the definition of 'child' in sub-section (6), and it is not possible to interpret this definition as if Parliament had included the words 'appears to be a child' or 'is reasonably believed to be a child'. Applying the analysis adopted by the House of Lords in *R (A) v Croydon London Borough Council* [2009] UKSC 8; [2009] 1 WLR 2557, per Lady Hale at para 27:
>
> > '… the question whether a person is a 'child' is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.'
>
> 130 My conclusion is that, by failing to have regard to the need to safeguard and promote his welfare as a child, the immigration officers erred in law, rendering the decision to detain unlawful."

39. The Court of Appeal in the present case distinguished *Croydon* and *AAM*. Arden LJ emphasised that in this case prior to the appellant's detention there had been not only an assessment by Hampshire but a determination by an immigration judge that he was aged over 18. The decision to detain was lawfully made under paragraph 16 and was not rendered retrospectively unlawful by the later evidence, accepted by the Secretary of State, that he was in fact under 18.

Discussion

40. From ancient times the common law provided two remedies for a person who was unlawfully detained – a writ of habeas corpus to obtain his release and a writ of trespass to the person (one form of which is false imprisonment) to obtain compensation.

41. The burden is on the person detaining another to justify the grounds of detention, and liability for false imprisonment is strict. Reasonable belief in a power to detain is not ordinarily a defence at common law, although there are various examples of statutory powers to detain on reasonable suspicion of certain matters (for example, the power of a police officer to detain a person who he reasonably suspects of having committed an arrestable offence).

42. With rare exceptions (the most notorious example being the decision of the majority of the House of Lords in *Liversidge v Anderson* [1942] AC 206), the courts have looked with strictness on statutory powers of executive detention. These principles are all too well established to require citation of authorities.

43. In the present case the Secretary of State relies for justification of the appellant's detention from 7 to 20 July 2010 on the statutory power of detention created by paragraph 16. There is no dispute that the appellant came within that paragraph, but the appellant contends that the decision to detain him was unlawful because it was made in breach of section 55.

44. I accept that if there was a material breach of section 55, it would make the detention unlawful: *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245. So the question is whether there was a material breach of section 55. Essentially that involves a short question of construction.

45. Mr Stephen Knafler QC submits that section 55 should be read in a similar fashion to section 20 of the Children Act 1989. Children are defined in section 55(6) as persons who are under the age of 18. That is a pure question of fact. The duty is to ensure that in the case of every person who is in fact a child, the functions of the Secretary of State and immigration officers under the Immigration Acts are discharged having regard to the need to safeguard and promote the welfare of the individual child. In the present case the welfare of the appellant was not taken into account. Therefore there was a breach of the section. Mr Knafler reinforces his argument by reference to article 5 of the European Convention, the UNCRC and other conventions identified in Every Child Matters, and to the

emphasis placed in domestic law on the importance of the courts maintaining responsibility for determining jurisdictional questions affecting the power of the executive to detain an individual.

46. Section 55 of the 2009 Act and section 20 of the Children Act 1989 contain the same definition of children, but their structure and language are very different. Under section 55 the Secretary of State has a direct and a vicarious responsibility. She has a direct responsibility under section 55(1) for making arrangements for a specified purpose. The purpose is to see that immigration functions are discharged in a way which has regard to the need to safeguard and promote the welfare of children ("the welfare principle"). She has a vicarious responsibility, by reason of section 55(3), for any failure by an immigration officer (or other person exercising the Secretary of State's functions) to have regard to the guidance given by the Secretary of State or to the welfare principle.

47. In order to safeguard and promote the welfare of children the Secretary of State has to establish proper systems for arriving at a reliable assessment of a person's age. That is not an easy matter, as experience shows. The arrangements made by the Secretary of State under section 55 include the published policies referred to above: Every Child Matters, EIG 59.9.3.1 and Assessing Age.

48. The instructions in Assessing Age are detailed and careful. In my judgment the guidance complies with the Secretary of State's obligation under section 55(1), applying its natural and ordinary meaning. In this respect, the reasoning set out in the passage quoted at para 24 above is persuasive. Further, on the facts of this case there is no basis for finding that there was a failure by any official to follow that guidance. It follows that there was no breach of section 55 and therefore that the exercise of the detention power under paragraph 16 was not unlawful.

49. I have referred to the natural and ordinary meaning of section 55(1). Its wording and structure are very different from section 20(1) of the Children Act, as I have said, and I am not persuaded that section 55 should be interpreted in the way for which Mr Knafler contends in order to meet the UK's international obligations or to provide adequately for the welfare principle. In particular, I do not see that the section on its natural construction is inconsistent with article 5 of the European Convention or article 3 of the UNCRC. The risk of an erroneous assessment can never be entirely eliminated but it can be minimised by a careful process and there are appropriate safeguards. In addition to the process for making the initial assessment, which includes requiring the benefit of any doubt to be given to the claimant, the Secretary of State is under a continuing obligation to consider any fresh evidence. An age assessment by a local authority can be challenged on judicial review, and the Secretary of State would be bound to give proper respect to the outcome of such proceedings.

50. The judgment in *AAM* was right on the facts as Lang J found them, but if and insofar as her judgment amounted to holding that any detention under paragraph 16 of a child in the mistaken but reasonable belief that he was over 18 would ipso facto involve a breach of section 55, I would disapprove that part of the judgment.

51. An asylum claimant who gives his age as under 18 is in practice likely also to be a claimant for local authority support under the Children Act. For both purposes there will be an age assessment by the social services department in any case of doubt. If the claimant is assessed as being over 18 and is also detained under paragraph 16, any legal challenge is likely to be, as in this case, against both the local authority and the Secretary of State. In such a case the court would have jurisdiction under *Croydon* to determine the question of age as a primary fact finder under the Children Act. Its conclusion – if in the claimant's favour – would obviously affect the Secretary of State's future action under the Immigration Acts. It would give rise to a new situation and the Secretary of State could no longer properly rely on the accuracy of an age assessment which had been discredited by a judgment of a court.

52. A question arose in the course of argument about the legal position if the claimant challenged the legality of his detention without directly involving the local authority whose social services team had carried out the age assessment. Would the court be limited to determining whether the Secretary of State had acted lawfully or would it also have jurisdiction to make a fresh determination of the claimant's age? The latter would not arise from the language of section 55 (unlike section 20(1) of the Children Act). The source of any such jurisdiction would have to be the court's habeas corpus jurisdiction. The point was not argued because both parties proceeded on the basis that the court would have such jurisdiction.

53. The court's habeas corpus jurisdiction is a creation of the common law, although it has also been the subject of numerous statutes. The courts have power to develop it where necessary in order to achieve effective justice in matters of personal liberty. (Professor Paul Halliday gives a magisterial account of the history of the development of the "great writ" in *Habeas Corpus From England to Empire*, 2010, Harvard University Press.) Although it is unnecessary to decide the point, I am sympathetic to the view that the court's habeas corpus jurisdiction in this type of situation should not be confined to determining whether the Secretary of State had acted lawfully in the detention of the claimant, but should extend to enable the court to make a fresh determination of the claimant's age, which would necessarily impact on the lawfulness of his continued detention. The effect of a finding in the claimant's favour would not take him outside the scope of paragraph 16, which conferred the statutory detention power, but it would impact on the operation thereafter of the Secretary of State's policies introduced for the purpose of implementing section 55. In practical terms it would mean that the court is able

to reach a final determination of the claimant's age not only when his rights under the Children Act depend on it but more fundamentally when his liberty depends on it.

54. For the reasons set out above, I would dismiss the appeal.

LORD CARNWATH

55. On the issues before us in this appeal, I agree entirely with the reasoning and conclusions of Lord Toulson, to which I have nothing to add.

56. I do, however, have some reservations with regard to his concluding paragraphs, relating to the possible use of habeas corpus to fill a perceived gap in the present statutory code. Given the constitutional importance of the "Great Writ" of habeas corpus, I would hesitate before accepting it as a suitable procedure for the narrow, factual inquiries likely to be required in cases such as this. I would in any event be particularly anxious that there should first be full exploration of all the legal and practical implications.

57. The evidentiary and procedural challenges arising from the decision of the House of Lords in *Croydon* have now to a large extent been addressed by use of the powers under the Tribunals, Courts and Enforcement Act 2007, allowing transfer of defined categories of judicial review to the Upper Tribunal. Judges of that tribunal, in turn, have been able, with the assistance of representatives of interested bodies and other experts, to develop the necessary specialist skills for handling them. As I understand it, those arrangements are working well.

58. There is at present no provision under the 2007 Act for the equivalent transfer of habeas corpus proceedings to the Upper Tribunal. Given the constitutional importance of the writ, that seems unlikely to change. The problems no doubt could be overcome. There is likely also to be more scope for transfer of such judicial expertise between the tribunals and the courts under the new powers conferred by the Crime and Courts Act 2013, but this seems an additional complication which we should be careful of imposing on the parties and the lower courts, unless and until the implications have been worked out.

59. Accordingly, I would prefer to say nothing on this issue, which, as Lord Toulson acknowledges, is not before us for decision and on which we have heard no argument. Nor is there any evidence before us of a serious jurisprudential gap requiring an urgent remedy at this level. In my view, we would be better advised at

this stage to leave it to those directly concerned, working with the specialist courts and tribunals, to address such problems, if and when they arise, and to seek practical solutions to them. If in due course the issue does need to return to the higher courts, it will be with a better appreciation of what is involved.