Neutral Citation Number: [2011] EWCA Civ 1590

Case No: C1/2011/0868

IN THE COURT OF APPEAL (CIVIL DIVISION)
(Sitting at Cardiff) ON APPEAL FROM
THE QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT (MR JUSTICE OUSELEY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2011

Before :

LORD JUSTICE LAWS
LORD JUSTICE PITCHFORD
and
MR JUSTICE LLOYD JONES

- -

Between :

R (CJ by his litigation friend SW)	**Appellant**
- and -	
CARDIFF CITY COUNCIL	**Respondent**

- -
- -

P Brown QC and C Buttler (instructed by **TV Edwards LLP - Solicitors**) for the **Appellant**
M Hutchings (instructed by **Cardiff City Council (Raqeiya Riaz**) for the **Respondent**

Hearing date: 1st December 2011

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Judgment

Lord Justice Pitchford :

1. The appellant, an Afghan national who was living in Iran, entered the United Kingdom illegally on 27 August 2008. In a claim for judicial review he sought a declaration that he was owed duties by the respondent, Cardiff City Council, under the Children Act 1989. It was common ground that if the appellant was aged under 18 when he entered the UK those duties were owed. Furthermore, if the appellant was under 18 on entry the local authority owed duties towards him until he was aged 25 years. On or about 24 August 2009 the local authority assessed the appellant as aged 18 or over on entry to the UK.

2. In *R (A and M) v Croydon and Lambert Borough Councils* [2009] UKSC 8, [2009] I WLR 2557, the Supreme Court settled the question whether, in the event of a challenge to the decision of a local authority as to the claimant's age, the High Court was required either to reach its own decision as to the claimant's age or, alternatively, the challenge was by way of review of the local authority's assessment on *Wednesbury* principles alone. Baroness Hale gave the leading judgment with which

the other members of the Supreme Court agreed. At paragraphs 26 and 27 Baroness Hale explained the difference in approach required for the evaluative judgment whether a child was "in need" within the mean of section 20 of the 1989 Act and the decision upon the precedent question of fact whether the individual concerned was a child. She said this:

> "26. … the 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments … but where the issue is not what order the court should make but what service should the local authority provide it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the Public Authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "*Wednesbury* reasonableness" there are no clear-cut right or wrong answers.
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> 27. But 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."

Lord Hope, in his concurring judgment, said at paragraph 51:

> "51. It seems to me that the question whether or not a person is a child for the purposes of section 20 of the 1989 Act is a question of fact which must ultimately be decided by the court. There is no denying the difficulties that the social worker is likely to face in carrying out an assessment of the question whether an unaccompanied asylum seeker is or is not under the age of 18. Reliable documentary evidence is almost always lacking in such cases. So the process has to be one of assessment. This involves the application of judgment on a variety of factors, as Stanley Burnton J recognised in *R (B) v Merton London Borough Council* [2003] 4 All ER 280, para 37. But the question is not whether the person can properly be described as a child. Section 105 (1) of the Act provides: "in this Act … 'child' means, subject to paragraph 16 of Schedule 1, a person under the age of 18". The question is whether the person is, or is not, under the age of 18. However difficult it may be to resolve the issue, it admits of only one answer. As it is a question of fact, ultimately this must be a matter for the court."

3. The issue whether this appellant was a child when he entered the UK on 27 August 2008 came before Ouseley J for decision. In a judgment handed down on 17 January 2011 the judge found that the appellant was not under the age of 18 when he entered the UK and dismissed the claim. This appeal, for which the trial judge gave leave, challenges the judge's application of the burden of proof to the claim for review. The judge held that it was for the claimant to prove that he was aged under 18 years upon arrival in the UK so as to establish his qualification for the assistance sought. The appellant contends that the application of a burden of proof to an issue of fact precedent to the lawful exercise by a public body of a power to act was inappropriate. Stripped to its essentials, the appellant's case is that the question the court should

have asked itself is: "On a balance of probability was the appellant over or under the age of 18 at the date of his entry into the United Kingdom?"

4. Before discussing the merits of this single ground of appeal, which raises an issue of considerable importance in this field, it is necessary to examine the evidence upon which the judge eventually resorted to the burden of proof.

Evidence before Ouseley J

5. The claimant had given different accounts of his age. At his screening interview he had given his birth date (after conversion to the Gregorian calendar) as 1 April 1993. If that was true the appellant was then aged 15 years. That age was challenged by the London Borough of Croydon which carried out an age assessment. During the course of this assessment the appellant claimed to have received from his father in Iran three documents in proof of his age and identity. These were:

(1) An Iranian resident's card which gave the appellant a date of birth of 20 September 1993; the card had expired on 23 August 2006;

(2) A certificate from the Kharameh health centre also showing a date of birth of 20 September 1993; and

(3) A record of vaccinations in which the date of birth 20 September 1993 was recorded.

6. Croydon assessed the appellant as aged 18 years. However, the appellant was dispersed to Cardiff. On 9 October 2008, by which date all three documents had been received, Cardiff City Council ("Cardiff") carried out its own age assessment. It assessed that the appellant was over the age of 15 years but, pending further investigation of the documents produced, the appellant was placed in foster care. The appellant's foster carer reported that in her view the appellant was much older than 15, perhaps 25 years of age. UKBA informed Cardiff that it did not consider the resident's card to be a genuine document. Accordingly, Cardiff carried out a further assessment in December 2008. The social worker who performed the assessment was Mr Nedsky. During the course of the assessment the appellant self-harmed and was admitted to the University Hospital of Wales. At the conclusion of the assessment Cardiff decided that the appellant's birth date was 19 September 1988. The choice of 19 rather than 20 September appears to have been a slip which became relevant to later events (see paragraphs 7 and 10 below). The judge summarised the facts which influenced Mr Nedsky's judgment at paragraph 23 of his judgment:

> "23. Seven factors were listed as impinging on the Claimant's credibility and indicated that he was probably over 18: repeated lies about his age to officials en route to the UK; use of false documentation to prove identity and age; the improbability of a 15 year old from a rural area undertaking so long and arduous a journey to the UK; his obtaining employment several times; vagueness about his age and contradictions about the time spent in Turkey and Greece; he spent two years in secondary school which started at 14, and so he was likely to have been 17 when he left Iran, and then spent several months travelling to the UK; there was a consensus among professional and others

> e.g. foster carer, medical staff at the hospital and social workers that he was over 18."

7. On 26 January 2009 the appellant was removed from his foster placement. He again self-harmed. After treatment in hospital he was discharged to Adult Services. However, in July 2009 the two further documents relied upon by the appellant (the health centre certificate and the vaccination record) had been translated into English. Cardiff was informed that the birth date recorded in them was identical to that asserted in the resident's card. On 29 July 2009 the appellant was again treated as a child and placed with a new foster carer. His behaviour there was alarming. On 17 August 2009 he was taken under restraint and detained pursuant to section 2 Mental Health Act 1983. The following day he was transferred to Whitchurch Hospital Psychiatric Intensive Care Unit in Cardiff. While at the hospital the appellant, according to the hospital notes, consistently gave his date of birth as 19 September 1988.

8. The appellant was interviewed again by Mr Nedsky on 24 August 2009. At first the appellant told him that he was aged 15 years. Thereafter he insisted he was aged 20 having been born in 1988. The appellant was for the final time assessed by Mr Nedsky as aged 20 having been born in 1988. At paragraph 40 of his judgment Ouseley J summarised his findings concerning Mr Nedsky's evaluation:

> "40. The result of the interview between Mr Nedsky and CJ was discussed the next day between Mr Nedsky and his Operational Manager, who had been involved in earlier decisions about CJ's age and care, but had not actually met him. Mr Nedsky made no recommendation about age, but the decision emerged by agreement in the course of the discussions that, taking everything into account, CJ was an adult. There is no record of the age decided upon, but Mr Nedsky said, and I accept, that they agreed to the 1988 birth date. If discharged to adult mental health services, he would be better looked after. He was discharged on 28 September 2009. There is no record of the reasons but I accept that the consideration was careful, and was based on the previous age assessment, what had happened since, and especially what had been said at the hospital."

9. The appellant was discharged from Whitchurch Hospital on 28 September 2009.

The judge's analysis of the evidence and his conclusions

10. The evidence was closely analysed by the judge. For present purposes a summary of his principal findings will suffice. The judge found the appellant to be an unsatisfactory witness in many respects. He found it "hard to believe" that the appellant had left his rural home in Iran at the age of 13 or 14 to embark on a journey to Turkey, Greece, Italy, France and the United Kingdom. The judge did not believe the appellant's account of that journey in its details, such as his claim to have earned as a cobbler $1,000 to fund his departure from Iran. His account of stealing from his brother-in-law in Turkey was troubling. The judge considered that the appellant was covering for a period when he was working in Turkey. If the appellant was working in Turkey that fact would suggest he was older than he was prepared to admit. He had admittedly lied about his age to officials in Greece and Italy. The judge concluded that the appellant had adjusted his evidence, on occasions quite astutely, to suit his

case as to his age. The judge did not accept, however, that the appellant's apparent admission in hospital to 19 September 1988 was reliable. He concluded that the appellant thought there had been something to be gained by adopting 1988 as his birth-date, perhaps an earlier release from hospital, and had therefore adopted the date being suggested to him by "the authorities". The fact the appellant adopted *19* rather than 20 September as his birth date in 1998 appears to justify the judge's caution.

11. The appellant relied on the written evidence of an expert witness, Dr Warner, a consultant endocrinologist, who assessed the appellant as emotionally aged about 15½ years. His physical features were, Dr Warner said, compatible with that age. For reasons with which I need not for present purposes be concerned, the judge rejected Dr Warner's evidence as valueless. The appellant also relied upon the evidence of Dr Kakhki, a document expert. The judge found that Dr Kakhki had adjusted his evidence to a significant extent after he had received a report from UKBA upon the status of the resident's card. Having expressed the view in his first written report that an original resident's card would be a "secure" document in Iran, Dr Kakhki changed his opinion in respect of the resident's card produced by the appellant. Having read UKBA's opinion that the card produced was manufactured, in some respects at least, with an ink jet printer, Dr Kakhki said that the card may have been a re-issue or renewal which was not itself designed to be a secure document. This evidence the judge could not accept as objective or accurate. Finally, the appellant relied on the opinion evidence of a social worker, Mr Winstanley, who had seen the appellant every 2 to 3 weeks over a period of 18 months. Mr Winstanley considered that there was no reason to doubt the appellant's age as claimed. The judge was not persuaded that Mr Winstanley had adopted an objective approach and did not accept his evidence.

12. The judge's conclusions upon the evidence are summarised at paragraph 123-125 of his judgment as follows:

> "123. I have in the end, after a great deal of thought, come to the conclusion that I should accept the appraisal by Mr Nedsky, that CJ now is 20 plus. This is supported by the general impression of foster carers and hospital staff, and for what little it is worth the brief Croydon LBC assessment. It is also more in line with my own view of his emotional maturity from his demeanour, relevant but not especially weighty let alone decisive. He could be between 18 and 22, but I found just 17 impossible to accept and untruthfully alleged. I do not regard Mr Winstanley's evidence as persuasive.
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> 124. I have explained the difficulties in CJ's evidence which caused me to have real doubts about it. There is nothing sufficiently reliable in it taken on its own to cause me to alter my view that Mr Nedsky's appraisal, supported as it is by other, albeit more impressionistic views from different sources, is correct. All of that evidence however would require the reliability of the documents he produced to be well demonstrated for his claim as to his age to be accepted.
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> 125. In my view, there are too many unsatisfactory features in CJ's evidence for it to be accepted in the light of all the evidence about these three documents. The expert evidence simply fails to persuade me that I can give them the necessary credence. As it is, the documentary evidence is insufficient

> to counter the strong reservations CJ's evidence created about his truthfulness. I do not have to find that the documents are forged or obtained by bribery or a mixture of the two. I am not satisfied as to their authenticity, having heard all the evidence".

13. These findings appear at first sight to be conclusive of the issue as to the appellant's age. The judge was unable to accept the truthfulness of the evidence of the appellant, or of the documents, or the opinion of the experts called on his behalf, and he accepted the appraisal made by Mr Nedsky. However, the judge turned to the burden of proof and said:

> "126. I have intended not to decide this case by what could be an unsatisfactory resort to the burden of proof. But it has been quite a close decision, principally because the speed with which the three documents were sought and obtained by CJ from Iran, supports their authenticity, which in turn helps CJ's credibility and could overcome my strong reservations about him. And I am aware of the fragility of the basis for the age assessment decisions. In reality, if I ask: has the Council shown the Claimant to be an adult aged over 18 now and on arrival, I would answer nearly but not quite. If I ask: has the Claimant shown himself to be under 21 now, the answer is no and he is some way short of doing so.
>
> 127. I therefore have had to decide who bears the burden of proof. In my view it is for the Claimant to show that he is or was under 18 at the time that he asserts a duty was owed to him as a child. First, in judicial review proceedings it is for the Claimant to show that the public authority has erred in its duties. Second, but obviously related, it is the Claimant who is asserting that the duty is owed; the authority is not asserting a power to do something. It is not crucial but supportive nonetheless that the readier means of knowledge lies with the Claimant on this issue.
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> 128. I appreciate Mr Buttler's point that there may be instances under the Children Act, e.g. a disputed age for the purpose of preventing a parent removing a child from section 20 accommodation, where an authority might have to prove age. But that is consistent with the obligation being on the person who is exercising power to show his entitlement to do.
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> 129. That is the basis of my decision in *R (Becket) v SSHD* [2008] EWHC 2002 Admin para 2, that the SSHD bore the burden of establishing that the Claimant had obtained leave to remain by deception, the *Khawaja* issue [1984] AC 74.
>
> 130. It is not for the authority to disprove the jurisdictional fact asserted by a Claimant as the basis for the duty alleged. It is for the authority to prove the jurisdictional fact which it needs to assert against a disputing Claimant in order to give it the power it exercises.
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> 131. This is not a case either, as I have considered it, where there is a grey middle range of 17-19 with the crucial age falling in the middle. Giving the benefit of the doubt to such a Claimant wisely reflects the uncertain nature of

age assessment. But that is not the issue here: it is which side of the large gap was this Claimant, essentially as a matter of credibility".

The appellant's case

14. Mr Brown QC, on behalf of the appellant, drew attention to the variety of powers granted to, and obligations imposed upon, local authorities by the Children Act 1989. For instance, duties to provide accommodation, and to maintain and advise, are to be found in sections 20, 23 and 23D. Section 20 (4) creates a power to accommodate and maintain and, in the case of a child aged 16 or 17 years, to accommodate against the wishes of the parent. Mr Brown pointed out the primary duty of the local authority under section 17 of the Act "to safeguard and promote the welfare of children within their area who are in need …". By section 55 Borders, Citizenship and Immigration Act 2009 the Secretary of State for the Home Department is also required to discharge her immigration and asylum functions "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom".

15. It follows that, in the case of a person arriving in the United Kingdom unaccompanied, the response of the responsible public authority will be informed by the age of that person. The Secretary of State would be acting in breach of her obligations if she removed a child without due regard to the need to safeguard and promote the child's welfare. As a matter of policy the Secretary of State would not detain or remove a child until the child was aged 17½ years. Once admitted, the local authority would owe duties to the child under the Children Act 1989. Mr Brown argues that in the event of a dispute as to age the court must satisfy itself as to the precedent fact whether the claimant is a child. It is pointed out that a burden of proof which shifts according to whether the public authority is exercising a power, such as the power of removal, or is declining to perform a duty, such as to have regard to the best interest of a child, or to accommodate that child, could produce unfortunate results. If a conventional burden of proof is to be applied, in the former case the burden would be upon the Secretary of State to establish that the claimant is not a child; in the latter case, the burden would be upon the claimant to prove that he is a child. If, in the present proceedings, what had been at stake was the lawfulness of two decisions, one to remove the appellant from the jurisdiction and the other a refusal to accommodate, Ouseley J would have found himself making contradictory findings as to whether the appellant was a child.

16. The appellant's contention is that the factual issue whether the appellant was a child is precedent to the local authority's *power to act* whether or not what is in issue is a decision to act or a decision not to act. Since a public authority cannot abrogate to itself a power to act which depends for its existence on a state of affairs which is not present, the High Court, reviewing the authority's decision, must form its own conclusion whether the state of affairs exists or does not. As Mr Hutchings for Cardiff observed, the same fact is precedent whether the issue under consideration is the exercise of a power or the undertaking of a duty. Mr Brown argues that since the court is resolving a question of precedent fact the imposition of the burden of proof upon the claimant is not appropriate.

17. The foundation for the appellant's contention is a series of decisions which concerned the adoption of jurisdiction by public bodies created by statute. The first is *Bunbury v Fuller* [1859] 9 Ex 111. In 1840 an assistant tithe commissioner, Mr J M Herbert, made an award to the plaintiff of a rent charge in lieu of tithes for the Parish of Mildenhall in Suffolk. The plaintiff brought an action in debt for the recovery of the sum due. The defendant resisted the claim on the ground that his lands were, by virtue of a previous award under a pre-existing Inclosure Act, exempt from tithe. The issue was tried by Earle J and a jury upon assize at first instance. Earle J directed a verdict in favour of the defendant. The plaintiff issued a writ of error on a bill of exceptions which was heard by the Court of Exchequer Chamber. The court held that, properly construed, the Inclosure Act on which the defendant relied had not required the commissioners to compute all the tithes of the parish and, in particular, the tithe upon the defendant's land. On the contrary, an option had been left open. It was, therefore, a question of fact whether the Commissioners had or had not taken into account the defendant's land in making their original commutation. If they had not, Mr J M Herbert had enjoyed jurisdiction to commute the defendant's tithe and the plaintiff had a good claim for the rent charge. If, on the contrary, they had taken into account the defendant's land, Mr Herbert had no jurisdiction to commute the tithe since it had already been commuted in the earlier award. The assistant tithe commissioner had determined after enquiry that the tithe of the land in question had not previously been commuted. That finding, the Court of Exchequer held, was a finding which went to the jurisdiction of the assistant commissioner to make the 1840 award. It was a fact which was susceptible to review by the court. The court ordered a re-hearing. Coleridge J, delivering the judgment of the court, said, at pages 139-140:

> "… the 90th [section of the Act giving jurisdiction to the assistant commissioner] imposes a restraint on the jurisdiction of the Tithe Commissioners, among others, in the case of Lands and Tenants, Tithes whereof shall have been already perpetually commuted or extinguished under any act of parliament heretofore made. Now it is a general rule, that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary enquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to enquiry in the superior court…
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> [T]o apply this to the present case, there can be no doubt, we conceive, that the jurisdiction of the assistant tithe commissioner was well initiated. He came to a parish in which de facto tithes were being paid in kind or by compensation, but he was met with an objection which if well founded in fact, showed he had no jurisdiction. He was bound to inquire into that fact; he did so and decided against the objection, and thereupon proceeded with the commutation. But the learned judge was quite right in ruling that his decision on this point was not final and conclusive. If upon further enquiry, he shall be found to have been correct in determining that the tithes of these lands have not been commuted or extinguished under the Inclosure Act, then all that he

> has done thereupon will, under the 45th section, be conclusive, subject only to the qualifications arising out of the 46th section. On the other hand, if that enquiry should terminate in sustaining the award, all that he has done will have been *coram non judice*."

18. The rationale for the requirement that a Court must resolve the existence of a precedent fact going to jurisdiction was further explained by Farwell LJ in *R v Shoreditch Assessment Committee ex-parte Morgan* [1910] 2 KB 859 at page 880:

> "No tribunal of inferior jurisdiction can by its own decision finally decide on the question of the existence or extent of such jurisdiction: such question is always subject to review by the high court, which does not permit the inferior tribunal either to usurp a jurisdiction which it does not possess, whether at all or to the extent claimed, or to refuse to exercise a jurisdiction which it has and ought to exercise. Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure – such a tribunal would be autocratic, not limited – and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of its own jurisdiction is founded on law or fact; a court with jurisdiction confined to the City of London cannot extend such jurisdiction by finding as a fact that Piccadilly Circus is in the Ward of Chepe."

19. Mr Brown accepted the common law principles that (1) "he who asserts must prove" from which departure should be made only for the strong reasons – see Viscount Maugham in *Constantine Steamship Line Ltd v Imperial Smelting Corporation Limited* [1942] AC 154 (HL) at page 174 – which also applies to proof in public law claims and (2) a rebuttable presumption of the validity of acts by a public authority. In *Associated Provincial Picture Houses Limited v Wendesbury Corporation* [1948] 1 KB 223 at page 228, the Master of the Rolls, Lord Greene, said:

> "What then is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition."

20. There are, however, well recognised exceptions to the burden upon the claimant and the presumption of validity in cases of disputed detention, expropriation of property or expulsion in which the public authority (usually the State) must assert the right in order to justify its action. The origin of those exceptions, Mr Hutchings submitted in writing, may have lain, at least instinctively, in chapter 39 of Magna Carta 1215 and the later development of the writ of habeas corpus:

> "39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land." (The Rule of Law, Tom Bingham, p. 10).

It was a recognition by the House of Lords of this exception which in *R v Secretary of State for the Home Department ex p Khawaja* [1984] AC 74 led the House to hold that once detention of an alleged illegal entrant on the authority of the Secretary of State was established the court must be satisfied that the power was lawfully exercised. It was not enough for the Secretary of State to show reasonable grounds for so concluding; the evidence must be sufficient to establish that the claimant was an illegal entrant.

Discussion

21. As originally conceived, Mr Hutchings' argument on behalf of Cardiff was that there was nothing in the Children's Act 1989 which might establish strong reasons for departing from the usual rule that he who asserts must prove. During the course of argument, Laws LJ sought Mr Brown's recognition of the public interest in ensuring the performance of a public function strictly within but up to the limit of that body's jurisdiction. Both Mr Brown and Mr Hutchings appeared to accept my Lord's analysis that the High Court's supervision of the exercise of jurisdiction by an inferior court, or tribunal, or public body was not a matter which could be resolved according to the private interests of the parties. The nature of the court's inquiry under the Children Act was inquisitorial. To speak in terms of a *burden* of establishing a precedent or jurisdictional fact was inappropriate. Mr Brown, however, appeared to argue not just that the application of a burden of proof was inappropriate but that in a case of doubt, that doubt should be resolved in favour of the claimant. He suggested that the context, namely a duty "to safeguard and promote the welfare of children", required a sympathetic approach. It was just as important that jurisdiction was exercised in an appropriate case as it was for jurisdiction not to be exceeded. This is an argument which seemed to contradict the position taken by Mr Brown at the outset when posing what he submitted was the correct question (see paragraph 3 above). Mr Hutchings responded that the effect of the appellant's argument would be that the local authority owed duties to any person claiming to be a child unless and until the public authority established that the claimant was not a child. I do not consider that the appellant can have it both ways. It seems to me that once the court is invited to make a decision upon jurisdictional fact it can do no more than apply the balance of probability to the issue without resorting to the concept of discharge of a burden of proof. In my view, a distinction needs to be made between a legal burden of proof, on the one hand, and the sympathetic assessment of evidence on the other. I accept that in evaluating the evidence it may well be inappropriate to expect from the claimant conclusive evidence of age in circumstances in which he has arrived unattended and without original identity documents. The nature of the evaluation of evidence will depend upon the particular facts of the case.

22. In the course of argument an issue arose whether a finding by one court as to the establishment of a precedent fact, such as the age of the claimant, was binding upon a court subsequently considering the exercise of a power or duty dependent upon the

same precedent fact. There have been two relevant decisions in the High Court by HHJ Anthony Thornton QC, sitting as a deputy judge of the High Court, in *AS v London Borough of Croydon* [2011] EWHC 2091 (Admin) and Hickinbottom J in *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin). We have not received full argument upon the issue and the parties agree that it is unnecessary for present purposes for the issue to be resolved. It is, however, necessary to consider the real possibility that a range of powers and duties exercisable dependent upon the age status of an individual may be raised in the same proceedings. It would be, in my view, highly undesirable for contradictory findings to be made as to the existence of the precedent fact. I am persuaded that the nature of the inquiry in which the court is engaged is itself a strong reason for departure from the common law rule which applies a burden to one or other of the parties. I gratefully adopt my Lord's analysis that the High Court is exercising its supervisory jurisdiction and in so doing is applying the rule of law. Neither party is required to prove the precedent fact. The court, in its inquisitorial role, must ask whether the precedent fact existed on a balance of probability. I make it plain that I am not proposing that the burden of proof should not be applied in any case in which an individual is claiming a benefit under a qualifying statutory provision. Whether a burden of proof should be applied at all and, if so, where it should rest, will depend upon the terms of the statute conferring the power to act (see the judgments of Baroness Hale and Lord Hope in *A and M* at paragraph 2 above). In the Court of Appeal of Northern Ireland, the then Chief Justice, Lord Carswell, held, in *Kerr v Department for Social Development* [2002] NICA 32, using ordinary principles of construction of the qualifying statute, that the claimant bore the burden of establishing his entitlement to a payment in respect of his brother's funeral expenses, but the Department bore the burden of establishing any of the regulatory exceptions to that entitlement. I would confine my conclusion as to the absence of a burden of proof to the particular decision under the Children Act which faced Ouseley J on this occasion.

23. In the present case there was a range of powers and duties exercisable by public authorities dependent upon the single issue of age. Where the issue is whether the claimant is a child for the purposes of the Children Act it seems to me that the application of a legal burden is not the correct approach. There is no hurdle which the claimant must overcome. The court will decide whether, on a balance of probability, the claimant was or was not at the material time a child. The court will not ask whether the local authority has established on a balance of probabilities that the claimant was an adult; nor will it ask whether the claimant has established on a balance of probabilities that he is a child.

Conclusion

24. It seems to me that the next and final issue for our decision is whether the learned judge's application of the burden of proof undermined his decision. For this purpose, I would first examine the positions adopted by the parties themselves. There were two competing propositions: either, at the time of the hearing the appellant was aged 17 as he claimed, or he was aged 21 as the local authority had assessed. The judge found that there was no satisfactory evidence that the appellant was, on entry to the UK, aged 15 years; there was furthermore, as the judge found, no intermediate ground on which he could realistically have settled. Having accepted the evidence of Mr Nedsky, a finding that the appellant was some three or more years older than he claimed was,

it seems to me, inevitable. If the judge had asked the question what was the probable age of the applicant upon entry to the United Kingdom, his findings, upon the evidence to which I have referred, admitted of only one answer, namely that he was over the age of 18 years. Had that been the question that the judge posed once he had completed paragraph 125 of his judgment it is clear to me what his answer must have been. That was enough to dispose of the claim. For these reasons, notwithstanding what I would find to be the incorrect application of a burden of proof, I would dismiss this appeal.

Mr Justice Lloyd Jones:

25. I agree.

Lord Justice Laws:

26. I also agree.