Neutral Citation Number: [2014] EWCA Civ 1059

Case No. C2/2013/0445

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Wednesday, 2 July 2014

B e f o r e:

LORD JUSTICE LONGMORE

LORD JUSTICE RICHARDS

LORD JUSTICE FULFORD

- - - - - - - - - - - - - - -

Between:

THE QUEEN ON THE APPLICATION OF J

Appellant

v

LEICESTERSHIRE COUNTY COUNCIL

Respondent

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Mr C Buttler (instructed by TV Edwards LLP) appeared on behalf of the **Appellant**
Mr K Rutledge, QC (instructed by Leicester County Council) appeared on behalf of the **Respondent**

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J U D G M E N T

1. LORD JUSTICE RICHARDS: The Applicant is an asylum seeker whose appeal against the refusal of asylum has yet to be determined. I shall refer to him as the Claimant because we are concerned in this case with proceedings for judicial review brought by him as Claimant in October 2008 against Leicestershire County Council ("the Council") and the Secretary of State for the Home Department.

2. The claim against the Council related to the lawfulness of its assessment that he was an adult rather than a child and was not, therefore, entitled to services under Part III of the Children Act 1989. The claim against the Secretary of State related to the lawfulness of his immigration detention: it was the Secretary of State's policy not to detain children and it was contended that the Secretary of State had relied unlawfully on the Council's unlawful age assessment in deciding to treat the Claimant as an adult for the purposes of the detention policy.

3. On the filing of the judicial review claim, the court granted an interim injunction requiring the Secretary of State to release the Claimant from detention. He was released in due course. The claim against the Secretary of State was compromised, in that by a Consent Order sealed on 2 March 2011 the Secretary of State ceased to be a party to the judicial review proceedings upon agreeing not to detain or take any steps to remove the Claimant until after the judicial review proceedings had concluded.

4. As regards the remaining claim against the Council, in December 2011 permission to apply for judicial review was granted and the claim was transferred to the Upper Tribunal (Immigration and Asylum Chamber). The hearing before the Tribunal was subsequently listed for 3 to 5 December 2012. Prior to the hearing, however, and as a result of a reassessment of age, agreement was reached between the Claimant and the Council that the Claimant's date of birth was 1 August 1991, which made him older than he had claimed to be but younger than the Council had originally assessed him to be.

5. The importance of the agreed date of birth for the purposes of the claim against the Council was that although the Claimant was by now an adult, he had been a child at the time when the Council refused him services and, as a former relevant child, he would continue to be entitled to services under Part III of the Children Act 1989 until the age of 21 or, if he was in education, to the age of 25. We have been told today by Mr Rutledge QC on behalf of the Council that services are being duly provided to the Claimant pursuant to the relevant provisions of the 1989 Act and in accordance with the agreement as to his date of birth.

6. The parties submitted a Consent Order recording their agreement as to the Claimant's date of birth and ordering that the hearing be vacated but that the issues of relief and costs were to be determined by a single judge of the Upper Tribunal upon written submissions alone unless the judge directed an oral hearing. The Consent Order was approved by the Tribunal.

7. Pursuant to that order, both parties filed written submissions, though the Claimant's submissions were a day late. The Claimant sought a quashing order and a declaration to the Claimant's age on the basis of the decision in AS v London Borough of Croydon

[2011] EWHC 2091 (Admin) to which I will return. The Council contended that there was no need for any relief: the parties had agreed the Claimant's age and there was no issue over his eligibility for services; the only reason advanced by the Claimant for a declaration was that it would assist him in his attempts to regularise his position with the Home Office, but that was not a proper basis for seeking a declaration against the Council. Both parties also made submissions as to costs.

8. Upper Tribunal Judge Ward dealt with the matter on the written submissions. By an order sealed on 21 January 2013, he refused to grant any relief or to make any order as to costs, save to deal with the Defendant's publicly funded costs. In his written reasons, he made the point in relation to costs that the age asserted by the Claimant in his claim was very far from the position now agreed and the Council could not reasonably have accepted the Claimant's claim as brought. The claim was successful in the sense that the Claimant was a child at the material time, but the judge did not consider it would be an appropriate exercise of discretion to make a costs order in his favour in all the circumstances. The pleaded case had been shown to be massively inaccurate and misleading. The judge also observed that the written submissions for the Claimant had not been served within the time provided by the Consent Order. He saw no reason to extend time. As to relief, the judge said this in his final paragraph:

> "I agree for the reasons advanced by the Respondent that there is no need for relief in this matter and there is no proper basis for seeking a declaration against the Respondent."

9. The judge subsequently refused the Claimant's application for permission to appeal against his order, emphasising the discretionary nature of the decision he had taken and stating that it was clear that he had taken into account all relevant circumstances when exercising his discretion.

10. The Claimant then applied to this court for permission to appeal. The application for permission was adjourned by Moses LJ to a hearing on notice to the Council to be followed by the hearing of the substantive of appeal in the event of permission being given. Moses LJ gave these reasons for his order:

> "It is a mystery as to what this appeal is about since the SSHD must have compromised the case because she accepted the Council's assessment of age and since the County Council now agree his age, I do not know why the Applicant needs a declaration, nor do I understand why the Claimant Council resist it. The earlier submissions seem to suggest that it feared an order for costs against it, but no order has been sought or made. I have ordered the application into court to save time and expense, but if some agreement can be reached then that will save the public much expense which I suspect is unnecessary. Why cannot the County Council set out in a formal letter the agreed age, which the Applicant can then use on whatever occasion he wishes?"

11. On receipt of the order containing those reasons, the Council offered the Claimant a formal letter of the kind suggested by Moses LJ, but that offer was rejected by the

Claimant as insufficient to protect his interests. The Claimant indicated a willingness to compromise the appeal on the basis either of a declaration by the court that the agreed date of birth was correct or of an agreement by the Secretary of State to accept that date of birth. The Secretary of State for her part has indicated in subsequent correspondence that she is not prepared to accept the date of birth and that she relies on the Council's original assessment of the Claimant's age.

12. The matter, therefore, comes before us as a rolled up hearing on the question of whether the judge below was wrong to refuse relief, the first issue being whether permission to appeal should be granted.

13. The grounds of appeal are to the effect that, first, the judge erred in concluding that there was no proper basis for seeking a declaration and, secondly, he erred in concluding that there was no practical need for relief.

14. In his written skeleton argument, Mr Buttler for the Claimant advanced three broad submissions.

15. The first was that the judge was under an obligation to make a finding as to the Claimant's age, an obligation said to arise in part from the supervisory character of the judicial review jurisdiction and also from the court's duty before approving a Consent Order to satisfy itself that the order is properly made.

16. The second broad submission is that even if the judge was not obliged to make a finding as to the Claimant's age, he should nevertheless have done so given the significance of such a finding for the Claimant, and that the judge failed to give adequate reasons for declining to do so. It is submitted in relation to this, as it was in the court below, that the approach in AS v London Borough of Croydon should have been followed.

17. The third broad submission in the written skeleton argument is that a finding on age would be in rem; that is to say it would be conclusive of the issue in other proceedings and, in particular, on the pending appeal to the First Tier Tribunal against the refusal of the asylum claim. In the skeleton argument, Mr Buttler accepted that the issue "does not strictly arise on the present appeal", but submitted that it would be convenient for this court to decide the point.

18. In his oral submissions this morning, Mr Buttler has turned his written submissions on their head and has put at the forefront of his case, as an essential part of his argument, the submission that a declaration should have been made in this case because it would have operated in rem and would have been binding on the Secretary of State.

19. I am wholly unpersuaded by any of the ways in which the case is advanced before us. I can see no proper basis for challenging the judge's refusal to grant relief.

20. The starting point, as it seems to me, is the discretionary character of the judicial review jurisdiction, from the initial decision whether to grant permission to apply for judicial review through to the decision whether to grant a remedy at the end of the day. The jurisdiction will not generally be exercised in the first place unless there is a genuine

dispute as to whether a public body is acting in accordance with the law. The court or tribunal will be very reluctant, for example, to entertain a claim that is academic as between the parties. If the decision that is sought to be challenged has already been withdrawn or superseded by a fresh decision by the time when permission to apply comes to be considered, it can be expected that permission will be refused.

21. Similarly, the court will be reluctant to allow a claim to proceed if it has become academic after the grant of permission. If, for example, the decision under challenge is withdrawn before the hearing of the claim, the court or tribunal may well decline to hear the claim.

22. In any event, at the end of the case the grant of any relief lies in the discretion of the court. Thus, a quashing order is discretionary and will not necessarily follow even where a decision is shown to be erroneous in law. In the case of a declaration, the breadth of the discretion is underlined by the terms of section 31(2) of the Senior Courts Act 1981 which provides that a declaration *may* be made by the High Court if it considers that, having regard to various matters, including all the circumstances, it would be just and convenient to do so.

23. I have referred to the position where a claim proceeds in the High Court but corresponding remedies are available to the tribunal in a judicial review claim pursuant to section 15 of the Tribunals, Courts and Enforcement Act 2007. Section 15(4) and (5) of that Act provides that the Tribunal is to apply the same principles as the High Court would apply in deciding whether to grant the available remedies.

24. Consistently with the general approach to which I have already referred, where a matter has ceased to be the subject of dispute by the conclusion of a claim, the court or tribunal will be very slow to exercise its discretion to grant a remedy in relation to it, unless a remedy is necessary to give effect to the agreed position (e.g. by quashing a decision so as to enable a fresh decision to be made).

25. Turning to the present case, I consider first what would have happened if the Claimant and the Council, following the initial dispute between them, had reached agreement about the Claimant's age before the commencement of judicial review proceedings. In those circumstances, I do not think that a claim by the Claimant directed at securing a declaration against the Council in respect of his age would have got off the ground. The issue would have been academic. Judicial review would not have been appropriate and permission to apply would have been refused.

26. In the event, agreement was reached only at a late stage of the proceedings, but it meant that thereafter there was no substantive issue left to fight about between the parties. They were agreed not just on the Claimant's date of birth, but on its consequences for the discharge of the Council's relevant statutory functions. There was no continuing dispute between them as to whether the Council was acting in accordance with the law. By this stage of course, the Claimant and the Council were the only parties to the proceedings. The Secretary of State had dropped out of those proceedings pursuant to a Consent Order a long time previously.

27. The suggestion that in those circumstances the Tribunal was nevertheless under an obligation to make its own determination of the Claimant's age strikes me as frankly nonsensical. A court or tribunal seized of the judicial review claim cannot be obliged to make a determination of a matter that is not any longer in dispute between the parties. Nor was the matter put before the Tribunal on the basis that it was obliged to make a determination of age. The Consent Order already submitted to, and approved by, the Tribunal provided simply that the issue of relief was to be determined by a single judge. That brought into play the range of remedies available to the Tribunal by way of relief, all of which are discretionary, but the Claimant specifically sought a quashing order and a declaration saying that the Tribunal should follow the approach in AS v London Borough of Croydon but not arguing that there was some obligation to make a determination as to age.

28. In any event, I do not accept that the judge can have been under any such obligation or, indeed, that he could have been under any obligation to grant either of the remedies sought; that is to say a quashing order or a declaration. On the contrary, I take the view that he was plainly concerned with a discretionary decision and that he was fully entitled in the exercise of his discretion not to grant any relief, on the basis the dispute between the parties had been resolved and no order was needed.

29. The suggestion that the Tribunal was under an obligation to determine the Claimant's age and/or to grant a declaration gains no support from the leading case on the court's role in relation to the determination of age; namely, the decision of the Supreme Court in R (on the application of A) v London Borough of Croydon [2009] UKSC 8, [2009] 1 WLR 2557. In that case, the Supreme Court held that where a Local Authority's assessment of age is disputed, the court must make its own determination of age on the evidence available to it rather than reviewing on conventional public law principles the Local Authority's assessment. The court expressly envisaged, however, that a court might have to intervene only if age remained in dispute as a live issue following the Local Authority's own determination: see the judgment of Baroness Hale at paragraphs 33 and 36. There is nothing in any of the judgments to support the view that the court must go on to determine the issue of age even in the absence of a live dispute between the parties as to that issue.

30. AS v London Borough of Croydon, to which I have already made reference, was another case concerning disputed age assessments. It appears from the judgment of HHJ Anthony Thornton QC in that case that the parties had reached a settlement at a late stage in the proceedings. In that respect, the case has similarities to the present one, but there are also important differences. The settlement agreement involved a submission of a Consent Order including provisions that the relevant assessments be quashed and that a declaration be made as to the Claimant's date of birth.

31. The judge said at paragraph 38 of his judgment that when a judge is presented with a proposed settlement of an age assessment dispute, he or she must independently consider the terms of the settlement and satisfy himself or herself that the proposed settlement is one which can and should be approved. The need for that independent consideration arose in particular in that case because the child claimant, on the agreed position, was still a child and therefore a protected party, so that under CPR 21.10 no

settlement could be valid without the approval of the court. The judge also referred, however, to the judgment of Neil Garnham QC in R (on the application of N) v London Borough of Croydon [2011] EWHC 862 (Admin) where similar points were made about the need for the court to consider carefully the terms of a Consent Order before giving its approval to that order.

32. In AS the judge considered the evidence and concluded that new assessments, on the basis of which agreement had eventually been reached, were reliable and that the age thereby arrived at should be adopted and approved by the court. He went on to rule as a separate matter that the declaration being granted should state that it was a declaration in rem.

33. In the present case, by contrast, the task for the Upper Tribunal Judge was not to approve the terms of the Consent Order (and, indeed, the Claimant on the position by now agreed was no longer a child). The Consent Order representing the settlement agreed between the parties had already been approved at a prior stage in the process. Moreover, it contained no provision for an order quashing the Council's original age assessment or making a declaration as to age, and the statement of reasons given for the making of the Consent Order gave no details of the revised assessments upon which the agreement was based. The order simply recorded the agreement between the parties as to the Claimant's date of birth and left the issue of relief open for determination. It was not, I should stress, an order of the kind envisaged in R (N) v London Borough of Croydon at paragraph 36. The task for the judge pursuant to this order was simply to decide whether to grant relief in the exercise of his discretion. He was performing a different exercise from that of Judge Thornton in AS v London Borough of Croydon and, indeed, from that of the deputy judge in R (N) v London Borough of Croydon.

34. As I have said, the judge was, in my view, fully entitled in the circumstances to take the view that no relief was needed and that none was appropriate. Had he been minded to accede to the Claimant's request that he make a declaration as to the Claimant's age, it would have been necessary for him to consider all the evidence relating to that question and to make his own determination. He could not simply have rubber stamped the agreement between the parties. The need for caution in granting a declaration and for the exercise of care before going down that line is itself emphasised in the judgment of the deputy judge in R (N) v London Borough of Croydon at paragraphs 2 and 3. In the present case, the Tribunal judge was not even given any assistance in the parties' submissions as to the details of the age assessment and the matters that would have to be considered if the court was going to go down the line of making its own determination of age. In the situation that the judge faced, it was, in my view, an obviously sensible decision not to go down the path of examining the evidence and reaching a judicial determination in relation to an issue that was no longer live as between the parties. In my judgment, the judge gave sufficient reasons for his decision, accepting the points advanced in the written submissions on behalf of the Council.

35. I do not think that it is necessary in these circumstances to get involved in the in rem issue issued raised by Mr Buttler's third broad written submission and put at the forefront of his arguments today. The fact that the Claimant wanted to have a declaration as to age that might be deployed in separate proceedings against the

Secretary of State was, in my view, plainly not a good reason why the judge should make a declaration in the present proceedings, to which the Secretary of State was no longer a party and in which the Secretary of State had had no involvement since the first part of 2011.

36. There is no risk of inconsistent judicial determinations on the question of age arising out of the judge's approach. By refusing relief, he declined to make any such determination. In the absence of a determination in these proceedings, it will be open to the Claimant to seek such a determination in any other proceedings where the issue arises, particularly in an asylum appeal before the First Tier Tribunal.

37. The fact that the Council in this case has agreed for the purposes of its own functions a date of birth with which the Secretary of State disagrees is, in my judgment, no cause for concern and no reason why there should be a declaration granted in the present case. The whole matter can be determined in the pending proceedings in the First Tier Tribunal if there continues to be a dispute between the Secretary of State and the Claimant.

38. For all those reasons, I see no sustainable ground of challenge to the discretionary decision of the judge below and I would refuse permission to appeal.

39. LORD JUSTICE FULFORD: I agree.

40. LORD JUSTICE LONGMORE: I also agree.