Upper Tribunal
(Immigration and Asylum Chamber)

R (ota JS) and R (ota YK) v Birmingham City Council (AAJR) [2011] UKUT 00505 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
On 5 October 2011

Decision

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Before

Mr C M G Ockelton, Vice President
Upper Tribunal Judge Warr

The Queen on the application of JS
(by his litigation friend THE REFUGEE COUNCIL)

Claimant

- v -

BIRMINGHAM CITY COUNCIL

Defendant

and

The Queen on the application of YK
(by his litigation friend KAMALJIT SANDHU)

Claimant

- v -

BIRMINGHAM CITY COUNCIL

Defendant

Representation:

For the Clamant JS: Mr Suterwalla, instructed by Bhatia Best Solicitors
For the Claimant YK: Mr Bedford, instructed by Sultan Lloyd Solicitors
For the Defendant: Mr Harrop-Griffiths, instructed by Birmingham City Council

Introduction: The Problem

1. Local Authorities owe certain duties to children under the Children Act 1989 and other legislation. As the Supreme Court decided in R (A) v Croydon LBC [2009] UKSC 8, those duties are owed to those who are in fact under the age of eighteen, not only those who the Local Authority reasonably considers to be under the age of eighteen.

2. If the Local Authority refuses to provide benefits to a young person on the ground that he is not a child, the remedy is by challenge to the Local Authority's decision by way of Judicial Review. In addition to the normal grounds on which Judicial Review lies, the notion of illegality in this context encompasses a wrong assessment of age. Thus, in a case of this sort, it is open to a claimant to establish that, as a matter of fact, the Local Authority's assessment was wrong. The Court has, in other words, the task of assessing the claimant's age.

3. That task is in addition to the other tasks of the Court on Judicial Review. A Local Authority's decision on age may, like any other decision of a public body, be unlawful for failure to take into account relevant factors, or for taking into account irrelevant ones; it may simply be irrational. Considerations such as these may assist a claimant to establish that the Local Authority's decision should be quashed. But when the only issue is age, the proceedings are likely to be directed to an assessment of age by the Court, rather than merely to quashing the assessment already made, leaving the way open for the Local Authority to make a new one.

4. That must be particularly so when the case has reached an advanced stage of preparation. Days of court time will have been set aside for the hearing of evidence; witnesses will have been instructed; lawyers will have devoted considerable energy to preparing a precise case based on the evidence; the claimant seeks a substantive resolution of the disputed question of his age. It is very unlikely that at that stage the traditional processes and remedies of administrative law will provide an appropriate resolution of the case. The hearing will be directed not merely to seeing whether the Local Authority decision should be displaced, but, if so, to determining what the claimant's age most likely is.

5. Age Assessment is, however, an inexact science. The decision of a Court may be authoritative but it is not necessarily for that reason more nearly factually correct than an assessment by anybody else. And litigation should be a last resort: if the claimant can accept a Local Authority assessment, or if the parties can agree to compromise, there should be no need for the Court's intervention. The Judicial Review claim will not need to be brought, or, if brought, can be settled by consent. That is not in any sense a worse outcome than a full hearing, at the end of which the Court makes an assessment of the claimant's age. On the contrary, it is likely to be a better outcome. There is no "loser"; and a great deal of time and money is saved.

6. Unfortunately, however, settlement of the issue between the claimant and the Local Authority may not be the end of the matter. Even a judicial decision on the issue

between the claimant and the Local Authority may not be the end of the matter. The reason for that is as follows.

7. Many, perhaps most, of the young people who raise these issues have come to the United Kingdom as asylum claimants. The issue arises because they have no documents. They make an asylum claim to the Secretary of State for the Home Department. An officer of the UK Borders Agency may assess the claimant's age under section 94(7) of the Immigration and Asylum Act 1999, as part of the process of deciding whether he is entitled to NASS support; or he may simply need to take the claimant's age, or claimed age, into account in assessing any risk he would face on return to his own country. Further, the Secretary of State has developed and published policies for the granting of leave to unaccompanied asylum-seeking minors, even if they are not entitled to status as refugees. There may or may not be a negative decision on the asylum claim. If there is a negative decision, there may or may not be an appeal. In any case, the decision of the Secretary of State or a judge of the Tribunal may incorporate an assessment or a judgement of the claimant's age. Based on it, the claimant may be issued with status documents giving his age as so ascertained. And experience shows that that assessment or judgement may be different, sometimes very different, from any assessment made by the Local Authority.

8. What then? From being in a position in which the claimant did not know his age, he now has two officially ascertained ages. If he is asked how old he is, he must respond "it depends who is asking". And because of the difference in responsibility for the housing of asylum-seekers over and under eighteen years old, he may find that neither the Secretary of State (who operates the NASS System for those over eighteen) nor the Local Authority for the area in which he is (which has duties to those under eighteen) is prepared to house him. The Secretary of State refuses, because she accepts that he is under eighteen; and the Local Authority refuses because it considers that he is not.

9. This is obviously both unsatisfactory and unjust. Unfortunately in many cases it is not readily capable of satisfactory resolution, even on the basis of an Age Assessment by the Court. An assessment made by the Court in proceedings against a Local Authority is not a judgement in *in rem* and does not bind the Secretary of State. If authority is needed for that proposition it is to be found in the judgement of Hickinbottom J, in R (PM) v Hertfordshire County Council [2010] EWHC 2056 (Admin). There is a further consequence, which is that the Secretary of State does not need to be joined as an interested party, and perhaps cannot be: she is not a person directly affected by the proceedings within the meaning of CPR 54.1(2)(f). Anyway, she will not be joined as a defendant, by a claimant who is prepared to accept her assessment, but not that of the Local Authority. And she will not be joined as a defendant by a Local Authority anxious to perform its own duties but unconcerned with and not able to afford to be concerned with, the actions of another public body whose decisions do not bind it.

10. There is a further, procedural problem. Following the decision of the Supreme Court in R (A) v Croydon, a judicial initiative was developed, allowing transfer of Age

Assessment Judicial Reviews to the Upper Tribunal. Such transfer can take place under section 31A of the Senior Courts Act 1981, as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007. It has the sanction of the Court of Appeal in R (FZ) v Croydon LBC [2011] EWCA Civ 59 at [31], and such business is assigned to this Chamber by Article 11(c)(ii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655). The Immigration and Asylum Chamber is considered to have the appropriate expertise, because of hearing asylum and other cases in which the age of a claimant, particularly a claimant from abroad, is an issue.

11. But the Tribunals, Courts and Enforcement Act 2007 was passed at a time when the appeals process for immigration and asylum matters had recently been reformed; and it was no doubt considered inconceivable that such causes would ever come before the new Tribunals established by that Act. A consequence is that one of the conditions of the transfer of a Judicial Review application to the Upper Tribunal is, as specified in section 31A (7) of the Senior Courts Act 1981:

> "(7) Condition 4 is that the application does not call into question any decision made under –
> (a) the Immigration Acts,
> (b) the British Nationality Act 1981,
> (c) any instrument having effect under an enactment within paragraph (a) or (b), or
> (d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British national (Overseas) or British Overseas citizenship."

12. So if the Secretary of State is joined as a party, the claim cannot be transferred to the Upper Tribunal, and the benefits of expertise, speed and reduced cost are lost. And the joinder of the Secretary of State after transfer would result in even more waste, if the claim needed to be transferred back to the High Court.

13. There are thus motives for avoiding the involvement of the Secretary of State. On the other hand, the background to the dispute between the claimant and the Local Authority may, as we have indicated, include a decision by the Secretary of State or a judgement by the Tribunal, in each case under the Immigration Acts. And it may be that one party or the other seeks to rely on it.

14. It is with those matters in mind that directions were given in the present cases to enable the examination, as a preliminary issue, of the impact of decisions already made under the Immigrations Acts, on the course or the outcome of proceedings for Judicial Review against the Local Authority. In each of these cases the Local Authority had assessed the claimant as substantially older than the Secretary or State and the Immigration Judge had done.

The Claimants

JS

15. JS comes from the Gardiz Provence of Afghanistan. He claims to have been born in 1996: that is because he says that, before he left Afghanistan in 2008 his mother told him that he was twelve. He arrived in the United Kingdom in about December 2008. He was encountered by police in Birmingham and accommodated as a minor. He made an asylum application and was also assessed by Birmingham City Council. The Council estimated his date of birth as 1 January 1990, making him over nineteen at the date of the assessment. That assessment was challenged by way of Judicial Review, the proceedings being settled by way of a Consent Order. A second assessment was carried out by the defendant in July 2009. That again concluded that, at the date of the assessment, the claimant was aged over eighteen. That is the assessment challenged by the claimant in the present proceedings.

16. Meanwhile, the claimant's application for asylum had been unsuccessful. He appealed to the Asylum and Immigration Tribunal. Immigration Judge Juss heard the appeal and allowed it. He also made a finding about the claimant's age, concluding only that the claimant was a minor at the date of his decision in June 2009. The Judge's reasons appeared to have been that the assessment which had been made was not Merton-compliant, and that the claimant "certainly looks more like thirteen than nineteen". The Secretary of State sought reconsideration, and the appeal was eventually reheard before Immigration Judge Robertson in the Upper Tribunal. She allowed the Secretary of State's appeal (thus rejecting the claimant's claim to asylum), but concluded that the claimant was fifteen at the time of the assessment by Birmingham Council in 2009. So far as concerned the issue between the claimant and the Secretary of State, therefore, his age has been determined as presently under eighteen, and considerably under eighteen at the date of both the Secretary of State's original decision and the defendant's assessments. We have not seen any subsequent documentation issued by the Secretary of State to JS, but we understand from Mr Suterwalla who represents JS, that such documentation has been issued.

YK

17. YK is also from Afghanistan. He came to the United Kingdom in May 2010 and claimed asylum in June. He was treated as a child for the purposes of his substantive asylum interview, but refused asylum on the 27 August 2010. Birmingham City Council assessed his age as over eighteen on 3 September 2010. That is the assessment formally under challenge in these proceedings, although the appellant has subsequently undertaken a further review of the claimant's age and on 25 January 2011 confirmed its view that he is over eighteen, with an estimated date of birth of 1 January 1992.

18. Meanwhile, the claimant had appealed against the Secretary of State's decision in relation to his asylum claim. His appeal was heard by Immigration Judge Chohan on 14 October 2010. He dismissed the appeal, but considered in full the evidence relating to the claimant's age. He expressed concerns about the Secretary of State's reliance on Birmingham City Council's assessment, particularly because the assessment mentioned in the Secretary of State's decision letter only became available

after the date of the decision letter. He found as a fact that the claimant was born on 1 January 1996, adding "certainly, there is nothing to suggest otherwise".

19. The history of the claimant's appeal after that appears to be that the Upper Tribunal reversed the outcome of the appeal to Judge Chohan, and there has subsequently been a grant of permission to appeal to the Court of Appeal. But what is important for present purposes is that, following the appeal to the First-tier Tribunal, the Secretary of State appears to have accepted Judge Chohan's assessment of the claimant's age, and accordingly issued him with a status document giving 1 January 1994 as his date of birth.

20. The result was not entirely to the claimant's benefit, because the consequence of the Secretary of State's acceptance that the claimant was a minor was that NASS Support was withdrawn from him, and he was for a short time without any access to accommodation. The matter has been resolved on an interim basis pending the conclusion of these proceedings.

Submissions

21. The two claims therefore have the following relevant features in common. First, the defendant's assessment is that the claimant's age is substantially more than he claims. Secondly, there has been a judgement by an Immigration Judge that the claimant is of an age substantially lower than that assessed by the Local Authority, and therefore nearer to, or the same as, the claimant claims. Thirdly, the Judge's assessment has been accepted by the Secretary of State. These cases do therefore raise the uncomfortable spectacle of the claimant having different ages for different purposes, and in YK's case at least, the consequential difficulty of obtaining benefits.

22. For JS, Mr Suterwalla accepted that the Immigration Judge's finding as to the claimant's age is not binding on another Judge of the Upper Tribunal, or on the parties. He submitted that it is evidence in the case, and that the weight to be attributed to it is a matter for the court determining the claimant's age in these proceedings. But he also submitted that, in the circumstances, these proceedings inevitably call in to question the decision of the Immigration Judge, a decision under the Immigrations Acts. These proceedings should therefore, he submitted, be transferred back to the High Court.

23. Mr Bedford, for YK, raised a different issue which, with respect, we do not think was very fully developed. He asserted that the real issue was whether the Local Authority was bound by the Secretary of State's decision. His submissions were based on the assertion that both the Secretary of State and the Local Authority are emanations of the State and that, from the point of EU Law, it is the State that has obligations in relation to the reception and treatment of asylum seekers and the making of status and other decisions. He suggested that if the matter was not clear, we should refer it to the Court of Justice of the European Union. Both Mr Suterwalla and Mr Harrop-Griffiths, who represented the defendant, sought to resist that proposal. Mr Harrop-Griffiths submitted that the transfer of these claims to The

Upper Tribunal had been unlawful. He drew attention to the fact that in R (FZ) v Croydon LBC, there had been no hearing before the Tribunal: where there had been one, a claim such as this necessarily calls the outcome of a decision under the Immigration Acts into question. In any event, he submitted, the Secretary of State should be made a party to these proceedings, which would necessarily prevent Condition 4 in section 31A (7) of the Senior Courts Act 1981 from being satisfied.

Guidance and Protocol

24. Mr Harrop-Griffiths did, however, provide us with two documents which we regard as of the highest importance in the circumstances of these cases. They are the UKBA's Guidance "Assessing Age", most recently amended on 17 June 2011, and a document entitled "Age Assessment: Joint Working Protocol Between Immigration and Nationality Directorate of the Home Office (IND) and Association of Directors of Social Services (ADSS)." It is not dated although the reference to "IND" shows that it is of some age: IND is the former name of the UKBA. It is also on its face, incomplete: section 16 is marked "yet to be agreed". The substantial parts of it, are stated to have been agreed between IND and Local Authorities and Mr Harrop-Griffiths told us that Birmingham City Council accepted that it formed part of the Council's published policies.

25. The UKBA instructions on assessing age recognised, throughout, the difficulty of ascertaining the age of a young person whose date of birth is not known. Chapter 5 is headed "Local Authority Age Assessments". It summarises the circumstances in which Local Authorities will need to make Age Assessments, and notes that those assessments may sometimes differ from an assessment made by UKBA. It notes that if the Local Authority's Age Assessment is the only information available, it may conclude the question; on the other hand, there may be good reasons for the Secretary of State to differ from it. The Local Authority should be asked to indicate the reasons for the assessment, particularly if the Secretary of State intends to rely on the Local Authority's assessment at an appeal hearing. The principle of sharing information with Local Authorities pervades the document: for example, Chapter 7 is headed "Sharing Evidence of Age with Local Authorities", and begins:

> "Case owners are reminded that they **must** liaise closely and share information relevant to the applicant's age with Local Authorities"

26. In Chapter 8, "Weighing up Conflicting Evidence of Age", issues arising from different assessments by different Local Authorities, and new evidence obtained in the course of an immigration appeal is considered. A Merton-compliant Age Assessment by a Local Authority is to be given "prominence", but, for example, if the Secretary of State considers evidence produced for the purposes of an appeal to be sufficiently persuasive to give ground for displacing it, "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"

27. Section 11 is headed "Immigration Judge Findings on Age". It begins:

> "If during the determination of an asylum appeal the Immigration Judge finds the appellant to be a child, the Agency will accept this outcome in most cases, and proceed to treat the applicant as a child.
>
> Case owners cannot normally expect to depart from the Immigration Judge's determination on age unless that decision is appealed. "

28. The text goes on to note that there may be circumstances which provide exceptions to this general rule, but in any event UKBA must have a "sound and rational" reason to depart from the Immigration Judge's assessment. In cases where UKBA think that there is a reason not to implement the Immigration Judge's assessment, "case owners **"must"** consider section 7.1 Discussing Evidence of Age with the Local Authority and liaise with their senior case worker".

29. Further,

> "Where an Immigration Judge finds the applicant is a child and, on the particular facts of the case, the Agency intends to give effect to the decision, it is essential that the matter is first discussed with the Local Authority (the Agency's reason for accepting the Immigration Judge's decision should be put in writing to the Local Authority). This gives the Local Authority the chance to provide any new, relevant evidence to the case owner, ensures that the Local Authority is made aware of the Tribunal's finding on age and gives the Local Authority the opportunity to re-consider the assessment. The Local Authority should be asked to confirm **in writing** whether or not in light of the Immigration Judge's finding, it proposes to accept the applicant as a child and its reasoning".

There is then a reference to R (PM) v Hertfordshire County Council [2010] EWHC 2056 (Admin), and the section concludes as follows:

> "If the Local Authority has good reason not to accept the Immigration Judge's decision on age, consideration should be given to appealing the Tribunal's decision
>
> While these discussions with the Local Authority are taking place, case owners should notify the applicant and their legal representative that the Local Authority is currently considering the Immigration Judge's findings and whether or not to amend their decision on age".

30. The Age Assessment Joint Working Protocol begins by stating its purpose as to set out "arrangements to support a cooperative approach to Age Assessment" between IND (now UKBA) and UK Local Authorities and Statutory Child Care Agencies. One of the intended outcomes, listed at section 7, is:

> "Clear and agreed determinations on whether asylum applicants and other migrant children are over or under eighteen years of age, where their age is not known or is disputed by a partner agency".

31. Sections 9 to 12 set out the bureaucratic process for determination of age, according to whether it is a Local Authority or UKBA that is first approached by the claimant. But section 13 takes the matter further on in time. It is headed "Where Information with

a Bearing on Age Assessment Emerges Later in the Asylum Process". The section begins:

> "There are occasions when IND or the responsible LA only receives information bearing on the age or credibility of an applicant much later in the process. Where such new information merits a re-assessment of age of an asylum seeker, it is important that the Agencies follow processes consistent with those above to avoid applicants being left without appropriate support".

32. The section goes on again to deal with process. Section 14 is headed: "Conflicting Assessments". The first half of it deserves to be set out in full:

> "a.) **Between IND and a LA**
>
> In many cases it is likely that IND's assessment will be consistent with that of the LA. In some cases IND's assessment will differ from that of the LA; for example if IND believes that specific evidence, e.g. a document, has not been sufficiently taken into account or there are concerns that the person presenting to IND is not the same person as seen by the LA.
>
> In such a case IND frontline staff should discuss the case with the named contact at the LA in the first instance. For example they should point out contrary evidence that they believe may not have been considered by the LA.
>
> In the event that neither party can persuade the other as to the correctness of their determination the case will be referred to the Asylum Policy Unit and a formal reconciliation attempted with the LA within 7 working days.
>
> In the interim, pending reconciliation, the applicant should be supported in accordance with the LA assessment.
>
> If no agreement is reached through this process the matter will be referred for binding adjudication to a nominated third party."

Discussion

33. These two documents indicate that there should be constant communication between a Local Authority and the Secretary of State if there is a difference of opinion between them on an asylum claimant's age. The UKBA document indicates that the claimant and his representative are to be kept informed about any disagreement, and suggests that there will be a positive process of persuasion between agencies, clearly with the intention of achieving a common view. The joint working protocol goes further still. It provides for a formal process of "reconciliation", or reference to "binding adjudication". Mr Harrop-Griffiths told us, in written submissions after the hearing, that the defendant's position is that no such reference has ever been made; but that is not the point. We began by drawing attention to the difficulty faced by claimants who have different ages for different purposes. The declared public position of the Secretary of State and Local Authorities is that that will happen only after there has been constant liaison between them, discussion, persuasion, attempts to agree, and if necessary a process of apparently extra-judicial determination.

34. In the submissions to which we have just referred, Mr Harrop-Griffiths attempts to minimise the importance of the Age Assessment Joint Working Protocol in particular. He says that it needs and is receiving updating in the light of recent decisions of the courts, including R (A) v Croydon LBC. He suggests that the process for referral for "binding adjudication" is inappropriate in the light of that decision, unless the "nominated third party" is the Court or the Upper Tribunal.

35. It does not appear to us that these documents can be dismissed so readily. The clear public position is that differences in opinion about the claimant's age will be sorted out between the authorities concerned, and will not, save no doubt in most exceptional circumstances, which do not appear to be envisaged by the published policies, be a matter for the claimant to have to take up with two authorities separately. Clearly, if he disagrees with the assessed age following the reconciling of difference between the authorities, he may be able to take proceedings by way of Judicial Review. But there is no suggestion that a claimant would be in a position that the present claimants are in. They each have their two assessed ages. They challenge the one they do not like, but they run the risk of losing an advantage that they already have from the Secretary of State. Even if that does not happen, they can have no assurance that all the governmental and quasi-governmental authorities that they deal with will, as a result of these proceedings, or at all, agree on their age.

36. It was for this reason that we raised during the hearing the proposal that, in these cases, which have not yet been fully prepared for an Age Assessment hearing on evidence, the appropriate outcome was to be found in traditional public law. In his written skeleton, Mr Harrop-Griffiths asserts that, in R (A) v Croydon LBC, the Supreme Court ruled that:

> "A Local Authority's decision that a person was or was not a child for the purposes of the Children Act 1989 was not susceptible to challenge on ordinary Judicial Review principles but was a matter of fact to be decided by a court on an application for a Judicial Review."

37. As we have already indicated, we do not think that is accurate. The judgements of the Supreme Court, as we read them, are that such a decision is not only susceptible to challenge on ordinary Judicial Review principles: they are not ruled out, but in addition the Local Authority's assessment is susceptible to challenge simply on the basis that it is in fact wrong.

38. In the present cases, there is little or no trace of the communication, discussion, persuasion and reconciliation that the defendant's policies indicate will take place. It is in our judgement no answer to say that those policies relate only to initial assessment, and not to reassessment in the light of an Immigration Judge's judgement. Both the UKBA's policy and section 13 of the protocol show that the principles apply throughout the assessment process, including the taking into account of evidence on appeal, and an Immigration Judge's judgement. In both of the present cases, the Secretary of State has, following the judgement of an Immigration Judge, made a new assessment which is in flat contradiction to that of

the Local Authority, with no attempt to decide whether there was any good reason for preferring one over the other for the general purposes for the State's dealings with the claimant.

39. The policy documents to which we have referred are commendable. They indicate a clear and public intention to avoid difficulties such as arise for the claimants in the present cases. It is best if an assessment can be reached which all parties, including the claimant, can accept. If that cannot be done, it is clearly much better for the claimant to be challenging only one assessment. Otherwise, as we have said, he may for various reasons be in great difficulty.

40. The UKBA document is not the defendant's policy; but the protocol is. The defendant appears to us neither to have followed the policy nor to have given any good reason for departing from it. Instead, the defendant simply adopted and maintained an Age Assessment that was different from that adopted by the Secretary of State.

41. In these circumstances it appears to us that the proper outcome of these proceedings is to quash the defendant's decisions on that ground alone, leaving the defendant to apply its policy and differ from the Secretary of State's assessment only by following the procedure in the protocol, in particular section 14(a). In a case such as this, where there are what we regard as clear grounds for Judicial Review on the traditional basis, there does not seem to be any good reason for preparing for a long and expensive hearing which may not need to happen if the claimants are content with an Age Assessment to which both the Secretary of State and the Local Authority have subscribed.

42. In any event, determining the proceedings in this way prevents the claimants from having to deal separately with the Secretary of State and the Local Authority as respects their age, and prevents them being prejudiced by the failure of the authorities of the State to agree between themselves.

43. We shall therefore quash both the decisions under challenge, and make any necessary directions.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 13 December 2011