Neutral Citation Number: [2012] EWCA Civ 1420

Case No: C5/2012/0246

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION & ASYLUM CHAMBER)
UTJ SPENCER
REF: AA/13345/2010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2012

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE DAVIS
LORD JUSTICE LEWISON

- -

Between :

KA (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

EDWARD NICHOLSON (instructed by **Wilson Solicitors LLP)** for the **Appellant.**
DAVID BLUNDELL (instructed by **Treasury Solicitors**) for the **Respondent.**

Hearing date: 23rd October 2012.

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Approved Judgment

Lord Justice Davis :

Introduction

1. The context of this appeal is a very familiar one: a disputed age assessment arising on an asylum claim. But the facts are unusual.

2. The decision under appeal is one of Upper Tribunal Judge Spencer promulgated on 4th November 2011. He dismissed the appeal of the appellant, KA, on all points raised. In doing so, he concluded that, among other things, he was not satisfied that there was a reasonable degree of likelihood that KA was under the age of 18 at the time of the relevant decision.

3. KA now appeals with leave granted by Longmore LJ, limited to only one of the four grounds initially sought to be advanced: and it is that one ground (summarised below) which has been debated before us. The appeal was advanced by Mr Edward Nicholson, who also appeared on behalf of KA in the Upper Tribunal. The respondent Secretary of State was represented by Mr David Blundell, who did not appear below.

The relevant policy

4. The problems arising in age assessment cases, and not least in the context of asylum claims, are by now all too well-known. Where an applicant is indeed a child all the rights and privileges that go with that status are to be applied. At all stages the best interests of a child are normally to be regarded as a primary consideration. That finds reflection in various international conventions; statutory provisions such as, for example, s.55 of the Borders, Citizenship and Nationality Act 2009 ("the 2009 Act") and certain of the Immigration Rules; and court decisions at the highest level both in Europe and domestically. But the very rights and privileges that – most properly – are attached to the status of childhood can attract abuse. For example, in the asylum context, an applicant in the United Kingdom who is assessed to be a child stands to gain the benefit of the current policy not to seek to remove unaccompanied asylum seeking children before reaching the age of 17½. Such an individual also stands to gain the benefit of accommodation and maintenance under the provisions of the Children Act 1989, as well as access to education.

5. Assessments of age can be very difficult. There is no exact science: indeed, there have in the past been instances where those claiming to be expert and propounding an assertedly reliable methodology as to age assessment have been criticised and their propounded methodologies rejected. The physical appearance of an applicant – save in obvious cases – can be a poor guide, not least owing to different cultural and life experiences in many parts of the world. Very frequently too, applicants will – for easily understandable reasons – simply not be in a position to produce any reliable documentary or other evidence at all as to age or may only be able to provide very limited evidence. Some, regrettably, will provide misleading or downright false evidence, given the prospective advantages that may flow.

6. In such circumstances, the Secretary of State has devised a number of policies to deal with the various situations that may arise in the context of those claiming to be children. For present purposes, as was agreed before us, the particular applicable

policy at the relevant time was contained in an Asylum Policy Instruction entitled "Assessing Age" ("the Policy Instruction").

7. The introductory paragraph makes clear that the Policy Instruction sets out the policy and procedure to be applied when an asylum applicant claims to be a child with little or no evidence and that claim to be a child is doubted by the Agency.

8. The general policy in assessing age is then set out in paragraph 2. In part that provides as follows:

> "As many asylum applicants who claim to be children do not have any definitive documentary evidence to support their claimed age, a decision on their age needs to be made. Many are clearly children whilst some are very clearly adults. In other cases the position is more doubtful and a careful assessment of the applicant's age is required. All available sources of relevant information and evidence should be considered, since no single assessment technique, or combination of techniques, is likely to determine the applicant's age with precision.
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> …..
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> All other applicants should be afforded the benefit of the doubt and treated as children, in accordance with the ***Processing an asylum application from a child*** AI, until a careful assessment of their age has been completed. This policy is designed to protect the welfare of children. It does not indicate final acceptance of the applicant's claimed age, which will be considered in the round when all relevant evidence has been considered, including the view of the local authority to whom unaccompanied children, or applicants who we are giving the benefit of the doubt and treating as unaccompanied children, should be referred."

It was also stated in this paragraph of the Policy Instruction, by reference to s.55 of the 2009 Act (and related published guidance) that the Agency's policy was to rely on Merton compliant age assessments: this, of course, being a reference to the well-known case of *R (o/a B) v Merton LBC* [2003] 4 All ER 280, [2003] EWHC 1689 (Admin). It is repeated in that paragraph that it is appropriate initially to give applicants the benefit of the doubt until a further assessment is made.

9. In paragraph 3 of the Policy Instruction, headed "Screening", this among other things is said:

> "All applicants who claim to be a child should be asked for documentary evidence to help establish their age. If an applicant's claim to be a child is doubted and there is no evidence to support their claim, the screening officer should conduct an initial age assessment.

> If the screening officer considers an applicant's physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age a CIO/HEO (or higher grade) must be consulted. The CIO/HEO (or higher grade) should then make their own assessment of the applicant's age. If their assessment agrees with that of the screening officer the applicant should be informed that their claimed age is not accepted and that their asylum claim will be processed under adult procedures. Form IS.97M should be completed, served, and signed by the CIO/HEO (or higher grade).
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> In all other cases, where the claimed age has not been accepted, the applicant should be informed, in a sensitive way, that because there is insufficient information at this stage on which to make a final decision, they will be given the benefit of the doubt and will be treated as a child, until all available information is collected and a decision on their age has been made. In these situations the most pressing need will usually be to arrange accommodation. Applicants should be informed that a referral will be made to the appropriate local authority to collect them and that the local authority will make an assessment of their age and communicate that information to the Agency, at which time a final decision will be made about their age (on-site social workers are available during normal working hours at Croydon asylum screening unit). For further guidance on referring an applicant to a local authority see s.6 of the *Processing an asylum application from a child* AI…."

Background

10. In order to make explicable the ground sought to be raised on behalf of KA in pursuing this appeal, it is necessary to set out, briefly, the background facts and procedural history.

11. It was not in dispute that KA is a citizen of Afghanistan. He arrived clandestinely by lorry in the United Kingdom on or around 23rd November 2009. He thereafter applied for asylum on 14th December 2009.

12. His account was that (as, he said, he had been told by his mother) he had been born in 1994: if so, he was around 15 years of age on arrival in the UK. He said that he had lived with his family in Paktia province in Afghanistan and that his father had become involved with the Taliban. There came a time when his father told him that Taliban leaders wanted to make KA go to a training camp with a view to his becoming a suicide bomber: if he refused his life would be in danger.

13. He and his mother were very opposed to the suggestion. With the aid of an uncle he was taken to Kabul and then placed on a lorry on which he travelled for several days. Then, with others, he travelled over hills and mountains by foot or by lorry before eventually, some months later, arriving in the UK. His case was that, given this background, he would be at a real risk of serious harm if returned to Afghanistan.

14. There were doubts both about KA's version of events and about KA's claimed age. Among other things, his appearance seemed to be that of an adult. But the position was such that, under the policy, at this stage the benefit of doubt as to his age was to be given. He was accordingly referred to the relevant local authority (Surrey County Council) for an assessment designed to be Merton compliant.

15. He was assessed by two social workers. Their report dated 17th December 2009 concluded, giving reasons, that KA was assessed to be over the age of 18.

16. In her lengthy decision letter dated 4th March 2010, the Secretary of State set out fully the claims of KA. In dealing with the question of age, this was said at paragraph 10 of the decision letter:

> "10. When you made your application for asylum/human rights, you claimed you were 15 and a half years old. However, you have failed to produce any satisfactory evidence to substantiate this claim. Although you claimed to be a child your physical appearance, conduct and demeanour before the Social Workers at your Merton compliant age assessment suggested that you were over 18. In the absence of any satisfactory evidence to the contrary, it is not accepted that you are a child for the purposes of paragraph 349 of HC395 (as amended)."

The letter went on to explain, giving full reasons, why KA's account of events in Afghanistan relating to him were rejected as not credible. It was concluded that he would not be at risk on return, and in any event he could safely relocate. A decision that removal was appropriate was made. The letter accompanied a Notice of Decision to remove dated 19th March 2010. It was common ground that this decision was an immigration decision within the ambit of s.82(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), attracting the right of appeal under s.82(1).

17. KA appealed from this decision to the First-tier Tribunal on 30 March 2010. His grounds of appeal included a challenge to the decision that he was over 18. The First-tier Tribunal judge after a full oral hearing rejected the appeal by a determination dated 14th May 2010. She accepted, among other things, that the assessment of age, as carried out by Surrey County Council, was not displaced by any other convincing evidence. She found KA to be an adult. KA himself was assessed as being an unreliable witness. His evidence, where disputed, was rejected in all respects. It was found that his story had been fabricated and that he would not be at risk or face persecution if returned to Afghanistan.

18. Permission to appeal against this decision was granted, essentially on the grounds that the First-tier Tribunal Judge had not sufficiently engaged with all the evidence and all the submissions made on the evidence, and had also given inadequate reasons for her findings. Thereafter it was decided by the Upper Tribunal that that decision of the First-tier Tribunal should be set aside and re-made by the Upper Tribunal.

19. It is of relevance to note what the statutory remit of the Tribunal – and here the Upper Tribunal was remaking the decision of the First-tier Tribunal – was on appeal.

Section 86(2) of the 2002 Act among other things requires the Tribunal to determine any matter raised as a ground of appeal. Section 86(3) is in these terms:

> "86(3) [the Tribunal] must allow the appeal in so far as [it] thinks that –
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> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
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> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently."

Section 86(5) provides:

> "86(5) In so far as subsection (3) does not apply, [the Tribunal] shall dismiss the appeal."

As Mr Blundell observed, the statutory appeal scheme is not simply to be equated with an appraisal by way of review of the decision under challenge. Further, the actual decision the subject of the appeal in the present case was the decision to remove. The Upper Tribunal had, for this purpose, to determine whether KA qualified for protection as a refugee or under Article 3 in assessing whether the decision was wrong in law: albeit, of course, the issue of the age of KA would be an important constituent of the overall appeal determination. It may also be added that, on remaking a decision, the Upper Tribunal is empowered to make any decision which the First-tier Tribunal could have made and may make such findings of fact as it considers appropriate: s.12 of the Tribunals, Courts and Enforcement Act 2007.

20. In the present case, KA had initially not put in expert evidence of his own but, among other things, argued before the First-tier Tribunal, in support of his contention that he was a child, that the age assessment of Surrey County Council, and the Secretary of State's reliance thereon, was flawed. The point had been renewed in his grounds of appeal. The matter first came before the Upper Tribunal (comprising Kenneth Parker J and Upper Tribunal Judge Spencer) on 16th November 2010. The Upper Tribunal took the view on that occasion that the evidence so far adduced by both parties on age was unsatisfactory "in circumstances where the establishment of his correct age was of great significance". The hearing was therefore adjourned.

21. In the event, the Secretary of State declined to tender the authors of the Surrey County Council's assessment for cross-examination; and an application to compel their attendance was refused. KA had in the meantime put in expert evidence in the form of a written report of Dr Birch. Her stated opinion was that KA's age was in the region of 15 years and 11 months (giving a two year median bracket). The Secretary of State had not herself sought to obtain or put in expert evidence.

22. Thus matters came before Upper Tribunal Judge Spencer on 10th October 2011.

The determination of the Upper Tribunal Judge

23. The Upper Tribunal Judge, in a full determination, and after rejecting an initial application to remit the matter, set out the background and KA's version of events. He reminded himself that KA bore the burden of showing that there was a reasonable degree of likelihood or a real risk that on return he would suffer persecution or serious harm. No claim under Article 8 of the European Convention on Human Rights was advanced.

24. On the question of age, the Upper Tribunal Judge explicitly directed himself by reference to the totality of the evidence. KA's own evidence on the issue of age was that his mother had told him his age at around the time preparations were being made for him to leave Afghanistan and claim asylum elsewhere.

25. The Upper Tribunal Judge reviewed the Surrey County Council age assessment. He found that it could be criticised in essentially four particular respects:

    i) Whilst the two authors were social workers and members of the Surrey County Council Children's Service Asylum Support Scheme, details of their experience were not forthcoming.

    ii) The reasoning was in respects, as the Upper Tribunal Judge considered, "shallow" and conclusions based on behaviour such as fidgeting, irritability and periodic assertiveness were not justified; nor were firm views expressed by reason of KA not appearing dishevelled considered to be warranted.

    iii) There was criticism by the Upper Tribunal Judge of some aspects of the authors' reasoning in finding that KA had not been honest in giving his account of events.

    iv) Too much weight, he considered, had been put on KA's physical characteristics and apparent maturity, without sufficient reasoning or allowance for cultural variations.

    His overall conclusion in paragraph 47 of his determination was that he could not regard the age assessment report of Surrey County Council as providing a proper basis for finding that the appellant was over the age of 18 years.

26. But the Upper Tribunal Judge had also found that he could place no reliance on Dr Birch's report. KA had elected to provide a report from Dr Birch notwithstanding that Dr Birch's approach and methodology had, on detailed examination, been the subject of considerable criticism in a number of previous High Court and Tribunal decisions and had been assessed as not reliable. The Upper Tribunal Judge reviewed the matter at length. He agreed with those criticisms. He found that the same considerations in relation to Dr Birch's conclusions applied in the present case.

27. Having so found, the Upper Tribunal Judge said: "In these circumstances I am left with the appellant's own evidence". He assessed that evidence (KA himself, it may be recorded, had given oral evidence before him). His conclusions were these:

> "52. Looking at the totality of the evidence, I am not satisfied that the appellant has told the truth about his

> father wishing him [sic] to make a suicide bomber of him and that his reason for coming to the United Kingdom was to escape that fate. In reaching that conclusion I have taken into account the possibility that the appellant might be under 18 years of age but the basis upon which I reject his account is no less compelling having regard to that possibility.
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> 53. In relation to the issue of the appellant's age, having found the appellant's account not to be credible, I cannot rely upon his own assertion of his age based on what he claims his mother told him at a time when it was decided that he would come to the United Kingdom. I regard the basis of the appellant's claim, including his claimed age, as having been fabricated in support of a false asylum claim. I am not satisfied that there is a reasonable degree of likelihood that he was under the age of 18 at the date of the decision.
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> 54. In these circumstances I am not satisfied as to the truth of the appellant's account and I am not satisfied accordingly that he would be at a real risk of serious harm on return to his own home area of Afghanistan. It has not been suggested on his behalf that in his own home area of Afghanistan he would be at risk from indiscriminate violence."

The judge went on to find that in any event KA could safely and reasonably be expected to relocate. Remaking the decision, he therefore dismissed the appeal on all grounds.

Discussion and determination

28. This, on the face of it, seems unexceptional. An issue had arisen, in the light of the Secretary of State's decision which was challenged, as to the age of KA. It thus required determination; and it was for the tribunal to determine on appeal that issue: cf. *R (A & M) v Croydon and Lambeth BC* [2009] 1 WLR 2557, [2009] UKSC8. Moreover that seemed to be precisely the way both the First-tier Tribunal and the Upper Tribunal throughout had been invited by the parties to approach the matter.

29. Mr Nicholson, however, now submits that the Upper Tribunal Judge's approach was wrong. His arguments took a number of different forms. But in essence, as I understood them, they were these.

30. He submitted that, under the Policy Instruction (and in particular paragraph 3) the benefit of the doubt was to be given to an applicant such as KA pending assessment. Here an assessment was made (by the Surrey County Council). But, as the Upper Tribunal Judge's subsequent findings showed, that assessment was flawed. Consequently, so the argument went, the Secretary of State's reliance on that assessment in reaching the conclusion on age as expressed in the decision letter was itself flawed. Thus, so the argument went on, since the Secretary of State had no

other evidence available to justify a conclusion that KA was over 18, the benefit of the doubt – consistently with the policy – continued to apply. Therefore KA should at the least have been granted discretionary leave to remain in the UK until reaching the age of 17½. Overall, it was submitted, the decision therefore had not been "in accordance with law", in that it was contrary to the Secretary of State's policy: and so the appeal should have been allowed under s.86(3)(a) of the 2002 Act.

31. I do not agree. In accordance with the Policy Instruction, an assessment, designed to be and purporting to be Merton compliant, had been sought from Surrey County Council. That assessment was then considered by the Secretary of State and was relied on in reaching the decision. The conclusion was that KA was over 18. That conclusion was then challenged. The issue (among others) thus was indeed whether or not KA was in fact over 18. That is what had to be determined – along with other issues – on the statutory appeal.

32. It is true that the Policy Instruction does afford a benefit of doubt to age-disputed applicants. But that, as the terms of the Policy Instruction show, is an initial position pending a decision. The benefit of doubt under the policy, as I see it, no longer applies after the decision is made. It could not, in my view, thereafter avail KA in the way Mr Nicholson sought to say.

33. At one stage, Mr Nicholson seemed to argue that it was a pre-condition for a legally valid decision by the Secretary of State that a Merton compliant age assessment, not capable of criticism, must first have been obtained. That is not tenable. Of course the Policy Instruction requires the Secretary of State to seek such an assessment. Of course the Secretary of State must have material to justify a conclusion that an age disputed applicant is over 18. But that is what happened here. Whether the age of KA was *correctly* so assessed was then precisely what had to be resolved – along with other issues – in the appeal. Thus if the assessment of Surrey County Council had not (as it transpired) contained flaws, it nevertheless would still have been open to KA – as Mr Nicholson agreed – to dispute the correctness of that assessment of age and to seek to adduce evidence (documentary, expert or otherwise) designed to show that he was indeed a child.

34. Mr Nicholson said that an applicant such as KA was disadvantaged if not treated as a child in the proceedings: in that he would fail (and here did fail) to gain the benefit of the special procedures available in tribunal proceedings relating to the giving of evidence by children or other potentially vulnerable witnesses. That submission has no validity. First, it simply assumes that such an applicant is to be regarded as a child notwithstanding that the initial decision has been otherwise; second, a tribunal can always consider in each particular case, by reference to the relevant Rules and relevant Guidance, what is the fairest way to proceed; third, in the present case no-one ever made any particular request or raised any particular objection as to the way in which the evidence of KA was given: either before the First-tier Tribunal or before the Upper Tribunal.

35. Mr Nicholson objected that, once the Upper Tribunal Judge had rejected the reliability both of Dr Birch's report and of the Surrey County Council's report, he simply was not justified in himself deciding the age assessment issue by reference to his own findings on credibility. Here too I disagree. There had already been one adjournment to enable the parties to put in more evidence if they wished. There could not now

sensibly be another. In any case, credibility often does have a very significant part to play in resolving an age assessment dispute. In my view, the Upper Tribunal Judge was entitled to proceed as he did. Besides, as stated by Lady Hale in paragraph 27 of her judgment in *R (A & M) v London Borough of Croydon and Lambeth*: "The decision-makers may have to do their best on less than perfect or conclusive evidence".

36. Mr Nicholson then complained that the Upper Tribunal Judge had not been alert to the ever-present risk in cases of such a kind that, even when an applicant lies in some respects, that does not mean he lies in all respects and in particular does not mean that he is wrong on the issue of age (that is to say, adopting the language of the criminal courts, some kind of *Lucas* self-direction is needed). But, as Mr Blundell pointed out, this was an experienced judge sitting in a specialist jurisdiction. He could not possibly have overlooked that obvious point and there was nothing to suggest that he did. As to KA's own evidence on age, the Upper Tribunal Judge was clearly entitled not to give weight to that: not least given that, on KA's own evidence, his mother apparently first told him his age at precisely the time when it was known his departure from Afghanistan, to seek asylum elsewhere, was being planned.

37. Some criticism was also made of the Upper Tribunal Judge's directing himself by reference to the burden of proof lying on KA. There is nothing in this. Just possibly in some contexts this may matter (cf. *R (o/a CJ) v Cardiff City Council* [2011] EWCA Civ 1590, itself a decision expressly confined to a particular case arising under s.20 of the Children Act 1989). To the extent, at all events, that a tribunal is required to consider an issue of age assessment "holistically" I regard that as little more than another way of saying that it must, before reaching a decision, appraise all the relevant evidence: which is what the Upper Tribunal Judge here did. Furthermore, the ultimate overall burden in an asylum appeal such as this rests on the appellant, to the usual lower standard. In my view, the way in which the Upper Tribunal Judge framed his conclusion on age assessment in the last sentence of paragraph 53 of his determination is not open to criticism.

Conclusion

38. I would reject all the various points raised by Mr Nicholson and would dismiss this appeal.

Lord Justice Lewison:

39. I agree. The essential point to my mind is that the question before the Upper Tribunal was one of substance, not process. Was KA a child at the relevant time, as he claimed to be? That was a question of fact to be decided on all the evidence. Upper Tribunal Judge Spencer considered all the evidence and came to the conclusion that KA had not established that he was a child. That is a pure question of fact. It raises no point of law. There is, therefore, no ground upon which this court can interfere with the decision of the Upper Tribunal. Although I have far less experience of these cases than either of my Lords, it does strike me that there are too many appeals where what is essentially a question of fact is dressed up as a point of law. I therefore agree that the appeal should be dismissed for the reasons given by Lord Justice Davis.

Lord Justice Longmore

40. I agree with both judgments.