Neutral Citation Number: [2012] EWCA Civ 1432

IN THE COURT OF APPEAL (CIVIL DIVISION)

C1/2011/0808
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT, BIRMINGHAM DISTRICT REGISTRY
HIS HONOUR JUDGE OWEN QC
CO67912010

C1/2012/0063
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE BEATSON
CO10992011

C2/2012/0703 & C2/2012/0704
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
MR CM G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE WARR
CO105732010
CO642011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2012

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE SULLIVAN
and
LORD JUSTICE MCFARLANE

- -

Between:

C1/2011/0808

THE QUEEN ON THE APPLICATION OF KADRI	**Appellant**
- and -	
BIRMINGHAM CITY COUNCIL	**Respondent**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

C1/2012/0063

Between:

THE QUEEN ON THE APPLICATION OF MWA (BY HIS SOLICITOR AND LITIGATION FRIEND KAMALJIT SANDHU)	**Appellant**
- and –	

BIRMINGHAM CITY COUNCIL	**Respondent**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

C2/2012/0703

Between:

BIRMINGHAM CITY COUNCIL	**Appellant**
- and –	
THE QUEEN ON THE APPLICATION OF JS (AFGHANISTAN) (BY HIS LITIGATION FRIEND THE REFUGEE COUNCIL) & ANR	**Respondent**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

C2/2012/0704

Between:

BIRMINGHAM CITY COUNCIL	**Appellant**
- and –	
THE QUEEN ON THE APPLICATION OF YK (AFGHANISTAN) (BY HIS LITIGATION FRIEND KAMALJIT SANDHU)	**Respondent**
- and –	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

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C1/2011/0808

Mr Ramby De Mello and **Mr Azeem Suterwalla** (instructed by **Bhatia Best Solicitors**) for the **Appellant**
Ms Peggy Etiebet (instructed by **Birmingham City Council**) for the **Respondent**
Mr Vikram Sachdeva (instructed by the Treasury Solicitors) for the **Interested Party**

C1/2012/0063

Mr Ramby De Mello and **Mr Beckett Bedford** (instructed by **Sultan Lloyd Solicitors**) for the **Appellant**
Mr Jonathan Cowen (instructed by **Birmingham City Council**) for the **Respondent**
Mr Vikram Sachdeva (instructed by the **Treasury Solicitors**) for the **Interested Party**

C2/2012/0703

Mr Jonathan Cowen (instructed by **Birmingham City Council**) for the **Appellant**
Mr Ramby De Mello and **Mr Azeem Suterwalla** (instructed by **Bhatia Best Solicitors**) for the **Respondent**
Mr Vikram Sachdeva (instructed by the **Treasury Solicitors**) for the **Interested Party**

C2/2012/0704

Mr Jonathan Cowen (instructed by **Birmingham City Council**) for the **Appellant**
Mr Becket Bedford (instructed by **Sultan Lloyd Solicitors**) for the **Respondent**
Mr Vikram Sachdeva (instructed by the **Treasury Solicitors**) for the **Interested Party**

Hearing dates: 22 & 23 October 2012

- -

Judgment

Master of the Rolls:

Introduction

1. These appeals raise two issues in relation to age assessments carried out (i) by local authorities for the purposes of the Children Act 1989 ("the 1989 Act") and (ii) by the Secretary of State for the Home Department ("SSHD") in discharging her immigration functions. What happens if the local authority and the SSHD make different assessments of age, one determining an individual to be a child and the other as an adult? This is a problem which continues to trouble the courts. For example, is the second decision-maker bound by the first? If not, does the second decision-maker have to take the first decision into account and, if so, what weight should he accord to the earlier decision? It is not in dispute before us that, as a matter of domestic law, the correct approach was stated by Hickinbottom J in his valuable judgment in *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin), [2011] PTSR 269. Before I come to the two issues that arise on these appeals (para 20 below), I need to set the scene and briefly summarise the facts in the cases that are before us.

2. Section 20(1) of the 1989 Act provides:

> "Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of – (a) there being no person who has parental responsibility for him; (b) his being lost or having been abandoned; or (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

3. Section 105(1) provides that a "'child' means…..a person under the age of 18". Local authorities routinely carry out age assessments of unaccompanied young persons from abroad so as to determine whether they owe them the duty to provide services under the 1989 Act. It was held by the Supreme Court in *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557 that the question whether a person is or is not a child depends entirely on the objective fact of a person's age. Any challenge to the age assessment conducted by a local authority is by judicial review and subject to the ultimate determination of the courts.

4. The SSHD is obliged to consider an application for asylum pursuant to Rule 339C of the Immigration Rules. An applicant's age may be material to the question whether he has been persecuted in the past and is at risk of persecution if returned to his country of origin. The SSHD has also published a policy that asylum seekers under the age of 18 are not to be removed from the United Kingdom unless there are adequate reception arrangements in their country of origin: see paras 17.7 and 17.8 of the Guidance contained in "Processing an asylum application from a child". Further, such children will not be detained under her immigration powers, save in exceptional circumstances and then normally only overnight. Any challenge to a decision of the SSHD (including a challenge to her assessment of age) is by appeal to the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT"): see sections 82, 83, 85 and 86 of the Nationality, Immigration and Asylum Act 2002.

5. It is inevitable that, from time to time, a local authority and the SSHD will reach different conclusions as to the age of the same applicant. This may be because they have considered different evidence or because they have made different assessments on what is substantially the same evidence. It can hardly be denied that it is in principle undesirable for different public bodies to make separate decisions on the same question, with the attendant risk of inconsistent findings as well as the additional cost and delay occasioned by successive decisions, not to mention the stress which it imposes on children. Recognising these difficulties, in November 2005 the Immigration and Nationality Directorate of the Home Office ("IND") (now the United Kingdom Border Agency) agreed a joint working protocol with the Association of Directors of Social Services for the United Kingdom Local Government and Statutory Childcare Agencies ("ADSS") ("the Protocol"). The purpose of the Protocol was "to support a co-operative approach to age assessment between IND and the Local Authorities". The Protocol is important in these proceedings, because one of the issues is whether Birmingham City Council ("BCC") acted unlawfully in failing to comply with it.

6. But before I come to the Protocol, I should mention the UKBA's Guidance "Assessing Age". This document contains detailed guidance to immigration officers as to how they should approach the question of assessing the age of an asylum-seeker who claims to be a child, where there is little or no evidence and the claim is doubted by the Agency. It was most recently amended on 17 June 2011. Para 7 is headed "Sharing evidence of age with local authorities". It states:

> "Case owners are reminded that they must liaise closely and share information relevant to the applicant's age with local authorities.
>
> The Agency is required to make decisions on age for immigration purposes; local authorities make similar decisions for the purposes of assessing eligibility to children's support services. It is therefore possible the two agencies may make different decisions on age. Close liaison with local authorities, appropriate date sharing (e.g. sharing the screening form or statement of evidence form (SEF) in appropriate circumstances) and reference to the joint working protocol agreed between the Agency and the Association of Directors of Children's Services (ADCS) on behalf of local authorities, should keep such cases to a minimum. The current protocol (embedded below) was agreed in November 2005 and is in the process of being revised."

7. Para 7.1 is headed "Discussing evidence of age with the local authority". It contains guidance as to how immigration officers should share information with local authorities. Chapter 8 is headed "Weighing up conflicting evidence of age". Here issues arising from different assessments by different local authorities and new evidence obtained in the course of an immigration appeal are considered. For present purposes, however, it is important to note that the "Assessing Age" document is not a document jointly agreed by the UKBA and the local authorities.

The Protocol

8. Para 1 of the Protocol identifies its purpose as being to set out "arrangements to support a cooperative approach to Age Assessment" between IND and United Kingdom Local Authorities and Statutory Child Care Agencies. Para 7 states that one of the intended outcomes 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".

9. The Protocol contains detailed provisions for the determination of an applicant's age, depending on whether a local authority or the UKBA is the first body to be approached by an individual. Para 14 is headed: "Conflicting Assessments". It includes the following:

> "a) Between IND and a [Local Authority]
>
> 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."

The facts in K

10. K arrived in the United Kingdom on 15 June 2008. He is a citizen of Iran. He applied for asylum on 3 July 2008. He said that his date of birth was 15 January 1994. On 19 June 2008, Oxfordshire County Council ("Oxfordshire") carried out an assessment of K's age. It decided that K was born on 1 December 1993. He was accommodated under section 20 of the 1989 Act. On 8 August 2008, Oxfordshire carried out a second age assessment. This time, it concluded that K's date of birth was 15 May 1990. Following this assessment, K was placed in UKBA accommodation in Birmingham.

11. On 12 August 2008, the SSHD refused K's claim for asylum relying, in part, on Oxfordshire's assessment of his age. K appealed to the FTT. On 12 June 2009, HH

Judge Kirkham refused K permission to apply for judicial review against BCC. On 13 August 2009, BCC conducted its first age assessment and held that K was born on 25 January 1990.

12. Following a hearing in the FTT, on 4 March 2010 IJ Khan determined that K's date of birth was 15 May 1994 (as he had claimed), but rejected his claim for asylum.

13. Following the presentation of fresh evidence on behalf of K, BCC decided on 23 November 2010 that his date of birth was 25 January 1990. K sought judicial review of this decision. The judicial review proceedings were heard by HH Judge Owen QC. K's case in summary was that BCC was bound by IJ Khan's findings that he was a child. The judge rejected this submission, but granted permission to apply for judicial review so that K's age could be determined at a fact-finding hearing in the Upper Tribunal ("UT"). There is no challenge to any part of the judge's reasoning, which is careful, thorough and unimpeachable. K seeks permission to appeal on the basis of two issues which were not canvassed before the judge at all. These are the two issues summarised at para 20 below.

Facts in JS and YK

14. JS is a citizen of Afghanistan. He claims to have been born in 1996. He arrived in the United Kingdom in about December 2008 and claimed asylum. He was assessed by BCC as being 18 years of age (date of birth, 1 January 1990). Meanwhile, his application for asylum had been unsuccessful. His appeal to the Asylum and Immigration Appeal Tribunal (IJ Juss) was allowed. The judge found that JS was a minor at the date of his decision in June 2009. On a reconsideration of this decision, IJ Robertson (sitting in the UT) allowed the appeal of the SSHD on the asylum issue, but concluded that JS had been 15 years of age at the time of the assessment by BCC in 2009. JS issued judicial review proceedings challenging BCC's assessment of his age.

15. YK is also from Afghanistan. He came to the United Kingdom in May 2010 and claimed asylum the following month. He was treated as a child for the purposes of the asylum interview, but was refused asylum on 27 August 2010. On 3 September 2010, BCC assessed him as over 18 years of age. It conducted a further review of his age, and on 25 January 2011 confirmed its view that he was over the age of 18.

16. Meanwhile, YK had appealed against the SSHD's asylum decision. On 14 October 2010, IJ Chohan dismissed the appeal, but considered in full the evidence relating to YK's age. He found that YK was born on 1 January 1996. The UT reversed the decision of IJ Chohan, but it seems that the SSHD accepted IJ Chohan's assessment of YK's age and issued him with a status document giving 1 January 1994 as his date of birth.

17. It can, therefore, be seen that in both cases, (i) BCC decided that the claimant was an adult and (ii) there has been a judgment by an immigration judge that the claimant was a child.

18. JS and YK applied to the UT (Mr Ockelton, Vice President and Judge Warr) for judicial review of BCC's age assessments. By a decision promulgated on 13 December 2011, the UT quashed both assessments on the ground that the Protocol

was a BCC policy and that BCC had not given any good reason for departing from it in the case of either applicant. BCC seeks permission to appeal against this decision.

Facts in MWA

19. MWA is also a national of Afghanistan. He entered the United Kingdom on 26 June 2009 and claimed asylum within a few days of his arrival. He said that he was 12 years of age. On 7 July 2009 and again on 16 December 2010, BCC determined that he was over 18 years of age on the material dates. On 9 July 2009, his claim for asylum was refused. MWA sought judicial review of BCC's assessment of his age. Beatson J conducted a detailed fact-finding exercise and concluded that MWA was not a child. There is no challenge to any part of the judge's reasoning. Like that of HH Judge Owen QC, this judgment too is careful, thorough and beyond challenge. Like K, MWA seeks permission to appeal on the basis of the two issues which are before this court.

The issues

20. Two issues arise. The first is whether BCC acted unlawfully in relation to all of the cases in failing to apply para 14 of the Protocol in that it did not (i) attempt a reconciliation of its age assessments with those of the SSHD or (ii) agree to refer the disputed age assessments to the binding adjudication of a nominated third party. This issue was not raised before Judge Owen QC and only briefly raised before Beatson J. It was, however, raised by the UT in the cases of JS and YK and was the sole basis on which it allowed their applications for judicial review. The second issue is whether, as a matter of EU law, a local authority is bound to accept and apply the decision of the SSHD (or on appeal the tribunal) as to the age of an individual. This is a question of considerable general importance. It was raised (albeit briefly) before the UT in the cases of JS and YK, but not otherwise.

The first issue: was failure to follow the Protocol unlawful?

21. The threshold question here is whether the Protocol was a BCC policy at all. As we have seen, it was essential to the reasoning of the UT in the cases of JS and YK that the Protocol was BCC's policy (para 40). Mr de Mello submits that BCC's failure to follow the Protocol in the two respects to which I have referred rendered its decisions unlawful. He says that the failure to apply the Protocol was unlawful for the simple reason that a failure by a public body to apply its policy is unlawful, unless there is good reason for departing from it (and none was relied on by BCC); alternatively, even if the Protocol did not represent BCC's policy, it was unconscionable and/or unreasonable not to follow it. Mr de Mello does not put his case on the basis of the frustration of a legitimate expectation.

22. In my view, there is no evidential basis for holding that the Protocol was part of BCC's policy. Mr de Mello relies on the witness statement of Stuart Luke dated 18 October 2012 in support of the submission that the Protocol was adopted by BCC. The high watermark of the evidence is a letter dated 30 July 2010 from a BCC solicitor to the Treasury Solicitor which appears to refer to and rely on the Protocol. But the context of this letter was that BCC was submitting in the case of K that the current support provided by the UKBA would continue until the issue of K's age had been determined. A single letter by one solicitor written in the particular context of

arrangements made in one case for interim care pending an age assessment is a very flimsy basis for a finding that BCC accepted the Protocol as its policy.

23. Mr de Mello also relies on a letter dated 8 August 2012 by Steve Liddicott (Interim Service Head, Children's Social Care at Tower Hamlets Borough Council). This letter gives valuable information about the Protocol. Mr Liddicott says that the Protocol was issued by the Home Office and the ADSS as "guidance for local authorities" and "good practice" and that the ADSS was not in a position to tell local authorities to abide by it. He also says:

> "Overall, the protocol was intended to provide the basis for working relationships between local authorities and the home office by way of a description of best practice, but was never seen to be binding upon the respective organisations; indeed, since it was never, so far as I am aware, presented to the political representatives of local authorities or the home office ministers, it seems to me to be unlikely that it could be said to have been so."

Far from assisting Mr de Mello's argument, it seems to me that it totally undermines it.

24. There is cogent evidence from Swaran Singh (BCC social worker), Shankarbhai Patel (BCC's responsible Area Manager) and Lorna Scarlett (BCC's Assistant Director, Children's services) which makes it clear that the Protocol has not been followed by BCC in practice. It is sufficient to refer to Ms Scarlett. She says that the Protocol has never been adopted or used operationally as BCC's policy and has not been published as part of its procedures or appeared in any form on its website. She says that, where there is a dispute between UKBA and the local authority about a person's age, it is BCC's practice to engage with UKBA to resolve the difference if possible. But, she says, in most cases it is not possible to resolve the difference. This is because UKBA's view will be based on the assessment of the immigration officer (or the immigration judge in the event of an appeal) and the local authority will not have participated in that process. Ms Scarlett also says that the requirement in the Protocol of a third party binding adjudication in the event of a dispute is too vague to be workable. Mr de Mello does not challenge this assessment of the practicability of the requirement.

25. Mr Singh says that it is BCC's practice to engage with UKBA to resolve disputes where possible. There is contact between the local authority social workers and the UKBA case workers; and the BCC case workers reconsider their age assessments in the light of the decision of an immigration judge.

26. There are also witness statements from Megan Heap and Ailish King-Fisher. They are respectively a SEO Policy Officer in the Children, Families and Gender Team with the Operational Policy and Rules Unit of the UKBA and Deputy Director in the Strategy and Intelligence Directorate of the UKBA. They say that they do not consider the Protocol to be a legally binding document. It represents an agreement between the parties that consistency as to age assessments is best practice. But it is out of date, since it does not reflect changes in the law since November 2005. They

also say that they are not aware of the third party adjudication process ever having been used.

27. On this material, it is impossible to say that the Protocol has ever formed part of BCC's policy. The UT's finding to the contrary effect was based on a misunderstanding of what counsel then appearing for BCC (Mr Harrop-Griffiths) had said. There was no evidential foundation for the finding. I would, therefore, grant BCC permission to appeal and quash the UT's determination.

28. As for Mr de Mello's alternative submission that it was unconscionable and/or unreasonable for BCC not to apply the Protocol, this is misconceived. No authority has been cited to us in support of the proposition that there is a free-standing public law principle of unconscionability. I repeat that the case is not put on the basis of legitimate expectation.

29. The submission that it was irrational or unreasonable for BCC not to invoke the third party adjudication process is hopeless. First, the Protocol was not binding on BCC and was not part of its policy. The evidence suggests that it was not part of the policy of any other local authority either. That is not a promising start for an argument based on irrationality or unreasonableness. Secondly, I accept that it is desirable for local authorities and the SSHD to attempt, so far as possible, to agree age assessments. But to insist on differences being referred to the binding decision of a third party is quite another matter, particularly since the adjudication process envisaged by the Protocol is vague and unworkable for the reasons given by Ms Scarlett.

30. In any event, an adjudicator's decision which is binding as between the local authority and the SSHD cannot be determinative of the age issue for the purposes of the 1989 Act. That is because the question of whether a person is a child for the purposes of section 20(1) is one of jurisdictional fact (and therefore for the court as finder of facts).

31. Finally, as Mr Sachdeva points out, even if the failure to refer a disputed age assessment to adjudication represents a breach of policy or is irrational or unreasonable, this cannot vitiate a decision on age after an assessment. That is because a failure to resolve a dispute with the SSHD is neutral as to whether the age contended for by the applicant is likely to be correct. In other words, the criticism comes down to a failure to undertake alternative dispute resolution, rather than suggesting an error in the assessment. It is therefore not a material error as regards the age assessment itself.

32. For all these reasons, I would refuse permission to appeal to K and MWA in relation to their submissions based on the Protocol.

The second issue: the EU point

33. Mr Bedford seeks to uphold the decision of the UT in the cases of JS and YK on a ground that was advanced below but which was dealt with very briefly (no doubt because the appeals were allowed for other reasons). Mr de Mello also adopts Mr Bedford's submissions in support of the applications of K, JS and MWA for permission to appeal. In short, Mr Bedford submits that (i) the SSHD is the United Kingdom's designated authority responsible for examining and determining asylum

applications; and (ii) where the SSHD determines that a person is an unaccompanied child applicant for asylum or an unaccompanied child refugee, it is a requirement of EU law that all other government or state bodies are bound by the decision and must treat him as a child in so far as age is relevant to the discharge of their functions. This conclusion is said to be compelled by a proper interpretation of Council Directive 2003/9/EC ("the Reception Directive"), Council Directive 2004/83/EC ("the Qualifications Directive") and Council Directive 2005/85/EC ("the Procedures Directive").

34. The Reception Directive lays down minimum standards for the reception of asylum seekers. It makes provision for schooling and education of minors (article 10). Article 19 makes a number of provisions for unaccompanied minors. They include an obligation on Member States to take measures to ensure proper representation and regular assessments by "appropriate authorities" and the provision of accommodation and the other specified benefits. Article 21 provides that Member States shall ensure that negative decisions relating to the granting of benefits may be the subject of appeals within procedures laid down in the national law.

35. The Qualifications Directive sets out minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection. Article 4(2) provides that the elements needed to substantiate an application for international protection include the applicant's age. Article 4(3) states that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account "(c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age". Article 27 provides that Member States shall grant full access to the education system to all minors granted refugee or subsidiary status under the same conditions as nationals. Article 29 provides that Member States shall ensure that beneficiaries of refugee or subsidiary status have access to health care under the same eligibility conditions as their nationals. Article 30 makes a number of provisions which are similar to those contained in article 19 of the Reception Directive.

36. The Procedures Directive lays down minimum standards on procedures in Member States for granting and withdrawing refugee status. Article 4 provides that Member States shall designate a determining authority which will be responsible for an appropriate examination of the asylum applications in accordance with the Directive. Article 17 provides procedural guarantees for unaccompanied minors. Article 17(6) provides that the best interests of the child shall be "a primary consideration for Member States when implementing this Article". Article 39 provides that Member States shall ensure that applicants for asylum have the right to an effective remedy before a court or tribunal against "(a) a decision taken on their application for asylum....(e) a decision to withdraw refugee status pursuant to article 38".

37. Immigration Rule 328 confirms that the SSHD is the designated authority for the determination of asylum applications.

38. Mr Bedford submits that to permit a local authority to have an independent power to refuse welfare and support to a person who has been determined by the SSHD to be a child, on the ground that the local authority does not agree with the SSHD's age

assessment, is incompatible with the rights and protections to children guaranteed under Community law.

39. Mr Bedford advances five reasons in support of his submission. The first is that, in "revoking" the entitlement of the applicant to the content of international protection under the Qualifications Directive or entitlements under the Reception Directive, the local authority is, in effect, taking a decision on the asylum application which only the SSHD is competent to do. I do not agree. If the local authority disagrees with the SSHD's assessment of the age of the applicant, this has no *necessary* effect on the SSHD's decision on the asylum application. An applicant's age *may* be an important (and in some cases a decisive) element in the SSHD's reasoning that leads her to conclude that refugee status should be granted or revoked. For example, it may be that in certain countries, children are at risk of persecution but adults are not. In such cases, it is important for the SSHD to decide whether an individual is a child or an adult. But even where (i) age assessment is an important (or even decisive) element in the SSHD's decision and (ii) the local authority disagrees with the SSHD's age assessment when it discharges its own statutory functions, the local authority is plainly not taking a decision on the asylum application. In *Samba Diouf v Ministre du Travail* [2012] CMLR 8, the CJEU said at para 42:

> "the decisions against which an applicant for asylum must have a remedy under art 39(1) of the Directive 2005/85 are those which entail rejection of the application for asylum for substantive reasons or, as the case may be, for formal or procedural reasons which preclude any decision on the substance."

The local authority's assessment of age manifestly does not *entail* a decision on refugee status.

40. Mr Bedford's second reason is that the local authority would deny the applicant a right of appeal to the tribunal to which he is entitled pursuant to the domestic transposition of article 39(1)(a) or (e) of the Procedures Directive. This argument suffers from the same flaw as the first. A local authority's decision on age does not constitute or entail a decision on an applicant's asylum application.

41. The third reason is that a remedy limited to judicial review of the local authority's decision to refuse accommodation under section 20 of the 1989 Act would unfairly place the burden on the child of requiring him to prove his minority for a second time, but this time to a higher standard than is required in order to succeed in an asylum application. But that is the very procedure envisaged by article 21 of the Reception Directive, namely access to the national law procedures for an appeal against a negative decision relating to the grant of benefits under the Directive. A negative decision on age which results in a refusal of benefits by a local authority does not constitute the refusal of an asylum claim or the revocation of refugee status. The two decisions are different and EU law does not require the standard of proof to be the same in relation to each of them.

42. The fourth reason is that it would be incompatible with the decision in *Samba Diouf* that the court's determination of a claimant's age on a judicial review of the decision of a local authority should preclude any subsequent review of the decision by the

SSHD. But this ground is another example of the conflation of the decision of a local authority on age with that of the SSHD on an asylum application. The local authority's decision on age does not constitute a decision on an asylum application under article 39(1) of the Procedures Directive: see *Samba Diouf* at para 42.

43. Mr Bedford's final reason is that it is oppressive, unfair and contrary to the child's best interests to subject an applicant to repeated full scale examinations of age, especially where he has previously been accepted as a child by the designated authority. But as Mr Sachdeva points out, Directives specify a result, leaving the precise method of implementation to each Member State. Article 288 of the Treaty on the Functioning of the European Union states:

> "CHAPTER 2
>
> LEGAL ACTS OF THE UNION, ADOPTION PROCEDURES AND OTHER PROVISIONS
>
> *SECTION 1*
>
> THE LEGAL ACTS OF THE UNION
>
> *Article 288*
>
> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
>
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
>
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
>
> A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them.
>
> Recommendations and opinions shall have no binding force." (emphasis added)

44. There is a significant margin of appreciation surrounding the methods by which a Member State implements a Directive (see *Samba Diouf* at para 29). However there remains an obligation to implement it; a Member State is not entitled to simply ignore it. If a Member State fails to properly implement a Directive, it may be challenged in the ECJ on the grounds of breach of the effectiveness principle. In *Marks & Spencer v Customs & Excise Commissioners* [2003] QB 866 the ECJ stated at para 34 as follows:

> **"The principle of effectiveness**

> It should be recalled at the outset that in the absence of Community rules on the repayment of national charges wrongly levied it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and, secondly, that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness): see, inter alia, Aprile Srl v Amministrazione delle Finanze dello Stato (No 2) (Case C-228/96) [2000] 1 WLR 126, 148, para 18; Dilexport [1999] ECR I-579, 611, para 25 and Metallgesellschaft [2001] Ch 620, 663, para 85."

45. The Directives do not prescribe the standard of proof that an asylum seeker must satisfy. This is left to the Member States to determine. In substance, Mr Bedford is driven to argue that a system contravenes the principle of effectiveness if it requires an applicant to prove his minority for the purposes of obtaining the benefits prescribed by the Directives, where he has already been held to be a child by the authority designated for the determination of asylum applications. He submits that this is because it is unfair and oppressive to the applicant to be required to undergo a second examination of his age and to discharge a higher standard of proof (the balance of probabilities) than that applicable to the determination of the asylum claim itself.

46. I can accept that it is undesirable that a person's age should be subject to examination successively by the SSHD (and the tribunal on appeal) and then by a local authority. In an ideal world, there would be a single examination at which all interested parties were present and at the end of which consistent decisions were made by both the SSHD and the local authority. No such system operates at the present time. But that does not mean that the principle of effectiveness is breached. There is no reason to suppose that those who conduct the separate examinations under the present system do so other than politely and sensitively. More importantly, there is nothing inherently oppressive or unfair about such a system. The principle of effectiveness is breached only if the exercise of the rights conferred by Community law is rendered virtually impossible or excessively difficult. This is a high hurdle to surmount and for good reason: the Member States enjoy a significant margin of appreciation in determining the methods they employ to implement a Directive, where the Directive does not itself prescribe the methods to be employed. I do not accept that the requirement that an applicant must prove that he is a child on the balance of probabilities if he is to enjoy the benefits prescribed by the Directives makes the exercise of those rights virtually impossible or excessively difficult.

47. Mr Bedford's submission, if correct, would mean that the decision of the SSHD as to an applicant's age would be binding on local authorities. It would also mean that the decision of the Supreme Court in *R (A) v Croydon* was per incuriam. If the age

assessment of the SSHD is binding on local authorities, there can be no question of local authorities making their own independent age assessment. It must follow that there can be no scope for disputes as to those assessments being resolved by the court making its own assessment on the facts. And yet the Supreme Court has said that this is precisely how such disputes should be resolved.

48. But for the reasons that I have given, Mr Bedford's EU arguments are misconceived. The fundamental flaw in them is that the SSHD and the local authority discharge different functions in relation to the Directives. The SSHD is required to determine whether an applicant is entitled to international protection. She may have to make a finding as to the applicant's age in order to decide that question of entitlement. But if she does, that is not because that is the issue that she has to decide. Rather, it is because, on the facts of the particular case, the applicant's age is *relevant* to the issue that she has to decide. It is significant that the definition of "refugee" in the Directives makes no reference to age. An applicant's age is always relevant to whether or not he is entitled to the benefits specified in the 1989 Act. That is because only children are entitled to those benefits. For that reason, it is a necessary part of the local authority's function to make an age assessment in all cases.

49. I therefore reject all of Mr Bedford's arguments and hold that EU law does not require a local authority to be bound by an age assessment of the SSHD.

Other points

50. A number of other issues of some importance were discussed during the course of argument. It is right that I should say a few words about them. First, what should the court do where an applicant brings judicial review proceedings challenging the age assessment of a local authority both on the facts and on traditional public law grounds, such as, for example, procedural unfairness? This problem was considered in some detail in *R (Z) v Croydon London Borough Council* [2011] EWCA Civ 59, [2011] PTSR 748 at paras 5 to 10 of the judgment of the court given by Sir Anthony May. I do not wish to say anything to qualify the guidance given there as to how the court should decide whether or not to give permission to apply for judicial review of a decision on the facts. But what if there is also a challenge on traditional public law grounds? At para 5, the court said:

> "A judicial review claim challenging a local authority's assessment of age may thus be on various grounds. Some of them may be orthodox judicial review grounds. But the core challenge is likely in most cases to be a challenge to the age which the local authority assessed the claimant to be. Thus most of these cases are likely to require the court to receive evidence to make its factual determination. It is therefore understandable that Mr Hadden, for the defendant local authority in the present appeal, submitted that orthodox judicial review challenges are likely to be subsumed in the court's factual determination of the claimant's age. If the claimant succeeds on his factual case, the orthodox judicial review challenges fall away as unnecessary."

51. The point was also mentioned by Beatson J at para 5 of his judgment in *MWA*:

> "In the case of a question of jurisdictional fact, it is absolutely clear that although the relevant public authority has to inquire into the facts, if its decision as to those facts is wrong, it cannot give itself a jurisdiction which it does not have and cannot, as a result of that decision, decline a jurisdiction which it does have. That does not, however, mean that a local authority's decision that a person is or is not a child for the purposes of the Children Act 1989 is not susceptible to challenge on ordinary judicial review principles. In *R(A) v Croydon LBC* and *R(M) v Lambeth LBC* the Supreme Court recognised that the local authority had to make its own determination in the first place (see [33] and [54]). The fact that, in certain circumstances, a court is ultimately responsible for determining a matter, does not mean that, in an appropriate case, where the court has identified a public flaw, it cannot remit the matter to the local authority."

52. I would put the point that the court made at para 5 of its judgment in *R (Z)* in rather more forthright terms than merely to say that "it is therefore understandable that [counsel]....submitted that orthodox judicial review challenges are likely to be subsumed in the court's factual determination of the claimant's age". These appeals show how disputes as to age assessments can generate prolonged and costly litigation. The expense is bad enough. But even worse is the damage that delay and uncertainty may cause to the interests of children. Let us suppose that the court gives an applicant permission to apply for judicial review of a local authority's age assessment on the grounds that it is tainted by procedural unfairness or on some other orthodox public law ground. The applicant will not raise such an issue unless he disputes the authority's age assessment. There is, therefore, no point in deciding that there has been procedural unfairness and remitting the case unless the court is satisfied that on a reconsideration the authority is likely to make a different assessment and one which the applicant will not dispute. In most cases where there is a challenge both on the facts and on some orthodox public law ground, it will be better for the court to decide all issues in one hearing, or transfer the case to the UT for that purpose.

53. The second point is whether the court should give guidance so as to avoid the risk of inconsistent age assessments by tribunals on appeals from decisions of the SSHD and by local authorities. BCC put forward various suggestions. One was that the local authority assessing social worker should be notified where there is an appeal against the decision of the SSHD and be joined as an interested party and allowed to participate in the appeal before the tribunal on the issue of age. Another suggestion was that an applicant who appeals to the FTT against the SSHD's decision refusing him leave to enter on asylum/humanitarian grounds should at the same time make an application to the UT (sitting as a judicial review court exercising High Court jurisdiction) for a declaration of his age. These are interesting suggestions which are certainly worthy of consideration. But it would be inappropriate for this court, on the basis of limited adversarial argument by the parties to these three appeals, to give such guidance. Indeed, Ms Etiebet recognised that some legislative changes were likely to be needed to give effect to any such suggestions. It would not be desirable to introduce such procedures without proper consultation. This is better done by the appropriate rule making bodies and not the court.

54. The third point concerns the effect of a decision by the tribunal on an appeal against a decision of the SSHD as to an applicant's age. Mr de Mello accepts that, as a matter of domestic law, a local authority is not bound by such a decision (although he adopted Mr Bedford's submissions on the EU point). Valuable guidance as to the correct approach has been given by Hickinbottom J in *R (PM)* to which I have referred at para 1 above.

Overall conclusion

55. For the reasons that I have given, I would refuse permission to appeal to K and MWA and allow the appeal of BCC in the cases of YK and JS.

Lord Justice Sullivan:

56. I agree.

Lord Justice McFarlane:

57. I also agree.

DRAFT ORDER

1. Permission to appeal to the Court of Appeal in Kadri is refused.
2. Permission to appeal to the Court of Appeal in MWA is refused.
3. Permission to appeal to the Court of Appeal in JS and YK is granted.
4. The appeals of the Appellants in JS and YK are allowed.
5. Applications by MWA, JS and YK for permission to appeal to the Supreme Court are refused.
6. Requests for a reference under article 267 of the TFEU are refused.
7. In MWA paragraph 2 of the order of Hickinbottom J dated 5th May 2011 is discharged.
8. The final hearings in the cases of JS, YK and Kadri in the Upper Tribunal are to be expedited.
9. The Appellant in Kadri, the Appellant in MWA, the Respondent in JS and the Respondent in YK (parties who were in receipt of services funded by the Legal Services Commission: all such Appellants and Respondents being collectively

referred to below in this order as “the legally aided parties”) do pay the costs of and occasioned by the applications for permission to appeal and the appeals where permission to appeal was granted of the Respondent in Kadri, the Respondent in MWA, the Appellant in JS and the Appellant in YK (all such Respondents and Appellants being collectively referred to below in this order as “BCC”), pursuant to and subject to section 11(1) of the Access to Justice Act 1999 (“Section 11 (1)”);

10. Pursuant to Section 11 (1) and Regulation 9 (2) (a) of the Community Legal Service (Costs) Regulations 2000 ((SI 441 as amended by SI 2001/823) “the Costs Regulations”), the sum which the Court has assessed it is reasonable for the legally aided parties to pay is nil having had regard to the legally aided parties’ respective financial resources and their conduct in these proceedings;

11. Permission is granted to BCC to make a request pursuant to regulation 10 (3)(c) of the Costs Regulations within 3 months of the date of this order for a hearing before the Costs Judge or a District Judge to determine whether an order should be made requiring the Legal Services Commission to pay the BCC's costs in relation to these applications for permission to appeal and appeals and, if such a request is made, BCC's application shall be listed before the said Judge to determine, pursuant to Regulation 5 of the Community Legal Service (Cost Protection) Regulations 2000 (S.I 2000/824 as amended by S.I. 2001 No. 823), whether such an order should be made and, if so, the amount of any costs to be paid to BCC by the Legal Services Commission.

12. There be a detailed assessment of the costs of the legally aided parties, being persons who are in receipt of services which are payable out of the Community Legal Services Fund.