Case No: C5/2013/2115

Neutral Citation Number: [2014] EWCA Civ 706
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
UTJ HANSON
AA/01647/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2014

Before :

LORD JUSTICE MAURICE KAY
LORD JUSTICE DAVIS
and
LORD JUSTICE FLOYD

- -

Between :

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

- -
- -

BECKET BEDFORD (instructed by **Sultan Lloyd Solicitors**) for the **Appellant.**
DAVID BLUNDELL (instructed by **The Treasury Solicitor**) for the **Respondent.**

Hearing date: 30 April 2014

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Judgment

Lord Justice Davis:

Introduction

1. This is yet another case involving a disputed age assessment in the context of an asylum claim. It represents, so far as this appellant is concerned, part of the aftermath of the decision of the Court of Appeal in *R (Kadri) v Birmingham City Council* [2013] 1 WLR 1755, [2012] EWCA Civ 1432 in proceedings to which the appellant had himself been one of the parties. The principal (albeit by no means sole) point on this appeal arises in this way. The First-tier Tribunal had, among other things, found as part of its determination of the appellant's asylum claim that the appellant *was* a minor. Thereafter, by subsequent decision of the High Court in judicial review proceedings brought consequent upon a decision by a local authority made under s.20 of the Children Act 1989, it was found that the applicant was *not* a minor. The question is whether the Upper Tribunal, on appeal from the determination of the First-tier Tribunal, was entitled to place reliance on the conclusion of the High Court in the judicial review proceedings.

2. Leave to bring this appeal was granted on the papers by Maurice Kay LJ. The appellant was represented at the hearing before us by Mr Becket Bedford. The respondent Secretary of State was represented before us by Mr David Blundell.

Background facts

3. In order to explain how the appeal has arisen it is necessary to set out the procedural background in a little detail.

4. It is not disputed that the appellant is a national of Afghanistan. He entered the United Kingdom unlawfully on 26 June 2009. He claimed asylum on 2 July 2009. When interviewed at a screening interview he could not give his date of birth but said that he was 12 years old. That was not accepted.

5. On 7 July 2009 he was assessed by Birmingham City Council, by a *Merton* compliant assessment process, as being over 18 years old. He was re-interviewed on behalf of the Secretary of State on 15 June 2010 and his asylum claim was refused on 9 July 2010. He appealed against that decision.

(a) The First-tier Tribunal proceedings

6. The appeal came before Immigration Judge Cheales, sitting in the First-tier Tribunal, on 16 September 2010. By this time the appellant had obtained an expert report from Dr Diana Birch dated 17 June 2010, which ascribed an age of 13.89 years to the appellant. The Immigration Judge decided to consider the question of the appellant's age as a preliminary issue. It had been indicated by the appellant's legal representatives that no oral evidence would be called. Thus the appellant himself gave no oral evidence and, as the Immigration Judge stated, she was not able to assess his credibility. There was, however, produced at the hearing what purported to be an original of the Tazkira relating to the appellant, indicating that he was 10 years old in 2007, with a statement from the Iain Shearer Centre as to its authenticity. That Tazkira had not been provided to the Secretary of State previously. Its authenticity

seems not to have been formally challenged at the hearing, even if its reliability on the issue of age was.

7. By determination promulgated on 28 September 2010 Immigration Judge Cheales decided that the appellant's age was as stated in the Tazkira. The judge indicated that she had been referred by the Home Office Presenting Officer to the authority of *R (A & WK) v Secretary of State for the Home Department* [2009] EWHC 939 (Admin) which had cast significant doubts on the methodology of Dr Birch and which had made clear that there was no requirement whatsoever to prefer the assessment of Dr Birch or other such experts over the assessment of the social workers. The judge made no particular finding in that regard as to the reports of Dr Birch before her, albeit she referred to the authority in her determination. The judge shortly concluded her determination at paragraph 15 by saying this:

> "I gave substantial weight to the report of Birmingham Social Services but weighing all the evidence I believe that the appellant's age is as stated on the Tazkira and that in 2007 he was 10."

She directed that the matter proceed to a substantive hearing. It was common ground before us that, the determination as to age having been decided as a preliminary issue, there was not available to the Secretary of State under the Rules an appeal against that determination as to age.

8. In the event, there was no substantive hearing before Immigration Judge Cheales. This was because the Secretary of State on 7 October 2010 withdrew the decision of 9 July 2010 in the light of the determination of Immigration Judge Cheales. Birmingham City Council itself in the meantime carried out a further *Merton* compliant age assessment of the appellant, which was completed on 16 December 2010. That continued to assess him as an adult, with an age of 19 at the date of that assessment.

9. By a further, very detailed, decision letter of 28 January 2011, the Secretary of State again maintained the refusal of the asylum claim. Reference was made to the further assessment by Birmingham City Council. It was stated that the determination of the First-tier Tribunal as to age did not bind the Secretary of State. Among other things, it was noted that fingerprints matching those of the appellant had been taken in 2009 in both Greece and Italy, but that the appellant had denied that. Reference was made to medical and dental evidence which indicated that the appellant was "much older" than he was saying: and it was noted, among other things, that there had also been no height gain by the appellant in the intervening year between the reports. It was further noted that the appellant had been convicted of racial harassment in the Birmingham Magistrates' Court on 9 November 2010 and had been treated as an adult, with a date of birth of 1 January 1991, at all stages of the court process. It was also stated, with considerable detail given, that caution must be exercised before reliance could be placed on the Tazkira as to proof of age. In addition, significant queries were raised as to various inconsistencies and discrepancies in aspects of the appellant's account as to his claim that he was at risk from the Taliban in Afghanistan. The conclusion was that it was not accepted that the appellant was a child and it was also not accepted that he would be at risk if returned to Afghanistan. No infringement of Article 8 would be involved in removal.

10. The appellant appealed in turn from this second decision.

11. His appeal came before Immigration Judge Ford sitting in the First-tier Tribunal on 10 March 2011. At the hearing, the judge made clear that she was not just dealing with the question of the appellant's age: she was dealing with the issues of asylum, human rights and humanitarian protection. The appellant again did not himself give oral evidence before the tribunal.

12. The determination of Immigration Judge Ford was promulgated on 24 March 2011. On the question of age, she indicated that the determination of Immigration Judge Cheales:

> "… must form my starting point for any findings of fact, in particular as to the appellant's age. I will not interfere with the findings made by Immigration Judge Cheales unless I am satisfied that there is new reliable evidence that leads me to a different conclusion. I must also be satisfied that the evidence could not have been made available to Immigration Judge Cheales as at the date of the hearing before her in September 2010."

13. She expressed reservations as to the second Birmingham City Council assessment. She also stated that she had had regard to addendum reports obtained from Dr Birch and the Iain Shearer Foundation and which had been placed before her. She stated that the Secretary of State "chose not to appeal" – although in fact such a choice had not been available to the Secretary of State – against the decision of Immigration Judge Cheales and was seeking to "have a second bite of the cherry". Overall the judge could see "no basis on which to interfere with the findings of Immigration Judge Cheales" as to age.

14. But Immigration Judge Ford did not allow the appeal. On the contrary, she dismissed it. This was because she rejected the appellant's version of events, as put forward in his interviews and elsewhere. She noted numerous inconsistencies and implausibilities in his previous statements. The appellant was found not to have discharged the burden of proof to the lower standard. It was also found that he had family in Afghanistan with whom he could live without risk. The judge did not, however, deal with human rights grounds, apparently because she took the view that it was not necessary to do so as the appellant was, as she had concluded, under the age of 18.

15. In the light of that decision – from which (the appeal of the appellant having been dismissed) the Secretary of State herself had no obvious basis for appealing – the Secretary of State at that time indicated that it was accepted that the appellant was to be treated as a minor. But Birmingham City Council made clear that it did not accept it. In the event, the Secretary of State thereafter declined to grant the appellant discretionary leave to remain, on the footing that the appellant was not in need of international protection and that there were adequate reception facilities available on return.

(b) The judicial review proceedings

16. There were at that time extant judicial review proceedings brought by the appellant by claim form issued in the High Court on 7 February 2011 against Birmingham City Council and the Secretary of State. In the light of Birmingham City Council's maintained stance refusing to grant the appellant support under the Children Act 1989 these were re-activated. The Secretary of State in due course took no further part in these proceedings, albeit making it clear that the parties would "need to reconsider their position" if the appellant was found by the court to be an adult.

17. The matter came before Beatson J, sitting in the Administrative Court in Birmingham, on 6 and 8 December 2011. Much of the written material before him was that which had been before the First-tier Tribunal. On this occasion, however, the appellant had made a witness statement dated 2 December 2011 and he gave oral evidence. So also did Dr Birch and the relevant senior social worker employed by Birmingham City Council. All were cross-examined.

18. By a very detailed and thorough reserved judgment delivered on 21 December 2011, [2011] EWHC 3488 (Admin), the appellant's claim for judicial review was dismissed. The judge accepted that Birmingham City Council had not been bound by the previous tribunal decisions as to age. He fully reviewed the history. He also very fully reviewed the evidence before him, which he detailed with great care. He noted difficulties about the Tazkira. The judge noted, among other things, a dental report of 24 February 2010 and the dentist's conclusion that the appellant "is not 12 as he states, probably 18 years". Making every allowance, the judge's conclusion nevertheless was that he did not find the appellant a credible witness. He noted numerous unsatisfactory and inconsistent features in the appellant's own evidence. The judge had, by way of example, also noted very unsatisfactory features in the appellant's oral evidence as to evidence of his shaving; as to his continued denials that he had been fingerprinted in Greece and Italy; and as to his criminal conviction. As to Dr Birch's evidence, the judge noted the many criticisms made of her methodology and approach in a number of other previous decisions. He concluded, having assessed her evidence, that he did not find her evidence "satisfactory", explaining precisely why. As to the evidence of the social worker of Birmingham City Council, the judge considered that his assessment – that the appellant was "well over" the age of 18 – was one upon which the judge could properly rely. In any event, the judge also held that the appellant had failed to discharge the burden of proof resting on him "in view of my findings as to his credibility and as to Dr Birch's evidence". The judge in fact found that the appellant was 19 at the date of judgment.

19. Permission to appeal to the Court of Appeal thereafter was sought in respect of that decision. The application was joined with three other cases. The Secretary of State was joined as an interested party. The appellant's application – and the other application and appeals – was refused by the Court of Appeal on 7 November 2012: *(R Kadri) v Birmingham City Council* (cited above). In the course of its judgment the court emphasised that a decision by a local authority on age for the purposes of the Children Act 1989 was not to be conflated with a decision on age by the Secretary of State on an asylum application. The two kinds of decision were different. The court thus ruled, among other things, that a local authority, in making an assessment of age for the purposes of the Children Act 1989, was not bound by a prior determination on age of the Secretary of State or of an asylum and immigration tribunal. As to the

judgment of Beatson J, that was described as "careful, thorough and beyond challenge": see paragraph 19 of the judgment of the Master of the Rolls. The appellant accordingly was refused permission to appeal from that decision of Beatson J. Permission to appeal was sought by one of the unsuccessful appellants in *Kadri* but was subsequently refused by the Supreme Court.

(c) The Upper Tribunal proceedings

20. In the meantime, however, the appellant had also sought permission, out of time, to appeal to the Upper Tribunal against the decision of Immigration Judge Ford: primarily on the ground that the judge had failed to take into account the age of the appellant when dismissing his substantive asylum claim. Permission to appeal and the necessary extension of time were granted to the appellant on 2 February 2012.

21. By this time, and in the aftermath of the decision of Beatson J (and as foreshadowed by her earlier letters) the Secretary of State had written to the appellant's solicitors on 16 January 2012 to say that the Secretary of State would proceed to reconsider the question of the appellant's age. On 30 January 2012 the Secretary of State wrote to say that following the decision of Beatson J "the UKBA now has a sound reason for departing from the determination of the Immigration Judge" promulgated on 24 March 2011. The Secretary of State maintained that the appellant was indeed an adult at all relevant times.

22. On 3 May 2012 it was found by Upper Tribunal Judge Hanson that Immigration Judge Ford had erred in law in her assessment of the evidence and that the determination was to be set aside. There was a debate before Upper Tribunal Judge Hanson as to whether the finding of the Immigration Judge as to age was nevertheless to be regarded as a preserved finding: and that matter was directed to be dealt with as a preliminary point, along with the other issues, at the substantive hearing fixed for 27 November 2012.

23. Written arguments were in due course put in by the appellant and the Secretary of State. The appellant posed as the main question: should the substantive hearing be a complete rehearing or was it limited to consideration of risk on return, on preserved findings? He argued that there should not be a complete rehearing and that the question of the appellant's age should not be reconsidered but should be preserved. The Secretary of State, on the other hand, argued that there was no authority cited to prevent the Upper Tribunal having regard to the judgment of the High Court: it was submitted that "to refuse to consider the judgment would be unjust". It was further submitted that the finding of Beatson J as to the appellant's age "is binding on the Upper Tribunal".

24. The substantive hearing in due course concluded on 11 February 2013. The appellant was not called to give oral evidence during that hearing. By a detailed and thorough determination promulgated on 6 March 2013, Upper Tribunal Judge Hanson dismissed the appellant's appeal. The judge carefully reviewed the whole litigation background and the decisions of the judges of the First-tier Tribunal (who had, among other things, found the appellant to be a minor) and of Beatson J (who had found the appellant to be an adult). He roundly rejected an argument to the effect that the Secretary of State had bound herself to a concession accepting that the appellant was indeed a minor. He decided that the question of age was at large, and not the subject

of any judgment in rem on the point. He also decided that Immigration Judge Ford, before whom the issue of age had been challenged, had taken too rigid an approach in limiting her regard to the intervening evidential changes without the necessary degree of flexibility being adopted. He further found (as "a second and more fundamental issue") that in any event Immigration Judge Ford had failed to make reference to the criticisms of Dr Birch's methodology which had been made in other court and tribunal proceedings even before the hearing in front of Immigration Judge Ford. Upper Tribunal Judge Hanson found as follows in this regard:

> "42. Notwithstanding there being evidence of criticism of Dr Birch's reports and her reliance upon statistical methodology prior to the hearing before Judge Ford, she fails to make reference to these issues and to analyse Dr Birch's evidence in light of them. I find Judge Ford failed to carry out a proper assessment of the evidence with the degree of care required in an appeal of this nature, especially in the absence of oral evidence from the appellant. I find this to be a material error of law as the evidence of Dr Birch set out in the report before the First-tier Tribunal is flawed as Beatson J identified. Although the High Court had the benefit of oral evidence the criticisms of the report, by reference to the statistical analysis, is a situation that existed before the First-tier Tribunal. I find the finding of Judge Ford that the appellant was a minor of 14 years of age is tainted by a material error of law and cannot be a preserved finding."

25. Having so ruled, the central conclusion of Upper Tribunal Judge Hanson on the issue of age was as follows:

> "44. No additional evidence has been provided other than that available to Judge Ford which was considered by Beatson J who also had the benefit of being able to assess the appellant giving oral evidence. There is therefore at this stage a judicial finding of a Senior Court, upheld by the Court of Appeal who refused permission to appeal that decision, that the appellant is an adult whose date of birth is 16 December 1992. I place considerable weight on this unchallenged judicial finding. There is no reliable evidence to support a finding that he is the age he claimed to be and accordingly I adopted as my finding regarding the appellant's date of birth the conclusions of Beatson J. I find the appellant to be an adult and not a minor even to the lower standard applicable to this appeal."

Having so found, and having further found that there would be no risk on return and no breach of Article 8 or other objection to removal, the judge remade the decision, upholding the dismissal of the appellant's appeal.

Submissions and disposition

26. In the written arguments provided to this court there was much debate as to whether or not the various tribunal determinations and the decision of Beatson J could operate

as decisions in rem on the question of age: see the general discussion on this topic of Hickinbottom J in *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin). But the parties rightly did not press that in argument. Mr Bedford conceded that the First-tier Tribunal determinations could not so operate. For his part Mr Blundell conceded that the decision of Beatson J likewise could not so operate: he did not pursue, indeed positively disclaimed, any argument on behalf of the Secretary of State as previously advanced in the Upper Tribunal to the effect that the Upper Tribunal was bound by Beatson J's decision on age. He was right so to concede. Not only did Beatson J not even purport to make any declaration as to age but also he was making a decision in a civil context on the potential application of the Children Act 1989 to the appellant: which, of course, was not the context or subject matter of the Upper Tribunal's decision.

27. Mr Bedford, however, took a number of other points which in my view had no substance.

28. First, he repeated the argument that the Secretary of State had bound herself, by statements in correspondence, to accepting that the appellant was under 18 as determined by Immigration Judge Ford. In my view, the Upper Tribunal judge was quite right to reject that argument. The correspondence and other documents show that on a number of occasions the Secretary of State had in the aftermath of that determination in terms qualified her position by, for example, saying that matters may need to be reconsidered in the light of the (then pending) High Court case and decision. There was no detrimental reliance by the appellant on any purported concession. I am not surprised that, overall, the Upper Tribunal judge rejected the argument as having no merit: indeed "somewhat disingenuous".

29. Then Mr Bedford sought to argue – relying on the recent decision of the Court of Appeal in *R (Evans) v Attorney General* [2014] EWCA Civ 254 – that the Secretary of State had had no proper entitlement to make the fresh decision on 28 January 2011 departing from the prior determination of Immigration Judge Cheales on age as promulgated on 28 September 2010. Leaving aside the point that by then further materials – for instance, the second report of Birmingham City Council Social Services Department – had in the meantime become available and the point that the further decision did not on the face of it seem outwith what was permitted by section 14 of the then extant Home Office Instruction on Assessing Age, quite simply it is far too late for the appellant to raise that point now. The proceedings below before Immigration Judge Ford and Upper Tribunal Judge Hanson were by reference to that second decision letter; and the present point was only first raised shortly before the hearing and then developed in the course of oral argument before us. Mr Blundell's objection to the point being raised at this very late stage, when he had had insufficient time to prepare to meet it, was in my view valid.

30. Third, Mr Bedford made brief reference to Article 47 of the EU Charter of Fundamental Rights. I could not however discern from his argument any obvious assistance from that quarter, in the circumstances of this particular case.

31. This leads to the more substantive aspects of Mr Bedford's argument. He submitted that there had been no sufficient basis for Upper Tribunal Judge Hanson finding an error of law in the determination of Immigration Judge Ford on the issue of age and in setting that determination aside. In any event, he submitted, there was procedural

unfairness: in that Upper Tribunal Judge Hanson determined the matter by in effect regarding himself as bound by the decision of Beatson J in the High Court proceedings when, Mr Bedford says, he was not so bound. Further, the Upper Tribunal judge heard no oral evidence from the applicant; and the Secretary of State had not herself sought to put in, under Rule 15 of the Tribunal Procedure (Upper Tribunal) Rules 2008, any further evidence nor had the Secretary of State put in any response under Rule 24 of those Rules seeking to challenge the determination of Immigration Judge Ford as to age.

32. On consideration, I am not impressed by these points.

33. In my view, Upper Tribunal Judge Hanson was entitled to find an error of law in the determination of Immigration Judge Ford and not to preserve the finding as to age. His reasoning in paragraph 42 of his determination is valid. In particular, it is clear that Immigration Judge Ford had, as part of her decision, placed reliance on an addendum report of Dr Birch (put in by the appellant after the first tribunal hearing), without alluding in any way to the grave reservations that by then existed with regard to Dr Birch's entire methodology and approach. Mr Bedford said that those reservations had in effect been recorded in the previous determination of Immigration Judge Cheales by her reference to the decision in *A & WK* (cited above) and suggested that it is to be inferred that Immigration Judge Ford would have had them in mind. But there is nothing to show they had been borne in mind by Immigration Judge Ford in her own subsequent determination.

34. I nevertheless do agree – and as Mr Blundell accepted – that Upper Tribunal Judge Hanson was not bound, and was not entitled to regard himself as bound, by the decision of Beatson J. The two different kinds of proceedings are not to be conflated: and furthermore, and importantly, the tribunal proceedings involved, so far as the appellant was concerned, the lower standard of proof by reference to a reasonable degree of likelihood: see, for example, the Upper Tribunal decision in *Rawofi* [2012] UKUT 00197 (IAC). As Floyd LJ observed in argument, the determination of the tribunal judge on the issue of age in the asylum proceedings could not be sub-contracted to another judge in court proceedings.

35. In his written argument, Mr Bedford went so far as to submit that Upper Tribunal Judge Hanson had actually held that he was bound to follow the age assessment of Beatson J. That is wrong. Upper Tribunal Judge Hanson never so held. Rather, he held that it was appropriate for him to attach "considerable weight" to it. There is a significant difference.

36. Mr Bedford nevertheless made the point that the judgment of Beatson J was not of itself evidence as such: rather, it was one judge's view of the evidence placed before that judge. That is true. But that evidence – effectively duplicating what had been raised in the tribunals but in addition (and significantly) with the oral evidence of the appellant and Dr Birch in particular now to be added – was fully set out in the judgment of Beatson J. His judgment speaks for itself. It seems to me to be unreal to suggest that Upper Tribunal Judge Hanson was not entitled to have regard to it. Indeed, Mr Bedford accepted that tribunals could have regard to the criticisms of Dr Birch's methodology as found by judges in other cases without requiring her, or any rebutting evidence, to be called in every subsequent case where her evidence featured. It is not obvious why a like approach should therefore not have been taken in the

present case with regard to the decision of Beatson J. In my view, therefore, Upper Tribunal Judge Hanson was entitled to have regard to the decision of Beatson J. Furthermore, given the circumstances of this case, I think that Upper Tribunal Judge Hanson was entitled to attach considerable weight to that decision.

37. I also note that in *R(PM) v Hertfordshire County Council* (cited above) Hickinbottom J – in a judgment favourably commented on by the Court of Appeal in *Kadri* (cited above) – saw no objection to a council giving "due respect to the basis and reasoning" of a tribunal's prior decision on age, even though the council was not bound by it and was not to regard itself as bound by it. Mr Bedford himself had referred us to the decision of the House of Lords in *Crehan v Inntrepeneur Pub Co* [2007] 1 AC 333, [2006] UKHL 38. The context of that case was very different from the present, involving issues of competition law and the extent to which deference was due from the High Courts to a prior decision of the EC Commission as to the applicability on the facts of that case of Article 81 EC of the EC Treaty. Mr Bedford had relied on that authority to support his (correct) proposition that Upper Tribunal Judge Hanson was not bound by the decision as to age of Beatson J and could not abdicate his own judicial responsibility. But I note in passing that Lord Bingham, at paragraph 12 of his speech, indicated that the High Court Judge in that case had been entitled to give such weight to the Commission's assessment as in his judgment the evidence merited. At paragraph 69, Lord Hoffman made similar observations, saying that the decision of the Commission "was simply evidence properly admissible before the English Court".

38. Further (and reflecting the view also indicated by Upper Tribunal Judge Hanson himself) the intervening judgment of Beatson J in any event seems to me to comprise new material relating to the age of the appellant such as to justify its being taken into account by the Upper Tribunal, on the principles indicated in cases such as *DK (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1246, [2006] EWCA Civ 1747 (see, in particular, paragraphs 23 and 25 of the judgment of Latham LJ).

39. I also reject Mr Bedford's alternative argument that Upper Tribunal Judge Hanson had in practice, even if not in form, regarded himself as bound by Beatson J's decision and thus had fundamentally erred. Not only is that flatly contrary to what Upper Tribunal Judge Hanson actually said, it is also wholly inconsistent with his approach as set out in the last two sentences of paragraph 44 of his determination. That shows that first he had appraised for himself the evidence before him and found that there was "no reliable evidence" to support a finding that the appellant was of the age he claimed to be; and secondly, and very importantly, he had expressly directed himself by reference to the lower standard applicable to the appeal before him. I accept that the Upper Tribunal judge expressed himself shortly here. But this paragraph shows his approach was a proper one: and no ground of appeal raising insufficiency of reasons has been advanced.

40. As to Mr Bedford's objection that the Secretary of State had put in no Rule 24 notice, in my view that objection does not confront the realities. It was made clear at an early stage of the appeal process that age was very much an issue – that, indeed, is precisely why a direction was given in the Upper Tribunal that there be a hearing as to whether or not Immigration Judge Ford's decision on age was to be a preserved finding. In such circumstances, the Upper Tribunal was entitled not to require formal service of a Rule 24 notice.

41. Mr Bedford then made the submission that the only point raised by the Secretary of State before the Upper Tribunal had been in effect one of law: viz. whether the Upper Tribunal was bound by the decision on age of Beatson J. But while that was one way – perhaps the principal way – in which the argument was then (and wrongly) being advanced on behalf of the Secretary of State, it was not, I am satisfied, the only way: as indeed the Upper Tribunal judge himself appreciated. The prior written arguments show that the whole issue of age was at large and that was the case the appellant should have been prepared to meet. There is no proper basis for saying that the Upper Tribunal judge was obliged to accept the finding of Immigration Judge Ford as to age once the Upper Tribunal judge had rejected the argument that he was bound by the finding of Beatson J. As Mr Blundell observed, the various arguments here are all, in substance, variations on the argument that the finding of the Immigration Judge as to age should have been preserved by the Upper Tribunal. But that was a matter for the Upper Tribunal's evaluation.

42. In this regard, Mr Bedford nevertheless suggested that once the Upper Tribunal judge had rejected the argument that he was bound by the decision of Beatson J he should then at least have given the appellant the opportunity to give oral evidence himself. But it was for the appellant, and his legal advisers, to be prepared for such an eventuality. The appellant was not tendered to give additional oral evidence before the Upper Tribunal: nor was anyone else. Indeed I can hardly think that it would ever have been planned that the appellant should have given oral evidence before the Upper Tribunal: in view of the fact that he had not been tendered at either of the two earlier tribunal proceedings and in view also of the fact that in the intervening period, when he did eventually give evidence (in the court proceedings), his credibility had been demolished. Had he been tendered before the Upper Tribunal he would have been exposed to numerous bases for further cross-examination, including all those which had already been identified before Beatson J.

43. I would therefore dismiss this appeal.

44. I should add one other point. Our attention was drawn to the observations of the Supreme Court in its refusal of permission to appeal in the case of *Kadri*. It was there suggested by the Supreme Court that, in cases of potential conflicts arising under two statutory regimes (there, as here, services under the Children Act 1989 and asylum adjudication) certain cases might be potentially relevant. Those cases identified by the Supreme Court were *R v Secretary of State for the Home Department ex.p. Danaei* [1998] Imm AR 84; *R v Cardiff City Council ex.p. Sears Group Properties Limited* [1998] PLCR 262; and *R (Bradley) v Secretary of State for Work & Pensions* [2009] QB 114, [2008] EWCA Civ 36. (Perhaps *R (Evans) v Attorney General* (cited above) may now also be added to that list.) Mr Blundell suggested that those authorities supported his argument. Mr Bedford disputed that. I observe that those cases involved subsequent *executive* determinations in the light of a prior judicial determination of the point arising: whereas on the facts of the present case what is involved here is a subsequent *judicial* determination. In the circumstances, however, I do not think it necessary to express a view on such matters or authorities for the purposes of this appeal.

Conclusion

45. I would dismiss this appeal. In giving leave on the papers, Maurice Kay LJ had observed that the merits were not attractive. A full consideration of this appeal has only operated to reinforce that.

Lord Justice Floyd:

46. I agree.

Lord Justice Maurice Kay:

47. I also agree.