Neutral Citation Number: [2011] EWCA Civ 1284

Case No: C5/2011/0910

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)
The Immigration Appeal Tribunal
HX/58241/2003

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2011

Before:

LORD JUSTICE WARD
LORD JUSTICE MOSES
and
LORD JUSTICE PATTEN

- -

Between:

SH (Afghanistan) by Litigation Friend The Official Solicitor	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

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- -

Mr Stephen Knafler QC and **Ms Shu Shin Luh** (instructed by **Wilson Solicitors LLP**) for the **Appellant**
Ms Susan Chan (instructed by **The Treasury Solicitors**) for the **Respondent**

Hearing dates: 29th September 2011

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Approved Judgment

Lord Justice Moses :

1. SH is an Afghan national. He arrived secretly in the United Kingdom in September 2010 and claimed asylum. If he is a minor it is accepted that he would be at risk, should he be returned unaccompanied to Afghanistan. Accordingly, his age is of central importance. The Secretary of State has disputed his age and denies that he is under the age of 18, as he claims to be. That issue, and the appellant's claims that he was in danger from the Taliban, were considered first by Immigration Judge Froom, pursuant to the "Fast-Track" procedure, leading to a determination on 8 October 2010. Following a successful application for permission to appeal it was further considered by Senior Immigration Judge King on 26 October 2010. He too dismissed SH's claims and concluded that he was not a minor.

2. The central issue in this appeal concerns the procedure by which these conclusions were reached. The First Tier Tribunal (Immigration and Asylum Chamber) considered the age of the appellant and his assertion in support of his asylum claim under The Asylum and Immigration Tribunal (Fast-Track) Procedure Rules 2005. The procedure applies to those who are detained and wish to appeal (Rule 5). The time limit for appealing, not later than two days following service of the immigration decision (Rule 8), and the requirements for swift listing (Rule 11), are designed to achieve speed. Adjournments are discouraged. By Rule 28 the Tribunal's powers to adjourn are limited. There might be insufficient time to hear the appeal (28(a)) or a failure to serve parties (b) or:-

> "(c) The Tribunal is satisfied by evidence filed or given by or on behalf of a party that –
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> (i) the appeal for application cannot be justly determined on the date on which it is listed for hearing; and
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> (ii) there is an identifiable future date not more than ten days after the date on which the appeal or application is listed for hearing by which it can be justly determined;
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> or
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> (d) the Tribunal makes an order under Rule 30."

Paragraph 30 permits removal of pending proceedings from the Fast-Track and includes the provision that a Tribunal is required to order removal:-

> "(1)(b) If it is satisfied by evidence filed or given or on behalf of a party that there are exceptional circumstances which mean that the appeal or application cannot otherwise be justly determined;"

3. It was accepted by the Secretary of State that the reference to exceptional circumstances imposes no test additional to the issue as to whether the appeal could be justly determined. It is impossible to conceive of circumstances in which an

appeal could not be justly determined under the Fast-Track procedure but the circumstances were not exceptional.

4. At the hearing on 5 October 2010 Immigration Judge Froom learnt that there was dispute as to the age of the appellant. He claimed that his mother had told him he was 15 years old when he left Afghanistan in about June 2010. The appellant's age was assessed shortly before he claimed asylum. After he had claimed asylum, social workers from Lincolnshire County Council concluded that he was 24 years old. A subsequent check showed that this appellant had applied for a student visa on 24 November 2008 at the British High Commission in Islamabad, Pakistan. He gave a different name, saying that he was Nasib Ullah from Kabul and was born on 21 April 1991. He had a passport, with that date, issued on 15 May 2008 in Kabul, six months before he applied for the student visa.

5. On his behalf, the Refugee Council had assessed his age and "strongly" believed him to be under 18. It was in those circumstances that on 28 September 2010 solicitors on behalf of the appellant applied for the case to be transferred out of the Fast-Track, pursuant to Rule 30. The immigration judge was informed that they were in the process of arranging for an independent expert to carry out an age assessment and they challenged the social services age assessment conducted by Lincolnshire County Council. Their application was refused because it was said that a Practice Direction provided that applications should be made orally at the hearing. An application was made at the hearing. A letter was produced from another firm of solicitors contending that Lincolnshire's report was of poor quality and could not rationally support the conclusion that the appellant was 24. Further, the application relied upon a letter from a children's advisor, Mr Francesco Jeff, as to age dispute at the children's section of the Refugee Council. That asserted, following an interview with the appellant, that despite his appearance, his behaviour indicated he was between 15 and 16. The application for adjournment was made on the basis that an independent age assessment had been arranged. The judge was told that a report would be prepared within two or three weeks after the appellant had been seen. The Secretary of State did not oppose the adjournment.

6. The judge concluded that he was not satisfied that the appeal could not be justly determined. He said:-

> "I was more sympathetic to granting a short adjournment to enable the independent age assessment to be conducted, particularly as this was unopposed. However, no appointment had been made for the appellant to be assessed, and I was only given a rough estimate of when the final report would be available. It was not appropriate to grant a lengthy adjournment and I consider that I could justly determine the appeal on the basis of the evidence already available." (paragraph 27)

7. The judge went on to consider the merits of the asserted fear of the Taliban. He rejected the appellant's claim to be a minor, particularly on the basis of the previous student visa application which showed the appellant to be 18. I shall return later to the effect of that visa application which, if it correctly stated the appellant's age,

would mean that the appellant was 20 at the time of the appeal to Immigration Judge Froom.

8. The principle applicable to the request for an adjournment to adduce evidence on behalf of the appellant was not in dispute. It is fundamental that the parties should be allowed to answer adverse material by evidence as well as argument (see, e.g., *In Re. D* [1996] AC 593 at 603) and all the more so where the subject matter, such as a claim for asylum, demands the highest standards of fairness (*R v Secretary of State for the Home Department ex-parte Fayed* [1998] 1 WLR 763-777). Sensibly, in clear and forceful submissions of the highest quality, Mr Knafler QC did not contend that in every case where age was in dispute it was inappropriate to adopt the Fast-Track procedure. But in this case it was plain, contrary to the suggestion of the immigration judge in paragraph 26, that arrangements had been made for a report to be prepared. Curiously, it appears that there was some contradiction between the judge's view expressed in paragraph 24, and the record of the information the appellant's counsel gave him that a report would be prepared two or three weeks after the appellant had been seen. The judge says that it was not appropriate to grant a lengthy adjournment but no lengthy adjournment was sought. The mere fact that under the Rules an adjournment can only be given where there is an identifiable future date not more than ten days later provides no justification for refusing an adjournment where there are good grounds for doing so. After all, Rule 28(d) itself contemplates taking a case out of the Fast-Track procedure in circumstances where it cannot otherwise be justly determined.

9. In the instant appeal the Secretary of State relied upon an age assessment from Lincolnshire County Council. There was a dispute as to whether the assessment made by Lincolnshire County Council was what is called "Merton-compliant". This is a reference to a decision of Stanley Burnton J in *R (B) v The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC Civ 1689 in which he identified the requirements of fairness in relation to assessments of age. Solicitors on behalf of the appellant contended that the assessment breached those requirements in that there was no appropriate adult present during Lincolnshire County Council's interview and the causes of concern had never been put to this appellant. It is unnecessary, for the purposes of resolution of this issue, to reach any conclusion as to whether that assessment did comply with the requirements of fairness. The essential point is that the Secretary of State had expert evidence on which she relied and the appellant wished to produce his own. In those circumstances, it seems to me beyond argument that the judge ought, in fairness, to have given this appellant an opportunity to provide countervailing expert evidence, if he could obtain it, all the more so where the judge had been informed of assessments by others, such as Mr Jeff's, which challenged the social workers' own assessment. In my view, it was unfair and unlawful to refuse an adjournment at that stage. The judge appears to have done so merely on the basis that it would involve removing the appeal from the Fast-Track Procedure. That provided no justification for his refusal. A short adjournment would have permitted the appellant to obtain what expert evidence he could to counter the expert evidence on which the Secretary of State relied.

10. Following the grant of permission, a further appeal was heard by Senior Immigration Judge King on 26 October 2010. Senior Immigration Judge King had, by the time of the appeal before him on 26 October 2010, a new report from independent social

work assessors, Ken Ambat and Rose Palmer dated 22 October 2010. This report reached the conclusion that the appellant was 17. There were two issues before Senior Immigration Judge King. It was important that they were not elided. The first and discrete issue was whether the judge erred in law in refusing an adjournment for the appellant to obtain an independent assessment of his age. The second issue was whether, if the judge had erred in law in refusing an adjournment, that failure made any difference.

11. Senior Immigration Judge King considered the findings of fact made by the judge in relation to the factual question whether the appellant was under the age of 18. He too relied upon the appellant's application for a student visa which, if the appellant was telling the truth when he said he was 15, must have been made when he was only 13. Judge King then continued:-

> "[Immigration Judge Froom] drew a conclusion from the photograph and from the age stated on the visa application that that was indeed a more accurate reflection of the age of the appellant in 2008. That finding was *properly open to be made* in all the circumstances. The judge also concluded, on the basis of the false information and false identity, whether by the appellant or by his family on his behalf, that such undermined credibility generally. That finding also *would seem properly open to be made.* " (my emphasis)

12. Judge King then went on to consider the age assessment report and concluded that it did not support the evidence of the appellant as to his age or indeed the earlier assessment of Mr Jeff, the advisor working with the Refugee Council. Judge King concluded:-

> "52. …having considered the first issue as to whether or not the Immigration Judge erred in refusing to grant an adjournment, I find that his decision was one properly open to him and was not Wednesbury unreasonable or perverse or unfair.
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> 53. Even were I to widen the ambit of consideration to the more general question of unfairness, I do not find that even had the Immigration judge adjourned the matter and considered the report that is now presented, it is *reasonably likely* that he would have reached any decision other than the one which he had reached." (my emphasis)

13. In relation to both the two issues I have identified, whether the Immigration judge erred in law in refusing an adjournment and as to whether he would have reached the same conclusion, in my judgement Judge King fell into serious error. First, when considering whether the immigration judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. The test and sole test was whether it was unfair. In *R v Secretary of State for the Home Department ex-parte the Kingdom of Belgium and Others* [CO/236/2000 15 February 2000] the issue was

whether a requesting state and Human Rights organisations were entitled to see a medical report relevant to Pinochet's extradition. Simon Brown LJ took the view that the sole question was whether fairness required disclosure of the report (page 24). He concluded that the procedure was not a matter for the Secretary of State but for the court. He endorsed a passage in the fifth edition of Smith Woolf and Jowell at pages 406-7:-

> "Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The issue is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in relation to procedural propriety." (page 24)

14. The question for Judge King was whether it was unfair to refuse the appellant the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the Immigration judge to take the view that no such opportunity should be afforded to the appellant. Where an appellant seeks to be allowed to establish by contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand? It is plain from reading his decision as a whole that that was not the test applied by Judge King. His failure to apply that test was a significant error.

15. The next question which Judge King resolved was whether the report which had been obtained by the time of the hearing before him dated 22 October 2010 would have made any difference. The judge, on that issue, concluded that even if that report had been obtained, "it is reasonably likely" that Immigration Judge Froom would have reached the same decision. This was not the correct test. Judge King was, of course, not in the same position as Immigration Judge Froom. He had the advantage of considering the very report which, in my view, Immigration Judge Froom should have allowed the appellant to obtain. If that report had not been obtained the question for the Upper Tribunal on appeal from the First Tier Tribunal was whether it would have been pointless to wait for further independent evidence as to age. Tribunals, like courts, must set aside a determination reached by the adoption of an unfair procedure unless they are satisfied that it would be pointless to do so because the result would inevitably be the same. Both Simon Brown LJ and Dyson LJ reminded themselves, as all faced with the argument that the result would inevitably be the same must remind themselves, of Megarry J's evocation of the essence of justice in *John v Rees* [1970] Ch 345,402:-

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious," they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; unanswerable charges which, in the event,

> were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."

In the instant appeal it was impossible to say, at the stage an adjournment was requested, that any report obtained by the appellant could make no difference.

16. The situation before Judge King was, however, different. He had by then obtained the report that would have been produced had an adjournment been granted. He was bound, therefore, in the light of that report, to consider whether there was any point in remitting the case for a re-hearing in the First Tier Tribunal. That depended upon the evidence before him of the appellant's age. As the Supreme Court has held in *R (A) v Croydon London Borough Council)* [2009] 1 WLR 2557 the question of age was a question for the ultimate determination of the courts or, in this case, for the Tribunal (see the administrative consequence of that approach to which the President referred in *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59 at paragraph 4).

17. The question, I suggest, for us is whether the evidence that the appellant is over 18 is so overwhelming that it is pointless to remit the matter to a First Tier Tribunal notwithstanding the errors of approach of both the First Tier Tribunal and the Upper Tribunal which I have identified.

18. The assessment of age is not an exact science. The reports to which Collins J referred in *A v London Borough of Croydon* and *WK v Kent County Council* [2009] EWHC 939 emphasise the complexity and difficulty of which, for example, the Royal College of Paediatrics and Child Health have spoken (see paragraphs 15-17). The guidance Stanley Burnton J gave in *B v London Borough of Merton* reflects that difficulty. An assessment requires consideration of the general background, family circumstances and history, and not solely appearance. Ethnic and cultural information is important and if there is reason to doubt the applicant's statement as to age, his credibility must be assessed (see the Asylum Process Guidance on Assessing Age in its reference to local authority age assessments).

19. The difficulty is apparent in the report from Rose Palmer and Ken Ambat which reached the conclusion that:-

> "We feel that it is unlikely that he is significantly older than 17 and less likely that he is an adult, i.e., over the age of 18."

The report is twenty-four pages long. In the course of that report it appears that the appellant was questioned about the age and name he gave when seeking a passport and subsequently a student visa. He is recorded as asserting that an "uncle" had taken him to Pakistan and admitting that he had there attempted to obtain a student visa. He alleges that that "uncle" supplied the passport. He denied that he had had his fingerprints taken, notwithstanding that it was a biometric check which revealed that

the appellant had applied for a student visa at the British High Commission in Islamabad, Pakistan, in the name of Nasib Ullah, born 21 April 1990, from Kabul.

20. The assessment does not however grapple with the difficulties certain undisputed facts present. I do not think, contrary to the view of Judge King, that that reflects upon the impartiality of the authors' report. But it does leave it open to the tribunal, or for that matter this court, to reach a contrary conclusion based upon the facts as a whole. First, it must be recalled that six months before the student visa application this appellant had obtained a passport in Kabul, issued on 15 May 2008, on the basis of which he put forward his name as Nasib Ullah and a date of birth, 21 April 1990, in his student visa application.

21. It is of significance that he appealed against the Entry Clearance Officer's refusal of his student visa application again in the name of Nasib Ullah, together with another appellant, called Abdul Alim, a 20 year-old citizen of Afghanistan born on 2 March 1989. This appellant is described as his younger brother. A sponsor gave evidence as to how he would support the brothers. The appeal was rejected on the basis that neither appellant produced satisfactory evidence to show that they had a sufficient command of English language to pursue the study for a diploma in general English language. The appellant disputed that he knew the sponsor and claimed the sponsor must have lied, but has never given any explanation as to why he should have done so, still less why his application should have been joined with someone who purported to be his brother.

22. Nor has the appellant ever given any explanation as to why he should have claimed to be of an age sufficient to qualify for admission on a student visa. As Immigration Judge Froom pointed out, if in truth he was 13 at the time, then it would have been absurd to try and pass himself off as an 18 year-old, the age asserted in the student visa documents. It was a strategy, as Immigration Judge Froom pointed out, which was bound to fail.

23. There can be no dispute but that this appellant did claim to be Nasib Ullah and gave an age which would now make him 21 years old. He gave a different name on three separate occasions when encountered by immigration staff trying to enter the UK illegally, though he gave his date of birth as 1 January 1995. There is evidence that he is as young as he says, although the evidence as to his precise age varies. The Secretary of State has considered yet another report from Lincolnshire from Ann Crisp and Jane Hopkinson which suggests that he is 17, contrary to the earlier report obtained by Lincolnshire which concluded that he was 24. All the experts, therefore, conclude that he is under 18. But all that expert evidence must be considered in the context of the difficulty of assessment. Indeed, the latest report acknowledges a margin of error of between 2-5 years.

24. In my view, notwithstanding the errors which I have identified, this is one of those rare cases in which the unlawful errors of procedure made no difference whatever. Had I not reached that view, I would have proposed that the appropriate course was to remit this case for a re-hearing in the First Tier Tribunal. But I am confident that it is pointless to do so. There is no rational basis upon which this appellant could have held himself forward as being over 18 at a time when he was only 13. There is no rational basis for joining his claim with someone who purported to be an elder brother. This appellant would not have claimed to be of that age and sought for a

sustained period to suggest that he was born on 21 April 1990 if, in truth, he was substantially younger. In those unusual circumstances, I conclude, despite the errors I have identified, that this appeal should be dismissed and the case should not be remitted for re-hearing to the First Tier Tribunal.

Lord Justice Patten:

25. I agree.

Lord Justice Ward:

26. I also agree.