Neutral Citation Number: [2022] EWCA Civ 1663

Case No: CA-2022-00304

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE HENSHAW
[2022] EWHC 98 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2022

Before :

LORD JUSTICE BAKER
LADY JUSTICE CARR
and
LADY JUSTICE ANDREWS

- -

Between :

THE KING (on the application of MA and HT)	**Claimants and Respondents**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant and Appellant**

- -
- -

Deok Joo Rhee KC and William Irwin (instructed by **the Treasury Solicitor**) for the **Appellant**
Shu Shin Luh and Antonia Benfield (instructed by **Instalaw Solicitors**) for the **Respondents**

Hearing date: 1 December 2022

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Approved Judgment

Lady Justice Andrews:

INTRODUCTION

1. This appeal concerns the lawfulness of guidance ("the KIU Guidance") issued by the Appellant ("the SSHD") relating to the "short-form" assessment of the age of unaccompanied asylum seekers by social workers in the Kent Intake Unit (KIU), a short-term holding detention facility which is based in Dover. The KIU is part of the National Asylum Intake Unit, which is responsible for confirming the identity of asylum seekers and registering asylum claims through a screening process.

2. The KIU Guidance came into force on 18 September 2020, was updated on 3 December 2020, and remained in force for a total period of around 16 months. It applied only at the KIU, and only to individuals who were newly arrived in the UK and had been detained under immigration powers. It was only ever intended to be temporary, and was withdrawn on 15 January 2022 for reasons unrelated to this case.

3. In a judgment handed down on 19 January 2022, [2022] EWHC 98 (Admin), Henshaw J ("the Judge") concluded that the KIU Guidance and the decisions made as to the ages of the two Respondents, MA and HT, were unlawful, and that their detention was also unlawful insofar as it was lengthened for the purposes of carrying out the KIU age assessments.

4. Permission to appeal was granted on the sole ground that the Judge misdirected himself on the correct approach set out by the Supreme Court in *R(A) v Secretary of State for the Home Department* [2021] UKSC 37, [2021] 1 WLR 3931 ("*R(A) v SSHD"*) and in *BF(Eritrea) v Secretary of State for the Home Department* [2021] UKSC 38, [2021] 1 WLR 3967, ("*BF (Eritrea)")* in cases where a policy is alleged to be unlawful by reason of what it says or omits to say about the law.

5. For the reasons set out in this judgment, I consider that on a proper application of the principle set out in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("*Gillick*") and explained by the Supreme Court in *R(A) v SSHD* and *BF Eritrea,* the KIU Guidance was not unlawful, and the Judge was wrong to conclude otherwise.

BACKGROUND

6. The relevant background is set out at some length in the judgment below, but the following summary should suffice to explain the context in which the KIU Guidance was introduced, and in which the challenge to it arose.

7. The SSHD's powers of detention arise under paras 16(1) and (2) of Schedule 2 to the Immigration Act 1971. A person may be detained in order to examine them to determine whether they should be given or refused leave to enter the UK (para 16(1)), or if there are reasonable grounds for suspecting that they are someone in respect of whom a removal direction may be given (para 16(2)). However, an unaccompanied child cannot be detained save in narrowly prescribed circumstances (para 16(2A)). In the present case, the power that was exercised was the one arising under para 16(1).

8. The SSHD has additional obligations under s.55 of the Borders Citizenship and Immigration Act 2009 to make arrangements to discharge her functions in the context of immigration control "*having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."* ("the s.55 duty"). The arrangements made by the SSHD in compliance with that duty comprise four main policies:

> The Assessing Age Asylum Instruction ("Assessing Age");
>
> Enforcement Instructions and Guidance, Chapter 55.9.3 and 55.9.3.1 ("EIG 55.9.3.1");
>
> The Detention Services Order 02/2019, Care and Management Post-Detention Age Claims; and
>
> The Home Office Age Assessment Joint Working Guidance ("Age Assessment JWG"), which is accompanied by the Association of Directors for Children's Services ("ADCS") Age Assessment Guidance.

9. Assessing Age (to which the other policies cross-refer) is the SSHD's principal policy on her approach to dealing with age disputes arising in respect of putative unaccompanied asylum-seeking children. Its compliance with the SSHD's statutory obligations, including the s.55 duty, was affirmed by the Supreme Court in *R(AA) (Afghanistan) v Secretary of State for the Home Department* [2013] UKSC 49, [2013] 1 WLR 2224.

10. The general rule is that children under 18 should not normally be subject to immigration detention. On first encounter, immigration officers therefore have to assess whether they are dealing with an adult or a child. That initial assessment will determine how the individual will be dealt with thereafter, but it will not preclude a further age assessment being carried out by a local authority into whose area the individual may be dispersed, which will have its own legal obligations in respect of him or her.

11. In *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280, ("*Merton*") Stanley Burnton J gave guidance as to the appropriate processes to be adopted to ensure the fair assessment by a local authority of the age of a person claiming to be child who is neither obviously a child nor obviously an adult, where there is no reliable documentary evidence of their age. Acknowledging that the difficulty normally only arises in cases where the person concerned is approaching 18 or is only a few years over 18, he said at [27] that:

> "*the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as to sensibly cover all cases.*"

12. Stanley Burnton J went on to give some general guidance at [36] to [39], stressing that the process may be informal *so long as safeguards of minimum standards of inquiry and fairness are adhered to* (emphasis added). One of the main principles established in *Merton* is that other than in clear cases, the decision maker cannot determine age

purely on the basis of the physical appearance (and demeanour) of the individual concerned. Subject to that prohibition, and to the obligation to carry out appropriate inquiries and (if need be) form a view as to the individual's credibility, the decision in *Merton* is not prescriptive as to the ingredients of a fair assessment.

13. The approach that Stanley Burnton J advocated was subsequently endorsed and elaborated upon by the Court of Appeal in *R(FZ) v London Borough of Croydon* [2011] EWCA Civ 59, [2011] PTSR 748 and *R(ZS) v Secretary of State for the Home Department* [2015] EWCA (Civ) 1137. Age assessments which follow the guidance in that line of authority are commonly referred to as "*Merton* compliant assessments."

14. "Assessing Age" provides that the SSHD's policy is to apply the age assessment process in such a way as to guard against the detention of children generally, including the accidental detention of someone who is believed to be an adult but subsequently found to be a child. The principle of "the benefit of the doubt" is applied, which means that where there is uncertainty about whether an individual is an adult or a child, they should be treated as a child and referred to a local authority with a request for a *Merton* compliant age assessment to be carried out.

15. Under the version of "Assessing Age" that was in force at the material time, the SSHD would normally only treat an age-disputed individual as an adult in three circumstances, namely:

> (i) Where there was clear and credible documentary evidence showing the individual to be 18 years or over;
>
> (ii) Where two officers (one of at least Chief Immigration Officer grade) had separately determined that the individual's physical appearance and demeanour very strongly suggested that they were at least 25 years old; or
>
> (iii) Where a *Merton* compliant assessment had concluded that the individual was 18 years or over, and the SSHD agreed with that assessment.

16. The threshold for those who were assessed by Immigration Officers to be "clearly an adult" was set at 25 years following the judgment of the Court of Appeal in *BF(Eritrea)* [2019] EWCA Civ 872, [2020] 4 WLR 38. The Court held in that case that a provision in EIG 55.9.3.1 (reflected in the version of Assessing Age then in force) that the Home Office would not accept that an individual was under 18 if his physical appearance or demeanour very strongly suggested that he was significantly over 18 years of age, and there was no credible evidence to the contrary, was unlawful because it did not remove the possibility that an asylum seeker who claimed to be a child might in fact be one, even though he looked older. That decision was subsequently reversed by the Supreme Court in a judgment delivered jointly by Lord Sales JSC and Lord Burnett CJ, which I shall return to consider later in this judgment.

17. In the summer of 2020, Kent experienced an unprecedented increase in the number of persons arriving and seeking asylum after crossing the Channel in small boats, which increased pressures on Kent County Council's ("Kent CC") children's services. The pressures were further increased by the impact of the decision of the Court of Appeal

in *BF (Eritrea)*, which led to more individuals falling into the "borderline" category and being referred to Kent CC for age assessments; the National Transfer Scheme by which they might have been placed with a different local authority was at that stage still voluntary. Initially a team of Home Office funded social workers were used to support Kent CC to carry out a backlog of outstanding age assessments in respect of those who had been referred to it under the process outlined in Assessing Age. Despite this, on 17 August 2020, Kent CC decided to cease to accept newly arrived unaccompanied asylum-seeking children.

18. In response to this development, the Home Office contracted another team of suitably qualified professional social workers to provide Immigration Officers in the KIU with support and advice in relation to unaccompanied children, and those claiming to be unaccompanied children but whose age was doubted. The social workers concerned were supervised by senior social workers in the Home Office Safeguarding Advice and Children's Champion team. This arrangement was set out in the KIU Guidance, which was designed to operate alongside "Assessing Age" and the other relevant policies.

19. The underlying rationale was the need to ensure, as far as possible, that individuals being referred to local authorities were children or potential children and to support their placements under the National Transfer Scheme. It was considered that identifying adults as early as possible in the process would reduce the safeguarding risk of placing adults alongside children. Where children were identified on assessment, the KIU Guidance allowed for social workers to support the KIU safeguarding processes.

20. Both Respondents arrived in the UK claiming to be unaccompanied asylum-seeking children. Each of them was subject to a KIU age assessment when they arrived in the UK, and was detained at the KIU pending that assessment, which took place within 24 hours of their arrival. The assessments were embarked upon in circumstances in which neither the immigration officers nor the social workers concerned considered that their physical appearance and demeanour indicated that they were obviously over 18.

21. MA, a Kuwaiti Bidoon, was apprehended by Kent police at a service station just after midnight on 15 December 2020, having entered the UK on the back of a lorry. He claimed to be 16 years old. His age assessment was carried out between 12.15 pm and 12.57 pm the same day. The social workers concluded that he was 20 years old. Following his transfer to adult asylum support accommodation in Coventry, a fresh age assessment was carried out. This led to the conclusion by different social workers that he is at least 21 years old.

22. HT, an Iranian national, claimed to be aged 17 on arrival, having been rescued at sea from a small dinghy crossing the English Channel from France. He arrived at 10.30am on 10 January 2021, and his KIU age assessment was carried out between 2.05pm and 3.05pm the same day. The social workers concluded that he was 21 years old. He too was transferred to Coventry, but in his case Coventry City Council decided to accept his claimed age without carrying out a fresh age assessment. The SSHD also agreed to accept his claimed age following the service of expert evidence in the judicial review proceedings.

23. Both claimants, acting through litigation friends from the Refugee Council, commenced proceedings for judicial review in February 2021, in which they:

(i) challenged the lawfulness of the KIU age assessments carried out in their cases as being non-*Merton* compliant;

(ii) contended that the KIU Guidance was unlawful on a number of different grounds; and

(iii) claimed their detention at the KIU was unlawful.

Permission to proceed was granted on 11 May 2021, and the cases were directed to be heard together.

24. In her Detailed Grounds of Defence, served on 31 August 2021, the SSHD conceded that procedural errors had been identified in both the contested age assessments and confirmed that the Home Office's subsequent decisions to treat MA and HT as adults had been withdrawn. She agreed to make fresh decisions as to the claimants' ages following (and in the light of) the age assessments which were then due to be carried out by Coventry City Council. That substantively resolved the first ground of complaint. By the time of the hearing of the claim on 20-21 October 2021, any dispute regarding the ages of the two claimants had also been resolved. MA is and was at all material times an adult; HT was at all material times a child.

25. The remaining grounds of judicial review survived an application by the SSHD to strike out the challenge to the KIU Guidance and to transfer the unlawful detention claim out of the Administrative Court list, on the grounds that the public law challenge had become academic. That application was dismissed by Lang J on 4 October 2021.

THE KIU GUIDANCE

26. The first page of the KIU Guidance states that:

> "This document provides guidance and information relevant to the delivery of social work assistance, by a team of contracted social workers, in support of the delivery of the Kent Intake Unit (KIU's) functions in respect of children and those claiming to be children. This includes:
>
> - Guidance for the team of social workers on what their roles are, how these must be delivered and how they will operate alongside Home Office staff based in KIU,
>
> - Guidance for Home Office members of staff working alongside the social workers."

27. The Introduction provides information on the key aims of the process (to which reference has been made in para 19 above) and the principles that must be adhered to. Under the heading "General principles" it is stipulated that "the processes set out within this instruction *must be undertaken in accordance with, and to achieve, the following principles.*" (Emphasis added). A separate, later section under the heading:

"Services to be delivered" reiterates that the delivery of the functions listed by both KIU and the social workers *must be in accordance with the General principles*. The list of "General principles" which follows includes the following:

> "In cases where the Home Office doubts the age of a person claiming to be a child, their age is assessed in an appropriate and legally compliant manner, for both safeguarding purposes and, in the case of KIU, to protect the integrity of immigration controls."

28. A separate section of the Guidance is devoted to age assessment case law, and the reader is told where to find links to much of the relevant case law within the ADCS age assessment guidance. Relevant policy guidance documents (including Assessing Age) are also identified.

29. Under the sub-heading "Age Assessment", in broad terms, the Guidance envisages two situations in which the KIU will "immediately obtain" the opinion of a social worker, namely:

> (i) Where they are minded to make a decision that the claimant's physical appearance and demeanour strongly suggests they are 25 years of age or over, or
>
> (ii) Where there is reason to doubt the claimant's age, but their physical appearance and demeanour does not very strongly suggest they are 25 years of age or over.

The social worker is then to carry out an immediate review of that provisional assessment and provide written reasons for agreeing or disagreeing with it.

30. The KIU Guidance envisages that the social worker will conduct a "short *Merton* compliant age assessment" in two circumstances, namely:

> (i) where the social worker considers that the Immigration Officer was incorrect to assess the individual as being 25 or more based on physical appearance and demeanour alone, but the social worker is nevertheless of the view that the individual is potentially clearly an adult, or
>
> (ii) where the social worker is of the view that the individual is potentially clearly an adult despite the fact that the Immigration Officer did not assess them as clearly being over 25, based on physical appearance and demeanour alone.

31. The KIU Guidance specifies that a short *Merton* compliant age assessment must only be conducted if assessed to be appropriate by the social worker and "*if in accordance with age assessment case law and the ADCS age assessment guidance"*. It goes on to stipulate that the assessment *must* be conducted in a manner which is in accordance with age assessment case law and the ADCS age assessment guidance. The social worker must also take into account information obtained by the Home Office (though the KIU Guidance emphasises that the decision is the responsibility of the social worker).

32. The social worker must "use the Kent Intake Unit initial age assessment report *to set out the decision and provide evidence that it is case law compliant*" (emphasis added). The "assessment report" is compiled on a proforma. If the individual is assessed as being clearly an adult, the social worker must ensure that the date of birth assigned to them in the report is consistent with that decision.

33. On receipt of the report, the KIU must review its decision on age in accordance with the guidance in Assessing Age, the relevant sections of which are specifically identified. If doubt still remains, the individual is to be treated as a child and referred to a local authority for a (potentially second) *Merton* compliant age assessment to be conducted. If a short *Merton* compliant age assessment was conducted at the initial stage, a copy of the age assessment proforma must be sent to the local authority.

34. There are minor differences between the age assessment proforma used in MA's case and that used in HT's, but they are not material. On the first page there are sections for recording the name, nationality, claimed date of birth and port reference of the individual being assessed, and for the identification of the assessing social worker(s) and their assigned role(s). The form makes provision for a second named social worker to be an "appropriate adult" rather than an assessor.

35. The next section provides details of the circumstances in which the assessment was carried out, including the date and venue. There are boxes to be ticked to indicate whether an interpreter was used, and space for details to be provided, including the language and whether the interpretation was by telephone, and for an explanation to be given of why an interpreter was not required if the "no" box was ticked. There are similar boxes to be ticked to indicate whether an appropriate adult was present during the age assessment, whether anyone else was present, and whether the person being assessed was informed of the reasons for interview (and space to record what they were told).

36. The next section is used for the provision of details of all available sources of information that were taken into consideration during the age assessment. This is followed by a section entitled: "Summary of specific reasons for assessment of age", and a section entitled: "Details of analysis (include any identified safeguarding and welfare concerns)". The decision on age is recorded in section 7. There are then sections to record the delivery of the outcome to the assessed person, and any additional information. In the "delivery of outcome" section there are boxes to record whether an opportunity was provided for the assessed individual to check the information upon which the outcome was based, and whether they were given an opportunity to challenge the outcome, and if so, whether they did challenge it and why. The final section contains spaces for signature by the assessing social worker(s) and records the start time and end time of the assessment (if and insofar as that information has not already been recorded elsewhere on the form).

THE JUDGMENT

37. The Judge did not accept all the grounds of the claimants' challenge to the lawfulness of the KIU Guidance. He rejected the complaint that the Guidance was contrary to the SSHD's published policies (primarily, Assessing Age). He also accepted, at [94], the SSHD's submission (recorded at [92]) that detention within the overall parameters of

para 16(1) of Schedule 2 for the purpose of a short formalised age-assessment process would be lawful, provided that the age-assessment was *Merton* compliant.

38. However, he took the view at [109] that if the appearance and demeanour of an individual did not already indicate that he or she was obviously an adult, a *Merton* compliant assessment could not be carried out, even at the initial screening stage, without the individual being given the support of an "appropriate adult" (not just being afforded an opportunity to have one); and without their being told of the provisional view formed by the assessor(s) and given an opportunity to deal with important adverse points before a final conclusion was reached (referred to in shorthand as a "minded to" process).

39. The complaint made in the individual cases was that an appropriate adult had not been *offered* to either MA or HT, and that there was no "minded to" procedure. It is and was accepted by the SSHD in the court below that provision had not been made for the attendance of an appropriate adult at age assessments at KIU. However, the SSHD's position was that it was a matter for the judgment of the social workers concerned whether to adopt a "minded to" process in an individual case, and that in both cases the proformas evidenced that the claimants had been afforded the opportunity to check the information upon which the outcome was based.

40. This appeal is *not* concerned with whether the Judge's view properly reflects the legal principles in *Merton* as developed in subsequent case law. It became clear in the course of legal argument that there is a divergence of views among first instance judges to whether there are essential ingredients of the process which must be present in order for *any* age assessment to be fair, and if so, what they are; or whether it is a fact-specific question in any given case whether the process adopted was fair and based on a sufficient enquiry. The difference is illustrated by the approach taken by the Judge in this case, at [109] and [111]–[112], on the one hand, and Swift J's approach based upon his analysis of the relevant principles going back to *Merton* itself in *R(HAM) v London Borough of Brent* [2022] EWHC 1924 (Admin), on the other. That difference may require resolution by a higher court, in due course, but this is not the case in which to do so. The appeal has proceeded upon an assumption that the Judge was right; nothing in this judgment is to be understood as expressing a view as to whether he was.

41. The crux of the Judge's finding that the Guidance was unlawful is to be found at [113] of his judgment in which he said this:

> "113. The SSHD makes the point that the Guidance does not mandate the absence of an appropriate adult, nor the lack of a "minded to" process, even if both were absent in the present cases. Moreover, the Guidance requires the social workers to comply with the applicable age assessment case law and policy guidance. *However, the Guidance also makes express reference to the report form, which by the use of yes/no tick boxes would seem to direct the social workers that both are optional features of the process. Further, the "short form" nature of the process virtually precludes any effective "minded to" process… On that basis, and to that extent, the Guidance in my view sanctions or approves a process which is not in accordance with the law.*" (Emphasis added).

DISCUSSION

42. In *R (A) v SSHD* the Supreme Court curtailed an overly expansive approach to *Gillick*. It explained the principle laid down in *Gillick* by clarifying what Lord Scarman meant when he said, at [1986] 1 AC p.181F,

> "It is only if the guidance permits or encourages unlawful conduct … that it can be set aside as being the exercise of a statutory discretionary power in an unreasonable way".

43. Lord Sales and Lord Burnett, at [34], stated that "permit" must in this context mean something like "sanction, i.e. positively approve" not merely that a course of action is not forbidden. They went on at [38] to formulate the test as being "*does the policy in question authorise or approve unlawful conduct by those to whom it is directed?"* and stated that the court will intervene when a public authority has, by issuing a policy, *positively* authorised or approved unlawful conduct by others. They explained this on the basis that public authorities have a general duty not to induce violations of the law by others.

44. The Supreme Court confirmed that when a public authority promulgates a policy, it is under no obligation for it to take the form of a detailed and comprehensive statement of the law in a particular area, and the court cannot strike down a policy which fails to meet that standard. The principled basis for intervention is much narrower. Lord Sales and Lord Burnett went on at [46] to identify three categories of case in which a policy could be found to be unlawful "by reason of what it says or omits to say about the law when giving guidance for others", namely:

> (i) Where a policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i.e. the type of case under consideration in *Gillick*);
>
> (ii) Where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position, and
>
> (iii) Where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.

45. In the present case, the Judge referred to the three categories at [73], but he failed to identify into which of them he considered the KIU Guidance fell. I accept the submission of Ms Rhee KC, for the SSHD, that the only category which could possibly apply is category (i). The KIU Guidance does not purport to provide a full account of the legal position – it cross-refers to other policies, and directs the reader to consider the relevant case law, of which it provides examples that are plainly non-exhaustive.

46. The other case which is pertinent in this context is *BF(Eritrea)*, the judgment in which was handed down by the Supreme Court on the same day as *R(A) v SSHD*. The challenge in that case to the policy guidance in Criterion C in EIG 55.9.3.1 and the version of "Assessing Age" then in force (see para 16 above) was based on the fact that its application created a real risk of a more than minimal number of children being unlawfully detained. It was submitted that the criterion "permitted or encouraged" unlawful conduct by immigration officers because it did not sufficiently remove the risk that the immigration officers might make a mistake when they assessed the age of an asylum seeker who claims to be a child as "clearly over 18" (based on physical appearance and demeanour alone). In other words, it allowed them to behave unlawfully, even though it in no way incited them to do so.

47. At [48], Lord Sales and Lord Burnett identified that the first question to be asked was what the obligation or obligations were of the person promulgating the guidance with regard to its content. They identified the *Gillick* obligation (as explained in *R(A) v SSHD*) as the principal obligation and then explained why the challenge in *BF (Eritrea)* was based upon a misinterpretation of what was said in *Gillick*. The proper application of the *Gillick* principle involves comparing the underlying legal position and the direction in the policy guidance to see if the latter contradicts the former. It does not involve comparing a normative statement with a prediction of what might happen if the persons to whom the guidance is directed are given no further information. Importantly, they confirmed at [51] that there is no obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law.

48. Lord Sales and Lord Burnett concluded, at [61], that:

> "The policy guidance given by the Secretary of State, in particular in criterion C, plainly does not direct immigration officers to act in a way which is in conflict with their legal duty. On the contrary, the policy recognises and reinforces the legal duties to which they are subject under the statutory regime, having regard to the limited evidence available to them when they are required to act. It directs them to treat immigrants they believe are children as children and to treat immigrants they believe are adults as adults."

49. Likewise, far from directing social workers and KIU immigration officers to act in a way which is conflict with their legal duties, the KIU Guidance urges them to comply with those duties. The primary duty here is to treat a child as a child; the secondary duty is to ensure that any assessment of age is carried out fairly and after appropriate enquiry. In order to assist the immigration officer to make a decision in "borderline" cases where an individual is potentially an adult, that involves a social worker carrying out a lawful, *Merton* compliant age assessment within the time constraints dictated by the period of lawful detention under para 16(1) of Schedule 2.

50. There was no obligation on the SSHD to set out in the KIU Guidance a comprehensive statement of what was required in order to achieve this. The onus is on the social worker who has been enlisted to help the immigration officer to decide whether they are dealing with an adult or a child, to ensure that the assessment is

fairly conducted and made upon proper inquiry, taking into account the factors referred to in the other policy guidance and in the *Merton* line of authorities.

51. The KIU Guidance contains no positive statement of the law which is wrong; nor, on a fair reading, does it direct or mandate the social workers or Home Office officials to act in a way which is in conflict with their legal duties. It does quite the opposite. As the Supreme Court indicated in *R(A) v SSHD,* at [63], the key question is whether the policy *could* be operated in a lawful way. Here, the KIU Guidance could be operated in a way which is consistent with *Merton* principles. The failure to do so in an individual case or cases is an operational failure, which cannot make the Guidance itself unlawful.

52. The Judge himself drew back from making a finding that the KIU Guidance could not be operated lawfully, though he expressed doubts about whether a "minded-to" process could be incorporated into a short-form assessment. I find persuasive Ms Rhee's further submission that it was not open to the Judge to come to any detailed finding about how a lawful "minded-to" process would operate in this context. However, since he did not conclude that it was impossible for such a process to be delivered within the terms of the Guidance, it is unnecessary to say any more about that aspect of his reasoning.

53. If it is assumed that a *Merton* compliant assessment requires the presence of an appropriate adult and a "minded to" process, nothing in the Guidance mandated social workers to carry out an assessment without those features or suggested that they were optional. On the contrary, the KIU Guidance reminded social workers of the need to carry out assessments in accordance with the case law and the relevant policies relating to lawful assessments and specifically directed them to that case law, the Assessing Age guidance and the suite of other relevant policies.

54. Given that if any age assessment is to be carried out in this context it must be *Merton* compliant, and that is stated time and again in the KIU Guidance, if for any reason the social worker considers that a *Merton* compliant assessment cannot be carried out at the KIU in a given case, he or she should not proceed with the assessment and should so inform the immigration officer. The upshot of that would be that the benefit of the doubt would be given to the individual, who would be treated as a child until a *Merton* compliant assessment was carried out at some future stage by a local authority. If the policy leaves room for the social worker (or the Home Office official that the social worker is assisting) to make mistakes, that is no indication that the policy itself fails to comply with the *Gillick* principle.

55. The Judge's reasoning appears to turn on the content of the proforma. Whilst the proforma does not reflect the Judge's ruling that an appropriate adult must always be present and that a "minded-to" process must always be adopted in an age assessment in a borderline case, that is not a matter which is capable of rendering the KIU Guidance unlawful.

56. The first, and fatal flaw in the Judge's analysis is that the proforma is not part of the KIU Guidance, and the Judge fell into error into treating it as if it was. The Guidance itself makes it clear that the function of the proforma is to serve as a record of the decision on the age assessment, and to provide evidence that the assessment was carried out lawfully. The proforma is not an instruction as to how the assessment is to

be carried out. It contains no guidance and no directions. The part of the KIU Guidance in which social workers are directed to use the proforma is not a direction of law, but an administrative instruction as to how to record their findings.

57. The proforma draws the attention of the social worker (and to any immigration official subsequently reading the completed form) to specific matters that might have a bearing on the fairness of the process, such as, for example, the presence of an interpreter; but it does not purport to contain an exhaustive check-list.

58. The Judge was also wrong to regard the tick boxes on the form as indicating that something was optional. The presence of a tick box on the form to indicate that an interpreter was or was not present, cannot be regarded as a direction to the social worker to carry out an assessment without an interpreter, let alone as indicating that an interpreter was an optional feature of the process. The ticked box is a record of what has happened, which in due course informs the Home Office official who has to make the final decision whether the individual should be treated as an adult or (at least provisionally) as a child. It tells him or her, at a glance, whether the process which was adopted included an element that one would generally expect to find present in a fair assessment. The same applies to the box which denotes whether an appropriate adult was or was not present.

59. The absence of any specific provision on the form for a "minded to" process cannot be translated into a positive direction to the social worker not to give the assessed individual a chance to comment on matters that appear to them to indicate that he or she is an adult, before the decision is finalised. It was not incumbent on the SSHD to include in the Guidance, let alone the proforma, a statement of every element that would need to be present in order for an assessment to be lawful. The Judge's additional criticism at [114] that the KIU Guidance was "not designed to comply" with *Merton* principles is a further illustration of his application of an approach to the *Gillick* principle that was expressly eschewed by the Supreme Court in *BF (Eritrea)* at [51]. That was not its function, and there was no obligation that it should comprehensively set out what was needed to comply with *Merton* principles.

60. I accept Ms Rhee's submission that in approaching the *Gillick* principle in the way in which he did at [113], the Judge erred by conflating the terms of the Guidance itself with the way in which it is or may be operated, whether generally, or on the facts of particular cases. The true foundation of the underlying complaint was about the absence in the Respondents' assessments of the two safeguards identified by the Judge as essential, not about the KIU Guidance, which did not mandate their absence and came nowhere near encouraging those to whom it was directed to behave unlawfully.

61. Ms Luh, on behalf of the Respondents, sought to uphold the judgment for the reasons given by the Judge. She wisely did not press the additional grounds for upholding the judgment that were set out in the Respondent's Notice. However, at one juncture she did seek to submit that, because no provision was made at the KIU for the presence of appropriate adults, which the Judge identified as an essential feature of a *Merton* compliant assessment, the KIU Guidance was not capable of being operated lawfully. This point was made in para 60 of the Respondents' skeleton argument on appeal.

62. That was not the way in which the Judge approached the matter. His reasons for finding the KIU Guidance to be unlawful were set out only at [113] of the judgment, and the argument that Ms Luh sought to pursue was not the subject of a Respondent's Notice. In any event, as *R(A) v SSHD* and *BF(Eritrea)* demonstrate, what the *Gillick* principle requires is an examination of the impugned policy itself to see whether, if its requirements are adhered to, it is capable of operating lawfully, not an examination of extraneous factual matters which might produce practical impediments.

63. As Ms Rhee also pointed out in her reply, the proforma cannot be faulted for failing to anticipate that a Judge would regard those specific features as essential in every case; nor was there any evidence to suggest that when the form was devised it was known to the SSHD that there would be a practical difficulty in providing appropriate adults at the KIU.

CONCLUSION

64. For the reasons stated above, I would allow this appeal and set aside the declaration made by the Judge that the KIU Guidance was unlawful in the particular respects identified at paras [99] to [113] of the Judgment.

Lady Justice Carr:

65. I agree.

Lord Justice Baker:

66. I also agree.