



Upper Tribunal (Immigration and Asylum Chamber)
PA/03601/2016

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment Tribunal
on 14 June 2017** **Decision & promulgated
on 23 June 2017** **Reasons**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**SA
(anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jones instructed by Hasan Solicitors

For the Respondent: Mr Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of First-tier Tribunal Judge Watson ('the Judge') promulgated on 1 November 2016 following a hearing at Birmingham in which the Judge dismissed the appellant's appeal on both protection and human rights grounds.

Background

2. The appellant is a national of Bangladesh who claimed his date of birth was 6 August 2000, although age was disputed.
3. The Judge records procedural aspects of the decision in [5 – 6] of the impugned decision in the following terms:
 - “5. The appellant’s identity and age are in dispute. The appellant arrived in the UK in 2011. He claimed asylum. This claim was refused, but he was found to have been a victim of forced labour in Bangladesh. His claimed name and date of birth is [SA], 06.08.00. On this account he was 12 on arrival in the UK. He was placed in the care of Birmingham City Council and a care order was made in the name of [SA]. His discretionary leave, granted under the name of [NU], expired on 03.12.15. Prior to the expiry of that leave he submitted an application for further leave to remain based upon his family and private life in the UK. A fingerprint report from the Home Office records noted that the fingerprints of [SA] were matched to those of a [NU], date of birth 03.06.98. The respondent refused his application for discretionary leave finding that the appellant was in fact [NU] and was therefore 18 as at the date of decision made.
 6. The decision was made on 23.03.16. The appellant’s representatives applied for an adjournment of the hearing on 04.10.16 on the basis that Birmingham City Council had not provided an age assessment report and the representatives were going to issue Judicial Review proceedings to require them to do so. A pre-action Judicial Review letter was attached to the adjournment application. This application was refused and detailed reasons are in the file. Briefly the Judge found that there was no legal requirement for Birmingham City Council to carry out an assessment; there was no explanation from the representatives as to why they had not taken steps to obtain an independent assessment themselves.”
4. The adjournment application was renewed by the appellant’s representatives before the Judge, the representative also conceded that the application for Judicial Review appeared misconstrued. The Judge refused the application for reasons previously given.
5. Having set out details of the issues, respective cases, a basic chronology, and the evidence made available, the Judge sets out the findings of fact from [27] of the decision under challenge which may be summarised in the following terms:
 - i. The appellant has been inconsistent about basic details in his two interviews in 2012 and 2013 even accepting he was very young and found to have been a victim of forced child labour [27].

- ii. Even making allowances for the appellant's presentation, inconsistencies in his family composition claiming to have no siblings in one interview and then three in another, the work he was forced to do, claiming one interview it was mainly at a restaurant and occasionally in a car wash yet in another interview at a car wash only and other matters are said to be inconsistencies undermining his credibility [27].
- iii. The appellant claimed that the person named S A was a cousin and that it was coincidental he ended up staying in his home. In another interview the appellant referred to this person as uncle when asked about relatives in the United Kingdom and in a further interview claimed he had met a person once in Bangladesh but was otherwise unknown to him. The Judge rejected as not credible the claim that the appellant's stay with SA was a coincidence [28].
- iv. In his oral evidence, the appellant initially stated when he first arrived in the UK his mother did not have a phone but now she had one which is followed by what is described as "a very unconvincing attempt" to deny having mentioned the phone. The Judge found the appellant inconsistent and that his explanation for mentioning the phone was not credible even to lower standard of proof [29].
- v. The appellant's initial witness statement, which is translated, carries an independent interpreter signature and refers to the appellant as aged 15 in 2013 which is the age given in the documents for NU. The Judge found that statement records the accurate age of the appellant which is why it was signed by him as it then stood [30].
- vi. The appellant lacks general credibility. It was not shown that he was 16 at the date of the hearing and the Judge found he was aged 18 [31].
- vii. The appellant accepted his fingerprints had been taken in Bangladesh but the Judge did not accept they were taken in the way claimed, by a person who visited the appellant on one occasion at home. The Judge found they were taken for the purposes of a visit visa application which was made. The appellant's true identity is NU and the fingerprint print report which identifies him as such is correct [32].
- viii. The Judge took account of the Birmingham City Council care order in the name of SA in which the date of birth he gave the authorities was accepted and that the school found nothing suspicious about the appellant's appearance or his actions and accepted at face value the information presented to them. The Judge found the difference in ages - 16 and 18 - is not such a person could not pass one off as the other. There was no evidence the appellant is of the younger age he claimed, apart from his self-serving claim. The appellant is unreliable in his evidence had not shown

to the lower standard he is a minor. The appellant was 18 years of age at the date of the hearing [33].

- ix. The appellant has been found to be a victim of forced labour. It is his case that it was his father who forced him to work. The appellant has not proved his at risk of persecution for a Convention reason [34].
- x. The appellant could relocate to another area Bangladesh if he wished to avoid his parents. He speaks the language and follows the majority religion. He is not at risk of inhumane treatment or torture. The appellant can look for and find work. He is healthy and has benefited from some UK education and speaks English. The appellant had not shown he is at risk of ill-treatment pursuant to Articles 2 or 3 [36].
- xi. The appellant cannot satisfy the Immigration Rules [37].
- xii. Paragraph 276ADE(vi) is the only paragraph relevant with regard to private life but there were no obstacles to the appellant's reintegration to Bangladesh on return. The appellant is in contact with his mother based upon his oral evidence and has access to her via telephone. He has not lost cultural ties to the country and speaks the language and can re-establish his private life in Bangladesh [38].
- xiii. In relation to Article 8 ECHR, having followed a structured approach and considers section 117 of the Nationality, Immigration, and Asylum Act 2002 the decision is proportionate in all the circumstances [39 - 49].

6. The appellant sought permission to appeal to the Upper Tribunal which was granted by another judge of the First-tier Tribunal on 23 November 2016 in the following terms:

"... the respondent relied on a positive fingerprint match suggesting the appellant was two years older than he claimed. As far as I can see, no evidence of the match was produced by the respondent and the FtTJ appears to have relied on the assertions made in the reasons for refusal letter. The Court of Appeal explained in SH (Afghanistan) [2011] EWCA Civ 1284 that where only one party relies on such evidence fairness requires the other party to be able to submit evidence to counter it. Whilst here had been delay on the part of the appellant, there was evidence before the FtTJ that the appellant had been pursuing the matter and was prepared to issue judicial review proceedings."

7. The Secretary of State opposes the application in her Rule 24 response in which, inter-alia, it is stated:
- i. In relation to the adjournment application to enable an age assessment to be undertaken, there was no unfairness to the appellant. The appellant was represented and informed the judge that he had been on notice for six months prior to the hearing of the hearing date. No steps had been taken to

- obtain an independent age assessment and as conceded by the appellant's representative, the judicial review had been misconstrued.
- ii. The Judge had made allowances for the appellant's vulnerability bearing in mind the small gap in dispute as to the age.
 - iii. Critically, there had been no challenge in the grounds of appeal to the other credibility findings made by the FtJ.
 - iv. The appellant did not dispute that his fingerprints were taken and his explanation as to the dates and times did not stand up to scrutiny. The grounds of appeal take no issue with the failure to provide evidence which it stated was inappropriate for the judge granting permission to raise as an additional point not relied upon by the appellant.
8. A previous hearing listed for the purposes of allowing the Upper Tribunal to consider whether an error of law material to the decision to dismiss the appeal had been made out had to be adjourned on 19 May 2017 as it appeared to Mr Jones, who was representing the appellant on that occasion too, that neither the appellant nor his accompanying social worker were aware of the content of the Judge's decision and thought they were attending the Tribunal for the purposes of the decision being handed down.
 9. During the short adjournment period Mr Jones was able to investigate matters further resulting in a letter written by Hasan Solicitors, dated 13 June 2017, explaining the situation and that what occurred on 19 May 2017 was as a result of the appellant and those assisting him having forgotten that the solicitors had explained the decision and the nature of these proceedings.
 10. This Tribunal does not consider there is a need to take the matter any further as clearly a misunderstanding has arisen which has now been adequately resolved.

Error of law

11. The appellant has provided the Upper Tribunal with a copy of an age assessment undertaken by Birmingham City Council which had not been disclosed to the Judge. At [17] of the ground seeking permission to appeal to the Upper Tribunal it is written *"We ask you to further note BCC completed the age assessment on 9/11/2016 and have accepted the appellants date of birth as he has always been claiming being 03/06/2000 and have confirmed that he has been accepted as a 16-year-old."*
12. It was accepted at the earlier hearing that the age assessment report is not Merton compliant.

13. Mr Jones submitted that two issues require consideration at this stage being (1) should the adjournment have been granted and (2) would it have made a material difference. Mr Jones referred to the judgment of the Court of Appeal in *SH (Afghanistan)* at [17] where that court suggested that in their case *"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"*. Mr Jones submitted that in this case that was a relevant issue.
14. The Judge was aware that the appellant was seeking an age assessment report and contemplated issuing judicial review proceedings to have the same expedited, even if the same were arguably without merit. It was known there was evidence relied upon by the Secretary of State of a passport and fingerprint evidence showing the appellant was older than he was claiming to be.
15. The submission the Judge should have accepted the appellant was the age he claimed to be as the earlier date of birth had been accepted by both Birmingham City Council and the appellant's school has no arguable merit. Both those institutions were entitled to form their own opinion as to what age they thought the appellant was, in relation to Birmingham City Council to ascertain whether they had a statutory obligation to him as a child in need of care and, if so, the nature and extent of such care, and in relation to the school into what class or age group the appellant should be placed for the purposes of proper administration of their educational duties and obligations. It is clear that the position adopted by both institutions was to accept the appellant's statement regarding his age. It is not made out that any form of detailed investigation was undertaken by either body at that time and it may have been that they accepted what the appellant said as that was the best evidence they had at that time.
16. This matter was, however, a contested issue before the Judge who was required to consider all the evidence made available with the required degree of anxious scrutiny and give proper reasons for conclusions that had been reached in the decision.
17. The submission by Mr Jones that the appellant travelled with two people previously and this may provide an explanation as to why documentation in his name was accepted as not being a matter before the Judge and there is no evidence in the appeal bundle that the appellant sought to rely upon this explanation. It cannot be an error of law for a judge not to take into account or factor into the decision-making process something of which they are not aware.
18. Mr Jones repeated on more than one occasion that what had occurred could explain why the documents have been obtained as they were, a short time before the appellant's period of travel, and that if the Judge

had investigated the matter or allowed the appellant further time to do so, there could have been a more detailed investigation which could have provided an explanation for the documents relied upon by the respondent.

19. In relation to the age assessment, Mr Jones accepted it is not Merton compliant and that the age assessment was written when enquiries had not been made of the Home Office of the nature of those outlined in the Joint Working Guidance between ADCS and the Home Office. As a result of the failure to undertake such enquiries, the author of the report is stated to have arrived at a conclusion on the balance of probabilities.
20. Mr Jones submitted it was not a case of the author of the report not being aware of the requirement to consult if an age assessment was being undertaken, but allegedly of attempts to contact the asylum offices at Liverpool and Newcastle not eliciting any response. It was accepted that communication with the Home Office may have made a material difference but that the author of the report did not have the benefit of this.
21. In any event, Mr Jones returned to his theme that the Judge should have granted a short adjournment to enable the agencies to complete a proper age assessment.
22. Mr Jones submitted that in light of the credibility issues referred to in the reasons for refusal letter, that the appellant had responded to in his witness statement, the lack of an age assessment and absence of further enquiries, this is not a clear-cut case which, according to the passage from *SH (Afghanistan)* quoted above meant the matter needed to be remitted to the First-tier Tribunal for the decision to be remade.
23. On behalf of the Secretary of State Mr Mills submitted that it was open to the Judge to find the period of time that passed was more than adequate to enable the appellant to produce evidence from the Home Office and Social Services combined.
24. Although an age assessment report is now available it was submitted it makes no difference to the Judge's decision based upon the evidence considered at the date of the First-tier Hearing.
25. The author of the age assessment in the conclusions at pages 13 - 15 of the report placed no weight upon the appellant's passport or the fingerprint evidence relied upon by the Secretary of State as it was stated there was no evidence the passport relied upon by the appellant was authentic.
26. Mr Mills noted the statement on page 11 of the report claiming the author had attempted to contact the Home Office, but was unable to

understand why telephone calls were made to Liverpool and Newcastle by Birmingham City Council when they knew the appellant's case was being dealt with by the asylum team at Solihull in Birmingham. It was submitted there was no evidence of any attempts to contact the correct office regarding this matter. The fact of the matter was that there was no consultation.

27. It was submitted the appellant's passport was accepted as being genuine by an Entry Clearance Officer.
28. In reply Mr Jones submitted that in relation to the passport this was not a determinative issue as further consideration of why a person chose to leave the country with a particular document was required as the document have been obtained near to the date of travel. It is noted this may be so, but the appellant gave oral evidence and it is not clear why, if this is a relevant fact, it was not advanced. It is also the case that evidence Mr Jones was referring to was not included in the bundle and the explanation he now seeks to provide does not appear to have been given to the Judge by the appellant's previous barrister Mr Martin.
29. Mr Jones submitted there was no evidence to support Mr Mills submissions regarding calls made or not made and that is likely the age assessment report was produced as Birmingham City Council thought they needed to expedite the same. It was submitted that if the age assessment report is short it is not the fault of the authors of that document.
30. I find the Judge was aware of the procedural history as noted above and the adjournment made by Mr Martin which was refused as there been adequate time to obtain an age assessment. The issue to be borne in mind by the Judge when considering the adjournment request was the fairness of the decision to either allow refuse the same. Not only had the appellant had a considerable period of time, during all of which he was represented, in which to prepare an age assessment report it is recognised that in a disputed age case a judge is required to consider the evidence available from all sources which includes oral and written evidence in addition to any age assessment report.
31. The Judge set out the correct self-direction at [12] of the decision that the main issue to be determined related to credibility. The Judge considered the documentary evidence and noted at [26] that the appellant gave oral evidence and that, even making allowance for his young age, found the appellant not to be truthful and to be inconsistent on details that it was reasonable for him to know, regardless of his young age.
32. A reading of the decision as a whole does not establish any arguable unlawfulness or irrationality in the Judges conclusions in relation to the

evidence made available and the resultant adverse credibility findings.

33. It has not been made out that the refusal of the adjournment request by the Judge is infected by arguable legal error on the basis that the decision to refuse the adjournment request was unfair.
34. The first of the questions posed by Mr Jones, whether the adjournment should have been granted, is answered in the negative as no arguable legal error has been made out in relation to this aspect of the claim.
35. The second question, requiring consideration of whether the age assessment report now available made a material difference, such that the decision needed to be set aside and the appeal remitted, requires consideration of the evidence as a whole.
36. The Judge found the appellant to be 18 years of age having considered all the available evidence. Without considering all the available evidence the author of the age assessment found the appellant's age to be consistent with that he claimed and that he was therefore 16. It is known that within any age assessment there can be a margin of error of between plus or -2 to 5 years and so there is the possibility, applying the margin of error, that the author of the age assessment places the appellant within the age range established by the Judge on the evidence. This aspect in isolation is not therefore determinative.
37. It is also necessary to appreciate the seriousness of the failure to produce a Merton compliant age assessment. The Merton judgment was handed down by Burnton J in the High Court on 14th July 2003, and gives 'guidance as to the requirements of a lawful assessment by a local authority of the age of a young asylum seeker claiming to be under the age of 18 years'. All local authorities are required, following the Merton judgment, to ensure that their assessments are full and comprehensive, and that the process for assessing age is clear, transparent and fair.
38. A Merton Compliant assessment will normally include a face-to-face meeting with the young person; set out the general background of the applicant, and adhere to standards of fairness. Some of the key points noted by the court were:
 - The decision maker must explain to an applicant the purpose of the interview;
 - Except in clear cases, the decision-maker cannot determine age solely on the basis of the appearance of the applicant;
 - In general, the decision-maker must seek to elicit the general background of the applicant, including the applicant's family circumstances and history, educational background, and the applicant's activities during the previous few years. Ethnic and

cultural information may also be important. If there is reason to doubt the applicant's statement as to their age, the decision maker will have to make an assessment of the applicant's credibility, and he will have to ask questions designed to test the applicant's credibility;

- If the decision-maker forms the provisional view that the applicant is lying, the applicant must be given the opportunity to address the matters that have led to that view;
 - Adequate reasons must be given for a decision that an applicant claiming to be a child is not a child (though these need not be long or elaborate);
 - Cases vary, and the level of inquiry required in one case may not be necessary in another;
 - A local authority may take into account information obtained by the Home Office, but it must make its own decision, and for that reason must have adequate information available to it.
 - A failure to adhere to the guidelines may result in an assessment that is neither full, transparent, fair or lawful.
39. To prevent scope for misunderstanding and to improve working practices the Age Assessment Joint Working Guidance dated April 2015 was agreed between the Home Office and Local Authorities and in England and Wales, the local authority's and local government associations being represented by the Association of Directors of Children's Services.
40. The guidance sets out contacts and referral points in the Home Office and local authorities which is stated to usually be between the Home Office member of staff or social worker managing the case, provides for the local authority to request information from the Home Office and that the local authority must aim to refer documents such as travel, identity documents or birth certificates to the Home Office contact to be verified before the local authority conduct their age assessment. This latter issue is of importance for, as noted by Mr Mills, the author of the age assessment excluded from the information being considered the passport and fingerprint document relied upon by both the Secretary of State and the Judge. This is a material omission.
41. Mr Mills made available to the Upper Tribunal several documents including an application for leave to enter the United Kingdom for six months as a visitor dated 24 August 2011 in the name of NU with a date of birth 3 June 1998. The application has a photograph of the applicant and it is noted that the same applicant had previously been refused entry on 19 July 2011 in the same name with the same date of birth, and that appropriate biometrics, which included fingerprints, were taken.
42. There is within the documents provided a photocopy of a Bangladeshi passport containing a photograph of a person appearing to be the

same person as that who made the Visa applications, albeit slightly older, in the name of NU with a date of birth of 3 June 1998.

43. Mr Mills has also provided documents confirming the fingerprint match, two in the name of SA with a date of birth of 6 August 2000 with a biometric recording date of 5 April 2012 at the Asylum Screening Unit (ASU) showing three matches to the fingerprints taken being that at the ASU, and two Visa applications in Dhaka in Bangladesh. The other two documents are in the name of NU with a date of birth of 3 June 1998 showing biometric recording dates of 19th July and 24 August 2011 in Dhaka.
44. Although the names and claimed dates of birth are different what is clear is that a biometric fingerprint sample taken in the United Kingdom on 25 April 2012 matched two previous fingerprint samples taken in Bangladesh in 2011 which also matched each other.
45. The Entry Clearance Officer does not make any finding that the passport relied upon in support of the visit Visa applications are forged and this is clearly evidence that deserves considerable weight being attached to it to support a finding that SA and NU are one and the same person and the person identified in the passport, a valid travel document issued by the authorities in Bangladesh who would have been able to verify the applicant's personal details including their date of birth, which is given as 3 June 1998. This places the person with this date of birth as being of the age found by the Judge.
46. If one is weighing up the evidence as a whole, it is clear that with an age assessment report on which very little weight can be placed for the reasons set out above and the appellant's assertion on the one hand, yet the substantial weight of evidence proving the appellant has been deceitful and deliberately misled not only the Home Office but also those who sought to assist him within Birmingham City Council and the educational services both of whom deserve greater respect with regard to his age, but also the First-tier Tribunal, it is clear that the balance of the evidence comes firmly down in favour of the finding of the Judge.
47. It has not been made out that any material element has since arisen following the publication of the age assessment report that warrants this matter being set aside and the appeal remitted.
48. The Judge arrived at findings that were reasonably available based on the evidence and no arguable legal error material to the decision that the appellant was 18 years of age, or in relation to the dismissal of the appeal, has been made out.

Decision

49. There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.

Anonymity.

50. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 22 June 2017