Neutral Citation Number: [2015] EWCA Civ 1142

Case No: A2/2014/2817

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SIMON PICKEN QC (sitting as a Deputy High Court Judge)
HQ13X04321

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2015

Before :

LADY JUSTICE BLACK
LORD JUSTICE TOMLINSON
and
LORD JUSTICE BURNETT

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Between :

HOME OFFICE	**Appellant**
- and -	
VS	**Respondent**

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Robin Tam QC & William Hansen (instructed by **Government Legal Department**) for the **Appellant**
Stephanie Harrison QC & Shu Shin Luh (instructed by **Coram Children's Legal Centre**) for the **Respondent**

Hearing dates: 15th and 16th July 2015

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Approved Judgment

Lady Justice Black:

1. On 22 July 2014, Mr Simon Picken QC, sitting then as a deputy High Court judge, declared that VS had been unlawfully detained by the Home Office on 2 July 2012 from 17.50 until 19.10 hours ("the first period of unlawful detention") and from 17 July 2012 until 10 August 2012 ("the second period of unlawful detention"). The context of the declaration was a claim by VS for damages against the Home Office for unlawful detention. The assessment of the quantum of damages was left for a later date.

2. The judge set out the facts, the law, and his reasoning for his decision in a substantial judgment entitled *VS v The Home Office* [2014] EWHC 2483 (QB) which can be found on bailii.org.

3. The Home Office appealed against the findings of unlawful detention with permission from Maurice Kay LJ. For the purposes of this judgment, I will refer to it as the defendant and to VS as the claimant.

4. The particular focus of the appeal is the detention, in the immigration context, of those who are, or possibly are, minors. It is now accepted that VS was, in fact, a minor at the time of his detention, but there were times in the past when he was thought to be, and was treated as, an adult.

5. As so often happens in cases of this type, the position has moved on since the events with which we are concerned. One of the developments is that a new "Age Assessment Joint Working Guidance" has been agreed between the Home Office and the Association of Directors of Children's Services, replacing a Joint Working Protocol drafted in 2005. The claimant argued that the appeal had become academic in the light of this and invited the defendant to withdraw it, but the invitation was declined and was not developed into any sort of formal application for the appeal to be brought summarily to an end. It should be noted also that there have been amendments to the Enforcement Instructions and Guidance ("EIG") which features in the appeal, and that the version addressed in this judgment is no longer current.

The central provisions of law and guidance

6. It may be helpful to go through, at an early stage, the provisions of the law and guidance which are central to the appeal.

Section 55 of the Borders, Citizenship and Immigration Act 2009

7. Section 55 of the Borders, Citizenship and Immigration Act 2009 is well known and does not need to be replicated here. It provides that the Secretary of State must make arrangements for ensuring that various of her functions, including functions in relation to immigration and asylum, are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

Every Child Matters: Change for Children: Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children

8. Under section 55, the Secretary of State may give guidance to which any person exercising functions in relation to immigration and asylum must have regard. Guidance was issued in November 2009 entitled "*Every Child Matters: Change for Children: Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*" ("the November 2009 guidance"). This replaced the "*UK Border Agency Code of Practice for Keeping Children Safe from Harm*" ("the Code of Practice") which was the relevant guidance at the time of events in *R (AN and FA) v SSHD* [2012] EWCA Civ 1636, which was the authority upon which the judge's determination in relation to the first period of unlawful detention depended.

9. It can be seen from §46 of *R (AN and FA) v SSHD* that the Code of Practice required that referrals of children by the Border Agency to the local authority "must be made *immediately* by phone" (my emphasis). The November 2009 guidance continues to expect the Border Agency to make "timely and appropriate referrals to agencies that provide ongoing care and support to children" and requires it to make a referral to a child protection/child welfare agency when the child appears to have no adult to care for him or her and the local authority has not been notified, but the provision requiring immediate referral by phone no longer features in it. Provisions of the 2009 guidance which are of particular relevance in the present case include Part 2, which relates to the Border Agency's role in relation to safeguarding and promoting the welfare of children, listing elements of the Border Agency's contribution to this and including the following:

> 2.5. Other parts of the UK Border Agency's contribution include:
>
> - Exercising vigilance when dealing with children with whom staff come into contact and identifying children who may be at risk of harm.
>
> - Making timely and appropriate referrals to agencies that provide ongoing care and support to children.

Enforcement Instructions and Guidance ("EIG")

10. The defendant's policy on detention is primarily contained in Chapter 55 of the EIG which plays a central part in this appeal. The judge set out key features of it between §§52 and 62 of his judgment. It says that, as a general principle, unaccompanied children must not be detained other than in the most exceptional circumstances and that they must normally be detained only for the shortest possible time (55.9.3). Paragraph 55.9.3.1 deals with people claiming to be under 18. At the time that is relevant to this case, it said (original emphasis):

> 55.9.3.1. Persons claiming to be under 18

Sometimes people over the age of 18 claim to be children in order to prevent their detention or effect their release once detained.

Information on the policy and procedures concerning persons whose ages have been disputed is available on the website at [link to the Assessing Age guidance, see below]

UK Border Agency will accept an individual as under 18 (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:

- there is credible and clear documentary evidence that they are 18 years of age or over;
- a full "Merton-compliant" age assessment by Social Services is available stating that they are 18 years of age or over. (Note that assessments completed by social services emergency duty teams are not acceptable evidence of age);
- their physical appearance/demeanour **very** strongly indicates that they are **significantly** over 18 years of age and no other credible evidence exists to the contrary.

....[medical age assessments]....

Once treated as a child, the applicant must be released to the care of the local authority as soon as possible. Suitable alternative arrangements for their care are entirely the responsibility of the local authority. Care should be taken to ensure the safety of the child during any handover arrangements, preferably by agreement with the local authority.

Where an applicant claims to be a child but their appearance very strongly suggests that they are **significantly** over 18 years of age, the applicant should be treated as an adult until such time as credible documentary or other persuasive evidence such as a full "Merton-compliant" age assessment by Social Services is produced which demonstrates that they are the age claimed, and the appropriate entry made in section 1 of the IS91.

In borderline cases it will be appropriate to give the applicant the benefit of the doubt and to deal with the applicant as a child.

It is UK Border Agency policy not to detain children other than in the most exceptional circumstances. However,

> where the applicant's appearance **very strongly** suggests that they are an adult and the decision is taken to detain ….[procedural requirements for such cases set out].

"Asylum Processing Guidance on Assessing Age" ("the Assessing Age guidance")

11. The defendant published guidance on assessing age in asylum cases entitled "Asylum Processing Guidance on Assessing Age" ("the Assessing Age guidance"). Chapter 55 of the EIG directs attention to it, making it relevant to the issues arising in this case, and the judge referred to it comprehensively between §§63 and 69 of his judgment.

12. Section 2 of the Assessing Age guidance (which is entitled "Assessing age – general policy") includes paragraph 2.1 which deals with "Initial age assessment", providing (emphasis in the original):

> Where there is little or no evidence to support the applicant's claimed age and their claim to be a child is doubted, the following policy should be applied:
>
> 1. The applicant should be treated as an adult if their physical appearance/demeanour **very strongly suggests that they are <u>significantly</u> over 18 years of age**. …
>
> 2. **All other applicants should be afforded the benefit of the doubt and treated as children, in accordance with the <u>'Processing an asylum application from a child'</u> AI [*sic*], until a careful assessment of their age has been completed**. This policy is designed to safeguard the welfare of children. It does not indicate final acceptance of the applicant's claimed age, which will be considered in the round when all relevant evidence has been considered, including the view of the local authority to whom unaccompanied children, or applicants who we are giving the benefit of the doubt and temporarily treating as unaccompanied children, should be referred….

13. Paragraph 5.2 is as follows:

> 5.2 Considering local authority age assessments
>
> Case owners should give considerable weight to the findings of age made by local authorities, recognising the particular expertise they have through working with children. In cases where the local authority's assessment is the only source of information about the applicant's age – their assessment will normally be accepted as decisive evidence.
>
> Nevertheless, case owners should carefully consider the findings of the local authority and discuss the matter with

> them in appropriate circumstances, such as where the findings are unclear; or do not seem to be supported by evidence; or it appears that the case is finely balanced and the applicant has not been given the benefit of the doubt; or that it appears the general principles set out in the Merton judgement were not adhered to.
>
> ....

14. Paragraph 5.3 of the guidance is particularly important for present purposes. It reads:

> 5.3 Obtaining the local authority's age assessment
>
> Case owners should request a full copy of the local authority's age assessment and confirmation from the local authority that it has been carried out in compliance with the guidelines in the Merton case. In some instances local authorities may still feel unable to share their full age assessment with the Agency citing data protection and/or confidentiality concerns. Whilst accepting that the information contains sensitive personal data, it should be pointed out to the local authority that there is provision for sharing such information with the Agency within the Data Protection Act 2008.
>
> This approach reflects the findings of the judge *in A & WK Vs SSHD & Kent County Council [2009] EWHC 939 (Admin)*, where it was considered that, *"since it [the local authority assessment] is being obtained for the benefit of the Home Office as well as the authority, it is in my judgement entirely reasonable that it should be disclosed to the Home Office. Only if the full report is available can it be seen whether there are any apparent flaws in it and whether it is truly Merton compliant. And sight of the full report will be essential if there is any challenge raised to the decision by the Home Office."*
>
> Case owners should discuss with the relevant local authority and obtain in writing, *at the very least* their assessment conclusion, the reasons on which their conclusion is based and an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case.
>
> Where applicants have been assessed as adults by the local authority, but maintain they are children, it is important to establish the local authority's reasons for their decision on age. The applicant should be asked to provide the age assessment or provide permission for the local authority to disclose it (where the local authority is reluctant to do so).

> If an applicant refuses to disclose the age assessment, this should be taken into consideration when assessing all evidence in the round, and if appropriate raised in the substantive decision and at any appeal. In particular, if the applicant has refused to provide the full age assessment before the appeal hearing, the caseworker should consider writing to the tribunal asking for an order that the claimant discloses the assessment and, if necessary, this application should be pursued further at the Case Management Review (CMR) or appeal hearing.
>
> Finally, if evidence relating to an applicant's age conflict [*sic*], a judge may want to compare the experience and qualifications of those completing the evidence (often medical evidence submitted by a paediatrician and a local authority age assessment). In order to defend the local authority age assessment at appeal, case owners should ask local authorities to include with the age assessment report, the social workers' age assessment experience (including length of practise) and qualifications.

15. Section 8 of the Age Assessment Guidance is entitled "Weighing up conflicting evidence of age". It begins:

> It is Agency policy to give prominence to a Merton compliant age assessment by a local authority, and it is likely that in most cases that authority's decision will be decisive. However, all sources of information should be considered and an overall decision made in the round. Account may be taken of the overall credibility of the applicant, established for example through the asylum interview, though care should be taken in doing so …

The facts and the judge's reasoning

16. As Mr Picken QC's full judgment is readily available, I will only repeat here that which is strictly necessary for an understanding of the appeal.

17. The claimant is an Iranian national. He arrived in the United Kingdom on 2 July 2012 on the back of a lorry, having travelled through various other European countries. He was arrested during the morning of 2 July 2012, after he was seen getting out of the lorry on the A2. He was held by Kent Police for a short time and, at 16.00 hours on the same day, he was served with form IS151A and detained pursuant to the Immigration Act 1971, pending a decision whether or not removal directions would be given.

18. At 17.52 hours, he arrived at the defendant's Dover Enforcement Unit. His basic details were recorded on a booking-in sheet. Although he did not produce any

supporting documentation, he gave his date of birth as 21 September 1995, making him 16 years old, and he was treated as a minor.

19. He was given time to settle in and offered refreshments, then interviewed between 18.35 and 18.55 hours ("the interview"). Some detail of the questions that he was asked can be found at §§11 to 13 of the judge's judgment. One question was why he left his home country.

20. Only after the interview concluded, at 19.05 or 19.10 hours, was the claimant referred to Kent children's services ("Kent"). A Kent representative attended at 21.00 hours and the claimant was released by the defendant to Kent at 23.30 hours, his temporary admission to this country having been authorised.

21. The claimant remained in Kent's care until 17 July 2012, during which time Kent assessed his age, concluding that he had in fact been born in 1993 rather than 1995, making him an adult.

22. Kent communicated their findings to the defendant on 17 July 2012 by first telephoning, and then sending a fax which said that the claimant had been found to be over the age of 18 and that the assessment carried out by Kent "was a full assessment as required by 'Merton'". A document described as "Age Assessment Results" was attached to the fax. Part A stated the claimant's name, claimed date of birth, and date of birth as assessed by Kent. Part B was as follows:

"<u>PART B: Age Assessment Factors Considered</u>

Physical Appearance and demeanour:	*X*	*Strongly*	*X*	*Adult*
The applicants physical appearance/demeanour:		*Weakly*		*Child*
			Young Person	

Observation of interaction with peers:	*Y*	*Cultural or linguistic skills:*	*Y*
Family and social history:	*Y*	*Maturity and developmental considerations*	*Y*
Education:	*Y*	*Health or medical considerations, if any:*	*N*
Independent self-care skills:	*Y*	*Other e.g. documents validated by IND:*	*N*
Self-disclosure:	*Y*		
Interaction of person during assessment:	*Y*	*Medical reports:*	*N*

Having considered the above factors, Kent County Council Children's Services has assessed the above person as having a date of birth of about: 21/09/93

Name of Social Worker/Assessor: Sarah Dolan

Contact Phone: ... Date assessment completed: 17/07/12

Note: Except in obvious cases of a child or adult, this pro-forma represents a summary of a more in-depth assessment conducted with the intent to comply with both 'Merton Judgements'. The Home Office, judges, solicitors and other parties are <u>required</u> to obtain the assessed person's written permission to allow Kent County Council to disclose the full Child in Need assessment which informs the decision on age...."

23. No full reasons accompanied the form. The full reasons were not typed up by Kent until 15 August 2012.

24. Following receipt of the fax and form on 17 July 2012, the defendant treated the claimant as an adult and detained him. He was informed that consideration was being given to requesting Italy to accept responsibility for examining his asylum claim, pursuant to the Dublin II Regulations (Council Regulation (EC) No. 343/2003).

25. In due course, the claimant provided the defendant with copies of his birth certificate, national identity card and school certificate from Iran. His solicitors sought his release and also wrote to Kent challenging the age assessment.

26. Kent agreed to reassess the claimant's age, concluding in November 2012 that he was indeed the age he had claimed. The defendant accepted that too, following the production of the fully formulated reasons by Kent in April 2013. However, the claimant had actually been released prior to this, on 10 August 2012, pursuant to a consent order made in anticipation of the hearing of his application to the Administrative Court for interim relief in judicial review proceedings. In light of the now agreed conclusion about his age, he had in fact been detained from 17 July 2012 until 10 August 2012 whilst a minor.

27. The issue for the judge in relation to the claimant's detention on the day he arrived (the first period of unlawful detention) was whether he had been referred quickly enough to Kent. The judge dealt with this between §§81 and 106 of his judgment, founding his conclusions upon the decision of this court in *R (AN and FA) v SSHD* [2012] EWCA Civ 1636, notwithstanding changes to the framework of law and guidance governing the responsibilities of the defendant.

28. He rejected the claimant's submission that an immediate referral should have been made no later than 16.00 hours, but accepted the claimant's alternative case that a referral should have been made following the conclusion of the booking-in process (§96). He reasoned that, by this stage, the claimant's basic details had been taken down as part of the booking-in process, it was established that he was (or at least was claiming to be) a minor, and it was established that there were no welfare concerns that might have justified a delay in referral. The interview carried out between 18.35 and 18.55 hours was, in the judge's view, not necessary. The judge assumed that the booking-in process started at 17.30 hours, allowed five minutes for booking-in and fifteen minutes thereafter for the referral to be made, thus arriving at the conclusion that the claimant's detention from 17.50 hours was unlawful. He took 19.10 hours as the end point of the unlawful detention because that was when the referral was actually made to Kent; the wait from then until 23.30 hours when the claimant left the defendant's detention was an unavoidable part of his transfer to Kent's care.

29. From §107 of his judgment, the judge dealt with the second period of detention. A central issue for determination was whether the documentation provided by Kent and their assurance to the defendant that their age assessment complied with the requirements set out in *R (on the application of B) v London Borough of Merton* [2003] EWHC 1689 (Admin) were sufficient to justify the defendant treating the applicant as an adult. The claimant submitted that this was not enough, that the defendant had failed to follow EIG Chapter 55 and its own 'Assessing Age' guidance when deciding to detain the claimant as an adult on 17 July 2012, and that that breach of policy rendered the detention unlawful. The parties' positions

were polarised in that the claimant submitted that nothing less than a full *Merton*-compliant age assessment would suffice as a basis for the defendant's decision, whereas the defendant submitted that the "Age Assessment Results" document was sufficient.

30. The judge considered that neither side was right. He rejected the claimant's analysis on the basis of the structure of paragraph 5.3 of the Assessing Age guidance (see §128). He rejected the defendant's analysis for reasons set out in §§ 129 to 135 of his judgment (and see also §139).

31. In essence, he considered that the guidance required the defendant to have three things from the local authority, namely their assessment conclusion, the reasons on which that conclusion was based, and an assurance that the assessment complied with the local authority's assessment policy and the *Merton* guidelines. The "Age Assessment Results" document in this case did not, in his view, provide the reasons on which Kent's conclusion was based. In consequence, he considered, there was no way for the defendant to make any independent evaluation as to whether a *Merton*-compliant assessment had actually been undertaken as Kent said. It can be seen from §135 of the judgment that the judge would have been looking for:

> "a document which, by reference to the Merton factors in the 'Age Assessment Results' document, states relatively brief reasons why, in relation to the particular person who has been age-assessed, the conclusion which has been reached has been arrived at. Those reasons need to be sufficient to enable the reader (the Defendant as well as the individual who has been age-assessed) to understand what, specifically, has led to the conclusion arrived at. These must, after all, be reasons which the assessors have already formulated, probably in some sort of note form, since otherwise it is difficult to see how it can be properly said that a Merton-compliant age assessment has been performed and completed. I do not, therefore, accept that it would be too burdensome to do what I have in mind. Nor would it be over-burdensome for the document to contain information concerning the matters identified in paragraph 109(1)-(4) above."

Paragraph 109(1)-(4) referred to what might be described as necessary Merton features.

32. The judge's conclusion comes at §136 where he said:

> "In the circumstances, the Claimant's claim in relation to the second period of detention must succeed, the Defendant having failed to comply with its own 'Assessing Age' guidance (and so EIG Chapter 55 which states that such guidance is to be followed) when deciding to detain the Claimant on 17 July 2012 and having continued to fail to comply when deciding whether to continue the detention at

> the various reviews which took place thereafter – and this not being a case in which either the first or the third bullet points in paragraph 55.9.3.1 of EIG Chapter 55 is applicable ("credible and clear documentary evidence that [the individual is] 18 years of age or over" and "physical appearance/demeanour **very** strongly indicates that [the individual is] **significantly** over 18 years of age and no other credible evidence exists to the contrary"). As a result, the Claimant's detention was unlawful since there was no lawful basis on which the Defendant could treat the Claimant as an adult as at 17 July 2012. The Claimant should have been regarded as an "unaccompanied minor" within the meaning of Article 2(h) of the Dublin II Regulations. Therefore, under Article 6, it was the responsibility of the UK to examine his application for asylum. As such, the Defendant had no entitlement to give removal directions under paragraph 16(2) of Schedule 2 to the 1971 Act, and there was no power to detain, with the effect that the detention was unlawful (and in breach of Article 5(1) of the ECHR)."

33. The judge supplemented this reasoning at §142 by a finding that as the documentation provided to the defendant was inadequate, the immigration officials had not adequately discharged their independent duty to apply their minds to whether the age assessment complied with the *Merton* principles.

The basis of the appeal

34. The defendant challenged the judge's finding in relation to the first period of unlawful detention on the basis that he should have held that the referral to Kent was timely and appropriate and should not have found any period of unlawful detention. *R (AN and FA) v SSHD* was said to be distinguishable or inapplicable on these facts because here a) there was nothing akin to the screening interview which was carried out in that case b) the period of detention prior to referral was shorter and c) the statutory guidance applicable required a "timely" referral rather than, as required in that case, an "immediate" referral.

35. The judge was said also to be wrong in finding it unnecessary or inappropriate to ask the claimant why he left his country because that question was legitimate, it was said, in order to check whether there were any trafficking issues and/or did not materially add to the length of detention. Attention was invited to what was said by Ms Whall, a chief immigration officer, in her oral evidence (Bundle 2/722) to the effect that the primary purpose of the interview which commenced at 18.35 hours was to ensure that there were no immediate concerns, including about trafficking, and that any such concerns would be highlighted to social services during the referral to them. It was pointed out that the referral form used by the Border Agency for referrals to child welfare services includes a number of references to trafficking issues.

36. In relation to the second period of unlawful detention, the defendant argued that the judge's interpretation of the policy or his application of it to the facts of this

case required too much of the defendant. He should have found that the defendant was entitled to rely upon the summary age assessment document provided by Kent and also upon Kent's assurance that their assessment had been *Merton*-compliant, that the defendant had complied with its independent obligation to satisfy itself that the assessment was *Merton*-compliant, and that it was justified in detaining the claimant as an adult. As no challenge was being made to the judge's finding that the claimant's detention became unlawful in any event on 7 August 2012 because the defendant failed to have proper regard to fresh documentary evidence as to the claimant's age, the defendant sought from this court a redrafted declaration to the effect that the claimant was unlawfully detained only from 7 to 10 August 2012.

Discussion: the first period of detention

37. Dealing with a child who has just arrived in this country in the way that the claimant had will inevitably be an unpredictable process, differing from case to case. I would not wish to be prescriptive about what immigration officials can and cannot ask the child at this stage or as to how quickly a referral to the local authority should be achieved. As I said in *R (AN and FA) v SSHD* (§97), acutely urgent issues may sometimes arise that necessarily divert the Border Agency for a time from making a referral to social services. I would not disagree with what Maurice Kay LJ said at §181 of that case to the effect that there can be no objection in principle to questions designed to assist an assessment of whether a particular child may be a victim of trafficking where there are reasonable grounds for suspecting that he might be.

38. I am not persuaded that the judge was wrong, in light of the change in the operative guidance, to place reliance on *R (AN and FA) v SSHD*. The requirement in the Code of Practice for *immediate* action featured in a section headed "The UK Border Agency must make *timely referrals* of children and work positively with others" (my emphasis). That language is reflected in the requirement in paragraph 2.5 of the November guidance which still requires the making of timely referrals. I recognised in *R (AN and FA) v SSHD* (§95) that what "immediately" meant in practice depended on the circumstances of the particular case, but considered that it conveyed a sense of urgency about making the referral of a child in need to the local authority. I would not interpret the omission of "immediately" from the 2009 guidance as indicating that it is no longer considered that referrals should be made urgently. It is self-evident that the interests of children will not be served by unnecessary delay in referring them to the local authority.

39. The question therefore was whether the defendant was entitled to defer the referral in this case until after a wait and an interview, rather than proceeding to make it directly after the booking-in process was completed. The judge concluded that on the facts of this case, the interview was not necessary, and I see no reason to interfere with that conclusion or, therefore, with his conclusion as to the first period of unlawful detention.

Discussion: the second period of detention

40. The judge's decision in relation to the second period of detention turned on the construction and application of the defendant's Assessing Age guidance. The

defendant sought to persuade us that not only was the judge's interpretation of it wrong, but the requirements that he placed upon the defendant were also impractical or unworkable.

41. The Assessing Age guidance achieved its central importance by the following route:

i) When dealing with questions of immigration detention, the defendant will always have to decide whether to treat a person as a child or as an adult, because different considerations apply to the two categories and the circumstances in which an unaccompanied child may be detained are much more circumscribed, see Chapter 55 of the EIG at paragraph 55.9.3. In this particular case, whereas it was justifiable to detain the claimant on 17 July 2012 if he was appropriately treated as an adult, there was no basis on which to do so if he should have been treated as a child.

ii) In accordance with the policy set out in the EIG, the Border Agency will accept an individual as under 18 unless one or more of the three criteria set out in paragraph 55.9.3.1 of the EIG applies. In this case, the only one of those criteria which could possibly have applied was that "a full '*Merton*-compliant' age assessment by Social Services is available stating that they are 18 years or over".

iii) Paragraph 55.9.3.1 directs the reader to the Assessing Age guidance for information on the policy and procedures concerning people whose ages have been disputed, as was the case here.

42. Argument focused particularly upon paragraph 5.3 of the Assessing Age guidance, and most intensely upon one particular passage from it which I will repeat here for ease of reference, although a fuller quotation from paragraph 5.3 can be found earlier in this judgment at §14:

> "Case owners should discuss with the relevant local authority and obtain in writing, *at the very least* their assessment conclusion, the reasons on which their conclusion is based and an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case."

43. This passage has been viewed as requiring "case owners" to obtain three things. Two of the three were available to the defendant, that is the local authority's assessment conclusion and an assurance from the local authority that the assessment was *Merton*-compliant. The debate was about the third requirement, that is the reasons on which the local authority's conclusion was based.

44. What was it that the case owner had to obtain, at the very least? That question has to be considered, in my view, in the light of the fact that paragraph 5.3 began with an instruction that case owners should request a full copy of the age assessment. That was followed by an acknowledgment that sometimes local authorities may still feel unable to share their full age assessment. The reference to what should be obtained "at the very least" followed, it seems to me, as very much a second best

option. In a situation in which what was really required was a full copy of the assessment, I would be very cautious about unduly paring down the scope of what it was contemplated would suffice where the case owner had to settle for an alternative approach.

45. The defendant argued that the form provided by Kent on 17 July 2012 was sufficient. It was argued that the local authority's reasons emerged sufficiently from it. The form revealed, it was submitted, that one reason for the local authority's conclusion was the claimant's physical appearance/demeanour strongly suggested he was an adult; so far I am prepared to go with the defendant as I accept that the form conveyed the bald proposition that these matters were influential in some way. However, Mr Tam QC and Mr Hansen submitted that the form provided more information as to the local authority's reasons as well. They submitted in their skeleton argument that the placing of "Y" against various of the list of features on the form meant that the selected item was amongst the reasons for the authority's conclusion. So, they argued, placing "Y" against "*Observation of interaction with peers*" meant that one of the reasons for the overall conclusion was that the claimant's interactions with his peers were those of an adult rather than a child, and similarly with the other features on the list. I find that an unconvincing argument. If one attempts to take this approach to another of the features on the list, "*Self-disclosure*", which also has a "Y" placed against it, the difficulty is demonstrated. The claimant's account was that he was a minor. "*Self-disclosure*" cannot therefore mean that he disclosed he was an adult. Might it possibly mean that other facts he referred to indicated that he was an adult? Or might this entry, alternatively, be intended simply to record that what he said (whatever it was) was taken into consideration? That interpretation gathers considerable support from the sentence which immediately follows the list of features (beginning "Having considered the above factors...") which suggests to me that the list was in the nature of a checklist, with the "Y" or "N" indicating no more than that the listed matter had been taken into account, whichever way it pointed. "*Medical reports: N*" makes perfect sense read that way, for example, indicating that no medical reports had been considered rather than that medical reports did not support the claimant being an adult. Accordingly, I view the form as indicating the parameters of the material considered but as disclosing hardly anything by way of reasoning for the conclusion. I do not consider that the judge was wrong to refuse to accept it as sufficient to satisfy the requirements of the guidance that the defendant should obtain in writing the reasons on which the conclusion was based.

46. I am not impressed by the argument that it was unworkable and unrealistic to require the defendant to obtain more information than that provided on the local authority's short form. I entirely accept that the defendant needs to rely upon local authorities to carry out age assessments as they have particular expertise in this field. I also accept that there are pressures on local authorities, and particularly Kent, by reason of the arrival of large numbers of unaccompanied asylum seekers who claim to be children. However, the assessment work has to have been completed in order for the local authority to reach the conclusion set down on the short form; all that remains is for the material to be written up. The judge did not consider that the Age Assessment guidance required the defendant to be in possession of the full assessment report, only of a briefer document, sufficient to

enable it to appreciate what the reasons were for the conclusion reached; he was not persuaded that this would be unacceptably burdensome for the local authority. I agree with him that it would not be too much to expect, fortified by the fact that the judge's thinking appears to be in line with the new Age Assessment Joint Working Guidance to which I referred earlier. That says, at the top of page 5 (emphasis in the original):

> "When the LA has completed the assessment it must let the Home Office know the outcome. The minimum they must do is to complete the **age assessment information sharing proforma** to confirm that the age assessment **complies with case law** (Merton judgement and following case law - refer to the practice guidance and Asylum Instruction (see Annex A for links) for information on relevant case law."

47. Annex A is intended to include a link to a model information sharing proforma which includes a prompt to include sufficient summary of the process of assessment to "[d]emonstrate that it has been conducted in a way that conforms to Merton and other relevant case law/guidance" and a "brief summary and analysis of reasons". The proforma refers to the "substantive report" which is clearly a different document from the proforma itself, with a reminder that the decision on the age issue should "concur with/summarise conclusion of substantive report".

48. The new Joint Working Guidance also shows that data protection issues can be addressed, see, for example, section 3 of that document which says: "The Home Office/LA must establish that the individual has been told the information they provide to them could be shared with other government organisations to enable it to carry out its functions" (*sic*) and note also that an "Age assessment information sharing consent form" exists.

49. I turn finally to the question of whether the judge was wrong to find that the defendant had failed to discharge its independent duty to consider whether the age assessment complied with the *Merton* principles.

50. It was not disputed between the parties that, in deciding to treat the claimant as an adult instead of a child, the defendant was under a public law duty to make the necessary inquiries in order to arrive at an informed decision on the fact of his age and that failure to discharge that duty would give rise to a public law error rendering the detention unlawful, see §70 of the judgment. The judge referred to a number of authorities (§§72 to 77) for the proposition that where an age assessment has been carried out by a local authority, the defendant can rely on that but has an independent obligation to consider it and to reach its own conclusion as to whether or not it was *Merton* compliant, namely *J v SSHD* [2011] EWHC 3073 (Admin), *AAM v SSHD* [2012] EWHC 2567 (QB), *Durani v SSHD* [2013] EWHC 284 (Admin), and *HXT v SSHD* [2013] EWHC 1962 (QB). The Age Assessment guidance itself acknowledges this in the second paragraph of §5.2, which I have set out above.

51. The judge treated what he saw as the defendant's failure to discharge its independent duty as "an additional reason" why the detention was unlawful (§142 of the judgment). I see it rather as part of the reasoning for the ultimate conclusion

that the defendant had not complied with the EIG and the Assessing Age guidance, which is the way in which the judge appeared to be putting it in §139, where he said that "the existence of the independent duty on the Defendant does amount to a further reason why Mr Hansen's submission that the '*Age Assessment Results*' document in the present case [is sufficient] cannot be right".

52. I am not persuaded that the judge was wrong in finding a breach of the defendant's independent duty. I agree that, as he found, the defendant was unable properly to discharge this without more information from the local authority than was contained in the Age Assessment Results document. In so far as Mr Tam submitted that paragraph 5.3 of the Age Assessment guidance is to the effect that the defendant is entitled to rely on the local authority's assurance without more, I do not accept that. On the contrary, in my view it is clear from the EIG and the guidance that the defendant must have more than a simple assurance. It is implicit in the wording of paragraph 5.3 itself. It also emerges from a consideration of paragraph 5.2, as the form used by the local authority in this case provided insufficient material to enable the case owner to comply with the requirement of paragraph 5.2 of the EIG that he or she "should carefully consider the findings of the local authority" and discuss the matter with the local authority if, for example, the findings did not appear to be supported by evidence or it appeared that the case was finally balanced or that the general *Merton* principles had not been adhered to.

53. In short, therefore, I would endorse the judge's decision that the material available to the defendant from the local authority was not sufficient to meet the requirements of the Age Assessment guidance and therefore of the EIG, or to enable the defendant to carry out its independent duty. It follows that his finding as to the second unlawful detention period stands. It is unnecessary, in the circumstances, for me to address the argument raised in the respondent's notice that a decision to treat a person as over 18 for detention purposes on the basis of an age assessment by a local authority can only properly be taken if the defendant is in possession of a full written *Merton*-compliant age assessment document.

Conclusion

54. Having rejected the defendant's challenge to the judge's determinations in respect of both periods of detention for the reasons I have set out, I would dismiss the appeal.

Lord Justice Tomlinson:

55. I agree.

Lord Justice Burnett:

56. I also agree.