



10 July 2013

PRESS SUMMARY

R (on the Application of AA) (Appellant) v Secretary of State for the Home Department (Respondent) [2013] UKSC 49
On appeal from: [2012] EWCA Civ 1383

JUSTICES: Lord Neuberger (President), Lord Clarke, Lord Wilson, Lord Carnwath and Lord Toulson

BACKGROUND TO THE APPEALS

The Immigration Act 1971, Schedule 2, paragraph 16(2) (“paragraph 16”) empowers the Respondent, acting through immigration officers, to detain a person if there is reasonable ground to suspect that he is liable to be removed as an illegal entrant to the United Kingdom. Section 55 of the Borders, Citizenship and Immigration Act 2009 (“section 55”) imposes duties regarding the welfare of children on the Secretary of State and immigration officers in all immigration matters. The issue on this appeal is whether section 55 renders the Appellant’s detention for a period of 13 days under paragraph 16 unlawful, in circumstances in which the Respondent acted in the mistaken but reasonable belief that the Appellant was aged over 18.

The Appellant, born in Afghanistan, arrived in the United Kingdom on 8 October 2008 whilst concealed in a lorry. When caught and arrested, he said that he was aged 14 and claimed asylum. However, the following day he was assessed as being over the age of 19 by social workers from Hampshire County Council. He was granted temporary admission and released from immigration detention, but on 6 November 2008 the Respondent refused his asylum claim and issued a decision to remove him as an illegal entrant. On 1 March 2010 the Immigration and Asylum Chamber of the First Tier Tribunal dismissed his appeal against that decision, during the course of which it concurred with the view that the Appellant was aged over 18.

On 7 July 2010, the Respondent detained the Appellant under paragraph 16 and set directions for his removal to Afghanistan on 20 July 2010. On the latter date, the Appellant sought judicial review in relation to several matters based on his assertion that his age had been wrongly assessed. On the same day, the implementation of his removal was stayed and he was released from detention into the care of Cardiff City Council (“Cardiff”). In August 2010, Cardiff carried out a fresh age assessment, as a result of which they accepted that the Appellant was born on 1 February 1993. Assuming that to be correct, the Appellant would have been aged 15 upon his arrival in the United Kingdom and aged 17 when detained on 7 July 2010. The Respondent accepted Cardiff’s fresh age assessment. Cardiff duly provided him with accommodation and associated support in accordance with his status as a child.

Had the Respondent known of the Appellant’s true age, she would not have detained him on 7 July 2010, as to do so would have been contrary to the Respondent’s policy in relation to minors. The Appellant proceeded with his claim for judicial review against the Secretary of State. His case was, and remains, that the fact of his age at the time of his detention made that detention unlawful under section 55 as his welfare was not taken into account, and that the Respondent’s reasonable belief that he was over the age of 18 is no defence to that claim. His claim was dismissed by the High Court and subsequently by the Court of Appeal. He appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses AA’s appeal. Lord Toulson, with whom Lord Neuberger, Lord Clarke and Lord Wilson agree, gives the lead judgment. Lord Carnwath gives a concurring judgment.

REASONS FOR THE JUDGMENT

- It is well established that the courts take a strict approach when construing statutory powers of executive detention [42]. Against that background, as there is no dispute that the Appellant fell within the ambit of paragraph 16, the question is whether there was a material breach of section 55. If there was, the Appellant’s detention was unlawful [43-44].
- Under section 55, the Respondent has a direct and a vicarious responsibility. With regard to the former, she must make arrangements for a specified purpose, namely that immigration functions are discharged in a way which has regard to the need to safeguard and promote the welfare of children (“the welfare principle”). Though not an easy thing to achieve, this includes establishing proper systems for arriving at a reliable assessment of a person’s age [46-47]. With regard to her vicarious responsibility, the Respondent is responsible for any failure by those exercising her functions on her behalf, such as immigration officers, to have regard to the guidance given by her or to the welfare principle [46].
- The relevant guidance in place for assessment of a person’s age in relation to the Respondent’s immigration functions, which is careful and detailed, complies with her direct responsibility under section 55 to safeguard and promote the welfare of children in the context of her immigration functions [24, 48]. Further, the Respondent’s vicarious responsibility has been discharged appropriately, as there is no basis in this case for finding that there was a failure by any official to follow the Respondent’s guidance. It follows that there has been no breach of section 55 and that her exercise of the detention power under paragraph 16 was lawful [48].
- The Court is not persuaded that section 55 requires to be interpreted in the way that the Appellant contends for in order to provide adequately for the welfare principle. Further, its natural construction does not render it inconsistent with article 5 of the European Convention on Human Rights or article 3 of the United Nations Convention on the Rights of the Child. Though the risk of an erroneous age assessment can never be eliminated, it can be minimised by a careful process. In that regard, the Respondent’s guidance requires that the benefit of the doubt be given to the claimant at the stage of the initial assessment and that the Respondent consider any fresh evidence arising thereafter. Further, a particular age assessment can be challenged by way of judicial review [49]. Detention of a child under paragraph 16 in the mistaken but reasonable belief that he was over 18 is therefore not in itself a breach of section 55 [50].
- An ancillary question is whether, in the event that a claimant seeks judicial review of his detention solely in respect of the Respondent’s actions in detaining him and not in respect of those of the local authority whose social services team carried out the age assessment, the court may freshly determine the age of the claimant rather than simply determining whether the Respondent had acted lawfully [52]. Though that question does not arise directly for decision in this case, the Court is sympathetic to the view that the *habeas corpus* jurisdiction of the court, which has provided a remedy against unlawful detention since ancient times, would indeed allow it to make a fresh determination of claimant’s age. Such a determination would necessarily impact on the lawfulness of the claimant’s detention [53].
- Lord Carnwath agrees with Lord Toulson’s judgment on the issues arising for decision in this appeal [55]. However, on the ancillary question, he expresses reservations as to whether the Court should propose the use of *habeas corpus* in that context, particularly without hearing argument on the matter [56-59]

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html