Case No: CO/9321/2011

Neutral Citation Number: [2011] EWHC 3188 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2011

Before :

MISS GERALDINE ANDREWS QC
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

R (on the application of A.K.)	**Claimant**
- and -	
(1) Secretary of State for the Home Department	**Defendants**
(2) Leicester City Council	

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Greg O'Ceallaigh (instructed by **TV Edwards LLP**) for the **Claimant**
Gwion Lewis (instructed by **The Treasury Solicitor**) for the **First Defendant**
Paul Greatorex (instructed by **Leicester City Council**) for the **Second Defendant**

Hearing dates: 28 October 2011

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Judgment

Miss Geraldine Andrews QC (sitting as a Judge of the High Court) :

INTRODUCTION

1. The Claimant is a young man who claims to be an Afghan national born on 12 July 1993. On his own case, therefore, he is now over 18 years old. Despite this, he has renewed his application for permission to apply for judicial review of (a) the decision of Leicester City Council, after a reassessment of his age carried out at his request and completed on 20 December 2010, that he was then over 18, and (b) the decision of the Secretary of State to detain him between 25 August and 4 September 2010 pending his (then) intended removal to Greece.

2. One of the grounds of challenge to the latter decision is that he was a minor at the time, and that it was contrary to the Secretary of State's published policy to detain children (save in exceptional circumstances, which it is not suggested apply here). The Leicester assessment had not yet been carried out when the Claimant was detained; instead, the Secretary of State relied upon an earlier assessment of the Claimant's age carried out by social workers from Essex County Council at the time of his arrival in the UK, which had also assessed his age as over 18.

THE RELEVANT LEGAL FRAMEWORK

3. In the case of R(on the application of A) (FC) v London Borough of Croydon [2009] UKSC 8, the Supreme Court held that when considering statutory duties that are owed by local authorities to a "child", ultimately the question whether the young person is a child or not is a question of precedent fact for the court to determine on the balance of probabilities.

4. As Baroness Hale explained in that case, under the Secretary of State's 2007 Policy on Age Dispute cases, where the age of a young person is disputed, it is the policy of the Secretary of State to refer the case for assessment by the local social services authority, and to accept that assessment if it is considered to have been properly carried out in accordance with the procedural guidance given by Stanley Burnton J in R (B) v Merton London Borough Council [2009] EWHC 1689 (Admin) [2003] 4 All ER 280. However, that policy was reviewed and there is now guidance from the UK Borders Agency (UKBA) which states as follows:

> "It is UKBA policy to give prominence to an age assessment by a local authority, and it is likely that in most cases the authority's decision will be decisive. Nonetheless, case owners should carefully consider the findings of the local authority and discuss the matter with the social worker in appropriate circumstances – for example when it appears that the findings are unclear; or do not seem to be supported by evidence or it appears that the case is finely balanced and the person has not been given the benefit of the doubt; or that it appears that the general principles set out by the judge in the Merton case have not been adhered to.. furthermore, all sources of information should be considered and an overall decision made in the end."

5. The Supreme Court in the case of R(A) v London Borough of Croydon did not address the question whether, even if the Secretary of State obtained a Merton-compliant assessment by a local authority of a young person as over 18, an otherwise Wednesbury reasonable decision taken in reliance upon that assessment and on the relevant policy guidance to detain him as an adult could later be challenged by judicial review on the grounds that he was in fact a child. That appears to remain an open question. In R(A) the Supreme Court was careful to spell out that the fact-finding jurisdiction given to the courts in precedent fact

cases on age assessment derives from Parliament's intention, as disclosed in primary or secondary legislation, that they should have that jurisdiction (see Baroness Hale's speech at [31] and Lord Hope at [52].) That would appear to indicate that where the challenge does not relate to the exercise of a statutory duty, normal judicial review principles continue to apply, even if the case involves an age assessment.

6. Mr O'Ceallaigh relied upon R (A)(Somalia)) [2007] EWCA 804 (Admin) as authority for the proposition that the Court should examine all the circumstances and make a finding of fact. However that was a case about the reasonableness of the length of the claimant's detention, not about whether the Secretary of State was or was not adhering to published policy when detaining an individual. Moreover, in that case, only Keene LJ was disposed to accept that it was for the court to decide for itself whether, in fact, a reasonable period of detention had been exceeded. The issue raised by the Claimant is one of some interest and importance, but it cannot be decided on a permission hearing. Since Mr O'Ceallaigh has raised a point about the threshold test which is plainly arguable, it seems to me that the fairest approach to take is that which favours the Claimant, and to assume at this juncture that his argument as to the scope of the Court's review of the decision to detain may be accepted in due course. I say nothing further about the merits of that argument.

7. Subsequent to the Supreme Court's decision in R (A), the Court of Appeal in R (FZ) v London Borough of Croydon [2011] EWCA Civ. 59 gave guidance as to the approach to be taken when the claimant seeks permission to challenge an age assessment by a local authority by judicial review, on the grounds that it was factually wrong, rather than that it was not Merton compliant or that it was conducted in a manner that was materially unfair. The parties in that case agreed that the test was that laid down by Holman J in R (F) v Lewisham London Borough Council [2009] EWHC 3542, namely, whether there was a realistic prospect or arguable case that the court would reach a conclusion that the claimant was of a younger age than that assessed by the local authority, but they disagreed as to its practical effect. The Court of Appeal, though understandably wary about embarking upon a reformulation of Holman J's test, said this at para 9:

> "We consider that at the permission stage in an age assessment case the court should ask whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so, permission should be refused. If not, permission should normally be granted, subject to other discretionary factors, such as delay. We decline to attach a quantitative adjective to the threshold which needs to be achieved here for permission to be given."

8. Accordingly, that is the approach that I shall adopt to the "age assessment" grounds for challenge to the two decisions, notwithstanding that it may have been more appropriate, in the case of the challenge to the Claimant's detention, to ask only whether there is a sufficiently arguable case that the Secretary of State departed from her own policy in respect of children or acted in a manner that was Wednesbury unreasonable in concluding that the claimant was a child. My conclusion that the threshold for permission has not been met would be the same on either test, for the reasons which appear below.

BACKGROUND

9. The Claimant arrived in the UK unaccompanied on 30th January 2009. He was spotted disembarking from the back of a lorry, and detained. He claimed at that

time to be 15 years old. On the date of his arrival, his age was assessed by two social workers from Essex County Council, Meela Jeewoonaram and Suzanne Von Tonder. There is no evidence that either of these individuals was not a registered social worker or properly qualified to make such an assessment. Mr Lewis told the Court on instructions that they *were* registered social workers. The assessment stated that it had been completed in accordance with the judgment in R (B) v Merton. The Claimant was described as being evasive and uncooperative, even though the role of Social Services and how it differed from the police and Immigration had been explained to him. Based on the answers given to their questions, his behaviour, interaction, and physical appearance, the Essex social workers concluded that he was over the age of eighteen and assigned him a notional date of birth of 1 January 1991. He was issued with an IS97M form informing him that he had received a full Merton compliant age assessment stating that he was 18 years of age or over. He was detained as an adult and treated accordingly.

10. It is worth noting that no complaint was made at the time that the assessment carried out on that occasion was not Merton compliant, and there was no attempt to challenge that assessment (or the decision to detain him) by judicial review.

11. The Claimant was detained at Oakington IRC. However, that detention was for only a few days. On 1 February 2009 the UKBA searched the Eurodac fingerprint database and found that his fingerprints matched those of a person who had been found to have entered Greece illegally on 26 August 2008. During a screening interview on 3 February 2009, the Claimant stated that he sought asylum in the UK. He was released from detention the next day, granted temporary admission, and placed in NASS accommodation (consistently with his age being assessed as over 18). Again, at the time, there was no complaint made about the decision to treat him as an adult and no attempt to bring judicial review proceedings. On 28 April 2009, the UK wrote to Greece asking it to accept responsibility for the Claimant's asylum application pursuant to the Dublin Regulation, but Greece failed to respond.

12. On 27 October 2009, the UK informed Greece, in accordance with Article 20(c) of the Dublin Regulation, that it was deemed to have accepted responsibility for the Claimant's asylum application. On the same day, the Claimant's asylum claim was refused and certified on third country grounds. On 19 November 2009, it was discovered by the UK BA that the Claimant did not appear to be living in the place that he had been required to reside as a condition of his temporary admission. His whereabouts were only located in late April 2010, and he was then placed on weekly reporting conditions. In May 2010 he was moved from London to NASS accommodation in Leicester. On 13 August 2010, the Secretary of State issued directions to remove him to Greece on 3 September 2010.

13. Shortly after the removal directions were set, on 16 August 2010, a General Practitioner based in Leicester, Dr Irum Khan, wrote a letter to the UK BA. The content of that letter is important, as it plays a significant role in the challenge to the Claimant's detention on grounds that are independent of his age. Its purpose appears to have been to request that the Claimant's reporting centre attendance be reduced until what was described as his "fragile mental state" became more stabilized. The letter refers to the Claimant's date of birth as 1 January 1991. Its contents, so far as are material, are as follows:

"[The Claimant] is registered with the Assist Service since 25th of May 2010 and is being seen regularly for symptoms of severe Post Traumatic Stress Disorder from resulting in 13 day detention at the hands of Taliban at a young age of 15 years. He suffered extreme physical and psychological trauma during that time in

detention, including repeated submersion in ice water and witnessing brutal murders including discovering a beheaded body of his older brother at that young age.

He is experiencing constant flashbacks resulting in excessive anxiety, hyper vigilance, inability to sleep and constant state of fear. He has been tried on strong sedating anti-depressant medications to help calm him down but without any beneficial effects. He is hardly getting 2 to 3 hours sleep in 24 hours and is complaining of constant feeling of pressure in his head and tension type headaches.

His lack of sleep and his constant worrying thoughts keep him distracted and he has ignored traffic signals and missed near accidents, and is now afraid of leaving the house. Also his flashbacks are precipitating his symptoms of acute anxiety which he is finding it difficult to deal with. His anti-depressants make him light headed but are not helping him sleep and are also causing resultant day time drowsiness. He has been very distressed each time he has been seen in surgery and I am reviewing him every 2 weeks to monitor his progress. He is also been seen by Art Therapist on three weekly basis for psychological counselling."

14. On 25th August 2010 the Claimant was detained at Campsfield House detention centre. The detention authority form (IS 91) signed on that date identified him as requiring special monitoring or supervision due to a risk of self-harm. It noted that he was being treated for depression and identified his medication, including the anti-depressants that he had been prescribed. On 26th August, the UK Border Agency sent a fax to the Claimant at Campsfield House, in response to what is described as a report notifying them of a special illness or condition. In summary, the fax states that the decision to continue with his detention had been reviewed, that the Claimant had stated that he was suffering from psychological trauma following beatings from the Taliban and witnessing the murder of his brother; that as the UK was proposing to return him to Greece, any issues or concerns of torture whilst in Afghanistan should be raised with the Italian authorities (sic) on his arrival, and that should he have any medical concerns he should speak to a member of the healthcare team. It ended by stating that having reviewed the Claimant's case, the Chief Immigration Officer was satisfied that his continued detention remained appropriate. There is nothing more by way of detail to indicate why that view was taken. It is not even clear whether the person who made the decision had seen Dr Khan's letter.

15. The power to detain someone must be exercised in accordance with general administrative law principles of rationality, fairness and reasonableness. If there is a failure to act in accordance with stated policy, the detention may be susceptible to challenge by way of judicial review. It is the Claimant's case that the Secretary of State's policy applicable to those with mental health problems, published on the website at the time when the Claimant was detained for the second time on 25 August 2010, was as follows:

"The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated immigration detention accommodation or elsewhere:

...*those suffering from serious mental conditions or the mentally ill* – [in Criminal Case Directorate] cases, please contact the specialist Mentally Disordered Offender Team." [emphasis added].

16. At some point in August 2010 that policy was amended, and the words I have highlighted in italics in the preceding quotation were replaced with "*those*

suffering serious mental illness which cannot be satisfactorily managed within detention." The amended paragraph goes on to state that "in exceptional cases it may be necessary for detention at a removal centre or prison to continue while individuals are being or waiting to be assessed, or are awaiting transfer under the Mental Health Act." That is a seismic shift from the previous policy.

17. Whilst he was in detention the Claimant's solicitors served a pre-action protocol letter on 31 August 2010. They informed the Secretary of State that the Claimant had an age assessment set for 7 September 2010 (this had been agreed by Oxfordshire County Council, which for some reason was then the appropriate local authority.) They asked that the removal directions be cancelled. When they received no response, they brought proceedings for judicial review, coupled with an application for urgent interim relief. At that stage, no complaint was made that the Claimant had been detained notwithstanding his mental health issues. The focus of complaint was that <u>he was not 18,</u> and that Oxfordshire County Council had agreed to undertake an age assessment.

18. On 2 September 2010, Irwin J. granted interim relief preventing the Claimant's removal from the UK until such time as he was agreed to be an adult or assessed to be over 18. Subsequent to that order, the UK BA moved the Claimant from Campsfield House to Harmondsworth IRC, and then on 4 September released him into NASS accommodation in Leicester.

19. In line with a decision taken by the Immigration Minister to suspend returns to Greece, on 27 October 2010 third country action was withdrawn in relation to the Claimant, and the Secretary of State agreed to consider his asylum claim substantively within the UK. That claim has not yet been determined, apparently because the Claimant's age is regarded as a critical factor (despite the fact that on any view he is now over 18). These developments disposed of the majority of the issues in the judicial review claim as it then stood. The Claimant was invited by the Secretary of State to withdraw his claim for judicial review, but declined to do so, maintaining the challenge to his detention in August 2010 on the basis that he was a child.

20. On 4 November 2010 Leicester City Council began a further age assessment of the Claimant. The Claimant was interviewed on 4 and 5 November and given an additional opportunity to address matters of concern on 20 December 2010, prior to the final outcome being provided to him on the same day. He was also afforded the opportunity to bring a friend with him on 20 December, but said that he would be coming alone. The assessment was carried out by two registered social workers accompanied by a student social worker. They concluded, consistently with the previous assessment by the Essex social workers, that the Claimant was over 18. No comment on this age assessment was received from the Claimant's solicitors until 4 February 2011, when a letter was sent purporting to address certain of the adverse findings and providing explanations/clarifications from the Claimant that he did not give on 20 December 2010.

21. In the meantime, the Claimant amended his claim for judicial review pursuant to an order made by consent on 17 November 2010. He now sought to challenge the Leicester assessment and joined Leicester County Council as a Defendant. In his amended grounds, the Claimant seeks to rely upon a report made on 11 January 2011 by Dr Diana Birch, the eminent paediatrician who has provided evidence in numerous age assessment cases. Dr Birch assessed the Claimant as being 15 years and 10 months old on that date, with a margin of error of one year on each side. This age is not only out of line with every other assessment but with the Claimant's own position, since he claimed to have been born in July 1993 and

therefore would have been well over 17 at the time of her report. Dr Birch's report did not alter the position of Leicester City Council. They refused to carry out a reassessment.

22. In the amended grounds for judicial review there is still no complaint about the Essex assessment. It was submitted that Dr Birch's report was new evidence that required Leicester City Council to carry out a fresh assessment, and that in the light of her report and the Claimant's Taskera (an Afghan identity document) there is a realistic prospect that at a substantive fact-finding hearing the court would reach a relevant conclusion that he was (still) a child at the time of his challenged detention on 25 August 2010.

23. On 18 February 2011 the Claimant was interviewed for some 2 hours and 20 minutes by Simon Shreeve, an independent social worker. Mr Shreeve followed the Merton guidelines. He did a very thorough professional job. Mr Shreeve concluded that the Claimant was functioning at a level similar to an 18 year old, that his physical appearance, behaviour and development were supportive of a hypothesis that he is likely to be approximately 17 to 18 years of age, and that his age was likely to be at least 17½ on the day of the assessment and possibly older. Mr Shreeve's view, therefore, was not inconsistent with the view taken by the Leicester social workers or the Essex social workers. At its highest it suggests that the Claimant *might* have been the age that he claimed to be at that time, 17½.

24. Mr Shreeve entirely discounted the age assessment made by Essex in January 2009 on the basis that "I do not consider this assessment to be Merton compliant". However in the body of his report he stated, without giving any particulars, that it "did not appear to be of sufficient depth and detail for it to be relied upon and may not be compliant with Merton principles". In the absence of further explanation, it is difficult to ascertain why Mr Shreeve took that view, especially since it is clear on the face of the Essex assessment that the reason why it is short on detail was that the Claimant was being unco-operative. Mr Shreeve also raised doubts as to whether the Essex social workers were registered social workers, although he had no evidence to suggest otherwise. As for the Leicester assessment, he did not criticise it as being non-Merton compliant, but gave it less weight in his overall assessment than Dr Birch's report (despite the fact that the age at which she arrived was far younger than the age that the Claimant himself claimed to be).

25. In R (on the application of R) v London Borough of Croydon [2011] EWHC 1473 (Admin) the claimant was also an asylum seeker from Afghanistan who claimed to be under 18 but who had been assessed by social workers, twice, as being over 18. After subjecting the assessments to careful scrutiny, and hearing evidence, including from Dr Birch, Kenneth Parker J. came to the conclusion that the claimant in that case was over 18. He was highly critical of the statistical methods used by Dr Birch. In paragraph 51, he stated that "in the absence of the blinded studies, based upon appropriate statistical methods supported by the assistance of a qualified bio-statistician, these statistical calculations cannot, in my judgment, safely be relied upon." He held that, notwithstanding Dr Birch's undoubted experience in working with children and adolescents, her misplaced confidence in the accuracy and reliability of the statistical methods that she had employed undermined the other evidence that she gave and that, as a result, her assessment of the age of the claimant was less reliable than that of a social worker. Dr Birch has subsequently responded to these criticisms by changing her methodology.

26. However, Dr Birch's report in the present case suffers from exactly the same failings as those criticised by Kenneth Parker J. (who, coincidentally, was the judge refusing permission on paper in the present case). Mr Shreeve therefore fell into error in affording her report more weight than that of the Leicester social workers. That, plus the fact that Mr Shreeve does not appear to consider that the fact Dr Birch came up with an age which is at odds with even the Claimant's own account detracted from the reliability of her conclusions, inevitably has an adverse impact upon his own conclusions.

27. Both the Defendants unsurprisingly took the point in their summary grounds for contesting the claim that there was apparently no challenge to the Essex assessment. In the response, the Claimant said that "for the avoidance of doubt the Claimant does not accept that at the time he had been detained he had been subject to a Merton-compliant age assessment". As Mr O'Ceallagh appeared to accept at the hearing, this was tantamount to putting the Secretary of State to proof that the assessment was Merton compliant rather than advancing a positive case that it was not; certainly there were no grounds set out in support of any such positive case. When this matter came before Kenneth Parker J., he was satisfied that the Essex assessment was Merton compliant. It was only when Mr O'Cealleagh's skeleton argument for the renewed oral application arrived that a positive argument was made (in para 22, with reasons given in para 36) as to why the Essex report was "*plainly not* Merton compliant". That put matters even higher than Mr Shreeve did. It seems apparent from this that those advising the Claimant appreciated from the reasoning of Kenneth Parker J. that the Essex assessment was potentially a formidable obstacle and decided, very belatedly, that it should be challenged head on. Of course if the challenge has merit, it matters not that it was raised late in the day. The timing only goes to the question of discretion.

The age assessment challenge

28. Despite Mr O'Ceallaigh's arguments I am not satisfied that, on the Claimant's factual evidence taken at its highest, there is any real prospect that the court would reach a different conclusion about his age from that reached by either the Essex or the Leicester social workers. The Supreme Court recognized in R(A) v Croydon London Borough Council that "the better the quality of the initial decision-making, the less likely it is that the court will come to any different conclusion on the evidence". The Leicester report is careful, methodical and well-reasoned. It is plainly Merton compliant, but, more than that, when one examines the underlying material relied upon by the Claimant, its substance is compelling. It pays due heed to the Claimant's mental health difficulties. It is also consistent with the Essex assessment, the views of the Claimant's main tutor at Leicester College and of one of his regular therapists, and with the assessment carried out by Mr Shreeve, who was unable to state with any confidence that the Claimant was not 18, but only that his minimum age was 17½. If one allows for a margin of error in Mr Shreeve's assessment, as one must, it is difficult to see how that could be relied upon as being so obviously inconsistent with the view of the Leicester social workers as to undermine their conclusion.

29. Moreover, in looking at matters holistically, Mr Shreeve appears to have given considerable weight to Dr Birch's report. He attached more credence to it than to the Leicester age assessment, despite the fact that it suffers from the failings identified by Kenneth Parker J. Quite apart from that deficiency, as I have already mentioned, Dr Birch's assessment is well out of line not only with the rest of the evidence, but with the Claimant's own claimed age. In my judgment there is no real prospect that at a full hearing the Court would decide that Dr Birch's views trumped those of the six social workers, including Mr Shreeve, who were involved

in the various assessments of the Claimant at different times. Mr Shreeve's evidence is, at best for the Claimant, neutral – and who knows how he might revise it in the light of the criticisms of Dr Birch's methodology? As for the Taskera, the translation makes it clear that the age of 15 on that certificate is based solely on "facial appearance". The Merton guidelines make it clear that views of age based on appearance alone are not reliable. The unauthenticated copies of the Afghan student (Madrassa) identity card and the vocational training certificate are consistent with the Claimant's case, as noted by Mr Shreeve, but are insufficient in themselves to outweigh all the other factors pointing towards his being older than he claimed. According to the Leicester assessment, the Claimant also gave conflicting accounts as to how the "ID documents" on which he relied came into his possession, casting doubt on their validity.

30. In short, the prospects that this Claimant might be found on a full examination of all the facts and evidence to have been under the age of 18 in August 2010 are very slender indeed.

31. Mr O'Ceallaigh was strongly critical of the fact that the Leicester assessment went ahead in early November 2010 notwithstanding a request by the Claimant's solicitors that it be adjourned so that an "appropriate adult" could be present when the Claimant was interviewed. There were repeated requests along those lines with intimations in the correspondence that the absence of such an adult would in itself be regarded as a ground for judicial review.

32. The presence of an "appropriate adult" is best practice, but it is not part of the Merton guidelines. Although in R(FZ) v London Borough of Croydon, which was a superficially similar case, the Court of Appeal said that the fact the claimant was not given the opportunity to have such a person present contributed to its decision whether he should be given permission to proceed to judicial review, they stopped short of stating that this was a compulsory additional requirement in all cases. In any event, the Claimant was given the opportunity to have a friend present prior to the final interview by the Leicester social workers, and declined. This is recorded in the assessment document. On the facts, it is clear that the only "friends" he could have brought with him would be adults, and in any event he had legal representation and could have sought advice as to who he should bring with him. In the light of the correspondence on this subject between his solicitors and the Council, it seems unlikely that the Claimant was kept unaware of this point.

33. I do not consider that the absence of an adult at the time of the Claimant's three interviews by the Leicester social workers in the present case constitutes a ground, in and of itself, for undermining the age assessment, or a separate reason why permission should be granted to bring judicial review. Objectively, it appears that the procedure adopted was fair to the Claimant and Merton compliant, and he did not appear to be disadvantaged in any material respect by the absence of an appropriate adult.

34. Moreover, in the case of R(FZ), the Court of Appeal specifically noted that there were no glaring inconsistencies in the claimant's account, nor clear analytical reasons why his account was unbelievable. That obviously played a significant part in the decision and it is easy to see why in a case of that kind, the absence of an appropriate adult could prove critical. By contrast, in the present case, as the Leicester social workers noted, there were inconsistencies in the Claimant's account. He also changed his account a number of times, and presented as evasive under challenge (just as noted by the Essex social workers when they carried out their assessment in 2009. Indeed in 2009 he was recorded as being generally unco-operative, and refused to answer their questions).

35. Even if I had been persuaded that the challenge to the Leicester age assessment passed the relevant threshold for permission, I would still have declined permission to bring the claim for judicial review on those grounds, because it is obvious that the claim against Leicester City Council has become academic. Even on his own case the Claimant is now 18½. Mr O'Ceallaigh sought to argue that despite this, there was still a purpose to be served by judicial review of the age assessment, because if Leicester City Council had looked after the Claimant as a child for more than 13 weeks after his 16th birthday, he would be a "former relevant child" for the purposes of s.23C(1) of the Children Act 1989 at his 18th birthday, and eligible for leaving care support until he is 21. This would give him a better standard of support appropriate to his needs than he would receive by way of asylum support.

36. However, the fatal flaw in this argument is that in order to qualify as a "former relevant child" the 1989 Act requires that the person concerned has been "looked after" for the relevant period, that is, actually provided with accommodation by Leicester City Council in exercise of its relevant social services functions. The Claimant was not provided with accommodation under the Children Act or with any accommodation by the Second Defendant in exercise of any social services function – he has been receiving asylum support at all times when he was not in detention.

37. I do not accept Mr O'Ceallaigh's argument that it is possible for the Court to interpret the provisions of the statute differently or to require that the Claimant be treated *as if* the Childrens' Services Department had accommodated him under the terms of the Children Act for the relevant period, when the reality is that it did not. I do not derive any assistance from the decision in R (TG) v Lambeth [2011] EWCA Civ 526, where accommodation ostensibly provided by a local authority under the Housing Act was deemed to have been provided under the Children Act. The case only fell on that side of the line because the actions of a particular social worker were deemed to be imputed to the Council's children and families division. This case falls squarely within the decision of the House of Lords in R(M) v Hammersmith and Fulham LBC [2008] 1 WLR 535 in which Baroness Hale (with whom the other members of the panel agreed) said at [44] "It is impossible to read the words [in s.22 of the 1989 Act] to include a child who has not been drawn to the attention of the local [children's] services authority or provided with any accommodation or other services by that authority."

38. Thus even if the case against Leicester City Council crossed the threshold in R (FZ), which in my judgment it plainly does not, there would be no purpose served by allowing the application for judicial review to go ahead. On that ground also, I refuse permission to bring the claim against the Council.

39. It follows from my assessment of the prospects of the Claimant's case on the facts, taken at its highest, that permission must also be refused in respect of the claim against the Secretary of State based upon the Claimant's alleged age at the time of his detention. Even assuming in his favour that the question whether he was a child at the time the decision to detain him was taken is a matter of precedent fact for the Court to decide, there is no real prospect of his being able to satisfy the Court, on the material relied upon, that he was under 18 at the time when he was detained in August 2010. If it is not a matter of precedent fact, the Secretary of State did not act unreasonably or carelessly or unfairly in relying on what appeared to be a Merton-compliant assessment by the Essex social workers.

40. The challenge to the Essex assessment as being non-Merton compliant has been brought far too late. No explanation has been given for the delay. Indeed the Claimant appears to have been content to have been treated as an adult whilst

his asylum claim was pending - until he was detained with a view to sending him back to Greece. Only then, over a year later, did he demand to be re-assessed. In any event I see little force in the belated criticisms made of the Essex assessment, given that the social workers were trying their best in the face of an obvious reluctance on the part of the Claimant to co-operate with them. I agree with Kenneth Parker J. that the assessment appears to have been Merton compliant. Moreover the outcome of that assessment has been vindicated by the subsequent Leicester assessment and, to a large extent, by Mr Shreeve's independent assessment, especially if one takes into account the undue weight he attached to Dr Birch's flawed report and makes an allowance for a reasonable margin of error.

The other grounds of challenge to detention

41. That leaves two grounds of challenge to the decision to detain the Claimant. Mr O' Ceallaigh contended that the policy on those with mental health issues was amended only after the Claimant was detained and that at the time of his detention he was mentally ill. Mr Lewis disputed the timing of the amendment to the policy, but argued that in any event there was no (or no valid) diagnosis at the time of his detention that the Claimant was mentally ill. He submitted that Dr Khan, as a General Practitioner, was not qualified to diagnose PTSD. In refusing permission on paper, Kenneth Parker J. clearly took the same view, (although I note that he addressed the language of the *amended* policy and not the policy that the Claimant contends was applicable at the time).

42. I respectfully disagree. It is unnecessary for a medical practitioner to have a psychiatric qualification to be able to diagnose either clinical depression (which is also a mental illness) or PTSD. An experienced GP is well able to make an accurate diagnosis of these illnesses and treat them with appropriate medication or recommend appropriate therapies. As Dr Rachel Daly says in her psychiatric report of 5 September 2011, "it is my understanding that mental health [provision] is provided within the General Practitioner setting which is normal within the current NHS setting" (my emphasis). The symptoms described in Dr Khan's letter – the flashbacks, the anxiety attacks, the sleeplessness, and indeed the depression - are consistent with the diagnosis of PTSD, as Dr Daly confirms. The Claimant was taking fluoxetine and other anti-depressants. He had been under Dr Khan's care since the end of May 2010, and was being seen regularly by him and by a psychologist. Dr Daly confirms that Dr Khan acted in accordance with National Institute for Health and Clinical Excellence Standards guidelines in terms of the appropriate treatment (both medication and therapy).

43. Moreover, quite apart from Dr Khan's letter, the IS 91 not only identified that the Claimant was suffering from depression and taking anti-depressant medication, but identified a risk of self-harm – a risk that Dr Daly has stated manifested itself because the Claimant was not given the necessary support while in detention.

44. In my judgment, there is a sufficiently arguable case on this point to cross the threshold for judicial review. The Claimant was only detained for a short period – until 4 September 2010 – and it would appear that during that time the Secretary of State's policy changed, so that the relevant question then became whether the mental illness could be satisfactorily managed within detention. The Secretary of State might well argue in due course that any unlawful detention on account of a failure to adhere to the old policy was of very short duration indeed and that the Claimant would gain nothing by judicial review. Be that as it may, there is a challenge to his detention that stands a real prospect of success, and I will give permission on this ground of challenge.

45. It is common ground that whichever version of the policy was applicable, another category of persons who should not be detained save in exceptional circumstances are "those where there is independent evidence that they have been tortured". Mr O'Ceallaigh contended that Dr Khan's letter constituted "independent evidence of torture". I reject that argument as having no prospect of success. The references to torture in Dr Khan's letter are based solely upon what the Claimant reported to him. It is not independent evidence that the Claimant was indeed tortured as he claims.

CONCLUSION

46. For the reasons given above, the Claimant will have permission to challenge the Secretary of State's decision to detain him in August 2010, but only on the ground that she acted contrary to her stated policy on the detention of those who were suffering from a mental illness. Permission to seek judicial review of the Claimant's detention on all other grounds, including the Claimant's age, is refused. Permission is refused to bring a claim for judicial review against Leicester City Council. Leicester City Council will have its costs of the Acknowledgment of Service and preparation of the Summary Grounds of Resistance summarily assessed in the sum of £1852.50.

47. The Secretary of State has been successful in respect of the most substantial challenge, and permission has been granted only on one point which was always of minor significance in the overall context of the case. I consider that the fairest approach in respect of the costs is to reserve them to the hearing of the substantive judicial review, but (without fettering the discretion of the Court in any way) in order to assist, I will indicate that in order to reflect the outcome on the merits, I would have been inclined to award the Secretary of State a significant proportion of the costs of the Acknowledgment of Service and summary grounds in any event.