

CO/1075/2005

Neutral Citation Number: [2005] EWHC 2833 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Thursday, 17th November 2005

B E F O R E:

MR JUSTICE GIBBS

THE QUEEN ON THE APPLICATION OF

BLERIM MLLOJA

(CLAIMANT)

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

(DEFENDANT)

Computer-Aided Transcript of the Stenograph Notes of
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NADINE FINCH appeared on behalf of the CLAIMANT

JEREMY JOHNSTON appeared on behalf of the DEFENDANT

J U D G M E N T

Thursday, 17th November 2005

1. MR JUSTICE GIBBS: These judicial review proceedings challenge the lawfulness of a decision taken by the Secretary of State for the Home Department ("the defendant") on 17th February 2005. It is baldly stated in section 3 of the claim form that the relevant decision was "taken by the Home Office on 17th February 2005 that claimant should be deported." The matter is not quite as simple as that. There is a letter in the file dated on or about 17th February 2005 indicating that the claimant was being detained. It can be inferred that he was being detained with a view to deportation. The decision to deport was communicated, it is said, orally to the claimant's representatives in that they were told that if judicial review proceedings were not promptly issued it was intended to remove the claimant within the next week or thereabouts. I mention that for the sake of completeness, but there is in substance no dispute that such a decision was made and that it is that decision which is now under challenge.
2. The claimant, Blerim Mlloja, was born in Albania on 1st December 1986. A birth certificate was produced by him at an early stage, following his entry into this country, and it shows that he was born on that date. It is right, however, to say, and this is a central issue in the case, that the defendant did not accept the age claimed by the claimant nor, by implication, the details on the birth certificate.
3. The history of the claimant in Albania is, as I understand it, based largely upon his recollection of events; however, the salient points of his history and upbringing appear not to be in dispute. In 1989 his mother died and he was placed in an orphanage. He had at that stage apparently lost contact with his father but resumed contact in or about 1997. In January 1998 his father was killed by the state authorities. He was accommodated with a person called Myftar Cela and, so he claimed, later detained himself by the authorities and ill-treated. In 2002 he fled the country and entered the United Kingdom clandestinely. On 14th June the following year Myftar Cela was himself murdered. The consequences of that was from the time shortly after the claimant's arrival in the United Kingdom, he had effectively no family or similar links or contacts with his home country. He was, on arrival in the United Kingdom, a boy of 15.
4. On 13th May 2002 he applied for asylum but his age was in dispute. There was at that time a screening interview in which he was treated as an adult. On 15th May he was referred to the Council of the London Borough of Bromley. It appears they were prepared to treat him as if he were 15 years of age from an early stage. However, as a result of documents helpfully produced in the course of the hearing by Miss Isles, who appears for the London Borough of Bromley as an interested party, it is shown that in December of 2003 a proper age assessment was carried out and it confirmed that he was of the age which he claimed. The Local Authority's social worker in the Leaving Care Team from the London Borough of Bromley wrote to the Unaccompanied Minor's Section of the defendant's Immigration and Nationality Directorate on 20th February 2004. That letter, so far as material to this case, reads as follows:

"On 13/05/02 the Home Office assessed Blerim and concluded that he was not a minor. On 20/05/02 he provided a birth certificate to this office and also to Nadia Bob-Thomas at the Asylum Screening Unit. This confirmed

his DOB as 01/12/86. As a result he was accepted as a minor and this department have been caring for him as an unaccompanied minor under S.20 of the Children Act 1989."

5. There is also a memorandum produced in the client contact record of the Leaving Care Team from Bromley, which contains the following entry:

"17th March 2004, Natalie Huegler rang Home Office and Blerim treated as unaccompanied minor since February '03."

6. I do not take that entry to mean that the defendant was aware that the claimant was being treated as a minor prior to being notified on 20th February 2004. But, by that date, the IND had become aware of it.
7. Returning to 2002, when the applicant was still 15, by then being treated as a child by the London Borough of Bromley, on 10th October the applicant was placed with a foster mother, Mrs Mary Watts. He remained with her right through until earlier this year when he was detained. The applicant, on evidence which appears to be common ground, formed a significant bond with Mrs Watts. Under her care he was able to attend school, learn the English language, make friends and make substantial progress. It is to be observed that no step was taken further to investigate the applicant's claim for asylum for a period of some two years. That, in itself, is not unlawful; but its effect in this case, having regard to the age of the applicant was unfortunate. What it meant was that during this substantial period of his teenage years the applicant was allowed, indeed encouraged, to form attachments in this country, and did so. There is no doubt that, on any view, the effect of that was to lead to some hardship to the applicant when matters came to a head again in 2004.
8. On 4th May 2004 the IND finally got round to interviewing the claimant again. He was interviewed as an adult although the IND was aware that he was a child. Subsequent to that, his application was refused. He appealed against that decision and the matter came before Mr Glossop the adjudicator on 4th October 2004. The applicant was represented by different solicitors at that stage, Raja and Co. His appeal was refused. A decision was taken not to appeal against the adjudicator's decision and on 25th November 2004 the applicant was told that he would have to leave the United Kingdom.
9. His 18th birthday was on 1st December 2004, and on 8th February 2005 he was detained. Notice of removal was then given in circumstances which I have already described. Subsequently, the claimant asked for leave to remain in the United Kingdom as a student. That was refused.
10. There are provisions which need to be taken into consideration before determining the lawfulness or otherwise of the decision to remove.
11. The starting point upon which the claimant bases his case is Article 8 of the European Convention on Human Rights. That provides:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right, except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

12. In connection with the way in which children are to be dealt with in asylum and immigration proceedings there are a series of guidance documents issued by the Secretary of State. The general rule, summarising the matter, is that children should not be interviewed. There are exceptions to that rule, which are dealt with in section 10 of the guidance entitled, "Processing Applications From Children." That reads as follows:

"10. Interviewing Children

A change in the Immigration Rules took effect from 18 September 2002, in order that we could interview children within a wider set of circumstances. Further to this, unaccompanied children may themselves request to be interviewed. In specific cases, a child may need to be interviewed. This should happen only on the advice of or with permission from, a Senior Caseworker."

13. Then further:

"10(1) Interviewing Unaccompanied Children

Children who have been invited to attend a substantive asylum interview must only be interviewed by a specially trained interviewing officer. The child must be accompanied by a responsible adult; i.e. a person who is not a police officer, an immigration officer or an officer of the Secretary of State."

14. Then there are further provisions dealing with interviews of accompanied children and other related topics.

15. The matter is also referred to in the guidance entitled "Conducting asylum interviews" and under "General principles" appears the following:

"19. Interviewing children

19.1. General Principles

Asylum claimants under the age of eighteen (Unaccompanied Asylum Seeking Children) will not normally be interviewed about the substance of their claim. If an interview is booked **in error** then the caseworker should cancel the interview."

16. Then there is information given about how to cancel the interview.

17. There is also guidance entitled "Disputed Age Cases." That guidance is relevant to this case for obvious reasons, namely that up to a certain point in the chronology the

defendant did dispute the age of the claimant. There is plainly a scheme incorporated within that guidance in which it is contemplated that age assessments are usually or often to be conducted by Social Services Departments of local authorities. That, indeed, happened here. It is not entirely clear what channel of communication the guidance envisages between the local authorities and IND in this regard. I am told by counsel that practices vary from place to place.

18. The most relevant provisions read as follows:

"3.4 Social Services age assessments

IND's agreement with Social Services on age assessments provides the claimant with a readily accessible route to challenge IND's decision to dispute a claimant's claim to be a child.

An age assessment carried out by a local authority Social Services Department which concludes that the claimant is under eighteen at the time of the application is acceptable evidence of age. If IND has already assessed a claimant as being aged eighteen or above, but a Social Services Department later submits an age assessment which concludes that a claimant is under eighteen, the IND decision should be set aside and records amended to reflect the conclusion of the Social Services age assessment.

It is envisaged that in the future Social Services Departments will provide IND with a standardised pro forma to confirm that an age assessment has been conducted. The pro forma will provide IND with an assessment of the age of the claimant."

19. There are then provisions as to how matters should be recorded in correspondence including reasons for refusal letters in cases where the age of a claimant is in dispute. Without quoting that guidance in full, it is contemplated that wherever an age is referred to, or date of birth is referred to, the word "(disputed)" should be written immediately afterwards to indicate that it is in dispute. There is also provision for a standard paragraph in reasons for refusal letters regarding the dispute about age and the failure of a claimant to provide proof of the correct age.
20. Provision is also made for where the age of the claimant is no longer in dispute because a claimant has provided evidence to be a child. Those principles include the following:

"9.1 General principles

Claimants whose ages have been disputed should be treated as adults until such time that they can prove that they are a child. If a claimant provides satisfactory evidence that they are a child, their case should be dealt with by a specialist children's case management unit."

"9.2.1 Satisfactory evidence of age received before the substantive interview

If evidence that meets the requirements set out in 3 is received before the

day of the substantive asylum interview and the caseworker is satisfied it proves that the claimant is under eighteen, the caseworker should:

1. Clearly minute the file to say what evidence has been received
2. Obtain authority to cancel an interview" from a suitable senior person.

21. I have already cited paragraph 3 as the means of establishing evidence of age.
22. On behalf of the claimant, Miss Finch submits that it would be both unreasonable and a breach of natural justice that the claimant should be removed to Albania before his Article 8 rights have been fully considered. She submits, in effect, that they have not been fully or properly considered because of the omission or failure on the part of the defendant to implement his own principles set out in guidance notes in relation to this claimant. She points out that he was only 15 when he arrived. The Immigration Service did not accept his age and he was, from then on, up to and including the commencement of the appeal proceedings before the Adjudicator, treated as an adult, although the Adjudicator was told that at that stage the defendant conceded that he was a child and proceeded to deal with the matter on that basis. She relies upon a series of consequences of that procedure, some more important than others, but which cumulatively, she submits, renders the process adopted so flawed as to invalidate the outcome of, first, the Secretary of State's decision and, second, the appeal before the Adjudicator.
23. Included amongst the procedural breaches are as follows. First, he was issued with an adult statement of evidence form on 13th May 2002. He should, it is pointed out, have been provided with a children's statement of evidence form which used a simpler and more child-friendly approach and language. The children's procedure would also have enabled the claimant to have 28 days as opposed to 14 days to complete the form. It is pointed out by Miss Finch that the detail supplied in that form, and in a fairly brief continuation statement appended to it, there was little detail given.
24. The submission is then made with the assistance of the material obtained by the interested party that by the time the interview of 4th May 2004 took place, the defendant had been notified of the Local Authority's age assessment and should have been aware that the claimant was a child. If the procedure had been followed, then the strong probability is that the claimant would not have been interviewed at all. It seems that the error was not noticed, even though towards the end of the interview form the claimant expressly told the interviewer that he was at that stage in foster care.
25. The determination by the Secretary of State, dated 11th May 2004, also proceeded upon the erroneous basis that the claimant was an adult and not a child. The appeal before the Adjudicator proceeded, it is pointed out by Miss Finch, in the absence of a medical report on the claimant regarding his psychological condition which had been obtained by the Medical Foundation. It is pointed out that the claimant's then solicitor abandoned any Convention claim based on medical grounds and did not provide the Adjudicator with the report. This would have confirmed that the claimant was suffering from panic attacks, having been traumatised by his previous experiences, something that he had mentioned in his asylum interview. The point is made by Miss Finch that the claimant at that stage

as a minor would not have been in a position, even had he understood the proceedings, to have given his informed consent to the withdrawal of a claim of that type.

26. Miss Finch points out that since the appeal proceedings, yet further evidence has come to light supporting the extent and seriousness of the claimant's psychological and emotional difficulties. She draws a comparison between the proceedings in relation to an asylum claim and various other forms of proceedings in order to emphasise the disadvantage that the claimant had suffered by being treated as an adult. She points out that in many proceedings a litigation friend would be compulsory, but not so in the case of asylum claims in which a child applicant has no such entitlement.
27. For all those reasons, Miss Finch submits not only that the procedure was flawed but that it was fatally flawed in the sense that the decision arrived at at the end of the procedure could not be regarded as either lawful or reliable.
28. In answer to those submissions, Mr Johnston concedes that aspects of the claimant's case give rise to an understandable human reaction of sympathy, but he says that those feelings should not be allowed to overcome or cloud the fact that the decision itself is not flawed on public law grounds. He points out that there is no single issue on which any breach of procedural or policy provisions can be shown to have been crucial to the outcome of the asylum claim. He says that it is noteworthy that Miss Finch has not submitted that she can establish that there would have been a different outcome had all proper procedures been followed; he submits that in fact the reverse is the case, that it is highly unlikely that the outcome would have been different, even had all proper procedures been observed. Mr Johnston also points out that these judicial review proceedings do not seek to challenge the initial decision to treat the claimant as an adult, nor the defendant's decision to refuse the asylum claim, nor the decision of the Adjudicator. He points out that the decision of the Adjudicator was not appealed. He stresses that whatever defects may be found in the procedure, this was not a case of bad faith, although he concedes that the reason for any defects, whilst material, would not alter the effect of such defects on the claimant himself. He submits that if one analyses in detail the facts of the case, no unfairness arises from the claimant having been treated as an adult. He says that the time allowed to complete the SEO form is immaterial because it was completed within a day in any event, that the claimant was asked the same sort of questions as he would have been asked in the children's form. There is no evidence that the questions would have been answered in any different way. He submits that the reason for a child not being interviewed is because of the potential for unfairness or distress, but equally in this case it can be said that the interview provided the claimant with an opportunity of putting forward his case and therefore there was no unfairness attached to it. He reminds the court of the provisions from which I have already quoted which make it clear that there was no absolute bar to a child being interviewed, depending on the circumstances, and says that here, in the absence of documentary evidence, there would have been limited recourse to any other source of information about the claimant.
29. Put briefly, he submits that the decision was not unlawful on public law grounds and whilst there might have been breaches in procedure, there was no unfairness in treating the defendant as an adult.

30. I should perhaps note there that Mr Johnston's original position was that there had been no procedural breach because there was no evidence of the defendant being informed of any assessment of the Local Authority of the claimant's age until the concession was made at the outset of the appeal proceedings. Very properly, Mr Johnston has modified that position in the light of the documents produced by the Local Authority, but still submits that there was no resultant unfairness.
31. As it seems to me, there is no doubt that the claimant was treated, during the very long period of the consideration of his case, as an adult rather than a child. He was treated as such from his arrival in this country aged 15 until the appeal proceedings over two years later. When I say he was treated as an adult, I mean by the defendant. There is no evidence, or even suggestion, of bad faith in that matter. However, the effect, if any, on the claimant of being treated as an adult and the consequences for him would be no different, whatever the reason for so treating him.
32. I am unable now, particularly in the light of the documents that have been recently produced, to accept that there was no breach by the defendant of his own guidance. I am prepared to accept that there was no breach prior to February 2004, or, at any rate, no deliberate breach, but it is clear that as from that time the IND, and therefore the defendant, should have known that the claimant was a child and should have known that because of notification by the Local Authority. Nevertheless, it continued to deal with the case as if the claimant was an adult, thereby compounding its earlier unwitting error. Furthermore, there was reference in the interview on 5th May 2004 (bundle B86) to the claimant being with a foster family, which should have enabled the breach of guidance belatedly to have been detected.
33. What significance, if any, should the court attach to the failure to treat the claimant as a child? In my judgment, substantial significance should be attached to it, both generally and in relation to this particular case. The underlying reasoning which supports the detailed special provisions for children is obvious. A child, by reason of his lack of knowledge, experience and maturity, cannot be expected to comply with procedures in the same way as an adult. Of course, a child may lie as well as tell the truth, but he may also find it more difficult to answer questions with the necessary understanding and insight. That is reflected, and properly reflected, in the general practice set out in the defendant's guidance of not conducting interviews with children in asylum cases, save in exceptional circumstances. If those exceptional circumstances apply, then such interviews should be carried out by a specially trained person. One consequence of implementing those procedures is that, unlike an adult, a child would not normally be put in the position of detailed comparisons being made between an interview and his subsequent evidence and of adverse inferences being drawn from inconsistencies. Throughout the proceedings, in other words, if the guidance is observed, a more understanding and child-friendly approach is plainly considered appropriate. In this case, having been notified that the claimant was a child, the defendant or its agents carried out an extremely detailed interview in breach of the guidance. A significant reason for the Adjudicator reaching adverse conclusions on credibility was the presence of inconsistencies between different accounts given by the claimant.

34. Mr Johnston is right when he submits that the claimant cannot establish a particular substantive issue which would have been differently decided had the proper procedure been adopted, but neither, in my judgment, can it be said that the outcome would necessarily or inevitably have been the same if the correct procedures had been adopted. That, I think, follows on the facts of this particular case having regard to the period during which the mistaken procedure persisted, including not only the screening interview but the other interview two years later.
35. I certainly do not go so far as to say that procedural errors in the form of breach of guidance would be fatal in all cases, but having considered this matter carefully, I am satisfied that they are fatal to the validity of the present decision. I say that because the claimant was not just marginally under 18 on his arrival, he was only 15 years of age when the screening interview took place. I say it also because of the two year delay to which I have already referred. That had at least two effects. First, it interrupted consideration of the claim for a lengthy period of time which, as a matter of fact, constituted a significant period of the claimant's life. Secondly, it allowed him to acquire a family life and connections in this country, in contrast with the total apparent absence of family or other connections in Albania.
36. Following that two year delay, as I have already said, after it should have become apparent, on any view, that he was still under age, he was interviewed as an adult. Of course, it is right to say that once the Adjudicator had been informed that the claimant was a child, he took that into consideration and approached the matter on that basis on appeal. It is also true to say that no application was made to appeal the Adjudicator's finding that the defendant's decision was proportionate. Nevertheless, the inconsistencies played a significant part in the assessment of credibility. More fundamentally, it is clear that if the claimant had been dealt with from the outset as a 15 year old, an entirely different approach would have been adopted by the defendant. That is the whole purpose of the guidance. I am by no means persuaded that if such an approach had been adopted throughout, the outcome would have been the same. It may or may not have been.
37. I have also considered the points made about the failure of the claimant's solicitors to put in the medical evidence about the nature of that medical evidence and matters arising from that. If the Adjudicator had been dealing with an adult appellant it cannot be said that the psychological and emotional problems disclosed would have been critical in altering the decision on proportionality under the Convention. In my judgment, that issue alone, whilst significant, could not be crucial in this case. It is rather the adoption of a fundamentally wrong approach to the procedures in relation to this claimant and the potential effect of that upon him which lead me to the conclusion that the decision taken consequent on those procedures must be regarded as flawed and the decision is therefore quashed.
38. MISS FINCH: My Lord, I am obliged. I would just seek a costs order for the claimant.
39. MR JUSTICE GIBBS: Yes.

40. MR JOHNSTON: My Lord, we do not oppose costs. My Lord, forgive me, I was just discussing the appropriate form of relief.
41. MR JUSTICE GIBBS: I was going to ask you to consider that because although I said the decision was quashed, I am open to representations.
42. MR JOHNSTON: My Lord was using shorthand. We agree, effectively, that it should be an order quashing the decision to issue removal directions. The practical effect of that will be that the process will start afresh. The claimant will be interviewed as an adult and the process will take its course.
43. My Lord, I seek permission to appeal. I do so on one ground alone. The primary trigger for your Lordship's decision was the breach of procedure in interviewing the claimant in May 2004 and the sole ground on which I seek permission to appeal is that, in my submission, it is arguable that interviewing a 17-and-a-half year old was not a sufficient procedural flaw to render the subsequent decision unlawful in circumstances where, firstly, had the claimant been six months older then he could have and would have been interviewed in the full procedure, and secondly, the Adjudicator was able to and did take into account his age. I am also asked to advance the second ground that the two year delay cannot be said to have had an effect on the outcome of the case.
44. MR JUSTICE GIBBS: Mr Johnston, may I deal with both those grounds? I am not going to give you leave for these reasons: that whilst the claimant was 17 when he was in fact interviewed, by reason of the delay which had occurred, he was being interviewed in relation to matters which had occurred prior to his arrival at which time he was 15 or under. In that sense I deal also with your second ground because nothing in my judgment was intended to convey that the delay of two years was in itself unlawful. Rather, it was one of the circumstances which persuaded me that, on the facts of this particular case, the effect of the procedural breach or breaches was fatal.
45. MR JOHNSTON: I am grateful.