

Case No. CO/8829/2011

Neutral Citation Number: [2012] EWHC 3053 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 27 July 2012

B e f o r e:

HIS HONOUR JUDGE BIRTLES
(Sitting as a Deputy High Court Judge)

Between:
THE QUEEN ON THE APPLICATION OF ZS_
Claimant

v

SECRETARY OF STATE FOR HOME DEPARTMENT_
Defendant

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The Claimant appeared in person and was assisted by his Litigation Friend, Mr Fazlula Sapi (the Claimant's uncle)

Mr J Auburn (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T

Introduction

1. This is an application for judicial review in which, by agreement between the parties and the Court, the only issue to be determined at this hearing is the factual issue of the Claimant's age (see order dated 21 February 2012 of Miss Karon Monaghan QC Sitting as a Deputy High Court Judge).

Representation

2. The Claimant is representing himself. I permitted his Litigation Friend to assist him as a McKenzie adviser. Until very recently the Claimant was represented by TV Edwards Solicitors. However, they came off the record on 10 July 2012. That order was approved by Deputy Master Knapman on that date.
3. The First Defendant is represented by Mr Jonathan Auburn of counsel. The Second Defendant is not represented and does not appear. There was an application by the Claimant and the Second Defendant, or the Claimant's solicitors and the Second Defendant, for the Second Defendant to be removed as a defendant on the basis that the Claimant has permanently left the County of Oxfordshire and now resides with his uncle and litigation friend in Birmingham. That application was opposed by the First Defendant. It did not go any further and the Second Defendant therefore remains in the case.

The Pleadings

4. By reason of the limited issue I have to try today, it is not necessary to refer to the lengthy grounds attached to the Claim Form, nor the equally lengthy amended grounds, nor the somewhat briefer Acknowledgement of Service and Summary Grounds of Defence. Suffice it to say that for this hearing I can summarise the parties' arguments as follows. The Claimant's case is that he is a child having been born in or around April 1996 and is therefore currently 16 years of age. He was therefore under the age of 18 when he entered the United Kingdom. The First Defendant's case is that the evidence as to the Claimant's age is such that, on the balance of probabilities, the Claimant is more likely than not to be over 18 years of age and was so when he entered the United Kingdom.

The Evidence

5. Documentary evidence. I read and was referred to a trial bundle. At the commencement of the trial on Tuesday of this week the litigation friend produced three separate documents, which I have called C1.
6. Oral evidence. For the Claimant, I heard Mr Safi, who is the Claimant. I also heard Mr Fazula Sapi, his uncle and Litigation Friend. Both witnesses gave evidence through an interpreter. The language is Pushtu. For the First Defendant, I heard Miss Jackie Louise, who is a social worker employed by the Second Defendant. I also heard Mrs Michelle Sovory, formerly Miss Michelle Hayden, who is also a social worker employed by the Second Defendant. These two witnesses carried out the age

assessment of the Claimant on behalf of the First and Second defendants. The age assessment appears at trial bundle tab C, pages 33 to 43. They found that the Claimant was over 18 years of age. I also read a witness statement of Mr Sebastian Baker, who is a senior case worker in a judicial review team of the UK Dublin/Third Country Unit of the UKBA. His witness statement exhibits a number of documents. I did not hear any evidence on behalf of the Second Defendant. Miss Lewis and Mrs Sovory were called by the First Defendant.

Credibility

7. I found the Claimant to be an unreliable witness for the following reasons:
8. 1. Internal consistency. I have made due allowance for the fact that the Claimant was giving evidence through an interpreter and speaks little English. However, there were a substantial number of conflicts between the Claimant's witness statement and his oral evidence. Examples are:

(i) The number of brothers he had. In his witness statement, paragraphs 4 and 36, he stated that he had two brothers (tab D, page 98). At his screening interview on 2 April 2011 he referred to two brothers as Roman Safi and Rual Safi. In his age assessment interview on 13 May 2011 he said he had one brother called Roman (tab C page 36). In his oral evidence he said that he had two brothers, but that Roman was his cousin and not his brother. He accepted in cross-examination that this was the first time he has mentioned this. I reject his explanation that in Afghan culture a cousin is called a brother until he is 18. His cousin Roman, who is now in the United Kingdom, showed no such difficulty in usage at his age assessment interview (see tab D page 49). Neither did Mr Sapi in his evidence.

(ii) How did the Claimant and Roman, his cousin, come to be separated on the journey to England? In his witness statement, at paragraph 36 (tab D page 103) the Claimant said this:

"I became separated from my brother Roman after approximately one month when the agent we were travelling with put us in separate lorries. I do not know where we separated and all I can be sure of is that it happened in the early part of my trip."

In his age assessment interview on 13 May 2011, he said that he had lost Roman in the forest (tab C page 36). In his oral evidence he said that, (a) he had lost Roman in the forest, and, (b) when they were separated by the agents and put in to separate lorries on a road on which cars were passing. The evidence is different.

(iii) In his witness statement, paragraph 36, he said after separating from Roman:

"I have not seen or heard from my brother since."

That witness statement is dated 8 May 2012. In fact he has been living at his

uncle's house, that is Mr Sapi in Birmingham, with his cousin Roman since about mid-2011.

(iv) His mother's age. In his witness statement paragraph 4 (tab D page 98), he said:

"My mother is Janet Bibi. I do not know (her age)".

That was in May 2012. I compare that with what he said in his screening interview on 2 April 2011 when he said she is approximately 38 years of age.

(v) His late father's age. In his witness statement, paragraph 4 (tab D page 98), he said:

"My father is Khalid Khan. I do not know (his age)."

That was in May 2012. I compare that with what he said in his screening interview on 2 April 2011 when he says that he is approximately 40 years of age.

(vi) The date when his father died. In his witness statement, paragraph 6 (tab D page 98) he said:

"My father was killed in the Spring of 2010."

In the same witness statement at paragraph 22 (D100) he said:

"My father was killed by the Taliban in February 2010."

(vii) His reasons for coming to the United Kingdom. In his Derbyshire County Council assessment, he told the assessor that:

"He choose to leave Afghanistan to travel to the UK because he had family here and he wanted to study here."

That was on 2 April 2011 (tab C page 2). In his screening interview on same day he gave us his reason for coming to the United Kingdom as "asylum" and he could not return to Afghanistan because:

"His father worked for the Afghan Government. Taliban killed him. Told him to join the Taliban. If not they would kill him."

In his witness statement, paragraph 31 (D102), the Claimant said that the Taliban had told his mother:

"They wanted to take me to carry out a suicide attack against the American forces".

In his oral evidence he said his life was in danger because his father was police in the Government, "They wanted me to be a suicide bomber". All of these accounts are not consistent, one with another.

(viii) In his age assessment interview with the Second Defendant, he said his

father was in the army (tab C page 36). Similarly, he said the same thing in his witness statement at paragraph 6(D98). In his oral evidence, he said that his father worked for the police. When the discrepancy was pointed out to him, he said that his father worked in both.

(iv) How does the Claimant know his age? In his age assessment interview with the Second Defendant, he said that.

"His mother had told him when he left home. She said to him, 'you are 15 years old now'".

In his oral evidence he said that he had always known his age.

9. 2. Consistency with documents. Much of what I have said about internal consistency applies here, too.
10. 3. Consistency with Mr Sapi. I have already referred to the differences with the Claimant about the meaning of the word "cousin" to describe Roman Safi. Mr Sapi back-tracked in his evidence when cross-examined about this in order to support the Claimant's evidence. More to the point is that Mr Sapi gave no direct evidence about the Claimant's date of birth, although he said that he was present in the village when he was born. He came to the United Kingdom in 2002. He was not present when the document relied upon by the Claimant, in particular in this case the Taskera, was obtained because he was in the United Kingdom.
11. 4. Inherent probability. I found the Claimant's evidence inherently less probable than that for the First Defendant. Thus, for example, the Claimant claims to have travelled at the age of 15 for seven months from Afghanistan to the United Kingdom. There is no contemporaneous document recording his birth. For the reasons I give later in my judgment, I find that the Taskera documents produced by the Claimant are (a) suspect and (b) do not assist me in assessing the Claimant's age.
12. 5. Demeanour. I found that the Claimant gave his evidence by rote. He seemed to have memorised a script and stuck to it. When the discrepancies in his evidence were put to him in cross-examination, he had a variety of responses. Thus, he was injured at the time of his age assessment interview, he did not understand the interview process, he was stressed by the interview process, he had language difficulties. I do not accept any of these explanations as being sufficient to explain the very considerable number of discrepancies I have pointed to.

Mr Sapi

13. I found Mr Sapi to be an unreliable witness. My reasons are these:
14. 1. Internal consistency about Roman Safi. In his witness statement, paragraph 2 (D113), Mr Sapi makes no reference to Roman Safi. However, by the date of the witness statement, 8 May 2012, Roman Safi had been living with Mr Sapi and his family for approximately a year. I asked myself why this material fact was omitted from the witness statement.

15. 2. Consistency with the Claimant. I find that Mr Sapi tailored his evidence to fit with the explanations given by his nephew, the Claimant, who gave evidence before him. This was particularly noticeable in his explanation about Afghan culture using the word brother for a paternal cousin until the paternal cousin was 18. He himself, that is Mr Sapi, had no difficulty making that distinction.
16. 3. Inherent probability. Although he claimed to have first-hand knowledge of the Claimant's age, he was unable to help me at all about an accurate date.
17. 4. Demeanour. Mr Sapi also gave his evidence as if he had learned it by rote and was unwilling and/or unable to deviate from it. There was no give or take. As I have said he seemed more concerned to argue the Claimant's case than give factual evidence.

The First Defendant's witnesses

18. I found both Miss Lewis and Mrs Sovory to be honest and credible witnesses. They impressed me as careful and conscientious social workers with considerable experience of compiling these age assessment reports. Their age assessment report is at C33 to 43. I was told by Miss Lewis, and I accept, that the interview process took some two hours. Having listened to the witnesses and read their reports several times I am satisfied that it is Merton-compliant.

The Background

19. The Claimant is a young person and an Afghan national. He claims to have been born in 1996 making him 16 years old at the date of trial. Derbyshire County Council estimated his birth to be 1 February 1991, making him now 21 years of age (C3). The Second Defendant, Oxfordshire County Council, assessed his age to be over 18 (C43). The Claimant was born and brought up in Afghanistan in Dara-I-Pech, Kunar Province. His mother is in Afghanistan. He certainly has a sister in Afghanistan as well as other relatives. His father is dead.
20. The Claimant left Afghanistan in around October 2010 travelling across Europe (C7). He undertook this journey with his brother Roman, who we now know to be his cousin. However, he became separated from his cousin during this journey. I have already given references to the inconsistent account of that separation. The Claimant travelled through Italy whilst making this journey (D104), as well as other countries (C7): see the match on Eurodak Matching System recorded at E1. The Claimant believes he arrives in the United Kingdom on or about 1 April 2011. On 2 April 2011 he was subject to an age assessment by Derbyshire County Council (C1 to 3). On 2 April he was also subject to an immigration screening interview by the First Defendant (C4 to 19).
21. While in the United Kingdom the Claimant claimed asylum. As there had been a match on the Eurodak system indicating that the Claimant had passed through Italy, steps were undertaken by the First Defendant to ensure his return to Italy. The Claimant has an uncle in the United Kingdom who is his Litigation Friend in this claim. The present proceedings were commenced on 16 September 2011 (B1). As I have already said, up to about a week before the trial, the Claimant was legally represented by a well-known

firm of solicitors specialising in immigration law. They, however, ceased to act for him.

The Afghan Calendar

22. Afghanistan uses a form of the Persian calendar, a solar calendar calculating years from the Hejrah with a very accurate system of calculation. The difference between the Afghan calendar and the Gregorian calendar used in this country is rather over 621 years. For the purposes of this case I will take 621 years.

The Taskera

23. The Claimant relies upon the validity of the Taskera which, he says, proves that he was 10 when he obtained it in 2006 and he is therefore now 16. However, in my view, it is more probable than not that the Taskera in this case does not prove that. The Pashtu version appears at E21. I have not seen the original. It is numbered 468455. I have seen two translations. The first is at E22 and has been translated by the Society of Afghan Residents in the Midlands (SARMID). The translation date is 8 April 2011. It bears the same number of 468455.
24. The second translation was produced on the morning of the hearing on Tuesday of this week. It is at C1, page 1. It is for an identity card, 786642, and purports to an English translation prepared by an administrative assistant of the Afghanistan Ministry of the Interior. It is a somewhat different translation and form from the first translation. By a letter dated 14 July 2011, the Afghan Embassy in London said this:

"Dear Jonathan Reeve [that was Mr Sufi's former solicitor], this is to confirm that Mr Z's national ID (Taskera) is a legitimate document. His Taskera is issued for him by the Ministry of Interior of Afghanistan and has also been attested by the Ministries of Justice and Foreign Affairs of the Islamic Republic of Afghanistan."

25. In my judgment, the important point about this document is that as the evidence is clear it was issued when the Claimant was taken by his father to a Ministry of Justice office in his village. However, it is a self-serving document. The Claimant's evidence is that the Taskera is issued when a child is 10 and is required when the child starts school. However, the Taskera simply records what the official at the Ministry of Interior office has been told by the Claimant's father. It is not proof of his age, it simply records the information provided by the father. There are no birth records in rural areas of Afghanistan. I have no evidence about the circumstances of it being issued, except from the Claimant who was (a) a child at the time, and (b) whom I have found is an unreliable witness.
26. The second document produced in support of the age is a document in Pushtu and English for the Ministry of Public Health in Kunar Province in Afghanistan (E23). There is an English translation at E24. It is undated and appears to be from census registration, although how that cross connects with the Ministry of Public Health is

unclear. It asserts that the Claimant was born on 2-1375; in the Gregorian calendar that is April or May 2006. However, I find the document to be of little assistance.

27. The third document relied on by the Claimant is his current passport. That was produced on Tuesday of this week. However, this was issued by the Embassy of Afghanistan in London on 5 July 2011. It is of no evidential value.

The Law

28. Since the Supreme Court decision in A v Croydon London Borough Council [2009] UKSC 8, it is clear that the final decision as to whether someone is or is not a child, is for the Court to determine. The question for the Court is one of pure fact: see RF and others v Lewisham London Borough Council [2010] 1 FLR 1463. However, a local authority age assessment may still be relevant and assist in determining this point.
29. The proper approach for me is set out by the Court of Appeal in R(CJ) v Cardiff City Council [2011] EWCA Civ 1590 at paragraph 53. The application of a legal burden is not the correct approach. There is no hurdle which the Claimant must overcome. The Court must decide whether, on a balance of probability, the Claimant was or was not at the material time a child and is a person under the age of 18 years of age. The Court will not ask whether the local authority has established on the balance of probabilities that the Claimant was adult, nor will it ask whether the Claimant is established on the balance of probabilities that he is a child.

Discussion

30. I have set out the evidence which I have heard for both sides. The trial bundle contains a number of documents which I have referred to and that includes, not only on the Claimant's side, the documents that he has originally given to his solicitors or given to his solicitors and recovered and produced in evidence on Tuesday. But it also includes, on the First Defendant's side, the age assessment and the oral evidence of the two social workers who compiled it. I have found that that age assessment was Merton compliant. Having considered all of the evidence I have come to the firm conclusion that on the balance of probabilities the Claimant is in fact now at least 20 years of age and certainly was over 18 years of age when he arrived in the United Kingdom in 2011. In summary, my reasons for that are these:
 1. The unreliability of the Claimant and his uncle and Litigation Friend as witnesses.
 2. The paucity of documentary evidence in support of the Claimant's case.
 3. The unreliability of the Taskera document and the other documents produced by the Claimant.
 4. The age assessment conducted by the Oxfordshire County Council, the Second Defendant.
31. Although the point was not raised directly, it is right that I should note that that age assessment was withdrawn by the Second Defendant, but it was not withdrawn on the basis that the Second Defendant was unhappy or rejected the conclusion of its two social workers, but on the basis that, as far as these proceedings were concerned, they no longer owed any legal duty to the Claimant because he had permanently left the County of Oxfordshire and moved to live with his uncle in Birmingham. There is no

evidence before me that the Second Defendant rejected the assessment carried out by its two social workers.

32. For these reasons I have found that the Claimant is in fact at least 20 years of age now and was certainly over 18 years of age when he arrived in the United Kingdom in 2011. It follows that the claim must be dismissed. I also order that the stay on removal from the United Kingdom is removed.
33. Yes, Mr Auburn.
34. MR AUBURN: I am grateful, my Lord. In relation to costs, we say that the costs should follow the event. The matter is somewhat complicated by the issue of TV Edwards' withdrawal. I would suggest that the appropriate order is that for the period in which the Claimant was in receipt of public funding, the usual form of order applies, the effect of which is that costs are not for the examination of the court. As for the period in which the Claimant did not have the benefit of public funding, well, whether or not Secretary of State proceeds with enforcement is entirely a separate matter, but we ask for the order.
35. THE DEPUTY JUDGE: I will make an order in those terms. I think that deals with everything, doesn't it?
36. MR AUBURN: Yes, everything.
37. THE DEPUTY JUDGE: Thank you very much. I can't give legal advice, but it may be Mr Safi -- you don't have anyone sitting behind you, do you?
38. MR AUBURN: Not today.
39. THE DEPUTY JUDGE: It may be that Mr Safi might benefit from a short explanation of what his position is, but that's matter for you, through the interpreter, obviously.
40. LITIGATION FRIEND: I do want to ask a question, sir. (Inaudible) his age; what about his asylum case, would that be dismissed as well?
41. THE DEPUTY JUDGE: I have found that he was over 18 when he arrived in this country. I can't give legal advice, but the Home Office is taking steps. I have removed the stay of preventing his removal from the United Kingdom but under the law as it is at the moment because he came to this country through Italy, the Home Office proposes to remove him to Italy under the Dublin Convention.
42. LITIGATION FRIEND: He is not going to be sent back to Italy?
43. THE DEPUTY JUDGE: That is what the Home Office proposes to do. But I do think that Mr Safi ought to make contact -- I can't give legal advice, you understand that.
44. MR AUBURN: I can explain the Home Office's position outside court. What would also assist other public authorities such as Birmingham is if any transcript could be produced as soon as possible.

45. THE DEPUTY JUDGE: Yes, can I order a speedy transcript? Is that possible? I am going to get up and leave the court. Mr Auburn has very generously offered to explain the legal position from the point of view of the Home Office, but I also think that -- it is obviously a matter for Mr Sapi and his nephew -- they may wish to seek legal advice. Whether they can go back to TV Edwards or not, I don't know, that's a matter for TV Edwards. But the intention is not to deport him to Afghanistan but under the Dublin Convention the United Kingdom is entitled to return him to Italy for Italy to process his asylum application. Good, thank you very much indeed.