Neutral Citation Number: [2016] EWHC 1453 (Admin)

Case No: CO/920/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 June 2016

Before :

SIR STEPHEN SILBER
(SITTING AS A JUDGE OF THE HIGH COURT)

- -

Between :

THE QUEEN on the application of AA	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
- and -	
WOLVERHAMPTON CITY COUNCIL	**Interested Party**

- -
- -

Michael Armitage (instructed by **Bhatia Best**) for the **Claimant**
John McKendrick QC (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 11 May 2016
Further written submission filed on 12 May 2016

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Approved Judgment

Sir Stephen Silber :

Introduction

1. The Claimant, who was then a Sudanese child, arrived in the United Kingdom and claimed asylum in July 2014. He was detained by the Secretary of State for the Home Department ("the Secretary of State") for 13 days from 17 February 2015 until `1 March 2015 when he was released. He now seeks, first, a declaration that he was unlawfully detained throughout this period, and second, damages for the tort of false imprisonment. It is not disputed, first, that the Claimant is entitled to that relief as he was unlawfully detained in the period from 27 February 2015 until 1 March 2015, and second, that I should remit the issue of the quantification of that claim. Thus, the dispute between the parties now relates only to whether the Claimant was unlawfully detained between 17 February 2015 and 27 February 2015.

2. Elisabeth Laing J granted permission to apply for judicial review in respect of two specific issues relating to the Claimant's detention between 17 February 2015 and 27 February 2015 and they were:

   i) whether the entire period of the Claimant's detention was unlawful, pursuant to paragraph 18B of Schedule 2 to the Immigration Act 1971 ("1971 Act"[1],) a provision which prohibits the detention of unaccompanied children pursuant to the Secretary of State's immigration powers save in very narrowly circumscribed cases ("Issue 1"). and

   ii) in the event that Claimant is unsuccessful in respect of Ground 1, the issue is whether Claimant's detention nonetheless became unlawful with effect from 23 February 2015, the date on which the Secretary of State was provided with a copy of a written "age assessment" that had been carried out by the interested party, Wolverhampton City Council ("the Interested Party"), confirming that the Claimant was a child ("Issue 2").

3. Issue 1 raises what is said to be an important issue of statutory construction with wide ramifications as to how to approach the interpretation of the word "child" when used in the term "an unaccompanied child" in Paragraph 18B (7) of Part 1 of Schedule 2 of the 1971 Act, where it is defined as "a person who is under the age of 18". The issue of statutory construction, which has to be determined, is whether these words should be afforded the literal and objective construction (as contended for by the Claimant) or whether given the doubtful meaning of the words, in their statutory context, the true statutory interpretation, involving the weighing of proper interpretative factors, results in the definition involving the reasonable belief of the immigration officer exercising his authority to detain, as has been contended for by the Secretary of State. I should record that no *Pepper v Hart*[2]-compliant material relating to what was said in Parliament relating to the correct approach to construing the word "child" has been adduced.

4. If the Claimant's case that the words should be construed objectively is accepted on Issue 1, it is now not disputed first, that he should be regarded as "a person who is

[1] See paragraph 10 below for the provisions
[2] [1993] AC 593

under the age of 18", second, that he was "unaccompanied", and third that he was entitled to the rights of such a person, including the limitations on the statutory power to detain him. As the remaining aspects of the Claimant's case are undisputed, the Claimant's detention from 17 February 2015 until 1 March 2015 would then be regarded as being unlawful and so he would be entitled to damages for unlawful detention and a declaration to that effect.

5. If, on the other hand, the Secretary of State's case on Issue 1 is accepted, then the age of the Claimant had to be determined by the Immigration Officer as assessed by him. In this case, that would have led to a finding that the Claimant was over the age of 18 and therefore he was not then "a child". In consequence, he would not have been regarded as unlawfully detained in the period until 27 February 2015 but subject to my findings on Issue 2.

6. The thrust of the second issue (which only arises if the Claimant is unsuccessful on the first issue) is that at 10.55am on 23 February 2015, the Claimant's solicitors provided the Secretary of State with a copy of an age assessment carried out by the Interested Party ("the Age Assessment") and which confirmed that the Claimant was "a child of the approximate age of 16/17years old". The Claimant's case is that on receipt of the Age Assessment carried out by the Interested Party, the Secretary of State should then have decided to release him on 23 February 215, and that thereafter he was wrongfully detained. In that event, the Claimant would be entitled to damages for unlawful detention from 23 February 2015 until 27 February 2015 as well as from the admitted period of wrongful detention from 27 February 2015 until 1 March 2015. The Secretary of State contends that he was entitled to detain the Claimant until 27 February 2015 as her officials had to consider the Age Assessment carried out by the Interested Party. The Claimant's case is that the Secretary of State's officials delayed wrongfully in considering the Age Assessment until 27 February 2015 when the Claimant's release was ordered.

The Agreed facts

7. The facts in this case are not in dispute and they are that:

   i) On 19 July 2014, the Claimant arrived in the United Kingdom on a lorry and he claimed asylum. He said that he was about 17 years old and was therefore a child. He was taken into detention, but the legality of that period of detention is not being challenged in these proceedings.

   ii) On 25 July 2014, Italy accepted that it was the Member State responsible for the Claimant's asylum claim under Dublin II as Italy was the Claimant's initial point of entry into the European Union.

   iii) On 6 August 2014, the Secretary of State certified the Claimant's asylum claim on "safe third country grounds" so that he could be safely removed to Italy and she issued directions for the Claimant's removal to Italy. These were cancelled after he brought two judicial review applications.

   iv) Permission to apply for judicial review sought by the Claimant was refused in respect of the first judicial review application on 4 November 2014, and on 12 January 2015 in respect of the second judicial review application.

v) On 6 February 2015, the Interested Party conducted an age assessment of the Claimant and on 17 February 2015. It concluded that the Claimant was "a child of the approximate age of 16/17years old".

vi) The Claimant was detained by the Secretary of State between 17 February 2015 and 1 March 2015 and it is now accepted by the Secretary of State that he was a child for that entire period of his detention.

vii) For the entirety of that period of detention, the Claimant was detained at immigration removal centres, initially Brook House Immigration Removal Centre (from 17 February 2015 until 28 February 2015) and then at Tinsley House Immigration Removal Centre from 28 February 2015 until his release on 1 March 2015. The Claimant's case is that he was unlawfully detained for the whole of that period and that is Issue 1.

viii) At 10.55am on 23 February 2015, the Claimant's solicitors provided the Secretary of State with a copy of an age assessment that had been carried out by the Interested Party on 16 February 2015, which confirmed that the Claimant was "a child of the approximate age of 16/17years old". Issue 2 is based on the claim that the Claimant should have been, but was not, released at the latest on 23 February when the Secretary of State received that age assessment.

ix) On 24 February 2015, the Secretary of State nonetheless decided to maintain the Claimant's detention. It was not until 27 February 2015 that the Secretary of State decided that she would release the Claimant from detention, in light of the Age Assessment. It is this delay in releasing the Claimant from 2 February 2015 until 27 February 2015 which forms the basis for Issue 2.

Issue 1

Introduction

8. As I have explained, this issue relates to the correct approach to construing the word "child" in paragraph 18 B of Schedule 2 of the 1971 Act and the word "child" is defined in paragraph 18 B (7) as "a person who is under the age of 18" .The 1971 Act gave the Secretary of State the power to detain persons for the purposes of immigration control. Part 1 of Schedule 2 sets out how such powers should operate. Paragraphs 16 to 20 deal with detention of persons liable to examination or removal.

9. Paragraph 16 of Schedule 2 of the 1971 Act grants a power to an immigration officer to detain someone subject to removal directions, subject to sub-paragraph 16 (2A), and it provides (with emphasis added) that:

> "(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
>
> (a) a decision whether or not to give such directions;

> (b) his removal in pursuance of such directions.
>
> (2A) But the detention of an unaccompanied child under sub-paragraph (2) is subject to paragraph 18B."

10. There is no dispute that removal directions had been issued by the Secretary of State in respect of the Claimant's return to Italy, and that there then existed a power to detain, subject to compliance with the restrictions set out in sub-paragraph 16 (2A) of Schedule 2 of the 1971 Act read with paragraph 18B, which states (with emphasis added) that:

> "(1) Where a person detained under paragraph 16(2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where—
>
> (a) the child is being transferred to or from a short-term holding facility, or
>
> (b) sub-paragraph (3) of paragraph 18 applies.
>
> (2) An unaccompanied child may be detained under paragraph 16(2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.
>
> (3) The first condition is that—
>
> (a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24-hour period, or
>
> (b) a decision on whether or not to give directions is likely to result in such directions.
>
> (4) The second condition is that the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the relevant 24-hour period in accordance with those directions.
>
> (5) An unaccompanied child detained under paragraph 16(2) who has been removed from a short-term holding facility and detained elsewhere may be detained again in a short-term holding facility but only if, and for as long as, the relevant 24-hour period has not ended.
>
> (6) An unaccompanied child who has been released following detention under paragraph 16(2) may be detained again in a short-term holding facility in accordance with this paragraph.
>
> (7) In this paragraph—

> 'relevant 24-hour period', in relation to the detention of a child in a short-term holding facility, means the period of 24 hours starting when the child was detained (or, in a case falling within sub-paragraph (5), first detained) in a short-term holding facility;
>
> 'short-term holding facility' has the same meaning as in Part 8 of the Immigration and Asylum Act 1999;
>
> 'unaccompanied child' means a person
>
> (a) who is under the age of 18, and
>
> (b) who is not accompanied (whilst in detention) by his or her parent or another individual who has care of him or her."

11. Sub-paragraph 16 (2A) and paragraph 18B were inserted to the 1971 Act by section 5 of the Immigration Act 2014, and the amendments came into force on 28 July 2014. It is common ground that a short-term holding facility is the only place where an unaccompanied child could be detained, and then only for 24 hours. The Claimant was detained for longer than 24 hours, in fact for 13 days. The Secretary of State accepts that the Claimant was unaccompanied, and so if the Claimant fell within the description of being "a child", his detention would have been unlawful from 17 February 2015.

12. To support their submissions, Mr. Michael Armitage, counsel for the Claimant, and Mr. John McKendrick QC, counsel for the Secretary of State, each rely on a number of factors including in each case, a different decision of the Supreme Court, which deals with how it should be decided if a person was a "child". The two cases reach different conclusions as to whether the age of the alleged child has to be determined as a factual issue or whether it depends on the reasonable belief of the immigration officer. Mr. Armitage relies on the decision in *R(A) v Croydon* [2009] 1 WLR 2557 ("the Croydon case") in which the Supreme Court declined to interpret the word "child" in s.20 of the Children Act 1989 in a subjective manner and instead construed it objectively as a matter of fact. Mr. McKendrick relies on the later case of R *(AA (Afghanistan)) v Secretary of State* [2013] UKSC 49; [2013] 1WLR 2224 ("the Afghanistan case") in which it was held that the word "child" in s.55 of the Borders Citizenship and Immigration Act 2009 ("the 2009 Act") should be construed subjectively. The relevant provisions of s.20 of the Children Act 1989 and of s. 55 of the 2009 Act are set out in the Appendix to this judgment.

The Claimant's Case on Issue 1

13. Mr. Armitage's case is that it is for the Secretary of State to show that there was a lawful justification for the decision to detain the Claimant. He submits that this contention is supported by Lord Atkin's dissenting speech in *Liversidge v Anderson* [1942] AC 206 which is now accepted[3] as correct and in particular, his statement at page 245 "that in English law every imprisonment is prima facie unlawful and that it is for a person directing imprisonment to justify it". Indeed, in the *Afghanistan* case,

[3] See *R v Inland Revenue Commissioners ex p Rossminster* [1980] AC 952, 1011 and 1025

Lord Toulson (with whom the other members of the Supreme Court agreed) explained that:

> "42. With rare exceptions (the most notorious example being the decision of the majority of the House of Lords in *Liversidge v Anderson* [1942] AC 206), the courts have looked with strictness on statutory powers of executive detention. These principles are all too well established to require citation of authorities".

14. Mr. Armitage also relies strongly on the unanimous decision of the House of Lords in *Khawaja v Secretary of State* [1984] 1AC 74 which considered the provision in paragraph 9 of Schedule 2 to the 1971 Act which stated that where "an illegal entrant" is not given leave to enter or to remain in the United Kingdom, an immigration officer may give directions for that person's removal. It was decided that the statutory provision required the Court in the words of Lord Scarman at page 113 G "to be satisfied that the facts which are required for the justification of the restraint put upon liberty do exist". In other words, he was stating that an objective approach was required and he stated at page 111 that if "Parliament intends to exclude effective judicial review of a power in restraint of liberty, it must make its meaning crystal clear".

15. Mr. Armitage proceeds to submit that the Secretary of State cannot justify the detention of an individual who is under 18 years of age merely because that individual appears to an immigration officer to be over 18 years of age. His case is that the words "unaccompanied child" requires a factual inquiry first, as to the actual age of the person concerned, and second, as to whether or not that person was accompanied. Mr. Armitage relies strongly on the *Croydon* case as first, the word "child" is defined in the Children Act 1989 in exactly the same terms as in paragraph 18B (7) of Schedule 2 to the 1971 Act namely "a person under the age of 18" and second, in that case, the unanimous decision of the Supreme Court was that the issue of whether an individual was a "child" was an issue of fact, but one which could not be determined by the mistaken but reasonable belief of the local authority. Mr. Armitage then relies on the well-known principle of statutory construction that where an enactment uses a term, which is one upon whose meaning the courts have previously pronounced, it may be presumed that it was intended to have that meaning in subsequent enactments, see *Bennion on Statutory Interpretation* (6th edition) 2008 at Section 210 (page 549-551). Indeed, Viscount Buckmaster explained in *Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.* [1933] A.C. 402 at 411-412: that

> "It has long been a well established principle to be applied in the consideration of Acts of Parliament that where a word of doubtful meaning has received a clear judicial interpretation, the subsequent statute which incorporates the same word or the same phrase in a similar context, must be construed so that the word or phrase is interpreted according to the meaning that has previously been assigned to it."

16. Mr. Armitage also stresses the fact that paragraph 18B (4) of Schedule 2 to the 1971 Act states (with emphasis added) that "the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the

short-term holding facility within the relevant 24-hour period". His case is that in sharp contrast, the approach to the meaning of an "unaccompanied child" in paragraph 18B (7) of the same Schedule is *not* expressed to depend on the reasonable belief of the immigration officer. So Mr. Armitage contends that the inference to be drawn from these differences in wording is that the issue of the age of an individual is not to be determined by the reasonable belief of the immigration officer, but instead it has to be decided by a factual finding as to the age of the individual concerned.

The Secretary of State's case on Issue 1

17. Mr. McKendrick contends that the application of established principles of statutory interpretation leads to the conclusion that the issue of whether the Claimant or any detained person is a person under 18 has to be determined by the assessment and reasonable belief of the immigration officer. In the alternative, he contends that the Court should adopt a strained interpretation of the statutory provisions to avoid the alleged absurdities that would result if the word "child" had to be construed as mater of objective fact. He submits that the proper approach to be adopted to interpreting ambiguous statutory language was explained by Lord Simon in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 W.L.R. 231 when he stated at page. 235-236 (emphasis added): that:

> "Counsel for the appellants urged your Lordships, as he did the Court of Appeal, to modify the natural and ordinary meaning of the statutory language — in effect, to add words which are not in the statute in order to obviate what he claimed were the absurd and anomalous consequences of taking the words literally.
>
> The rider to 'Lord Wensleydale's golden rule' may seem to be at variance with the citations of high authority contained in the speeches of my noble and learned friends. But this is not really so. The clue to their reconciliation is to be found in the frequently cited passage on statutory construction in Lord Blackburn's speech in *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. 743, 763:
>
> 'In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view.'
>
> …
>
> What the court is declaring is 'Parliament has used words which are capable of meaning either X or Y: although X may be the primary, natural and ordinary meaning of the words, the purpose of the provision shows that the secondary sense, Y, should be given to the words.' So too when X produces

> injustice, absurdity, anomaly or contradiction. The final task of construction is still, as always, to ascertain the meaning of what the draftsman has said, rather than to ascertain what the draftsman meant to say. But if the draftsmanship is correct these should coincide. So if the words are capable of more than one meaning it is a perfectly legitimate intermediate step in construction to choose between potential meanings by various tests (statutory, objective, anomaly, etc.) which throw light on what the draftsman meant to say'

18. Further, Mr. McKendrick also submits that a Court must assume the legislator intended common sense to be used in relation to the facts of the case, see *Bennion* at Section 197 on page 511.

Use of language in Paragraph 18 B

19. First, he relies on the language of the legislation and in particular on the language used in paragraph 18B which states (with emphasis added) that: "where a person detained under paragraph 16 (2) is an unaccompanied child…" and that leads to paragraph 16 (2) and significantly to the power to detain. He says that this is an issue in the discretion of the immigration officer as it is stated (with emphasis added) that the person concerned "may be detained under the authority of an immigration officer". So, Mr. McKendrick contends that an immigration officer must first, decide whether to detain a person pursuant to paragraph 16 (2); and then second, determine if the person is an unaccompanied child in order to decide the maximum duration and location of the person's detention.

20. He submits that whilst "a person …who is under the age of 18" appears to have a literal meaning, it must nevertheless be read within the regime set out in the statute as a whole and, in particular, within the context of paragraph 16 and paragraph 18B(1). Mr. McKendrick contends that it is clear that the determination of whether a person is under 18, is one which takes place under the authority of the immigration officer and therefore the determination required is by him or her. There is no need, in this context, it is submitted, for the statute to refer to the "reasonable beliefs" of the immigration officer because this is implied from the language of the statutory context.

Context of Paragraph 18 B

21. Mr. McKendrick relies on the context in which the words "unaccompanied child" appear in paragraph 18B and the unrealistic nature of the Claimant's submission that there can be an "entirely objective" definition of a person under the age of 18 especially in the time available. His point is that the Claimant's case ignores the fact that age assessment exercises raise complex issues in which it is difficult to reach a definite conclusion. Indeed, in these proceedings, the Interested Party in the Age Assessment concluded only that it was "more likely" that the Claimant is 16/17 years old, but it then qualified its conclusion by stating that "Social workers are mindful that this process is not an exact science and that there can be a five year error either way". Mr. McKendrick submits that it is necessary to bear in mind that the statute seeks accuracy to the degree of days and hours because the decision required is whether a person is over or under 18 years of age. Further, the context of the assessment of the Claimant's age must be seen against the reasonable conclusion of

the Defendant's officials arrived at in good faith that the Claimant was an adult, because his physical demeanour strongly suggested that he was significantly over 18 years of age in July 2014. He stresses that this presumption that the Claimant was an adult persisted therefore from July 2014 until 22 February 2015, which was when the Interested Party made its assessment.

22. Mr. McKendrick contends that this all points to the fact that an age assessment exercise is subjective with a range of possible reasonable responses and Parliament is likely to have been aware of this. He also attaches importance to the facts that not merely was an age assessment exercise difficult, but also that an unaccompanied child cannot be detained for longer than 24 hours. Mr McKendrick points out that Parliament was clearly aware that it was legislating for a series of complex decisions that had to be made in a short timescale. He contends that these factors point towards the immigration officer on the ground making the decisions and therefore deciding whether the person already detained was under the age of 18.

23. Thus, the Secretary of State's case is that in the context in which the decision to detain is made, the immigration officer has to perform the duty of determining whether the child is or is not accompanied. The language of the Act is silent on this, but plainly the reasonable assessment of whether an individual is "accompanied" or otherwise falls, given the context and language, to the immigration officer. The context clearly also points to the determination of whether the person is a child being one for the immigration officer to determine on the basis of his or her reasonable view.

Previous judicial interpretation of the word "child"

24. As I have explained, Mr. McKendrick relies heavily on the meaning attached to the word "child" by the Supreme Court in the *Afghanistan* case in which the issue on the appeal was described by Lord Toulson in this way :

> "3.The issue on this appeal is the effect of section 55 on the legality of the Claimant's detention under paragraph 16 over a period of 13 days. At the time of the detention the Secretary of State acted in the mistaken but reasonable belief that he was aged over 18. It is now an agreed fact that he was born on 1 February 1993 and so were aged 17. If his true age had been known he would not have been detained, because his detention would have been contrary to the Secretary of State's policy in relation to minors. The Claimant's case is that the fact of his age made his detention unlawful on the proper construction of section 55, and that the Secretary of State's reasonable belief that he was over 18 is no defence to his claim."

25. The issue in the *Afghanistan* case appeal arose under s. 55 of the 2009 Act and in particular sub-section 55 (6), which defined child as: "persons who are under the age of 18…" Lord Toulson noted [45] that leading counsel for the appellant had submitted that s.55 (6) of the 2009 Act should be interpreted in the same manner as s. 20 Children Act 1989, namely as a question of fact which was how the Supreme Court had decided the *Croydon* case. Lord Toulson rejected that submission explaining (with emphasis added) that:

> "49.I have referred to the natural and ordinary meaning of section 55(1). Its wording and structure are very different from section 20(1) of the Children Act 1989, as I have said, and I am not persuaded that section 55 should be interpreted in the way for which Mr Knafler contends in order to meet the UK's international obligations or to provide adequately for the welfare principle.

26. Lord Toulson considered the decision of Lang J in *AAM v Secretary of State for Home Department* [2012] EWHC 2467 (QB) where she applied an objective definition to child, which was similar to that adopted in the *Croydon case* when interpreting ss. 55 (6) of the 2009 Act, in a claim for false imprisonment. Lord Toulson, at [38], sets out Lang J's conclusions (with emphasis added) that:

> "128. Unfortunately, the immigration officers did not have regard to the Claimant's status as a child, and the need to safeguard and promote his welfare as a child, when they made the decision to detain him, because they were under the mistaken belief that he was not a child.
>
> 129. However, he was in fact a child, within the meaning of the definition of 'child' in subsection (6), and it is not possible to interpret this definition as if Parliament had included the words 'appears to be a child' or 'is reasonably believed to be a child'."

27. Lord Toulson went on to hold (with emphasis added) that:

> "50.The judgment in the AAM case [2012] EWHC 2567 was right on the facts as Lang J found them, but if and in so far as her judgment amounted to holding that any detention under paragraph 16 of Schedule 2 to the 1971 Act of a child in the mistaken but reasonable belief that he was over 18 would ipso facto involve a breach of section 55, I would disapprove that part of the judgment."

28. The Supreme Court determined that s. 55 (6) of the 2009 Act should not be interpreted in an objective manner, but rather the issue of whether an individual was a child was to be interpreted on the basis of the reasonable belief of the Defendant.

29. Mr. McKendrick accepts that the ratio of the *Afghanistan case* cannot determine how this court should interpret the meaning of "a child" in paragraphs 16 and 18B of Schedule 2, but he relies on the well-known principle of statutory construction, which I have set out at paragraph 17 above that where an enactment uses a term, which is one upon whose meaning the courts have previously pronounced, it may be presumed that it was intended to have that meaning in subsequent enactments as was explained by Viscount Buckmaster in the passage in *Barras* (supra) and which I have set out in paragraph 17 above.

Absurd Outcome of the Claimant's approach and other matters

30. Mr. McKendrick contends that if the interpretation relied on by the Claimant were adopted, it would lead to an absurd and anomalous outcome. Michael Gallagher, an assistant director in the Asylum and Family Policy Team of the Home Office, refers to the difficulty of assessing the age of young people who arrive unaccompanied without any birth certificate or passport and who claim to be children. He explained that the Secretary of State has a policy under which age-disputed individuals are regarded as adults if they meet one of a number of criteria, as the approach of the Home Office is not to treat an individual as an adult where there is any doubt as to whether they are an adult or a child.

31. It was Mr. McKendrick's submission that if the Claimant is correct and the Secretary of State must rely on objective evidence, and not the subjective assessment of the immigration officer, then the Secretary of State would face major difficulties operating a scheme for detaining persons it reasonably suspects are adults. If the Secretary of State cannot rely on the reasonable but mistaken assessment of her immigration officers, but must have, as the Claimant asserts, "objective evidence", then it is a likely inference that the Defendant could not detain persons as it is wholly unrealistic to believe that her immigration officers could obtain the evidence of the person's age in less than 24 hours. This is so because an unaccompanied child can only be held in a short-term holding facility for a maximum of 24 hours.

32. He also referred to the Secretary of State's detailed Guidance entitled "Assessing Age" which sets out a policy for initial age assessment which states (with emphasis as in the original) that:

> "Where there is little or no evidence to support the applicant's claimed age and their claim to be a child is doubted, the following policy should be applied:
>
> 1.The applicant should be treated as an adult if their physical appearance /demeanour **very strongly suggests that they are <u>significantly</u> over 18 years of age.**
>
> Careful consideration must be given to assessing whether an applicant falls into this category as they would be considered under adult processes and could be liable for detention.
>
> <u>Before</u> a decision is taken to assess an applicant as significantly over 18, the assessing officer's countersigning officer (who is at least a Chief Immigration Officer(CIO)/Higher Executive Officer must be consulted as a 'second pair of eyes'. They must make their own assessment of the applicant's age. If the countersigning officer also agrees to assess the applicant as significantly over18, the applicant should be informed that their claimed age is not accepted….Form 1S.97M should be completed and served **and signed by the countersigning officer (CIO/HEO grade or above)…"**

33. It has not been suggested, let alone established, that the Secretary of State complied with this procedure in the case of the claimant's detention in February 2015 with which this claim is concerned. Therefore it does not assist me in resolving this issue, especially as the Secretary of State relies on the *Afghanistan case* to contend that the reasonable belief of the immigration officer that the Claimant was over 18 years of age would suffice. This is a lower threshold than is set out in the Guidance set out in the last paragraph, but the test in the Guidance had been used in relation to a previous period of the Claimant's detention[4].

34. Mr. McKendrick says that applying the principle stated by Lord Simon and set out in paragraph 17 above, I should find that the reasonable belief of the immigration officer should determine if an individual is a "child" and that it need not be proved as a matter of objective fact.

Discussion on Issue 1

35. First, Mr Armitage contends that the Court will be slow, particularly in the context of cases involving deprivation of liberty and deportation, to construe powers of executive detention so as to make them conditional only on the beliefs of the detaining official. In support he relies on the decision of the House of Lords in *Khawja v Secretary of State* [1984] 1 AC 74 in which it had to construe paragraph 9 of Schedule 2 of the 1971 Act which provided that where "an illegal entrant" is not given leave to enter or remain in the UK, an immigration Officer may give directions for his removal. At the time of that case, it was only when the immigration officer was entitled to give such directions that the power to detain arose. The House of Lords refused to read Paragraph 9 of Schedule 2 as meaning "where the immigration officer has reasonable grounds for believing a person to be an illegal immigrant".

36. Lord Scarman explained in *Khawja* at page 111 E that:

> "Faced with the jealous care our law traditionally devotes to the protection of the liberty of those who are subject to its jurisdiction, I find it impossible to imply into the statute word the effect of which would be to take the provision paragraph 9 of Schedule 2 of the 1971 Act [which provided that where "an illegal entrant" is not given leave to enter or remain in the UK] out of the precedent fact category".

37. A similar approach was adopted by Lord Atkin in *Liversidge v Anderson* (supra) as I explained in paragraph 13 above where I also quoted Lord Toulson's statement in the *Afghanistan case* that "the courts have looked with strictness on statutory powers of executive detention". Baroness Hale explained in [18] of the Croydon case that "where liberty is at stake, the court would be slow to read [a provision as only

[4] When I circulated a draft of this judgment to Counsel, it was pointed out to me by Mr. Mc Kendrick that in a prior period of the Claimant's detention (which is not under challenge in these proceedings), the Secretary of State gave effect to her immigration policy on 19 July 2014 as "the immigration officer concluded that the Claimant's physical demeanour strongly suggests that he is significantly over 18". There was no evidence before the Court that the Secretary of State had regard to this procedure that had been carried out in that earlier period of detention when re-detaining the Claimant in the period with which this application is concerned.

requiring a decision-maker to have reasonable cause to believe a relevant fact]". As Lord Scarman explained in *Khawja* (supra) at page 111 "If Parliament intends to exclude effective judicial review of a power in restraint of liberty, it must make its meaning crystal clear".

38. Second, both Counsel contend that their cases are supported by the fact that Paragraph 18B (4) states that one of the conditions for detaining a child in a short-term holding facility is that (with emphasis added) "the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the relevant 24 hour period". By way of contrast, Paragraph 18B (7) does not state that a child is a person who the immigration officer reasonably believes to be a child, but merely states that a child is a "person ...who is under 18 year of age".

39. The case for the Secretary of State is that reading these two provisions together, the question is not whether an individual is a child, but instead whether the immigration officer has reasonable grounds as to that individual's belief. I am unable to accept that submission which entails rewriting Paragraph 18B (7) so that it reads that child is a "person ...who the immigration officer reasonably believes is under 18 year of age".

40. Indeed, on the contrary, the correct inference to be drawn from the absence of any provision that the reasonable belief of the immigration officer will determine the age of the individual is that the intention of Parliament was that (in contrast to the matter set out in Paragraph 18B (4)) the issue of whether a person is a "child" in Paragraph 18B (7) would not be resolved by the reasonable belief of the immigration officer as to whether the person concerned was a child. No good reason has been put forward to show why this is not a correct approach.

41. Third, Mr McKendrick contends that if the interpretation relied on by the Claimant is accepted and the issue of whether a person is a child has to be determined as a matter of fact rather than by the reasonable belief of the immigration officer on that person's age, it would lead to an absurd and anomalous outcome. As I have explained, he relies on the evidence of Mr. Gallagher. His case is that it would be totally unrealistic in the time allowed to require the Secretary of State to obtain the evidence of the actual age of an individual in 24 hours, because an unaccompanied child can only be held in a short-term holding facility for a maximum of 24 hours.

42. I am unable to agree that the Claimant's interpretation leads to an absurd and anomalous outcome as the provision means that the immigration officers have to be very careful in detaining individuals who claim to be children. In any event, as Lord Simon of Glaisdale explained in *Stock v Frank Jones* [1978] 1 WLR 231, 237:

> "Parliament is nowadays in continuous session, so that an unlooked-for and unsupportable injustice or anomaly can be readily rectified by legislation; this is far preferable to judicial contortion of law to meet apparently hard cases with the result that ordinary citizens and their advisers hardly know where they stand".

43. I would respectfully follow this approach and reject the absurdity argument in this case, but there are other factors which support that conclusion. I add that the

Secretary of State's own department drafted the legislation which she is now saying is anomalous and/or absurd and these provisions must have been drafted at a time when her officials must have been aware of the alleged problems caused by the use of the word "child" from previous cases. Indeed, the Secretary of State had been an active party in the *Croydon case* as an intervening party and she or her predecessors had been a defendant in the *AAM case,* in the *Khawaja case* and in the *Afghanistan case* all of which preceded the amendments to the 1971 Act with which this application is concerned. In addition, the Secretary of State was well aware of the difficulty of assessing the age of immigrants as was explained in the Guidance "Assessing Age' to which I have referred in paragraph 32 above. So when the relevant amendments to the 1971 Act were being drafted and enacted, the Secretary of State must have been aware of what are now said to be the alleged absurdities on which she now relies. Thus, I reject the contention that it would be absurd and anomalous to require the issue of whether an individual is a "child" to be proved as a matter of objective fact.

44. Fourth, I cannot accept Mr McKendrick's submission that the fact that the immigration officer has a discretion as to whether to detain an individual means that he has a discretion to determine the age of the individual. The discretion does not extend to assessing the age of the child which is a separate issue and which is not expressed to be subject to the discretion of the immigration officer or under the authority of the immigration officer. I am fortified in reaching that conclusion by the established view that in Lord Scarman's word in *Khawaja:* "if Parliament intends to exclude effective judicial review of a power in restraint of liberty, it must make its meaning crystal clear".

45. Fifth, the decision in *Khawaja* is instructive as it is authority for the view that where an "illegal entrant" is not given leave to enter or remain in the UK, an immigration officer may give directions for his removal, but the fact that an individual is an immigrant must be proved as a matter of fact. Significantly, the House of Lords refused to accept the case for the Secretary of State for the Home Department that all that needed to be proved was that the immigration officer had reasonable grounds for believing that K*hawaja* was an illegal immigrant". I should add that *Khawaja* was cited in the *Croydon case* but not in the *Afghanistan case*.

46. I now will consider if the *Croydon* and *Afghanistan* cases support the contentions of either counsel.

The Croydon case

47. The issue in this case was how to determine whether an individual was a "child" which was defined in the provision under consideration (namely s.105(1) of the Children Act 1989) in the same terms as in paragraph 18B (7) of Schedule 2 to the 1971 Act ("a person under the age of 18"). The issue before the Supreme Court was whether the question of the age of the claimants was one for the decision of the court as a matter of objective fact, or for the decision of the local authority subject to review on public law grounds. The court decided that it was the former. Not surprisingly, Mr Armitage submits that I should follow that decision, but Mr McKendrick disagrees. He contends that Parliament could not have intended that the word "child" would be construed objectively.

48. First, Mr McKendrick submitted that age assessment exercises are difficult exercises to carry out as was shown by the fact that the Interested Party took a number of days to carry it out and it then produced a somewhat equivocal conclusion that the Claimant was "a child of the approximate age of 16/17years old". So his case is that Parliament cannot have intended that the question of whether a person was a "child" should be determined as a question of objective fact. This alleged difficulty of determining whether an individual was a child was raised as an objection to determining whether a person was a "child" in the *Croydon* case.

49. Baroness Hale (with whom Lords Scott, Walker, and Neuberger agreed) considered that this difficulty was not a valid reason for not determining the issue as a matter of objective fact. She explained at page 2567 in respect of the question as to whether a person is a "child" that:

> "... There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers".

50. Lord Hope at page 2573 took a similar view when he observed that that the question whether or not a person is a child:

> "51… is a question of fact which must ultimately be decided by the court" even though there is no denying the difficulties that the social worker is likely to face in carrying out an assessment of the question whether an unaccompanied asylum seeker is likely to face in carrying out an assessment of the question whether an unaccompanied asylum seeker is or is not under the age of 18".

51. The second objection of Mr McKendrick is that in the context of the Children Act 1989, the question of whether someone is a "child" is a gateway to a range of duties owed by the local authorities. Even if that is so, the question of whether someone is a "child" was a gateway to the power to detain in paragraph 16(2) of Schedule 2 to the 1971 Act. In the *Croydon* case, the existence of the duty or power was conditional on the objective finding of that person's age.

52. Mr McKendrick's objection is that the context in which a person's age needs to be determined under the Children Act 1989 is very different from the context in which a decision has to be made under paragraphs 16(2) (2A) and 18B of Schedule 2 to the 1971 Act, because in the case of immigration detention, the decision as to whether an individual is a "child" has to be taken "immediately". So it is said that Parliament could not have intended that the issue raised under the 1971 Act on the present application should be dealt with as a matter of objective fact, especially as in the immigration context, the individual concerned would not have reliable evidence of age.

53. I am unable to accept this point as under s.20(1) of the Children Act 1989, which was considered in the *Croydon case*, local authorities are under a duty to provide accommodation for any "child in need" in their area who appears to them to require accommodation in various circumstances such as having been abandoned. This required an immediate decision, as otherwise the person concerned would be street homeless. As I have explained, that decision under the Children Act 1989 was held to require a finding on an objective basis as to whether the person concerned was a "child".

54. There are striking similarities between the issues arising in determining if a person was a "child" under the Children Act 1989 and under the immigration provisions with which this case is concerned. First, in both cases powers of detention depend on whether the individual is "child", as there are powers of detention under the Children Act in s.46 as Baroness Hale explained in [18] of her judgment in the *Croydon* case where she observed that "where liberty is at stake, the court would be slow to read [a provision as only requiring a decision-maker to have reasonable cause to believe a relevant fact]".

55. Second, in cases under the Children Act and under the immigration provisions with which this case is concerned, there is frequently a situation where in Lord Hope's words at [51] in the *Croydon case* "reliable documentary evidence is almost always lacking". Nevertheless, the absence of such evidence did not prevent the Supreme Court deciding in the *Croydon case* that this difficulty for the decision-maker did not preclude them from concluding that that the issue of determining whether a person was a child had to be considered objectively. I do not see why I should not adopt the same approach.

56. In conclusion, I consider that the reasoning and the decision in the *Croydon case* is strong support for the Claimant's contention in this case that the word "child" should be determined on an objective basis, subject to what was said in the *Afghanistan case* which is the issue to which I now turn.

The Afghanistan case

57. As I have explained, this is the case on which Mr McKendrick placed great reliance, because the Supreme Court distinguished the *Croydon case* and held that the word "child" should not be given its objective meaning in relation to s 55 of the 2009 Act. His case is that in accordance with the approach advocated by Viscount Buckmaster in the *Barras* case[5], the word "child" in paragraph 18B should not be construed in an objective manner, but that instead it should be interpreted on the basis of the reasonable belief of the immigration official.

58. Mr Armitage disagrees, and he contends that the critical factor is that there are material differences between, on the one hand, s.55 of the 2009 Act on which the *Afghanistan* decision is based and, on the other hand, s.20 of the Children Act 1989 which was the background to the *Croydon case* and the provisions in the 1971 Act with which this application is concerned. He pointed out that the *Afghanistan* decision was given on 10 July 2013 which was more than a year before paragraph 16(2A) and 18B of Schedule 2 to the 1971 Act came into force on 28 July 2014.

[5] See paragraph 15 above

59. The significance of that is that during the period of detention in the *Afghanistan case*, there was no statutory restriction on the powers of detention of unaccompanied children. It followed that in Lord Toulson's words in that case at [43] "there was no dispute that the Claimant came [within] those powers of detention]". That is the dispute in the present case and that shows a crucial difference between the present case and the *Afghanistan case* especially because, as I have explained in paragraphs 35 to 37 above, where liberty is at stake, the courts require evidence that the conditions required for detention have been satisfied and not merely that it is believed that they have been satisfied. The 2009 Act contains no statutory restrictions on the detention of children, but instead it deals with the general duty to safeguard and promote the welfare of children, which is very different from the powers of detention which was the background to *Khawaja* and the present case.

60. The issue in the *Afghanistan case* was whether the detention of the Claimant was contrary to s.55 (1) of the 2009 Act (which is set out in the Appendix) under which the Secretary of State is obliged to make arrangements for ensuring that, among other factors, immigration functions are discharged having regard to "safeguard and promote the welfare of children" with the word "children" being defined in s.55 (6) as "persons who are under the age of 18".

61. Mr Armitage relies on the fact that in the *Afghanistan case*, Lord Toulson explained in [46] the crucial difference between the issue in the *Afghanistan case* and that in the *Croydon case* was that although s.55 of the 2009 Act and s.20 of the 1989 Act both contained the same definitions of children, "their structure and scope are very different" because under s.55 the Secretary of State "has a direct and vicarious responsibility".

62. The "direct responsibility" under s. 55(1) was in Lord Toulson's words in [46] the responsibility "for making arrangements for a specified purpose" and that was "to see that immigration functions are discharged in a way which has regard to the need to safeguard and promote the welfare of children ("the welfare principle"). He explained that the Secretary of State has vicarious responsibility by reason of s.55(3) of the 2009 Act for any failure by an immigration officer or other person exercising the Secretary of State's functions to have regard to her Guidance in "Every Child Matters" and "Assessing Age". This shows another difference between the present case and the *Afghanistan case*.

63. Lord Toulson considered [46] first, that on the facts of the *Afghanistan case*, the guidance complied with the Secretary of State's obligations under s.55(1); second, that there was no basis on the facts for finding that there was a failure on the part of any official to follow that guidance; third that there was no breach of s55; and fourth that the exercise of the detention power under paragraph 16 of Schedule 2 to the 1971 Act was not unlawful.

64. I agree with Mr Armitage that the reason why in the *Afghanistan case*, the Supreme Court did not accept the argument based on the decision in the *Croydon case* (which was that the word "child" be construed objectively) was that s.55 is a different type of provision.

65. Indeed, Lord Toulson recognised that his analysis was based on the specific situation in s.55 of the 2009 Act. It is noteworthy that he did not say anything to indicate that

the *Croydon decision* was not correct. In addition, he made it clear that his statement set out in paragraph 27 above that if Lang J was saying (with emphasis added) that:

> "any detention under paragraph 16 of Schedule 2 to the 1971 Act of a child in the mistaken but reasonable belief that he was over 18 would ipso facto involve a breach of section 55, I would disapprove that part of the judgment."

66. What is important about that passage is that Lord Toulson was limiting his disapproval to the adoption of the test of a "mistaken but reasonable belief that [the individual concerned] was over 18" to consideration of breaches of s55 and not to the matters raised in the *Croydon case*. Indeed, I could not detect any form of disapproval directed by any member of the Supreme Court in the *Afghanistan case* to the reasoning or to the decision in the *Croydon case.*

67. Pulling the threads together, I conclude that the Claimant's case is correct and the issue of whether he was a "child" had to be determined as an issue of objective fact. My starting point is Lord Scarman explained in *Khawaja* that:

> "Faced with the jealous care our law traditionally devotes to the protection of the liberty of those who are subject to its jurisdiction, I find it impossible to imply into the statute word the effect of which would be to take the provision paragraph 9 of Schedule 2 of the 1971 Act [which provided that where "an illegal entrant" is not given leave to enter or remain in the UK] out of the precedent fact category. If Parliament intends to exclude effective judicial review of a power in restraint of liberty, it must make its meaning crystal clear"[6]

68. So, the courts are reluctant to hold that a provision which interferes with a citizen's right to freedom need not be decided objectively as a precedent fact and this distinguishes the present case and cases like *Khawaja* from the *Afghanistan* case. There are further factors which I will set out in no particular order of importance and which show why the issue of whether the Claimant was a child must be decided as a matter of precedent fact and they are that:

i) Paragraph 18B (4) states that one of the conditions for detaining a child in a short-term holding facility is that (with emphasis added) "the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the relevant 24 hour period ". By way of contrast, Paragraph 18B (7) does not state that a child is a person who the immigration officer reasonably believes to be a child, but merely states that a child is a "person ...who is under 18 year of age". This indicates that the appropriate test for deciding if the Claimant was a child had to be determined as a matter of precedent fact and not according to the reasonable belief of the immigration officer.

[6] Similar views were expressed by Lord Atkin in Liversidge v Anderson (supra) and by Lord Toulson in the *Afghanistan case* as set out in paragraph 13above

ii) This point is supported by the additional and free-standing point that the courts are very reluctant to imply a term that would take an issue limiting the liberty of an individual out of the precedent category and I have referred to the statements to that effect from Lord Scarman[7], Baroness Hale[8] and Lord Toulson[9] as well as from Lord Atkin.[10]

iii) The *Croydon case* supports this conclusion.[11]

iv) The *Afghanistan case* dealt with a different issue as I explained in paragraphs 57 to 66 above. The main judgment of Lord Toulson refers to the *Croydon case* and it does not criticise it.

v) For the reasons set out in paragraph 15 above and in *Barras* (supra) Parliament must be presumed to have intended that the word "child" would be interpreted in accordance with the meaning attached to it in the similar cases of *Khawaja* and the *Croydon* case.

vi) For the reasons which I have set out, I cannot accept the submissions of Mr McKendrick that the issue of whether an individual is a "child" for the purposes of paragraphs 16 and 18B of schedule 2 can be decided by the reasonable belief of an immigration officer.

69. In reaching that decision, I have not overlooked any of the submissions of Mr McKendrick, and, in particular, his contention that the Claimant's case is "profoundly troubling for the efficient running of a fair immigration system". My task is not to ascertain what would lead to the most efficient running of a fair immigration system but to apply the established principles of construction. I should add that I have considered with care the statement of Lord Simon set out in paragraph 17 above relating to the applicable approach to construing statutory provisions and they also lead to the conclusion that the Claimant succeeds on Issue 1. For the avoidance of doubt, I do not consider that the requirement that the word "child" should be construed objectively leads to "injustice, absurdity, anomaly or contradiction".

Issue 2

70. As I have explained, this issue only arises if the Claimant does not succeed on Issue 1 in establishing that his detention was unlawful from the outset. As I have found in the Claimant's favour on Issue 1, it follows that Issue 2 is now only of academic interest and so I will cover it more briefly than I would have done if it had remained a live and crucial issue.

71. This issue has to be considered on the assumption that the Claimant's detention was lawful from 17 February 2015. The issue is whether the Secretary of State should have released the Claimant when his solicitors provided the Secretary of State with a copy of the Interested Party's Age Assessment at 10.55 am on 23 February 2015 stating that the Claimant was "a child of the approximate age of 16/17years old". It is

[7] See paragraph 67 above.
[8] See paragraph 37 above.
[9] See paragraph 37 above.
[10] See paragraph 13 above.
[11] See paragraphs 47 -56 above.

common ground that this assessment is correct or at least it is not being challenged in these proceedings.

72. Mr Armitage contends that that the Claimant should then have been released on receipt of the Age Assessment on 23 February 2015. First, he submits if, contrary to the Claimant's primary case, the Court considers that paragraph 18B should be interpreted so as to enable the Secretary of State to detain the Claimant during the period when there was no objective evidence in support of his contention that he was a child, the position changed immediately after the Secretary of State had been provided with the relevant objective evidence showing that the Claimant was a child in the form of the Age Assessment. In consequence, the restrictions in paragraph 18B applied with their full force. Mr Armitage contends that this meant that from 23 February 2015 onwards, the Secretary of State could not justify the Claimant's detention in a short-term holding facility, and in any event, the Claimant could not be detained for more than 24 hours or until 27 February 2015.

73. Second, Mr. Armitage relies on the published guidance of the Secretary of State which explains that these policy rules on child detention apply to all individuals who claim to be children, unless at least one of four criteria is satisfied. The only criterion that was even of potential relevance to the Claimant's case was category C, which stated of the individual concerned that his "*physical appearance/demeanour very strongly suggests that [he is] significantly over 18 year [sic] of age and no other credible evidence exists to the contrary*". Mr Armitage contends that given the Age Assessment, the Secretary of State's reliance on these criteria was very dubious indeed. His case is that once the Age Assessment was provided to the Secretary of State on 23 February 2015, this criterion no longer applied because there was then "*credible evidence*" in existence that the Claimant was a child. Indeed, there is no dispute that, once the Age Assessment had been accepted by the Secretary of State, the published guidance required the Claimant's prompt release. The dispute between the parties is whether or not the Secretary of State released the Claimant in "the shortest possible time".

74. Mr McKendrick contends that it was lawful to maintain the Claimant's detention from 23 February 2015 to 27 February 2015 because the Secretary of State was entitled to take "*some time*" in which to give the Age Assessment "*careful consideration*" before accepting it as proof that the Claimant was a child. He contends that four days was a reasonable period to perform that task in the circumstances of this case. In support of this contention, he relies` on the case of *R (C) v* Enfield [2004] EWHC 2997 (Admin). I do not consider that this fact-sensitive judgment assists the Secretary of State as the claimant in that case had not produced age assessment evidence, which had the cogency of the Age Assessment supplied by the Interested Party in this case. In addition, as I will explain in paragraph 77, the delay in considering whether the Claimant had to be released in the light of the Age Assessment was not the consequence of careful consideration, but instead it was caused by an inexperienced official, who did not raise the Age Assessment with more experienced colleagues, but when he did so, the Claimant was immediately released.

75. I accept that although the Secretary of State did need some time to review and to consider the contents of a local authority Age Assessment before authorising the Claimant's release, the evidence in this case does not support the contention of the Secretary of State that she was giving "*careful consideration*" to the Age Assessment

between its receipt on 23 February 2015 and the decision to release the Claimant on 27 February 2015.

76. I reach that conclusion because, the detention review conducted by the Secretary of State on 24 February 2015 stated (with emphasis added) that: "*PAP letter received and barrier to removal raised, this will be responded to shortly. Detention to be maintained due to disregard shown for EU immigration laws and risk of absconding is significant. Removal remains a likely prospect in the near future*". It seems clear that a positive decision was made to maintain the Claimant's detention notwithstanding the Age Assessment.

77. In addition and perhaps more importantly, the witness statement of Mr Mensah Logo, the Senior Manager of UK Dublin/ Third Country Unit of UK Visas and Immigration, explained that after receipt of the age assessment of the Claimant by the Secretary of State on 22 February 2015, "the inexperienced officer who carried out the review did not raise the age assessment with a senior or experienced colleague". Indeed, Mr Logo stated that the matter was only referred to a Senior Manager on 27 February and she immediately authorised the claimant's release on that day.

78. On the basis of the material I am satisfied if the Secretary of State had given "*careful consideration*" to the Age Assessment as soon as it was received on 23 February 2015, his immediate response should have been to order the Claimant's release on that day. Of course, that is what happened when proper consideration was given on 27 February 2015 as Mr. Logo has explained.

79. In reaching that conclusion, I have not overlooked the contention made on behalf of the Secretary of State based on the decision in *R (on the application of G) v SSHD* [2015] EWHC 3185 (Admin) that the Secretary of State's published guidance was not contravened when her officials took three days to release a claimant from detention following the provision of new evidence indicating that he was a child. In that case, the evidence that was provided was not a local authority age assessment, but evidence which necessitated further investigation. The position is very different in the present case where there was a local authority age assessment, and where the Secretary of State's own published guidance stipulates that "*considerable weight*" should be given to findings of age by local authorities, and that local authority age assessments will "*normally be accepted as decisive evidence*" as stated in paragraph 2.2.1 of the Secretary of State's *Assessing Age* guidance.

80. In the premises, the need to give careful consideration to the Age Assessment provides no justification for the Secretary of State's delay, and the concomitant maintenance of the Claimant 's detention, between 23 and 27 February 2015. There is no reason why the Age Assessment – a very short document – could not have been considered at the time it was received (10.55am on 23 February 2015) and the decision to release the Claimant was then taken on the same day.

81. A further objection to the Claimant's case on this issue is that the Secretary of State submitted that even if the delay in releasing the Claimant from detention between 23 February 2015 and 27 February 2015 constituted a breach of s 55, it was not a "material breach" which meant that the Claimant's detention was unlawful. In *R (Lumba) v Secretary of State for Home Department* [2012] 1 AC 245, 275, Lord Dyson explained [68] that an error had to be "material in public law terms… It is not

every breach of public law that is sufficient to give rise to a cause of action in false imprisonment. In the present context, the breach of public duty must bear on and be relevant to the decision to detain..."

82. In my opinion, the delay in releasing the Claimant between 23 February 2015 (when the Age Assessment was received by the Secretary of State) and 27 February 2015 (when the Claimant was released) was contrary and material in public law terms to the Secretary of State's published guidance which states that "*even where one of the statutory powers to detain is available in a particular case, unaccompanied children (that is, persons under the age of 18) must not be detained other than in very exceptional circumstances*", "*for the shortest possible time*" and "*must not be held in an immigration removal centre in any circumstances*": see Chapter 55 of the Secretary of State's *Enforcement Instructions and Guidance".*

83. I should add that Mr McKendrick has sought to derive assistance from the fact that the Age Assessment was completed on 16 February 2015, but it was only sent to the Secretary of State on 23 February 2015. I do not understand how this delay can reduce or extinguish any liability on the part of the Secretary of State.

84. So, in my opinion, even if the Claimant fails on Issue 1, he succeeds on Issue 2 as the Claimant's detention became unlawful with effect from 23 February 2015.

Conclusion

85. I am very grateful to both Counsel for their excellent and concise oral and written submissions. The Claimant succeeds on Issue 1 on a number of grounds, including statutory interpretation[12]. In addition, for the reasons which I have sought to explain, the Claimant succeeds on Issue 2.

[12] See paragraph 68 above.

APPENDIX

1. The relevant provisions of the Children Act 1989 state that:

> "20. (1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care." And
>
> "105(1) a 'child' means . . . a person under the age of eighteen".

2. S. 55 of the Borders Citizenship and Immigration Act 2009 provides that:

> "(1) The Secretary of State must make arrangements for ensuring that -
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are -
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> b) any function conferred by or by virtue of the Immigration Acts on an immigration officer; …
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> …
>
> (6) In this section
>
> 'Children' means persons who are under the age of 18; …"