Neutral Citation Number: [2009] EWHC 928 (Admin)

Case No: CO/7677/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 May 2009

Before:

THE HONOURABLE MR JUSTICE KEITH

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Between:

R (on the application of HBH)	**Claimant**
– and –	
The Secretary of State for the Home Department	**Defendant**
– and –	
Essex Crown Prosecution Service	**Interested Party**

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Ms Stephanie Harrison (instructed by **Bhatt Murphy**, **Solicitors**) for the **Claimant**
Ms Jenni Richards (instructed by **The Treasury Solicitor**) for the **Defendant**
Mr Anthony Arlidge QC (instructed by **The Chief Crown Prosecutor, Essex Crown Prosecution Service**) for the **Interested Party**

Hearing dates: 29 and 30 January 2009
Further written submissions: 2, 3, 5 and 12 February 2009, and 24 and 28 April 2009

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Judgment

Mr Justice Keith:

Introduction

1. This is another case relating to the assessment of the age of someone claiming to be under the age of 18. It arises in the context of a decision to prosecute him for an immigration offence. It is said that the methodology used to assess his age was unlawful. It all happened quite a time ago, and since this claim for judicial review was not issued until over two years later, there has been some uncertainty about who actually made the decision to prosecute the claimant. Accordingly, the Crown Prosecution Service appeared as an interested party in case it was thought that the decision to prosecute the claimant had been made by them. At an earlier hearing, Munby J directed that the claimant be referred to as HBH in reports of these proceedings, and accordingly that is how he will be referred to in this judgment.

The facts

2. HBH arrived in the UK at Stansted Airport on 30 July 2005 on an unknown flight. He had completed a landing card which gave his name, his nationality as Chinese and his date of birth as 30 April 1988, which would have made him 17 years old at the time. At about 11.15 pm, he was approached by an immigration officer in the arrivals hall. In answer to a series of questions, HBH said that he did not have a passport, and that he had come to the UK to claim asylum. He confirmed that he was 17 years old. Later that night he was searched, and no other documentation such as a boarding pass or an airline ticket was found. Two other Chinese nationals (who were to give similar accounts of their journey to the UK and who were also to be prosecuted) had been discovered in the arrivals hall at the same time.

3. At that time of night, a Chinese interpreter was not available, and it was decided to detain HBH overnight so that he could be properly interviewed the next day. At that stage, it was not thought that HBH might not be the age he claimed. That is apparent from the form which was used to authorise his detention. It contained the question: "Is this person claiming to be a minor but is believed to be an adult?" The answer recorded was "No". The fact that he was not thought at that stage not to be the age he claimed is also apparent from the fact that the Social Services Department of Essex County Council ("Essex") was contacted the following day. The attendance of a social worker was requested to act as HBH's appropriate adult while he was interviewed. Such a request would not have been made if he was not thought at the time to be a minor.

4. HBH was interviewed in connection with his claim for asylum by another immigration officer, Annette Rampley, the following afternoon with the assistance of an interpreter. Although Ms Rampley does not now recall whether a social worker was present or not, a file note completed the following day by someone in Essex's Asylum/Refugee Support Team recorded that a social worker had been present. It was during that interview that doubts began to emerge about HBH's true age. Ms Rampley recorded on the interview form that HBH was saying that he had attended school between the ages of 8 and 14, leaving secondary school in 2000. If he had been 14 years old in 2000, that would have made him 18 or 19 at the time, depending on when in 2000 he had left school and when his birthday was. That made Ms Rampley doubt whether he really was 17. That is what she claimed in a witness

statement (which she made on 9 April 2008 – about three years later – in connection with this claim) made her doubt the age HBH was claiming he was, and there is no reason to suppose otherwise since how old he said he was when he had left secondary school in 2000 *was* recorded by her on the interview form. The file note completed the following day in the office of Essex's Asylum/Refugee Support Team said that "[d]uring the interview it became evident that [HBH] is an adult", but the note did not go on to say how that view was reached.

5. After the interview, Ms Rampley told a chief immigration officer why she believed that HBH was not really 17. Not surprisingly, he has no recollection now of any such conversation with her, though he signed the standard letter which was used where someone who claimed to be a minor was assessed to be at least 18 years old. The material parts of the letter read:

> "You have applied for asylum in the United Kingdom. In making your application, you have claimed that your date of birth is **30 April 1988**. However, you have failed to produce any satisfactory evidence to substantiate this claim. *Furthermore, your physical appearance strongly suggests that you are eighteen years of age or over.*
>
> In the absence of any satisfactory documentary evidence to the contrary, the Secretary of State does not accept that you are a minor and you will be treated as an adult … " [Italics supplied]

There is no evidence about whether HBH's physical appearance was in fact regarded as significant, and the letter almost certainly referred to his physical appearance only because, as we shall see, the methodology used at the time to assess whether someone was a minor or not focused on their physical appearance. In view of the assessment that he was at least 18 years old, some subsequent documents gave him a notional date of birth of 1 January 1987.

6. In the course of the interview, HBH had said that he had left his own passport at home in China, that he had used a passport which he had been provided with and had been in English to check in with, and that it had been kept by the agent who had assisted him. These answers – together with the fact that he had arrived without a passport at all – suggested that he had committed an offence under section 2(1) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 ("the 2004 Act"), which in brief makes it an offence for someone not to have their passport with them when they are interviewed in connection with their claim for asylum. Accordingly, immigration officers contacted the police that day – at any rate that is what the Home Office case notes say. The notes go on to say that the police "agreed to prosecute but unable to take tonight. Will prosecute in the morning." That could mean that the police agreed to investigate the case the next day with a view to HBH being prosecuted, but since the Immigration Service had its own prosecution unit at Stansted, and since HBH was interviewed by an immigration officer (who I assume worked in that unit) the next day, it must have meant that the police agreed to charge HBH if immigration officers thought that a prosecution was appropriate.

7. HBH was detained overnight and returned to Stansted the following day – 1 August. There he was arrested by another immigration officer, Steve Rankin, and taken by

police officers to Stansted Airport Police Station where, with the assistance of an interpreter, he was interviewed that afternoon by Mr Rankin under caution. HBH declined to have a solicitor, saying that he had friends in China who could get him one. At the beginning of the interview, he gave his date of birth as 30 April 1988, but his age was not explored any further. He said that the passport he had used to check in with had been taken by the agent before he boarded the aircraft. At first he claimed that he had lost his boarding pass during the journey, but later on he said that the agent had told him to get rid of it. Again, he claimed initially that he had met the two other Chinese nationals at the airport, but he was then to say that he did not know how he had met them. He added that he had not presented himself to immigration control because the agent had told him not to. Following that interview, he was charged by the police (as were the two other Chinese nationals) with an offence under section 2 of the 2004 Act. According to the charge sheet, the officer in charge of the case was Mr Rankin (which reinforces the view that the decision to prosecute HBH was made by an immigration officer within the prosecution unit), and it showed HBH's date of birth as 30 April 1988 – presumably because that is what he claimed it was. Responsibility for the prosecution was then assumed by the Interested Party, the Essex Crown Prosecution Service ("the CPS").

8. The following day – 2 August – HBH appeared at Harlow Magistrates' Court. This was an adult court, not a juvenile court. He was represented by the duty solicitor. There was some discussion in court about HBH's age. The only evidence about that comes from two sources. The CPS representative at court wrote on the CPS file:

> "… def prod. Says 17 yrs but deeming exercise + Ct. say 19 or 20 yrs …"

And following HBH's plea of guilty, and his committal in custody to Chelmsford Crown Court for sentence, the warrant of commitment completed by the clerk of the court recorded that, although HBH had given his date of birth as 30 April 1988, he had been "deemed" by the court to be "over 18". That exercise to determine HBH's true age was presumably carried out pursuant to section 99(1) of the Children and Young Persons Act 1933, which provides (so far as is material):

> "Where a person, whether charged with an offence or not, is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child or young person, the court shall make due enquiry as to the age for that purpose, and for that purpose shall take such evidence as may be forthcoming at the hearing of the case …, and the age presumed or declared by the court to be the age of the person so brought before it shall, for the purposes of this Act, be deemed to be the true age of that person …"

We do not know the nature of the enquiry conducted by the magistrates' court into HBH's age, or what evidence, if any, it took on the topic, but the court may have been given the information which appears in the police file on HBH's prosecution, namely that Stansted was "an avenue for organised gang masters to facilitate entry of Chinese nationals", and that 17 was "an age that is now cherry picked by the crime network in an attempt to evade prosecution through age".

9. While awaiting his appearance at the Crown Court, HBH was detained at Chelmsford Prison. There is no evidence about the circumstances of his detention, but Ms Stephanie Harrison for HBH told me that he was detained in the young offenders' wing of the prison. That wing, she said, has two sections: one is for young offenders aged 16 and 17, the other is for those aged 18, 19 and 20. HBH, she said, was held in the latter. Whatever the position, HBH remained there (or maybe at Rochester Young Offenders' Institution for part of the time) until he appeared at Chelmsford Crown Court on 8 September 2005. There was some discussion about his age on that occasion as well. This time the evidence about that comes from only one source. The notes made by the CPS representative at court say:

> "HHJ isn't persuaded [HBH] is 17 – thinks 18."

Again, we do not know the nature of any enquiry conducted by the Crown Court into HBH's age, nor whether it took any evidence on the topic, though the exercise to determine HBH's true age was presumably carried out pursuant to section 164(1) of the Powers of Criminal Courts (Sentencing) Act 2000, which provides (so far as is material):

> "For the purposes of any provision of this Act which requires the determination of the age of the person by the court …, his age shall be deemed to be that which it appears to the court … to be after considering any available evidence."

10. The transcript of the judge's sentencing remarks shows that HBH was sentenced to 8 months' imprisonment, but that he would get credit for the 37 days he had spent on remand in custody. That would not have been a lawful sentence even if he had been 18 years old. Persons under the age of 21 could not then (indeed cannot now) be sentenced to terms of imprisonment (save as dangerous offenders under Chapter 5 in Part 12 of the Criminal Justice Act 2003). Leaving aside young offenders who were convicted of offences for which the sentence was fixed by law, the appropriate sentence for someone who had to receive a custodial sentence was detention in a young offenders' institution if they were 18 or over, or either a detention and training order or detention under section 91 of the Powers of Criminal Courts (Sentencing) Act 2000 if they were under 18. That, no doubt, was why the computerised records of the sentence passed on HBH recorded him as having been sentenced to 8 months' detention in a young offenders' institution rather than 8 months' imprisonment. That computerised entry proceeded on the assumption that HBH was at least 18 years old for it to have referred to detention in a young offenders' institution rather than to a detention and training order.

11. Having said that, the form of document used by an officer of the Crown Court to record the sentence which had been passed on HBH was the form which was to be used for persons under the age of 18. It was headed "Custodial order for persons under 18 years old", and recorded HBH's date of birth as 30 April 1988. That might suggest that the court *had* concluded that what HBH had claimed his date of birth was had been correct, but that is unlikely in view of the note in the CPS file, and the sentence of imprisonment which the judge passed.

12. HBH served his sentence at Rochester Young Offenders' Institution. Since the document used by the Crown Court to record HBH's sentence constituted the

authority for HBH's detention, it is likely that the Prison Service treated it as giving his correct age, and he would therefore have been accommodated in a wing for boys under the age of 18. He completed his sentence on 30 November 2005. But he was not released from detention. Instead, he was detained under the Immigration Acts and transferred to Oakington Detention Centre on 1 December 2005 pending the determination of his claim for asylum under the fast-track procedure. At that stage he was still being treated by the Immigration Service as at least 18 years old. An Immigration Service document dated 30 November 2005 gave the reason for that: his "[p]hysical appearance/demeanour strongly suggests someone who is 18 or over". That is highly unlikely to have been because his age had been re-assessed: it was almost certainly simply a repetition of the language in the standard letter HBH had got on 31 July 2005.

13. While at Oakington, HBH's case was taken up by the Immigration Advisory Service. Since he was still saying that he was only 17, they arranged for him to be seen by a consultant paediatrician. They also requested the Social Services Department of Cambridgeshire County Council ("Cambridgeshire") (Oakington being in Cambridgeshire) to assess his age properly. The consultant paediatrician examined HBH on 5 December, and assessed him to be 17 years old. That assessment persuaded Cambridgeshire to accommodate HBH pending their assessment of his age, and on 7 December he was temporarily admitted into the UK and released from detention into the care of Cambridgeshire. Two social workers from Cambridgeshire subsequently assessed him to be 17 years old. As a result of these assessments, the Immigration Service accepted that he was a minor, and treated 30 April 1988 as his date of birth. Although his claim for asylum was refused, he was given discretionary leave to remain in the UK until 29 April 2006.

The Immigration Service's policies

14. At the time when HBH arrived in the UK, the Immigration Service's policy relating to the assessment of the age of asylum-seekers who claimed to be under the age of 18 was set out in para. 38.9.3.1 of the Operation Enforcement Manual then in force. It read (so far as is material):

> "Sometimes people over the age of 18 claim to be minors in order to prevent their detention or effect their release once detained. In all such cases people claiming to be under the age of 18 must be referred to the Refugee Council's Children's Panel …
>
> IND [the Immigration and Nationality Directorate] will accept an individual as under 18 (including those who have previously claimed to be an adult) if:
>
> - credible documentary evidence has been provided, such as a passport or national ID card supporting the person's age
>
> - their appearance **strongly** supports their claim to be under 18

- a full social service department age assessment has been carried out suggesting that their age is under 18

IND does not commission medical age assessments. However the claimant may submit medical age assessment independently. This must be considered and due weight must be attached to it when considering an age dispute case. It should be noted though that the margin for error in these cases can be as large as 5 years either way. This is a complex area and, if in doubt, caseworkers should seek the advice of the Children and Family Asylum Policy Team in the Asylum Appeals Policy Directorate.

Once treated as a minor the applicant must be released as soon as suitable alternative arrangements have been made for their care.

Where an applicant claims to be a minor but their appearance **strongly** suggests that they are over 18, the applicant should be treated as an adult until such time as credible documentary or other persuasive evidence such as a social service department age assessment [is] produced which demonstrates that they are the age claimed …

In borderline cases it will be appropriate to give the applicant the benefit of the doubt and to deal with the applicant as a minor.

It is IND policy not to detain minors other than in the most exceptional circumstances. However, where the applicant's appearance strongly suggests that they are an adult and the decision is taken to detain it should be made clear to the applicant and their representative that:

- we do not accept that the applicant is a minor and the reason for this (for example, visual assessment suggests that the applicant is over 18), and

- in the absence of acceptable documentation or other persuasive evidence the applicant is to be treated as an adult."

Two comments should be made about this policy. First, the three ways in which someone would be accepted as under 18 were, of course, alternatives. It was sufficient for one of these criteria to be satisfied for someone to be treated as a minor. Secondly, although the second of the three criteria simply referred to the person's appearance, their demeanour was taken into account as well. That was why the document dated 30 November 2005 referred to both appearance and demeanour, even though the standard letter HBH was given on 31 July 2005 did not.

15. The three conditions were modified with effect from 30 November 2005. The relevant paragraph in the Operation Enforcement Manual read:

> "BORDER AND IMMIGRATION AGENCY will accept an individual as under 18 (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:
>
> - there is credible and clear documentary evidence that they are 18 years of age or over;
>
> - a full 'Merton-compliant' age assessment by Social Services is available stating that they are 18 years of age or over. (Note that assessments completed by social services' emergency duty teams are not acceptable evidence of age);
>
> - their physical appearance/demeanour very strongly indicates that they are significantly 18 years of age or over and no other credible evidence exists to the contrary"

Two comments should be made on these changes. First, although physical appearance and demeanour remained relevant factors, they now had to indicate *very* strongly that the asylum-seeker was *significantly* over the age of 18. Secondly, the reference to a "Merton-compliant" assessment was a reference to the judgment of Stanley Burnton J (as he then was) in *R (on the application of B) v Merton London Borough Council* [2003] 4 All ER 280. In that case, Stanley Burnton J gave guidance as to the requirements of a lawful assessment by a local authority of the age of young asylum-seekers claiming to be under the age of 18 for the purpose of determining whether the duties of a local authority under Part III of the Children Act 1989 were engaged.

16. This policy is still the relevant policy relating to the assessment of the age of asylum-seekers who claim to be under the age of 18 *for the purpose of deciding whether they should be detained* pending the determination of their claims for asylum under the fast-track procedure. For all other purposes connected with their claims for asylum, the current policy relating to the assessment of their age is contained in the Asylum Process Guidance. The change in policy occurred in March 2007. The effect of that guidance is that there are three different ways in which asylum-seekers who claim to be under the age of 18 will be processed in the absence of "credible documentary or persuasive evidence" that they are under the age of 18:

- If their physical appearance or demeanour does not suggest *very strongly* that they are aged 18 or over, they will be treated as under the age of 18.

- If their physical appearance or demeanour *very strongly* suggests that they are *significantly* over the age of 18, they will be treated as aged 18 or over.

- If their physical appearance or demeanour *very strongly* suggests that they are over the age of 18, but not *significantly* over the age of 18, they

> will be treated as someone whose age is in dispute, and pending a final determination of their age (for example, following a Merton-compliant assessment), they will be treated as if they are under the age of 18.

17. From the Immigration Service's policies relating to assessing the age of an asylum-seeker, I turn to its policies relating to the prosecution of young asylum-seekers for an offence under section 2(1) of the 2004 Act. The Crown Prosecution Service is now responsible for deciding whether someone should be prosecuted, and accordingly the Immigration Service's local prosecution units only decide whether to refer a particular case for possible prosecution. But in the days when HBH arrived in the UK, the practice was haphazard, and decisions to prosecute for an offence under section 2(1) could well have still been made by the Immigration Service's local prosecution unit. That is what happened in HBH's case, even though he was formally charged by the police, and the prosecution was taken over by the CPS.

18. In those cases where it was the Immigration Service who decided whether to prosecute a young asylum-seeker for an offence under section 2(1), the policy was to prosecute them unless it was thought that they might be able to establish the statutory defence in section 2(4)(c) of the 2004 Act, namely that they had a reasonable excuse for not being in possession of their passport. Section 2(7)(a)(ii) provides that the fact that the passport was deliberately destroyed or disposed of is not a reasonable excuse for not being in possession of it, unless it is shown that the destruction or disposal of it was for a reasonable cause; and section 2(7)(b)(iii) provides that "reasonable cause" does not include complying with instructions or advice to destroy or dispose of the passport unless in the circumstances it is unreasonable to expect non-compliance with those instructions or that advice. In determining whether young asylum-seekers are likely to establish the statutory defence, the guidance immigration officers received in September 2004 when section 2(1) came into force read:

> "It would be unreasonable to expect the same level of understanding from minors as we do from adults. Not only could some children not be expected to challenge the advice or instructions of a facilitator or another adult with whom they may be travelling, but they may not understand they need a passport or the consequences of destroying or disposing of it en route to the United Kingdom.
>
> Children have different levels of maturity, which might relate to age or other factors, and this need[s] to be taken into account in assessing the merits of a child's defence. Unaccompanied minors who have committed the offence would need to be considered on a case by case basis …"

It has to be said that young asylum-seekers who claimed to be under the age of 18 *were* being prosecuted at this time for offences under section 2 of the 2004 Act. A policy paper issued by the Immigration Law Practitioners' Association in February 2006 reported that between 22 September 2004 and 2 July 2005 11 children were convicted, though the age of 10 them had been disputed by the Immigration Service.

19. That was the prevailing policy when HBH arrived in the UK, but the position nowadays is different. The emphasis is on establishing at the outset whether

someone who arrives in the UK is an adult or not. If they are not, they are unlikely to be prosecuted. The problem is that the time it takes to get a Merton-compliant assessment differs throughout the country. For example, at Heathrow and Gatwick airports, they cannot be obtained within an acceptable timescale, and a prosecution will therefore not take place unless there is evidence "capable of being produced before a court" which shows that the passenger is an adult. On the other hand, Merton-compliant assessments can be obtained relatively quickly for passengers arriving at Stansted Airport. If the passenger is assessed to be under the age of 18, and there is no good reason for the UK Border Agency (as the Immigration Service is now called) not to accept that assessment, the practical reality is that a prosecution is less likely to take place, but it can and does still happen.

The previous litigation

20. There has been much litigation about how the Immigration Service assessed the age of asylum-seekers who claimed to be under the age of 18, but it is unnecessary to rehearse the history of the litigation at any length for present purposes. The litigation, which was known as *R (on the application of A and others) (Disputed Children) v Secretary of State for the Home Department*, was being managed by Munby J, and in the course of that litigation the Secretary of State conceded that the methodology which had been used for assessing the age of asylum-seekers prior to the change of policy which took effect on 30 November 2005 was flawed to the extent that they could be assessed as 18 years of age or over merely because their appearance or demeanour strongly suggested that. However, a vital exception to that concession related to those instances where the asylum-seeker's age was being assessed for a purpose other than deciding whether they should be detained, including being detained pending the determination of their claim for asylum under the fast-track procedure. The Secretary of State's concession did not apply to such cases. This concession – and its limited application – was the basis of a declaration which Munby J made to that effect on 26 January 2007.

21. It *now* looks, of course, as if HBH was assessed to be at least 18 years old because of what he had said about when he had left school and how old he had been at the time. But that only emerged from Ms Rampley's witness statement of 9 April 2008. Before then, it had been assumed that HBH had been assessed as being at least 18 years old because that was what his physical appearance strongly suggested since that was what the letter signed by the Chief Immigration Officer at the time had said. On the basis of that erroneous assumption, the Secretary of State thought that HBH's age had been assessed on the basis of the methodology which Munby J had declared to be flawed. Accordingly, she conceded that during the periods when HBH had been *detained* as a result of having been assessed to be at least 18 years old, that detention had been unlawful for such periods as he had been detained pending the determination of his claim for asylum under the fast-track procedure. She did not accept that he had been detained pending the determination of his claim for asylum once he had been charged with an offence under section 2(1) of the 2004 Act. From then until he completed his sentence he had been detained pending his appearance at the Magistrates' Court, pending being sentenced at the Crown Court, and then pursuant to the sentence he got. But she did accept that HBH's detention from 2.00 pm on 31 July 2005 (because he could lawfully have been detained up to then even if he had been assessed as under the age of 18, to give time for accommodation to be found for

him) until the afternoon of 1 August 2005 (when he was charged) was unlawful. So too was his detention from 30 November 2005 (when he completed his sentence) until 7 December 2005 (when he was released from detention) since his age had not been re-assessed in accordance with the new criteria which came into effect on 30 November 2005. Ms Jenni Richards for the Secretary of State did not seek to withdraw that concession, even though it may have been made on a wrong assumption about how HBH's age had been assessed.

The reason for the current claim

22. That brings me to what the current claim is all about. What is sought is a declaration that the methodology which it was assumed was used to assess HBH's age was unlawful, not merely because the assessment that he was at least 18 years old resulted in him being detained pending the determination of his claim for asylum under the fast-track procedure, but also because the assessment resulted in him being prosecuted for an offence under section 2(1) of the 2004 Act. It is ironic that the feature of the assessment of an asylum-seeker's age which might have made the assessment of HBH's age flawed – namely the reliance on the appearance and demeanour of the asylum-seeker – did not in fact play any part in the assessment of *HBH's* age if Ms Rampley's witness statement is correct. But Ms Richards did not suggest that that should prevent the court from determining the issue of principle which the case raises.

23. The current claim was issued on 3 September 2007. That was well over two years after HBH had been assessed as having been at least 18 years old. It was therefore issued well out of time. It is true that in the disputed children litigation, Munby J had extended the time for the filing of claims – by any prospective claimant who had not issued their claim by then but who notified the Secretary of State by 31 December 2006 of their intention to bring a claim under the Human Rights Act 1998 relating to the assessment of their age – to three months after judgment in that litigation was given, and that the Secretary of State was notified of HBH's proposed claim within that time. However, HBH's proposed claim at that time was limited to the Secretary of State's decision to detain him pending the determination of his claim for asylum under the fast-track procedure for the 7 days from 30 November 2005. It did not relate to the decision to prosecute him. Moreover, judgment was given in the disputed children litigation on 26 January 2007 when Munby J made the declaration referred to in [20] above, and accordingly the current claim should have been issued by 25 April 2007. In any event, although the current claim includes an allegation that the methodology used to assess HBH's age contravened some of HBH's human rights, the principal ground of challenge relates to its rationality and legality. However, when HBH's application for permission to proceed with the current claim was heard by Holman J on 15 February 2008, he decided that HBH's time for issuing the current claim should be extended to 3 September 2007 (see [2008] EWHC 446 (Admin) at [49]-[50]), and the issue of delay no longer arises.

24. Having said all that, it is still necessary to consider what HBH can get from the declaration which is sought on his behalf. The justification for proceeding with the claim is that HBH is applying to Harlow Magistrates' Court under section 142 of the Magistrates' Courts Act 1980 for his conviction to be set aside. The argument to be advanced on HBH's behalf is that he may not have been prosecuted at all if he had been assessed by the Immigration Service to have been under the age of 18 at the time. Since that argument depends for its success on the proposition that the

methodology used to assess the age of an asylum-seeker like HBH was unlawful, HBH needs the declaration sought on this claim for judicial review before the application for the setting aside of his conviction can be considered. When the district judge in the magistrates' court was told that, he adjourned the hearing of the application until after this claim has been determined. It may be that there is no wider public interest which justifies the grant of the declaration sought on HBH's behalf, but these proceedings are unquestionably warranted if they are a necessary step towards the setting aside of the conviction.

25. At one time, it was being said on HBH's behalf that the magistrates' court would be asked to set aside his conviction on the basis that the justices who heard his case on 2 August 2005 failed to discharge their duty under section 99(1) of the Children and Young Persons Act 1993 by failing to "make due enquiry" as to HBH's age. Certainly, Holman J thought that this was one of the arguments to be deployed on HBH's behalf (see para. 20 of his judgment), even though that was not spelt out in the detailed statement of grounds for claiming judicial review. However, no such argument was relied on before me. That is not surprising. There is no evidence about the nature of the inquiry which the magistrates conducted into HBH's age or of the evidence, if any, which it took on the topic, and thus the evidential basis for that argument is simply not there. In any event, by the time HBH appeared in the magistrates' court, the decision to prosecute him had already been taken. His age was relevant only to whether he could establish the statutory defence in section 2(4)(c) of the 2004 Act. The fact is that he did not seek to establish the statutory defence, and to the extent that the magistrates may have been criticised at one stage for not checking whether his plea of guilty was properly tendered, "[i]t is not self-evident", as Holman J said at [22], "that the justices can be criticised for failing to anticipate a defence that appears not to have been suggested or advanced".

26. I return, then, to the only argument now to be advanced on HBH's behalf in support of the application to set aside his conviction, namely that he may not have been prosecuted at all if he had been assessed by the Immigration Service to have been under the age of 18 at the time. As we have seen, *if* he had been assessed as under the age of 18 at the time, the question whether he would have been prosecuted would have depended on whether it was thought that he might have been able to establish the statutory defence in section 2(4)(c) of the 2004 Act. No consideration was given to that question since he was assessed as being at least 18 years old, but the case which HBH's legal team wish to argue in the magistrates' court is that his conviction should nevertheless be set aside because there was at least a chance that he might not have been prosecuted if he had been assessed as only 17 years old.

27. One of the points taken by Ms Richards is that if that is correct, the course which should have been taken on HBH's behalf when he appeared at the magistrates' court on 2 August 2005 was to apply for the proceedings to be stayed as an abuse of process. Whether it would have been appropriate for the magistrates faced with such an application to determine it themselves, or to adjourn the proceedings to enable an application to be made to the High Court for a mandatory order prohibiting the continuation of the proceedings on the ground of abuse of process, does not really matter. The point being taken is that rather than permitting HBH to plead guilty to an offence which it is said HBH should never have been prosecuted for, his solicitor

should at least have raised the issue of abuse of process, because the propriety of his prosecution should have been determined in the criminal justice process.

28. I see, of course, the logic of the argument, but I cannot go along with it because it completely ignores the practical realities of the situation. It will be recalled that HBH was represented at the time by the duty solicitor. He or she may have had many other demands on their time. But more importantly, I do not suppose for one moment that he or she will have been aware of the process by which the Immigration Service assessed the age of asylum-seekers at the time, let alone been aware that the methodology used in the process might be legally flawed. Nor do I suppose that he or she would have been aware of the criteria for determining whether a young asylum-seeker would be prosecuted for an offence under section 2 of the 2004 Act. It simply would not have occurred to the solicitor representing HBH on 2 August 2005 to do anything other than consider whether the statutory defence might be available to him.

29. Next, the Secretary of State contends that there is no real chance that HBH's conviction will be set aside under section 142. In those circumstances, it is said that the only basis on which the declaration sought on HBH's behalf can be of any practical value to HBH does not get off the ground. Proceeding with this claim for judicial review in order to obtain the declaration sought is therefore said to be an exercise in futility so far as HBH is concerned, and is of academic interest only. Three substantive points are taken:

    (i) There is no certainty that HBH would have been assessed by the Immigration Service as under the age of 18 even if his age had been assessed lawfully, i.e. by a "Merton-compliant" assessment. There is no definitive medical test which can point conclusively to someone's age, and at the end of the day the outcome depends on the subjective assessment of a social worker. The fact that HBH was subsequently assessed by two social workers from Cambridgeshire to be 17 years old does not necessarily mean that social workers covering Stansted Airport would have reached the same conclusion – especially as HBH was found by the magistrates to have been 19 or 20, and by the judge in the Crown Court to have been 18.

    (ii) Even if HBH would have been assessed by the Immigration Service as under the age of 18 had his age been assessed lawfully, there is no certainty that it would have been thought that he might have been able to establish the statutory defence in section 2(4)(c) of the 2004 Act. He did not say anything when he was interviewed which suggested any particular vulnerability on his part. He did not claim that he was the victim of trafficking or that he had not left China voluntarily.

    (iii) In any event, there is nothing to suggest that the assessment of HBH's age by the Immigration Service played a significant part in the process which led to HBH's conviction. In other words, there is no evidence that among the factors which led the magistrates to conclude that HBH was 19 or 20, or the judge in the Crown Court to conclude that he was 18, were the assessment of the Immigration Service that he was at least 18.

30. I have not been persuaded by these arguments. As for (i), the fact that HBH was subsequently assessed by two social workers from Cambridgeshire to be 17 years old makes it likely that an assessment by social workers covering Stansted Airport would have reached the same conclusion. In any event, there is no way of knowing how the magistrates or the judge in the Crown Court reached the conclusions they did about HBH's age. And most important of all, once the Immigration Service accepted that HBH had not actually reached the age of 18, the question of how old he would have been assessed as having been if the assessment had been carried out lawfully becomes a dead letter.

31. As for (ii), I agree that we do not at present know whether, if HBH had been assessed as under the age of 18, it would have been thought that he might be able to establish the statutory defence in section 2(4)(c) of the 2004 Act. But I see no reason why the magistrates' court would not be able to decide for itself whether, if consideration had been given to the question at the time, the decision would have been made not to prosecute him. No doubt the court would expect evidence to be given on the topic by someone from the UK Border Agency, identifying what the policy about prosecuting young asylum-seekers under section 2 of the 2004 Act was at the time and the facts which were then known about HBH, and expressing a view, in the light of that policy and those facts, whether he would have been prosecuted. It is true that HBH did not leave China involuntarily, but there is, on the face of it, nothing to suggest that HBH might reasonably have been expected to challenge the instructions he claims to have got from the agent to leave his passport at home, to hand over to the agent the passport he had used to check in with, and to dispose of his boarding pass during his journey.

32. As for (iii), it is true that we do not know whether the Immigration Service's assessment of HBH's age contributed to the findings of the magistrates' court and the judge in the Crown Court that he was at least 18. But that is not the critical point. The question is what would have happened if the Immigration Service at the time had assessed him to be 17 years old, as it was eventually to accept that he had been. If the magistrates' court and the judge in the Crown Court had been told that he had been assessed as 17 years old – as HBH had claimed all along – it is inconceivable that they would have gone behind that assessment.

33. However, the more difficult question relates to the reach of section 142(2). Section 142 is headed "Powers of magistrates' courts to re-open cases to rectify mistakes etc", and section 142(2) provides:

> "Where a person is convicted by a magistrates' court and it subsequently appears to the court that it would be in the interests of justice that the case should be heard again by different justices, the court may so direct."

Is it open to a magistrates' court, when faced with an application under section 142(2), to set aside a conviction on the basis that the defendant would not – or at least might not – have been prosecuted if the reason why he was prosecuted was because his age had been assessed – wrongly as it turned out – by a process which was unlawful? Mr Anthony Arlidge QC for the CPS contended that it is not open to a magistrates' court to set aside a conviction under section 142(2) on that basis. One of his arguments is that the court is *functus officio.* This cannot be right: section 142(2)

constitutes a statutory exception to the principle that the time will come when the court has completed its task, and cannot revisit the case.

34. Mr Arlidge's other argument is that section 142(2) amounts to a slip rule. It is intended, as the heading makes clear, to deal with mistakes, or – as the Divisional Court said in *R v Croydon Youth Court ex p. Director of Public Prosecutions* [1997] 2 Cr App R 411 at p. 416F with an eye to the presence of the word "etc" – with "a situation akin to mistake". Thus, in that case, the defendant had unequivocally pleaded guilty to a charge of assault occasioning actual bodily harm in the youth court. When his co-defendants were acquitted, he sought to have his conviction set aside under section 114(2). The magistrates' decision to set aside his conviction was quashed on the basis that there had not been a mistake in the trial process. What the defendant was attempting to do was to obtain a re-hearing of his case under section 142(2) since he could not appeal against his conviction in view of his plea of guilty, and that was said to be an inappropriate use of section 142(2). Mr Arlidge contended that however you characterise what happened in the present case, it was not a mistake – or at least not the sort of mistake which can be corrected by the invocation of a slip rule.

35. It occurred to me that there might be another arguable reason for saying that section 142(2) is not an appropriate vehicle in this case. The argument is that section 142(2) expressly applies only to those cases in which the interests of justice require (a) that the defendant be retried and (b) that he be retried by a different bench of justices. A retrial, whether by the same bench of justices or a different bench, would be considered by him only as a last resort, since if he is retried he runs the risk of being convicted again on the footing that he cannot establish the statutory defence. He is saying that he should not have been tried at all – and therefore that he should not be retried – because he should never have been prosecuted in the first place.

36. It could be said, I suppose, that this construction of section 142(2) is unduly restrictive. Despite its language, it might be that what it was intended to do was to enable a magistrates' court to decide whether the interests of justice required the original conviction to be set aside, and if so whether a retrial should be ordered. When considering whether to order a retrial, the court would be entitled to take into account the fact that the original conviction had to be set aside because the defendant would – or even may – not have been prosecuted at all if his age had been assessed by a process which had been lawful. Moreover, it is said that section 142(2) has been used in circumstances similar to those which arise in the present case. Reliance is placed on the procedure which I am told was adopted following the Divisional Court's ruling in *R v Uxbridge Magistrates' Court ex p. Adimi* [2001] QB 667 that asylum-seekers who had used false passports when fleeing from persecution should not have been prosecuted for possessing or using false documents without proper regard having been had to the provisions of Art. 31(1) of the Refugee Convention which prohibits the imposition of penalties on asylum-seekers in such circumstances. I have been told that, in the light of that ruling, asylum-seekers in these circumstances have had their cases "re-opened" under section 142(2) by the magistrates' courts which convicted them and have had their convictions "withdrawn", though I have not been supplied with an example of any of the orders which the magistrates' courts actually made. However, it has not been suggested that the magistrates' courts were ever asked to consider whether section 142(2) was an appropriate vehicle to be used

for the quashing of a conviction in a case in which it was said that the defendant should never have been prosecuted, and the true reach of section 142(2) may not have been seriously considered.

37. All these considerations suggest that the true reach of section 142(2) is not an easy question. It may be that the right answer is that it cannot be used to set aside a conviction when the defendant claims that he should not have been prosecuted at all, and that it can only be used when something has gone wrong with the trial process which makes it desirable for the defendant to be retried, and by a different bench of justices. Equally, it may be that this is too legalistic an approach. But in the final analysis I do not think that the true reach of section 142(2) should be decided by a sidewind. It should be decided by the district judge who hears the application when it is restored following the handing down of this judgment. In the meantime, because the possibility of the conviction being set aside – on the assumption that HBH's age was assessed by the Immigration Service by a process which was unlawful – cannot be excluded, I shall proceed on the footing that section 142(2) can be used to set aside HBH's conviction in the circumstances of this case.

38. Mr Arlidge argued that even then the declaration which is sought on HBH's behalf would serve no useful purpose. Since the magistrates' court has already declared HBH to have been 19 or 20 in August 2005, and since that is deemed to have been his true age at the time, the magistrates' court on any retrial which may be ordered under section 142(2) would have to treat him as having been that age then. He will then be no better off than he was when he first appeared at the magistrates' court. That is not necessarily the case. The setting aside of his conviction and the order for a retrial may well have the effect of setting aside the finding about his age. But even if it does not, it would be open to the magistrates' court on a retrial to consider, even on the assumption that HBH had been 19 or 20 at the time, whether he could establish the statutory defence.

The legality of the methodology

39. That leaves the way clear for the court to address the critical issue which this case raises, which is whether the methodology in place at the time to assess the age of an asylum-seeker who claimed to be under the age of 18 was unlawful in the context of deciding whether to prosecute them for an immigration offence. The methodology used at the time has to be seen, of course, against the background that asylum-seekers may well claim to be younger than they really are to get the advantages which flow from their youth. Just two of those advantages need be mentioned here. First, the Secretary of State did not then – and does not now – authorise the detention of asylum-seekers under the age of 18, save in exceptional circumstances and even then only overnight. Secondly, failed asylum-seekers then and now will normally be granted leave to remain in the UK until they are 18. Indeed, Stanley Burnton J himself said in *Merton* at [29] that "it would be naïve to assume that the applicant is unaware of the advantages of being thought to be a child".

40. In these circumstances, the Secretary of State has to have in place a policy for determining the age of young asylum-seekers which balances the desirability of safeguarding the welfare of those who are genuinely under the age of 18 against the importance of maintaining an effective system of immigration control, and the consequences if everyone, or even most of those, claiming to be under the age of 18

are to be treated or accepted as under the age of 18 when they may or may not be. This was recognised by Munby J in the reasons he gave for making the declaration which the Secretary of State conceded should be made. He said that "[i]ndividuals may falsely claim to be under 18 years old for a variety of reasons but primarily to benefit from the more generous asylum policies and support arrangements which are applied to children". He went on to acknowledge that a balance has to be struck between "the interests of firm and fair immigration control" and, since the disputed children litigation related to the assessment of age for the purposes of decisions relating to their detention, "the importance of avoiding the detention of unaccompanied children save … in the most exceptional circumstances, whilst alternative arrangements are made, and normally just overnight". The declaration which Munby J made was because it was acknowledged that the Secretary of State's methodology for assessing age did not strike the right balance between these two considerations.

41. Two other points should be made. First, the formulation of policy is a gradual process. It evolves over a period of years and changes from time to time. A change in policy does not necessarily mean that the previous policy was recognised to have been unlawful. Secondly, the formulation of policy is for the Secretary of State, not for the court. Although subject to judicial review so that the court can examine its rationality and legality, the court should nevertheless accord a significant degree of deference to the Secretary of State's view as to what the policy should be. However, since the Secretary of State has acknowledged that the methodology used up to 30 November 2005 to assess the age of asylum-seekers in the context of deciding whether they should be detained, including being detained pending the determination of their claims for asylum under the fast-track procedure, was unlawful – which was the same methodology used in the context of deciding whether to prosecute them for an immigration offence – it is necessary to consider whether any rational distinction can be made between the two contexts in which the assessment of age was being made.

42. Ms Richards contended that the rationale for the distinction lay in the fact that the Immigration Service had a policy of *not* detaining young asylum-seekers save in exceptional circumstances, but that when it came to deciding whether they should be prosecuted each case was individually considered on its own merits. If a young asylum-seeker was detained (because they were assessed as being at least 18 years old), and it subsequently turned out that they were only 17, they could be released, but the fact that they had been in detention for a while could not be undone. Contrast that with the young asylum-seeker who was prosecuted for an immigration offence. If they were wrongly assessed as being at least 18 years old, but it subsequently turned out that they were only 17, no real harm would have been done in the intervening period. After all, there were plenty of opportunities for their true age to be discovered. In a case in which the decision to prosecute was made by the police or the Crown Prosecution Service rather than the Immigration Service, there was the time between being referred by the Immigration Service for prosecution and the decision to prosecute being made. And even in a case in which the decision to prosecute was made by the Immigration Service, the asylum-seeker had the opportunity to raise their true age with the court, and might by then be able to rely on a medical report or one from a social worker which showed what their true age was.

43. I am sceptical about whether this rationale for the distinction between the two contexts in which the assessment of age was being made was in anyone's mind at the time. It is not spelt out in any of the witness statements filed on behalf of the Secretary of State, let alone in any contemporaneous document. It was referred to in the Secretary of State's detailed grounds for opposing the claim of another claimant – HA – in March 2007, and has all the hallmarks of being the product of *ex post facto* rationalisation. But assuming that the rationale for the distinction advanced by Ms Richards reflected the thinking of the Immigration Service at the time, I do not believe that it can be justified at all. It proceeds on the fallacious assumption that before an irrevocable step in the criminal proceedings is taken – such as an admission or finding of guilt – the asylum-seeker's true age will have been discovered. That is simply not so. Take HBH's case as an example. He was assessed by Ms Rampley on 31 July to have been at least 18 years old, and his true age had not been discovered by the time he pleaded guilty on 2 August. Of course, in HBH's case, it was the Immigration Service who decided that he should be prosecuted, but even in those cases where all that the Immigration Service did was to refer the asylum-seeker to the police for the police or the Crown Prosecution Service to decide whether they should be prosecuted, it would be naive to suppose that the police or the Crown Prosecution Service would address the question of the asylum-seeker's age if the Immigration Service had already decided that he or she was an adult. After all, it would have been an immigration officer who had interviewed them.

44. The fact of the matter is that it was just as important to assess a young asylum-seeker's age properly to decide whether they should be prosecuted for an immigration offence as it was to assess their age to determine whether they ought to be detained, including being detained pending the determination of their claim for asylum under the fast-track procedure. If relying on the asylum-seeker's appearance and demeanour did not strike the right balance between maintaining an effective system of immigration control and ensuring that asylum-seekers under the age of 18 were not detained, so too relying on their appearance and demeanour did not strike the right balance between the needs of immigration control and ensuring that asylum-seekers under the age of 18 were not inappropriately prosecuted for an immigration offence.

45. But apart from the absence of any rational distinction between the two contexts in which the age of young asylum-seekers is assessed, the fact is that forming a view about someone's age based only on their appearance and demeanour is fraught with risk. That is especially so with people who may be close to their 18th birthday, and whose ethnicity, culture, education and background may be very unfamiliar to the decision-maker. All this is ground well travelled in the authorities. Indeed, when it came to assessing age for the purpose of determining whether the duties of a local authority under Part III of the Children Act 1989 were engaged, Stanley Burnton J pointed out in ***Merton*** that there was no reliable anthropometric test to determine age, and for someone who was close to 18 there were no medical or other scientific tests which could assess their age with precision. To obtain any reliable medical evidence, one has to go to one of the few paediatricians who have experience in the field. In the absence of such evidence, appearance and demeanour may justify a *provisional* view, but it was only in an obvious case that appearance and demeanour alone would be sufficient. It was important, therefore, in such cases for the decision-maker to find out about the person's background – namely their family, their education and what

they have done – and to assess that information against the background of their ethnicity and culture.

46. The ***Merton*** guidelines do not, of course, apply directly to the Secretary of State's obligations in the context of immigration, but Stanley Burnton J himself acknowledged at [31] that there were many different circumstances in which decisions have to be made about whether someone is under the age of 18, and when the ***Merton*** guidelines are analysed, there is nothing about them which are context specific. In the circumstances, there are a number of reasons why the policy of assessing age based only on whether appearance and demeanour strongly supported the asylum-seeker's claim to be under the age of 18 contravenes the ***Merton*** guidelines and is therefore flawed. It does not distinguish between those cases in which whether an asylum-seeker is 18 or under 18 is obvious and those in which it is not. It treats the conclusion based on appearance and demeanour alone as determinative, not provisional. And procedural fairness of the kind which Stanley Burnton J thought was important – namely, telling the asylum-seeker of the features of their appearance and demeanour which the decision-maker was minded to hold against them so that they could respond to it, and not giving adequate reasons for the conclusion about their age – was lacking. It may be that the sort of evidence which the courts should take into account when determining the age of a defendant – whether under section 99(1) of the Children and Young Persons Act 1933 or section 164(1) of the Powers of Criminal Courts (Sentencing) Act 2000 – should take these points on board, but that is not something which arises for consideration in this case. What is important here is that appearance and demeanour alone are hardly a sufficiently principled and grounded basis for assessing the age of someone who may be on the cusp of becoming an adult and who may come from a very different culture.

Conclusion

47. Ms Harrison developed some wide ranging arguments based on the jurisprudence relating to Arts. 5, 6 and 8 of the European Convention on Human Rights and on Council Directive 2003/9/EC (known as the "Reception Directive"). But it has not been necessary for me to address them, since for the reasons I have already given, I have concluded that I should declare that the methodology which has been used to assess the age of asylum-seekers – namely, whether their appearance and demeanour strongly supports their claim to be under the age of 18 – for the purpose of determining whether they should be prosecuted for an immigration offence is unlawful. Whether that declaration should lead to HBH's conviction being set aside is for the district judge in the magistrates' court to decide when the application under section 142(2) is restored.

48. I wish to spare the parties the time and expense of attending court when this judgment is handed down. At present, I see no reason why the Secretary of State should not pay HBH's costs, to be the subject of a detailed assessment if not agreed. That is the only order for costs which I currently have in mind, but if any of the parties wish me to consider another order for costs, or the Secretary of State wishes to suggest that the order for costs which I currently have in mind is not an appropriate one, they should notify my clerk of that within 14 days of the handing down of this judgment, and I shall make such orders for costs as I think are appropriate without a hearing based on such written representations as the parties wish to make. It is, I think, premature to consider what orders, if any, should be made about HBH's claim for damages – at any

rate until his application to set aside his conviction has been considered – especially as the assessment of HBH's age was in fact based on something other than his appearance. If the Secretary of State wishes to apply for permission to appeal, the Treasury Solicitor should notify my clerk of that within 7 days of the handing down of this judgment, and I will consider that application without a further hearing. However, the Secretary of State's time for filing an appellant's notice will still be 21 days from the handing down of this judgment.

49. Finally, I regret the lapse of time which has occurred since the hearing of this case, but as the parties will recall, the two days set aside for the hearing proved insufficient, and although Mr Arlidge was able to complete his submissions, Ms Richards was not. She subsequently put the remainder of her submissions in writing, and Ms Harrison replied to them. But Mr Arlidge chose to file further submissions, and since they went to an issue which Ms Harrison had not addressed, she had to be given an opportunity to respond to them. The irony is that I would have had time to complete my judgment if I had been able to get down to it immediately after the hearing, but by the time all these submissions had been received, I was prevented from completing the judgment by other commitments and then I went on leave. I completed the judgment while on leave, though I realised while doing so that there was an additional point on which I needed the parties' assistance. A draft of this judgment was sent to the parties the day after the last of the submissions on that point was received.