ILPA information sheet

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Age Disputes and Detention 2

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The May 2011 "Age Disputes and Detention" information sheet provided information about separated children (often referred to as unaccompanied children), who may find themselves in detention because the UK Border Agency does not accept them to be children. An asylum-seeking child, whose age is disputed, could find himself or herself detained and his or her asylum claim dealt with in the Detained Fast Track. More information on the Detained Fast Track is provided by the March 2010 "Detained Fast Track" information sheet.

In November 2011, the Court of Appeal gave judgment in the case of *SH (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 1284. This case concerned an Afghan national, who claimed to be a child but whose age was disputed. He was detained and his asylum claim was dealt with in the Detained Fast Track. This information sheet provides more information about the Court of Appeal's judgment. That judgment is available at:

http://www.bailii.org/ew/cases/EWCA/Civ/2011/1284.html

The Facts

SH is an Afghan national. He arrived in the UK in September 2010 and claimed asylum. He claimed to be a child, but the UK Border Agency disputed this. Lincolnshire County Council assessed his age as 24 years. UK Border Agency records indicated he had previously applied for a student visa (in 2008), giving a date of birth that would give him an age of 19 years. The Refugee Council's assessment of his age, however, was that he was a child (i.e. under 18 years). He was detained for his asylum claim to be dealt with in the Detained Fast Track, and was refused asylum. He appealed, and his appeal was also dealt with in the Detained Fast Track.

On 28 September 2010, solicitors for SH applied to the First-tier Tribunal for his case to be taken out of the Detained Fast Track. They also took steps for an independent expert to assess his age. The application for the case to be taken out of the Detained Fast Track was refused. It was said that it should be made at the oral hearing of the appeal. That hearing took place on 5 October 2010. No appointment had yet been fixed for the expert to carry out the age assessment. The immigration judge, therefore, decided to proceed with the appeal without the benefit of the assessment. SH stayed in the Detained Fast Track, and the immigration judge dismissed his asylum appeal.

SH appealed against the immigration judge's decision to the Upper Tribunal. The Upper Tribunal heard the appeal on 26 October 2010. A report from independent social work assessors was now available. That report concluded SH was 17 years old. However, the Upper Tribunal could only interfere with the immigration judge's decision if there was some legal error in his decision or in the way he had conducted the appeal. The Upper Tribunal considered whether the immigration judge was correct to proceed with the appeal without allowing time for the independent expert report to

become available. The Upper Tribunal concluded the refusal by the immigration judge to allow time for the report was not so unfair as to be an error of law. The Upper Tribunal, therefore, dismissed the appeal. SH appealed to the Court of Appeal.

The decision of the Court of Appeal

The Court of Appeal made the following findings about the way in which the immigration judge and the Upper Tribunal had dealt with SH's appeal. As regards the immigration judge and his refusal to allow time for the report to become available, the Court of Appeal said:

> "*...it was unfair and unlawful to refuse an adjournment at that stage. The judge appears to have done so merely on the basis that it would involve removing the appeal from the Fast-Track Procedure. That provided no justification for his refusal.*"

As regards the decision of the Upper Tribunal, the Court of Appeal said:

> "*The question for Judge King was whether it was unfair to refuse the appellant* [SH] *the opportunity to obtain an independent assessment of his age; the question was not whether it was reasonably open to the immigration judge to take the view that no such opportunity should be afforded to the appellant. Where an appellant seeks to be allowed to establish contrary evidence that the case against him is wrong, the question will always be, whatever stage the proceedings have reached, what does fairness demand?*"

However, having found that both the immigration judge and Upper Tribunal had made errors of law, the Court of Appeal continued:

> "*The question... for us is whether the evidence that the appellant is over 18 is so overwhelming that it is pointless to remit the matter to the First Tier Tribunal notwithstanding the errors of approach of both the First Tier Tribunal and the Upper Tribunal...*"

By this time, Lincolnshire County Council had reassessed the age of SH. They now concluded his age to be 17 years. As the Court of Appeal said: "*All the experts, therefore, conclude that he is under 18.*" Nonetheless, the Court of Appeal decided that it was "*pointless*" to send the appeal back to the First-tier Tribunal because there could be no doubt that SH was an adult. The Court of Appeal reached this view because there "*...is no rational basis upon which the appellant could have held himself forward as being over 18 at a time when he was only 13.*" This was a reference to the student visa application in 2008.

Comment

It is well known that some children travel or seek to travel on visas and travel documents giving their age as over 18 years. For example, this happens in some cases of child asylum-seekers and also in some cases of trafficked children. Smugglers and traffickers may arrange this because there is nothing concerning about an adult travelling alone or without a parent, while a child in the same circumstances may attract attention. The Court of Appeal's conclusion about the student visa application may, therefore, be surprising. The Court of Appeal had found that SH had provided no explanation as to why he had tried to claim he was over 18 years if he was only 13 years, and why when the student application was refused he had pursued an appeal again on the basis that he was over 18 years. In these circumstances, the Court of Appeal found it to be "*pointless*" to hold a further hearing to consider any explanation that might now be offered, despite the expert evidence all supporting the notion that he was younger. The importance of explaining discrepancies such as this is something individuals and their legal advisers need to be aware of.

However, the Court of Appeal's decision as to how immigration judges should deal with requests for time for expert evidence to become available is very important, including for children whose age is disputed and who may be put in the Detained Fast Track.