OUTER HOUSE, COURT OF SESSION

[2017] CSOH 122

A54/16

OPINION OF LORD WOOLMAN

In the cause

AU

Pursuer

against

(FIRST) GLASGOW CITY COUNCIL

(SECOND) THE ADVOCATE GENERAL

Defender

Pursuer: Scott QC, Irvine; Drummond Miller LLP
First Defender: Ross QC; Glasgow City Council

15 September 2017

Introduction

[1] The United Kingdom authorities regularly assess the age of young individuals who come here seeking asylum. The exercise has important consequences. First and foremost it affects the individual in question. His or her identity is in part made up of their age. Further, it affects their right to remain here and to receive certain types of benefit including accommodation. Correspondingly, it governs the duties owed to the individual by central and local government and influences the role of other agencies. By way of illustration, local authorities wish to ensure that they do not place vulnerable 16 year olds with 20 year olds.

The Age Assessment Process

[2] Experienced social workers carry out the age assessment exercise. In doing so they apply the "Merton guidelines", first articulated by Stanley Burnton J in *R (B)* v *Merton London Borough Council* [2003] EWHC Admin 1689, [2003] 4 All ER 280, at para 37. The central features of the process are informality, fairness and a reasoned decision. All relevant factors are taken into account, including the individual's appearance and any medical evidence. A provisional view of incredibility must be put to an applicant for his or her response: *R (Z)* v *Croydon LBC* [2011] PTSR 748 at para 3, per Sir Anthony May.

[3] The relevant Scottish document is *Age Assessment Practice Guidance and Age Assessment Pathway for Social Workers in Scotland*. It was published in 2012 by Glasgow City Council ("Glasgow CC") and the Scottish Refugee Council and incorporates the *Merton* guidelines.

[4] The initial decision-makers often have a difficult task. While assessing the age of a baby may be straightforward, the position in respect of young adults is much more difficult. The evidence is often imperfect and there is a significant margin for error: *R (A)* v *Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557. Miss Ross for Glasgow CC informed me that asylum seekers are given the benefit of any doubt. The social workers recognise that the individuals being interviewed may have experienced significant trauma before they arrived in the UK.

The Issue

[5] How can an individual challenge an age assessment? Scots law provides two possible remedies: an action of declarator, and a petition for judicial review. The choice is not merely a technical issue. There are significant procedural differences between them. Proceedings for judicial review: (i) must be brought within three months of the date of the decision under challenge: s 27A(1) of the Court of Session Act 1988; (ii) are subject to preliminary evaluation, and (iii) are "case managed": RCS chapter 58.

General Background

[6] Recent years have seen a marked upward trend in the numbers of child asylum seekers. This is due in part to the UK government's commitment to receive more children after the disbanding of the refugee camp at Calais known as "the Jungle". Glasgow CC shoulders the main responsibility for looking after such individuals within Scotland. It expects to carry out many age assessments in the near future.

The Circumstances of this Case

[7] The summons gives the following narrative. AU was born in Afghanistan in 1379 in the Shamsi calendar. That translates to the year 2000 in our calendar. In 2012 his father and brother were murdered. He believes that was done on the instructions of his paternal uncle, who placed AU in a military training school ("Madrassa"). Because he refused to fight, AU was attacked and sustained fractures to both arms. Another relative, fearing for AU's safety, arranged to smuggle him out of Afghanistan.

[8] When he embarked on his journey to the West, AU had an Afghan identity document ("Taskira"). It included his photograph and gave the date of his birth, and the

names of his father and grandfather. AU passed from Asia to Europe and continued travelling west. His journey lasted about a year before he arrived at the Jungle. After several unsuccessful attempts, he managed to cross the Channel in April 2014. In the process of boarding the lorry on which he hid, he lost his Taskira.

[9] AU claimed asylum on arrival in the United Kingdom. He told the immigration authorities that he was 14, but he was assessed to have been born on 1 January 1996. The Secretary of State for the Home Department then transferred him to Glasgow. From June 2014 he resided at the Campus Project, which provides self-catering accommodation to persons between the ages of 16 and 18.

[10] In all his contacts with those appointed to deal with his case, AU maintained that he was 14. Two social workers, however, carried out a formal assessment procedure. On 25 September 2015 they determined that he was aged between 17 and 20. They assigned to him a birth date of 1 January 1997. In consequence Glasgow CC indicated that it proposed to relocate him to other accommodation.

[11] AU objected to such a move. In February 2016 he sought judicial review, claiming that the decision breached his rights under the Children (Scotland) Act 1995 ("the 1995 Act"). In the body of the petition, AU disputed the age assessment and stated that he would raise separate proceedings to establish that he had only reached the age of 16. The parties subsequently reached an extra-judicial agreement and the court granted their motion to dismiss the petition in April 2016.

[12] In March 2016 AU raised the present action. He concludes for declarator that his "date of birth is 20 March 2000, or such other date as the Court shall find established". Glasgow CC contends that the action is incompetent as the correct procedure is judicial review.

Legal Framework

England & Wales

[13] In *R (A)* v *Croydon LBC* the Supreme Court considered whether someone was a child for the purposes of the Children Act 1989. It is the equivalent of the 1995 Act. Baroness Hale and Lord Hope of Craighead DPSC delivered the leading judgments. They emphasised three points:

a. A person's age is a question of fact, which admits of a right or wrong answer.

b. The court may hear evidence not led before the initial decision makers.

c. Any challenge must proceed by way of judicial review.

[14] With regard to the final point, Baroness Hale stated:

> "The only remedy available is judicial review and this is not well suited to the determination of disputed questions of fact. This is true but it can be so adapted if the need arises …" (at para 33)

[15] Accordingly in England and Wales such challenges result in a hybrid form of action:

> "A judicial review claim challenging a local authority's assessment of age may thus be on various grounds. Some of them may be orthodox judicial review grounds. But the core challenge is likely in most cases to be a challenge to the age which the local authority assessed the claimant to be. Thus most of these cases are now likely to require the court to receive evidence to make its factual determination. … If the claimant succeeds on his factual case, the orthodox judicial review challenges fall away as unnecessary." (*R (Z),* Sir Anthony May at para 5)

Scotland

[16] The position in Scotland is less clear cut. The uncertainty arises from three petitions for judicial review that were all decided within a short period by Lord Stewart.

[17] The first decision was *L* v *Angus Council* 2012 SLT 304. Possibly because of its important role in this area, Glasgow CC entered the process as the second respondent. Lord Stewart accepted the argument that judicial review is incompetent as a means of challenging an age assessment.

[18] He held that the reasoning in *R (A)* did not apply, because no other remedy was available in England and Wales. By contrast in Scotland "relief is available by way of an ordinary action of declarator" (para 25). He distinguished a fact-finding exercise from a review of decision-making errors (para 59). He concluded that the Court of Session had power to determine status or rights "as against the world" in an action of declarator (para 70).

[19] Lord Stewart heard the two later cases together. Each concerned the age of a male asylum seeker from Nigeria: *ISA* v *Angus Council* [2012] CSOH 134; and *ALA* v *Angus Council* [2012] CSOH 135. After several days of evidence, but before he had heard submissions, he issued his opinion in *L*. Not surprisingly, armed with that decision, senior counsel for the respondents contended that the two petitions were incompetent. Lord Stewart decided, however, that it was too late to take that point (para 14). In each case he went on to make a finding about the petitioner's age.

[20] While recognising the utility of that stance, it leaves matters in a state of flux. Procedure either is competent or not. There can be no half-way house. Mrs Scott said that she had raised the present action on the basis of Lord Stewart's finding in *L*.

[21] Glasgow CC has therefore boxed the compass. Having contended for declarator as the correct remedy in *L*, it now adopts the opposite position. I highlighted the potential unfairness to AU. He is now out of time to petition for judicial review. Ms Ross gave an assurance that Glasgow CC would not insist on this point should her argument prevail.

Competency

Declarator

[22] Declarator is an ancient and valuable remedy in Scots law. It enables a wide spectrum of issues to be determined, provided that the decision will have a civil legal consequence. A person's age clearly falls into that category. Whether a person is an adult or a child governs their legal capacity: Age of Legal Capacity (Scotland) Act 1991. Children have special status under both the European Convention on Human Rights and the United Nations Convention on the Rights of the Child. I am satisfied that it is a competent remedy here.

Judicial review

[23] I hold, however, that judicial review is also available. In *Ruddy (AP)* v *Chief Constable, Strathclyde Police* [2012] UKSC 57; 2013 SC 126 at para 18, Lord Hope urged caution in using English authority in relation to practice in this field. He stated that:

> "The sole purpose for which the supervisory jurisdiction of the Court of Session may be exercised is to ensure that a person to whom a power has been delegated or entrusted does not exceed or abuse that jurisdiction or fail to do what it requires: *West* v *Secretary of State for Scotland* 1992 SC 385, 413."

[24] Taken alone, that might suggest that fact-finding in relation to age is inappropriate. But Lord Hope added these important words at para 32:

> "The guiding principle, where an objection to competency is taken on these grounds, is whether the way the action as framed is likely to lead to manifest inconvenience and injustice. The court must, of course, seek to be fair to all parties. It must take a pragmatic approach to the question whether the way the case is presented is so complex and disconnected that, despite the opportunities that exist for case management, it will not be possible to conduct the case in a way that meets the requirements of justice. … Rules of procedure should, after all, be servants, not masters, in matters of this kind."

[25] In *Ruddy* itself Lord Hope held that the appellant should not be required to give evidence about the same matter twice over in two separate actions on two separate occasions (para 33). He continued:

> "good order in litigation favours the two claims being heard together. They are interconnected both in law and in fact, and it would be in the interests of justice and more convenient for them not to be separated."

[26] The pragmatism of those views has a distant echo. David Hume said in a letter to Adam Smith dated 12 April 1759:

> "A man might as well think of making a fine Sauce by a Mixture of Wormwood and Aloes as an agreeable composition by joining Metaphysics and Scotch law".

The Preferred Route

[27] It would be highly unsatisfactory to require individuals to raise two actions to obtain a final determination about their age. That would lead to delay, inconvenience and expense. In particular it would require two applications for legal aid and lead to almost certain duplication of evidence.

[28] There are decisive advantages to proceeding by way of judicial review. First, it means that the court begins with the age assessment decision, rather than starting afresh. Secondly, it is a more streamlined procedure. Every application is subject to the three-month time limit. Local authorities and other agencies would therefore not be left uncertain of their obligations for extensive periods. The court could refuse leave to proceed in cases with no prospects of success. It could also issue directions designed to limit the length of any factual inquiry. Finally, there is a greater likelihood that a local authority will enter the process to defend the original decision.

[29] I do not accept Mrs Scott's suggestion that a decree in an action of declarator is better than a decision in a petition for judicial review. In both cases it would be a formal determination of the person's age.

[30] Accordingly I recommend that all future challenges be by way of Judicial Review.

Two Further Arguments

[30] In its written case Glasgow CC made two further arguments. The first related to the competency of a bare declarator. The second related to relevancy and specification. As Miss Ross discarded both in the course of the hearing, I shall say no more about them.

Conclusion

[31] I shall fix a by order hearing to determine further procedure in light of this opinion.