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Steve Symonds ILPA Legal Officer 020 7490 1553 [steve.symonds@ilpa.org.uk](mailto:steve.symonds@ilpa.org.uk)  
Immigration Law Practitioners' Association [www.ilpa.org.uk](http://www.ilpa.org.uk) 020-7251 8383 (t) 020-7251 8384 (f)

## Age Disputes and Age Assessment 4

20<sup>th</sup> February 2012

Where a person wishes to challenge a local authority's assessment that he or she is not a child (or is a child, but is not the age he or she claims to be), this can be done by a claim for judicial review. In England and Wales, these judicial review claims may be transferred from the High Court to the Upper Tribunal (Immigration and Asylum Chamber), as indicated by the April 2011 "Age Disputes and Age Assessment 3" information sheet at <http://tinyurl.com/72jobr2>

The Upper Tribunal (Immigration and Asylum Chamber) has now given its first reported decision on one of these claims in the case of *R (JS & YK) v Birmingham City Council* [2011] UKUT 00505 (IAC). This information sheet provides more information about this. The decision is available at: [http://www.bailii.org/uk/cases/UKUT/IAC/2011/00505\\_ukut\\_iac\\_2011\\_js\\_yk\\_aajr.html](http://www.bailii.org/uk/cases/UKUT/IAC/2011/00505_ukut_iac_2011_js_yk_aajr.html)

### **The facts in *R (JS & YK) v Birmingham City Council***

JS and YK are from Afghanistan. They arrived in the UK in 2008 and 2010 respectively and claimed asylum. Both claimed to be, and were initially treated as children. However, Birmingham City Council, in whose area they were then accommodated, assessed them as over the age of 18 years. Each sought to challenge the Council's age assessment.

Meanwhile, each was refused asylum by the UK Border Agency and appealed. In their respective appeals, immigration judges concluded they were children. The UK Border Agency accepted the immigration judges' findings as to the ages of JS and YK.

Each challenge to the Council's age assessment was brought by judicial review. The two challenges were linked and transferred to the Upper Tribunal (Immigration and Asylum Chamber). The Upper Tribunal heard these cases on 5 October 2011 and gave a decision dated 13 December 2011, but which has only become generally available this month.

### **Policy documents considered by the Upper Tribunal**

The Upper Tribunal considered the following documents to be "of the highest importance":

- UK Border Agency's asylum process guidance "Assessing Age"
- "Age Assessment: Joint Working Protocol Between Immigration and Nationality Directorate of the Home Office (IND) and Association of Directors of Social Services (ADSS)"

Section 11 of the "Assessing Age" document sets out that where an immigration judge finds that an appellant is a child (where the local authority had assessed that person as an adult), the UK Border

Agency must discuss the finding with the local authority before deciding to act on the immigration judge's decision. The local authority should reassess the person's age, having regard to the finding and reasons of the immigration judge. If the local authority still disputes the person's age, the UK Border Agency will need to consider whether it nonetheless intends to accept the finding of the immigration judge or needs to seek to appeal against his or her decision. The "Assessing Age" document is available at:

<http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/>

As the Upper Tribunal said, the second document "*is of some age*". However, the Upper Tribunal set out significant parts of that document in its decision. The document is currently being revised and updated, and the Council sought to downplay its significance before the Upper Tribunal. However, the Upper Tribunal took a different view:

*"It does not appear to us that these documents can be dismissed so readily. The clear public position is that differences in opinion about the claimant's age will be sorted out between the authorities concerned, and will not, save no doubt in most exceptional circumstances, which do not appear to be envisaged by the published policies, be a matter for the claimant to have to take up with two authorities separately."*

### **The Upper Tribunal's decision**

The Upper Tribunal concluded there was a requirement that, in the circumstances that had arisen in these two cases, the UK Border Agency and the local authority would communicate and seek to reach an agreement as to the person's age. This had not happened. In those circumstances, the Council's failures to reassess the ages of JS and YK (in the light of the immigration judges' findings and decisions by the UK Border Agency to accept those findings) were unlawful. The Upper Tribunal, therefore, quashed (i.e. overturned) the age assessments of the Council and so required the Council to reassess the ages of JS and YK.

### **Further comment**

In 2009, the Supreme Court held in the case of *A v London Borough of Croydon & Anor* [2009] UKSC 8 that in judicial review proceedings of a local authority's age assessment, the role of the court is to make its own decision as to the person's age. More information about the Supreme Court judgment is available from the February 2010 "Age Disputes and Age Assessment 2" information sheet at <http://tinyurl.com/74topcn>

The Upper Tribunal did not, however, attempt to reach any conclusion for itself as to the ages of JS and YK. The Upper Tribunal instead concluded:

*"In a case such as this, where there are what we regard as clear grounds for Judicial Review on the traditional basis, there does not seem to be any good reason for preparing for a long and expensive hearing which may not need to happen if the claimants are content with an Age Assessment to which both the Secretary of State and the Local Authority have subscribed."*

There was another reason why the Upper Tribunal did not attempt to make its own decision as to the ages of JS and YK. As the Upper Tribunal had explained, to make its own decision it would be necessary to give an opportunity for the UK Border Agency to be joined in the proceedings so as to explain its position having accepted the ages as found by the immigration judges. However, judicial reviews involving matters relating to immigration are generally excluded from transfer to the Upper Tribunal. If it were necessary to make an assessment of the ages in the judicial review proceedings, it may have been necessary to transfer the case back to the High Court.