IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

JR/221/2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:-

THE QUEEN (on the application of)
QH

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

[redacted]T ORDER

UPON HEARING from Sonali Naik QC and Greg Ó Ceallaigh on behalf of the Applicant and Gwion Lewis on behalf of the Respondent

AT A HEARING on 11 October 2018

IT IS ORDERED:-

1. The Applicant's claim for judicial review is granted.

DECLARATION

2. It is declared that the Respondent unlawfully removed the Applicant from the UK without proper notice in breach of his policy and Article 27 of the Dublin III Regulation.

IT IS FURTHER ORDERED:

3. The following decisions of the Respondent are quashed:
   a. The decision of 9 April 2017 to remove the Applicant from the United Kingdom;
   b. The decision of 30 March 2017 to certify the Applicant's asylum claim on third-country grounds;
   c. The decision of 30 March 2017 to certify the Applicant's human rights claim as "*clearly unfounded*".

4. The Respondent shall within 10 days write to the German authorities informing them that:
   a. The decision to transfer the Applicant pursuant to the Dublin III Regulation has been quashed in accordance with Article 27(1); and

b. The United Kingdom will therefore promptly accept the Applicant's return to the United Kingdom from Germany in accordance with Article 29(3); and
c. The United Kingdom does not consider that Germany is responsible for the Applicant's asylum claim under the Dublin III Regulation;
d. The United Kingdom is content to arrange the Applicant's transfer and pay for the costs of transfer in accordance with Article 30(2).

5. Either party has liberty to apply to the Tribunal in the event that the Applicant's return to the United Kingdom has not occurred within 5 weeks of the date of this order.

6. The Respondent shall pay the Applicant's reasonable costs of the bringing the claim to the date of the sealed Order, to be assessed if not agreed.

7. (a) Upon the Applicant providing an itemised preliminary bill of costs to the Respondent and the Tribunal together with brief submissions in writing as to the reasonableness of the costs claimed, the Respondent within 21 days of receipt thereof shall reply in writing to the submissions.

(b) Upon receipt of the Respondent's submissions or, in the absence of submissions by the Respondent, 21 days after receipt of the Applicant's submissions the Tribunal will consider on paper the issue of payment of an amount on account of costs with a view to making an order to reflect the percentage of the preliminary bill of costs considered appropriate in the light of the submissions of the parties.

8. There shall be a detailed assessment of the Applicant's publicly funded costs.

9. Within 14 days of the date of the sealed Order, the Applicant shall particularise his damages claim and serve the same on the Respondent.

10. The parties shall seek to reach an agreement on the Applicant's damages claim within 3 months of the service of the particularised damages claim ("the negotiating period");

11. If agreement on the Applicant's damages claim is not reached before the expiry of the negotiating period, the Applicant has leave to file and serve written submissions on its damages claim within 14 days of the expiry of the negotiating period.

12. The Respondent has leave to file and serve written submissions in respect of the Applicant's damages claim within 14 days of the service of the Applicant's submissions referred to in paragraph 10 or the expiration of the time for the Applicant to file submissions (whichever is sooner).

13. Thereafter the Tribunal will make a decision on the papers in respect of the damages claim whether by further directions or by an order for final disposal of the claim.

Date 3 December 2018

Mr Justice William Davis

IN THE UPPER TRIBUNAL

JR/221/2018

Field House,
Breams Buildings
London
EC4A 1WR

11 October 2018

BEFORE

MR JUSTICE WILLIAM DAVIS

Between

THE QUEEN (on the application of)
QH

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- - - - - - - -

SONALI NAIK QC and **GREG O CEALLAIGH**, instructed by Duncan Lewis appeared behalf of the Applicant.

GWION LEWIS, instructed by the Government Legal Department appeared on behalf of the Respondent.

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JUDGMENT

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MR JUSTICE WILLIAM DAVIS

Anonymity Direction pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The Applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of the family. This direction applies to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

1. The Applicant applies for judicial review of the decision of the Secretary of State for Home Department ("SSHD") to remove him from the United Kingdom. The decision was made on 3 April 2017 but not communicated to the Applicant until 9 April 2017. He was removed on 11 April 2017. He also applies for judicial review of the linked decisions made on 30 March 2017 to certify the Applicant's asylum claim on third party grounds and to certify his human rights claim as clearly unfounded. The application for permission to apply for judicial review was made on 10 January 2018. After an initial refusal of permission the Applicant on 27 July 2018 on a renewed oral application was granted permission to judicially review the SSHD's decisions.

2. The Applicant was born in Afghanistan. As will become apparent there is a dispute between him and the SSHD about his date of birth. Whatever his age he left Afghanistan in the middle of 2015. His journey took him through Greece (where he was fingerprinted in December 2015) and Germany (where he was fingerprinted in January 2016). He entered the United Kingdom on 13 April 2016. He was detained as he was alighting from the rear of a lorry near Lincoln. He immediately claimed asylum. He gave a history which involved witnessing the murder of his father, being kidnapped and tortured and his brother being murdered. He said that he was aged 16.

3. On 27 April 2016 an age assessment was conducted by social workers employed by Lincolnshire County Council. The result of their assessment was that the Applicant in fact was 19. They gave a date of birth in September 1996. The next day the Applicant was informed of the outcome of the age assessment though he was not provided with a copy of the assessment document.

4. On 13 June 2016 the Applicant provided an Afghan identity document (commonly known as a Taskera) to the SSHD. This document stated on its face that it had been issued in April 2013 or the equivalent date in the Afghan calendar and that the Applicant at this date was assessed as being aged 13. In the same month the SSHD requested Germany to accept responsibility for the Applicant's asylum claim in accordance with the Dublin III Regulation. This was on the basis that he was aged 19. Initially Germany did not accept responsibility. It was said that the request needed to be investigated further. Germany notified the SSHD that it would accept responsibility in January 2017.

5. On 30 March 2017 the SSHD certified the Applicant's asylum claim on safe third country grounds, that country being Germany, and certified the Applicant's human rights claim as clearly unfounded. Whether the written decision was sent to the Applicant is disputed.

However, he was required to report on 3 April 2017 which he did. Reference is made in an agreed chronology to 4 April 2017 as the date on which the Applicant reported. Whichever date it was (and nothing turns on the precise date) he was detained when he reported.

6. The decision to remove the Applicant was made on 3 April 2017. The written notice specified that he would not be removed before 10 April 2017. Had he been served with the notice on the day the decision was made i.e. when he reported, he would have had five working days' notice of removal. In fact, the notice was not served until 9 April 2017. That was a Sunday. Removal occurred at 10.00 a.m. on 11 April 2017.

7. The Applicant is still in Germany. Within a few weeks of his arrival there the authorities conducted an age assessment. They concluded that the Applicant was born in January 2000. Thus, he was treated as a minor in Germany.

8. There is no doubt that the SSHD failed to follow his own instructions and guidance in relation to notices of removal. Chapter 60 of the EIG as in force in April 2017 required a minimum notice period of five working days. As set above the notice given in fact was one working day. I have been told that this was due to an administrative error. There is no evidence substantiating this proposition. This is of no consequence. The SSHD accepts that the reason for the lack of notice is immaterial. It is the effect of the lack of notice which matters. Further, the SSHD concedes that the lack of notice of removal constituted a breach of Article 27 of the Dublin III Regulation. Paragraphs 1 and 2 of Article 27 are in these terms:

1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.

It follows that the removal of the Applicant was unlawful.

9. The SSHD resists the application for judicial review. He argues that this is a proper case for the application of Section 15(5) of the Tribunals Courts and Enforcement Act 2007. That sub-section applies Section 31(2A) of the Senior Courts Act 1981 to judicial review proceedings in the Upper Tribunal, the section being as follows:

(2A) The High Court—

(a) must refuse to grant relief on an application for judicial review....if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

The SSHD's argument goes as follows. Had the Applicant been given the right to an effective remedy, this would have been by way of an application for permission to apply for judicial review to the Upper Tribunal. Such an application would have postponed his removal in accordance with Chapter 60 of the EIG. The application for permission would have considered whether there was an arguable case that the SSHD ought to treat the Applicant as a minor. Given that whether removal was justified would depend on the age of the Applicant, the Upper Tribunal at that point would have considered the matter in the same

way as a conventional age assessment case. The test then is "...whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so, permission should be refused." R (Z) v Croydon LBC [2011] EWCA Civ 59.

10. The SSHD relies on the following matters. The Upper Tribunal considering the Applicant's case at the notional permission stage in (say) July 2017 would have been presented with a lawful Merton compliant age assessment by qualified social workers. If not of high quality, the age assessment met minimum standards. It had not been challenged by the Applicant at the time. The Upper Tribunal would have had the evidence of the Taskira document. But this evidence would have included the assessment of the document by the document fraud unit operated by the SSHD. As indicated on the contemporaneous case record sheet, that unit's conclusion "regarding the document's authenticity is inconclusive" for want of a verifiably genuine comparison document. Those two factors would have led to a refusal of permission by reference to the factual case on age assessment. In addition the Upper Tribunal would have been faced with a position in which Germany had accepted responsibility for the Applicant pursuant to the Dublin III Regulation. To review the decision of the SSHD would offend the principle of comity. In all of those circumstances it is said that the outcome for the Applicant would not have been substantially different. His removal would not have taken place in April 2017 but that would only have been a postponement. The delay would have been only a few months at most. Thus, relief should be refused.

11. The SSHD puts forward an alternative basis on which judicial review should be refused based on the situation as it now obtains. The Applicant has been in Germany for over a year. He has failed to exhaust his alternative remedy i.e. his right to challenge the position in the German administrative court. He has not used the Dublin III processes in Germany. Further, although time was extended when the Applicant was given permission to apply for judicial review, the late issue of the claim remains relevant to the question of discretion. The Applicant has made good progress in Germany as demonstrated by the evidence of medical and other professionals with whom the Applicant has had dealings in that country. Finally, the Applicant no longer is a minor on any view of the evidence. On his own case he was 18 last January. In terms of the application of the Dublin III Regulation it is the Applicant's age of entry into this country which is relevant. That will be so even if the question is considered some two or more years after the event. But the Applicant's age now is relevant to the exercise of the discretion inherent in any application for judicial review. The SSHD argues that those matters taken together should lead to the application for judicial review being refused on the alternative irrespective of the merits of the substantive claim.

12. I shall deal with the alternative bases of the SSHD's resistance to the application for judicial review in turn.

13. The proposition that the outcome of the proper removal procedure being following would have been substantially the same must depend on the issue of age being resolved in the SSHD's favour. I shall consider this issue purely by reference to the statutory test in Section 31(2A) of the 2007 Act as it is read over to the Upper Tribunal exercising its judicial review jurisdiction. A note of caution is required at this point. Where there is an alleged breach of human rights a court or tribunal should be slow to adopt the "it would have made no

difference" jurisdiction. The fact that I shall consider the test without importing any nuance to take the human rights element into account should not be taken as an indication that I would do so in every case. Rather, in this instance a strict application of the test does not disadvantage the Applicant.

14. The age assessment document consists of a pre-printed 18 page pro forma completed in handwriting. The interview was conducted through an interpreter with an appropriate adult present. It is apparent that the two social workers conducting the age assessment and the appropriate adult were English speaking and unable to understand the Applicant directly as he spoke in Dari. The first section of the interview consisted of direct questions about age i.e. how old are you, what is your date of birth, etc. In the course of his answers the Applicant at one point is recorded as having given conflicting years of birth in the Afghan calendar. This was something reported by the interpreter. At another point the Applicant hesitated before indicating the last year in the Afghan calendar on which he celebrated his birthday. These matters were significant in the eyes of the social workers because they gave prominence to them in their conclusion on the age issue. "Different D.O.B.s given in assessments" was one bullet point. "Evasive about dates including years" was a further bullet point.

15. The following sections of the interview dealt with the Applicant's religion, how he travelled to the UK, his family both in the UK and elsewhere, his education and development and his health history. To some questions he answered that he did not know e.g. the name of his school in Afghanistan, the current whereabouts of family members and when he began to fast in accordance with his faith. A further bullet point in the conclusion was that the Applicant was evasive about significant events. This can only be a reference to the occasions on which he said that he did not know the answer to the question being posed.

16. I place myself in the position of the Upper Tribunal engaged in a judicial review of the decision to remove based substantially on this age assessment. The Upper Tribunal would have considered the substance of the age assessment. This would not have been with intense scrutiny and or with a view to deciding whether the Tribunal would have reached the same conclusions based on the written materials. That would not have been appropriate. But the Tribunal would have considered whether there was scope for saying that no reasonable social worker would have reached the conclusion that the Applicant was aged 19 on the basis of the material in the assessment. More significant, the Tribunal would have considered the procedural fairness of the process. I have no evidence from the Lincolnshire social workers other than what appears on the pro forma but there is no indication on the form that the Applicant was given any opportunity to comment on or to explain the matters on which the social workers relied in the bullet points I have recited. The printed introduction of the pro forma indicated that it had been completed in line with the principles in B v Merton BC [2003] 4 All ER 280 as emphasised in NA v Croydon [2009] EWCA 2357 Admin. Those principles required the Applicant to be given the opportunity to comment and explain. It is clear from the handwritten entries on the pro forma that supplementary questions were put to the Applicant. None of these dealt with the issues later relied on by the social workers in reaching a conclusion adverse to the Applicant.

17. There is further criticism to be made of the age assessment. After the bullet points set out above, the authors of the assessment referred to the Applicant's physical presentation and

appearance as justifying their conclusion. It is well recognised that these factors are of limited value when assessing age: NA v Croydon at paragraph 27. There was no medical input into the age assessment.

18. The SSHD does not suggest that the age assessment was high quality. Rather, it is said that on its face it met minimum standards. Therefore, the SSHD was entitled to rely on it and the Upper Tribunal in reviewing the decision based on the age assessment would have concluded that the decision was reasonable. For the reasons I have given, I am satisfied that the age assessment ought to have been identified by the SSHD as being flawed. Thus, the decision to remove on the basis of the age assessment equally would have been found to be flawed.

19. I turn to the question of the Taskira document. The SSHD says that an Upper Tribunal considering an application for permission to apply for judicial review in 2017 would have been presented with the evidence of his document fraud unit. With that evidence the Tribunal would have concluded that the SSHD was justified in rejecting the document as being of no value. It is important to consider the evidence available to the SSHD with which the Tribunal would have been provided. The document fraud unit was not able to point to any specific feature of the document which suggested that it was bogus. The unit had no similar document known to be genuine with which to compare it. Thus, the assessment of its authenticity was "inconclusive". This outcome was reported by the SSHD's third country unit to the litigation section in these terms: "Documents are not found to be genuine following a document examination." This report was not accurate. An Upper Tribunal considering an application for judicial review of the removal decision based on the assessment of the Taskira would have found that the SSHD reached an adverse conclusion based on insufficient evidence.

20. The Upper Tribunal considering the application in 2017 also would have taken account of the fact that the document was referred to by the Applicant during the age assessment interview when he was asked by the social workers whether he had any document showing his age. At that point he did have the document. It was sent by his then solicitors to the SSHD in June 2016. I do not have evidence as to how those solicitors came into possession of the document. However, the SSHD had no material to indicate that the circumstances of the provision of the document were suspicious. None is available now. The Tribunal would have taken those matters into account when assessing whether the Taskira document assisted the Applicant's case on age and, perhaps more to the point, when considering the reasonableness of the SSHD's decision based on his assessment of the document. In NA v Croydon Mr Justice Blake emphasised the significance and importance of Taskira documents in relation to Afghan citizens and the age of those citizens. The Upper Tribunal would have concluded that the SSHD's approach to the Taskira in this case was flawed.

21. It follows that the main planks of the SSHD's case in justifying the removal decision in a judicial review of the decision before the Upper Tribunal would not have withstood proper scrutiny. The mere fact that the Applicant by then was within the jurisdiction of Germany would not have tipped the balance. The principle of comity is important. Of greater importance is the need for UK courts and tribunals to uphold the human rights of those within their jurisdiction even if the interference with those human rights has led to the removal of the individual to a third country.

22. The result of a judicial review by the Upper Tribunal in 2017 would have been a quashing of the SSHD's decisions, all of which were predicated on the basis that the Applicant was over 18. The SSHD would have been required to use his best endeavours to facilitate the return of the Applicant to the UK. Given that there was a real dispute about his age, the practical outcome would have been a hearing before the Upper Tribunal. At such a hearing the Applicant would have been in a position to call evidence including the evidence of his uncle who was still in Afghanistan living in the same house as his sister when the Applicant was born. Whether the Applicant would have succeeded on the issue of his age is not for me to say. I am satisfied that the Upper Tribunal would have concluded that there was a factual case which could have succeeded.

23. What then of the alternative basis on which it is said that I should refuse this application for judicial review, namely the exercise of my discretion to refuse judicial review due to the effects of the passage of time. The most obvious effect of the passage of time is the presence of the Applicant in Germany. The SSHD argues that the situation of the Applicant is analogous to that of the claimants in ZT (Syria) v SSHD [2016] 1 WLR 4894. In ZT the claimants were unaccompanied minors in France who wished to use the Dublin III mechanism in the UK. The issue was whether an unaccompanied minor who was in one member state could invoke the Dublin III process in another member state without first instituting the process in the first member state. The Court of Appeal concluded that this could only be done "in very exceptional circumstances" where it could be shown that the first member state's system was not capable of an adequate response to the needs of the unaccompanied minor. The SSHD invites me to carry over that principle to this case and to say that very exceptional circumstances do not exist in this instance. I reject that proposition. The Applicant arrived in the UK and claimed asylum. His case was that he was an unaccompanied minor. Dublin III required the UK to consider his claim. I have concluded that judicial review in 2017 of the SSHD's refusal to consider his claim on the basis that he was not a minor and the consequent removal of the Applicant to Germany would have succeeded. The only reason the Applicant is in Germany is because of the SSHD's unlawful decision. The principle set out in ZT cannot apply.

24. The SSHD also points to the fact that the claim was issued some 9 months after the removal decision. Although time was extended when permission was granted on the renewed oral application for permission, the delay and its effects are relevant to whether the discretionary remedy of judicial review should be granted. It is said that the Applicant has made considerable progress in Germany as evidenced by the reports obtained from that jurisdiction. That may be so. However, the Applicant is entitled to have his claim considered in the appropriate jurisdiction as per Dublin III. That requires consideration of his claim by the SSHD. His desire for that to occur is not irrational given that he has an uncle who now is a British citizen and with whom he had significant contact in the 12 months between his arrival in the UK and his removal to Germany.

25. Finally in relation to discretion the SSHD points out that the Applicant now is an adult whatever his date of birth is found to be. This may not be relevant in terms of the application of Dublin III since that requires consideration of his age at the date of entry into the UK. It is relevant to discretion. The SSHD argues that the Applicant's relationship with his uncle gives rise to no significant level of dependency adult to adult. This argument is of doubtful validity on the facts. But it is unnecessary for me to review the available evidence

in detail. I am satisfied that the fact that the Applicant on any view now is 18 is insufficient to overcome the unlawfulness of his removal and the need to provide proper relief notwithstanding the passage of time. I observe that the SSHD in oral argument acknowledged that the issues in relation to delay and discretion had not been raised prior to the hearing. Moreover, it was accepted that those issues were of limited weight. That was a proper concession.

26. It follows that the Applicant's claim for judicial review succeeds and that the decisions to remove, to certify the asylum claim on third party grounds and to certify the human rights claim as clearly unfounded must be quashed. How the quashing of those decisions should be reflected in further relief was left open at the hearing. The parties indicated that it would be appropriate to allow them to consider whether they could agree on a final order. I shall do so. Within 14 days of the promulgation of this decision I require a proposed order from the parties or, failing agreement on the terms of an order, written submissions on the terms of a final order. If I am required to determine the terms of the order, I shall do so on the basis of the written submissions without any further hearing.