THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondent who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or of any member of his family in connection with these proceedings.

30 July 2021

PRESS SUMMARY

R (on the application of BF (Eritrea)) (Respondent) v Secretary of State for the Home Department (Appellant)
[2021] UKSC 38
On appeal from: [2019] EWCA Civ 872

JUSTICES: Lord Reed (President), Lord Lloyd-Jones, Lord Briggs, Lord Sales, Lord Burnett

BACKGROUND TO THE APPEAL

This appeal concerns the standards to be applied by a court on judicial review of the contents of a policy document or statement of practice issued by a public authority. It is one of two appeals heard by the same panel of five Justices examining this issue. It is being handed down and should be read with the Court's judgment in *R (on the application A) v Secretary of State for the Home Department* [2021] UKSC 37, which sets out the principles governing this area.

The Immigration Act 1971 (as amended by the Immigration Act 2014) (the "**1971 Act**") sets out the legal regime applicable to asylum seekers. Schedule 2 to the 1971 Act makes distinct provision in relation to the detention of asylum seekers who are unaccompanied children as compared with those who are adults over the age of 18.

The Secretary of State has issued policy guidance for immigration officers in cases of doubt as to the age of an asylum seeker presenting as a child, ("**the Policy**"). It is set out in two documents: (i) an asylum instruction entitled *Assessing Age*; and (ii) the relevant section of the general operational guidance issued to immigration officers entitled the Enforcement Instructions and Guidance ("**the EIG**"). Section 55.9.3.1 of the EIG sets out various criteria for circumstances when the Home Office will not accept that an asylum seeker is a child. Criterion C is relevant to this case. Criterion C initially provided that an asylum seeker would not be accepted as being under 18 if "*their physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age and no other credible evidence exists to the contrary*" (emphasis in original). This was subsequently amended to include a requirement within Criterion C that two Home Office officials must separately come to this conclusion. The *Assessing Age* instruction gives further guidance on the age assessment process, particularly in relation to Criterion C.

BF is a national of Eritrea who arrived in the UK in 2014 and claimed asylum. Despite claiming to be a 16 year old child, BF was initially assessed as an adult by immigration officers applying Criterion C. He was accordingly detained as if he were an adult. More detailed age assessments were subsequently carried out in 2015, and it was eventually decided that he was aged less than 18.

BF challenged the Policy by way of judicial review before the Upper Tribunal on the basis that it was unlawful in so far as based on Criterion C, because physical appearance and demeanour are an inherently unreliable

guide to age. He was unsuccessful before the Upper Tribunal, but the Court of Appeal allowed his appeal. The Secretary of State now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously allows the Secretary of State's appeal. Lord Sales and Lord Burnett give the judgment (with which Lord Reed, Lord Lloyd-Jones and Lord Briggs agree).

REASONS FOR THE JUDGMENT

The Gillick obligation

The Court rejects the Court of Appeal's assessment of the lawfulness of the Policy by reference to whether it creates a real risk of more than a minimal number of children being detained and/or creates a risk which could be avoided if the terms of the policy were better formulated.

The Court sets out the principles governing the test that should be applied when considering the lawfulness of policies in *A v SSHD* **[1]**,**[48]**. The standard of judicial review of a policy issued by a public authority derived from *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("***Gillick***") is that the policy must not direct officials act in a way which is contrary to their legal obligations (see *A v SSHD* at [29]-[47] for the Court's discussion) **[49]**. Guidance in a policy should not sanction, positively approve or encourage unlawful conduct.

The Court of Appeal erred by applying a different and more demanding standard of review, contrary to the guidance in *Gillick*, in holding that Criterion C is unlawful because it does not sufficiently remove the risk that immigration officers might make a mistake when assessing the age of an asylum-seeker claiming to be a child. The Court of Appeal's approach would turn the limited test of unlawfulness set out in *Gillick* into a requirement to issue a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty **[50]-[51]**. But it is in the nature of law that a person subject to a legal duty might misunderstand or breach it, and the remedy is to have access to the courts to compel that person to act in accordance with their duty **[52]**.

An obligation on Ministers (or anyone else) to issue policy guidance to eliminate uncertainty in relation to the application of a stipulated legal rule would be extremely far-reaching and difficult, if not impossible, to comply with. It would also conflict with the separation of powers as it would require Ministers to amplify and, to some extent, restate Parliament's legislation. It would also inevitably involve the courts assessing whether Ministers had sufficiently done so, thereby requiring courts to intervene to an unprecedented degree in executive decision-making and legislative choices **[52]**.

The 1971 Act stipulates the legal rule in relation to the detention of immigrant children. Although it may be difficult in marginal cases to tell whether a particular individual is an adult or child, this does not indicate a problem with the rule itself **[53]**. The policy and objectives behind the 1971 Act allow immigration officers to detain adult immigrants and are adjusted to take account of the greater vulnerability of unaccompanied children. However, in order to apply this statutory regime as intended by Parliament, immigration officers must distinguish adults and children as best as they can using the available evidence **[56]-[57]**. The *Gillick* principle does not require anything different. The Policy does not direct immigration officers to act in a way which is in conflict with their legal duty. Rather, it directs them to treat immigrants that they believe are children as children, and to treat immigrants that they believe are adults as adults **[61]**.

Criterion C in the Policy provides some safeguards. An immigrant who claims to be a child should only be assessed as an adult if their physical appearance and demeanour "very strongly suggests" that they are "significantly" over 18 years old. Moreover, two immigration officers of specified seniority should separately reach the same conclusion **[58]**.

The Court of Appeal's solution of directing immigration officers to treat a person as a child only if they believe them to be aged less than 23 or 25 might itself risk being unlawful on the basis of *Gillick*, as it appears to contradict the rule laid down by Parliament regarding the treatment of adults. This approach would produce a large number of erroneous identifications of adults as children, thereby undermining the purpose

of the statute **[62],[66]**. This is not changed by the fact that it unlawful to detain someone as an adult (even if they are reasonably believed to be so) when they are a child **[66]**. Immigration officers are obliged to interpret the statute in accordance with its terms. The fact that identification mistakes may lead to different kinds of unlawfulness depending on whether a person is wrongly considered an adult or child does not affect the nature of the officers' duty under the 1971 Act **[67]**.

Access to justice

The case of *R (UNISON) v Lord Chancellor* [2017] UKSC 51; [2020] AC 869 is concerned with the lawfulness of policy which impedes an individual's access to a court or tribunal. This does not assist BF as nothing in the Policy creates any such impediment **[68]**. The Court of Appeal erred by mixing together the principle in *UNISON* and the distinct jurisprudence on inherent systemic unfairness in order to arrive at the test which it applied in relation to Criterion C, as discussed in *A v SSHD* **[69]**.

Convention rights

Cases based on rights protected by the European Convention on Human Rights ("**the ECHR**") do not assist BF. They are based on distinct obligations arising in the context of specific ECHR rights, which are not engaged in the present case **[71]-[72]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html