Case No: C4/2016/2787

Neutral Citation Number: [2017] EWCA Civ 138
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
SIR STEPHEN SILBER SITTING AS A JUDGE OF THE HIGH COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/03/2017

Before:

LORD JUSTICE DAVIS
LORD JUSTICE UNDERHILL
and
LORD JUSTICE LINDBLOM

- -

Between:

THE QUEEN (on the application of ABDUL-MUTTELAB AWED ALI)	**Respondent /Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND ANOTHER	**Appellant/ Defendant**

- -
- -

James Strachan QC and Jennifer Thelen (instructed by the **Government Legal Department**) for the **Appellant**
Ian Wise QC and Michael Armitage (instructed by **Bhatia Best**) for the **Respondent**
Written submissions (prepared by **Christopher Buttler),** were put in on behalf of the **Equality and Human Rights Commission** as intervener**)**

Hearing date: 23 February 2017

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Judgment

Lord Justice Davis:

Introduction

1. This appeal relates to the right of the Secretary of State for the Home Department to detain, pending potential removal, unaccompanied children seeking to enter or remain in the United Kingdom. It involves a point of interpretation of provisions contained in Schedule 2 to the Immigration Act 1971 as amended by s. 5 of the Immigration Act 2014. The essential question, put broadly, comes to this. Will such detention have been lawful where a detainee is on reasonable grounds assessed at the time of detention to be an adult over the age of 18 but when it later transpires that, in point of fact, the detainee was a child under the age of 18?

2. The judge, Sir Stephen Silber sitting as a judge of the High Court, decided, by a detailed and thorough reserved judgment, in favour of the claimant on this issue: see [2016] EWCH 1453 (Admin). He granted a declaration that the claimant had been unlawfully detained for an identified period and ordered the Secretary of State to pay damages caused by the wrongful detention, to be assessed.

3. This case has a wider importance for other cases. The judge himself granted permission to appeal.

4. Before us the Secretary of State was represented by Mr James Strachan QC leading Ms Jennifer Thelen. The claimant was represented by Mr Ian Wise QC leading Mr Michael Armitage. I would like to acknowledge the thoroughness and care with which their arguments, written and oral, were presented to us. Detailed written submissions were also put in by the Equality and Human Rights Commission, as intervener.

Facts

5. The background facts are not in dispute and can be shortly summarised.

6. The claimant is Sudanese. He entered the United Kingdom at Dover by hiding in a lorry travelling from Calais on 19 July 2014. He was unaccompanied. He immediately claimed asylum and participated in a screening interview and Biometric Residence Permit application on that date.

7. In his interview he claimed to be 17, although his date of birth was entered on the form as 1 January 1996 (that is, over the age of 18 at date of interview). He was thereafter placed in detention: the legality of that particular period of detention is not challenged in these proceedings.

8. In view of an issue having been raised as to age, that matter was considered. By letter dated 19 July 2014 the Chief Immigration Officer indicated that the claimant had produced no satisfactory evidence to substantiate his claim to be under 18 and that "your physical appearance/demeanour very strongly suggests that you are significantly over 18 years of age". The letter went on to state that he would be treated as an adult. But it also indicated that he was not precluded from approaching a local authority for it to undertake its own age assessment: which, if obtained, the Home Office would then take into account in reviewing the matter.

9. Further enquiries were made. It transpired that Italy had been the claimant's initial point of entry into the European Union; and on 25 July 2014 Italy accepted that it was the Member State responsible for the claimant's asylum claim.

10. On 6 August 2014 the Secretary of State certified the asylum claim on "safe third country" grounds. Removal directions were set. However these directions were cancelled in the light of two judicial review applications brought by the claimant.

11. Permission to apply was refused in respect of both applications, on 4 November 2014 in the High Court and 12 January 2015 in the Upper Tribunal respectively. On the first refusal, the single judge stated that the prior detention was lawful and there was "nothing unlawful about the Defendant's conclusion that the claimant was over 18". The second, and parallel, claim brought by the claimant was by reference to the alleged treatment he would receive if returned to Italy. That was refused by the Upper Tribunal.

12. The claimant had in the interim been released from detention. In the light of the failed applications, fresh removal directions were set. He was then detained again, from 17 February 2015 until 1 March 2015. It was not in dispute before us that the Home Office as at 17 February 2015 had reasonable grounds for suspecting (and indeed believing) that the claimant was an adult.

13. In fact the claimant had very recently been the subject of a *Merton* compliant age assessment by Wolverhampton City Council undertaken on 6 February 2015 (although it seems he did not mention this when detained on 17 February 2015). The written age assessment report, dated 16 February 2015, was provided to the Home Office by the claimant's solicitors on the morning of 23 February 2015. The claimant was described in the assessment report as around 5 feet 6 inches in height, with smooth skin and a limited amount of facial hair and "presenting as shy and timid". The assessment of the social workers records the claimant saying that he did not know his birth date but that his brother had told him (when he was in Libya over 3½ years earlier) that he was then 12 years old. The view was taken, among other things, that his appearance suggested that he was at "mid to late adolescent stage" with the demeanour "typical of a teenager". The social workers in terms stated that the assessment process was not an exact one and there could be a five year error either way. The conclusion of the assessment was that the claimant was "a child of the approximate age of 16/17 years old".

14. On receipt and consideration of this assessment the Secretary of State ultimately released the claimant from detention on 1 March 2015.

15. It should be noted that the judge accepted the claimant's argument that he should at least have been released from detention by the end of 23 February 2015. There is no appeal from that part of decision. The appeal is solely as to the decision that the period of detention from 17 February to 23 February 2015 was also unlawful.

16. I should add that it was indicated to us that, for the purposes of these proceedings, it was accepted that the claimant was indeed under the age of 18 in February 2015. We were also told that the claimant has since been granted 2 years' leave to remain.

<u>The law and related policy</u>

17. Before its amendment by the 2014 Act, the 1971 Act, which conferred the power on the executive to detain persons, pending potential removal, for the purposes of immigration control, had contained no specific provisions in Schedule 2 with regard to detention of unaccompanied children. That changed with the amendments introduced by the 2014 Act with effect from 28 July 2014.

18. The relevant powers are contained in Schedule 2 to the 1971 Act, as incorporated by s. 4 (2). Of particular relevance for present purposes is paragraph 16 (2) and (2A) of Schedule 2 (as amended):

> "(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions.
>
> (2A) But the detention of an unaccompanied child under sub-paragraph (2) is subject to paragraph 18B."

19. Paragraph 18 of Schedule 2 (as amended) provides in the relevant respects as follows:

> "(1) Persons may be detained under paragraph 16 above in such places as the Secretary of State may direct (when not detained in accordance with paragraph 16 on board a ship or aircraft).
>
> (1A) But the detention of a unaccompanied child under paragraph 16 (2) is subject to paragraph 18B."

. . . . .

Paragraph 18B provides:

> "(1) Where a person detained under paragraph 16 (2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where –
> (a) The child is being transferred to or from a short-term holding facility, or
>
> (b) sub-paragraph (3) of paragraph 18 applies.
>
> (2) An unaccompanied child may be detained under paragraph 16 (2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.
>
> (3) The first condition is that –

(a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24 hour period, or

(b) a decision on whether or not to give directions is likely to result in such directions.

(4) The second condition is that the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the relevant 24 hour period in accordance with those directions.

(5) An unaccompanied child detained under paragraph 16 (2) who has been removed from a short-term holding facility and detained elsewhere may be detained again in a short-term holding facility but only if, and for as long as, the relevant 24 hour period has not ended.

(6) An unaccompanied child who has been released following detention under paragraph 16 (2) may be detained again in a short-term holding facility in accordance with this paragraph.

(7) In this paragraph –

"relevant 24 hour period", in relation to the detention of a child in a short-term holding facility, means the period of 24 hours starting when the child was detained (or, in a case falling within sub-paragraph (5), first detained) in a short-term holding facility;

"short-term holding facility" has the same meaning as in Part 8 of the Immigration and Asylum Act 1999;

"unaccompanied child" means a person –

(a) who is under the age of 18, and

(b) who is not accompanied (whilst in detention) by his or her parent or another individual who has care of him or her."

20. From these provisions, it follows in general terms that a person in respect of whom removal directions are contemplated may be liable to detention subject, among other things, to compliance with the provisions of paragraph 16 (2), 16 (2A) and paragraph 18B. Paragraphs 16 (2A) and 18B, as was paragraph 18 (1A), were introduced by the 2014 Act: and it is the meaning and effect of those provisions which govern the outcome of this case.

21. Although the position of unaccompanied children had not (prior to the amendments made in 2014) expressly been dealt with in Schedule 2 it was rightly common ground before us that, for the purpose of the exercise of the functions of the Secretary of State

with regard to immigration and asylum, the provisions of s. 55 of the Borders, Citizenship and Immigration Act 2009 were relevant. That provides as follows:

> "Duty regarding the welfare of children"
>
> (1)The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> . . . . .
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> . . . . .
>
> (6) In this section—
> "children" means persons who are under the age of 18;
>
> . . . . .

22. Operational guidance has been issued with regard to the use of the powers of detention conferred. These are contained in Chapter 55 of the Enforcement Instructions and Guidance promulgated by the Home Office.

23. Chapter 55.1.1 makes clear that, to be lawful, detention must be based on an available statutory power and must accord with stated policy. Chapter 55.9.3 specifically deals with unaccompanied children. It states, as a general objective, that unaccompanied children (that is, persons under the age of 18) must not be detained "other than in very exceptional circumstances". Chapter 55.9.3.1 provides, in part, as follows:

> "The guidance in this section must be read in conjunction with the Assessing Age Asylum Instruction (even in non-asylum cases). You may also find it useful to consult Detention Services Order 14/2012 on managing age dispute cases in the detention estate.
>
> The Home Office will accept an individual as under 18 (including those who have previously presented themselves as an adult) unless one or more of the following categories apply (please note this does not apply to individuals previously sentenced by the criminal courts as an adult):

A. There is credible and clear documentary evidence that they are 18 or over.

B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over.

C. 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.

D. The individual:

- prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and
- only claimed to be a child after a decision had been taken on their asylum claim; and
- only claimed to be a child after they had been detained; and
- has not provided credible and clear documentary evidence proving their claimed age; and
- does not have a Merton compliant age assessment stating they are a child; and
- does not have an unchallenged court finding indicating that they are a child; and
- physical appearance / demeanour very strongly suggests that they are 18 years of age or over."

Dealing with the impact of s. 55 of the 2009 Act, this, among other things, is said in the guidance:

> "The assessing age detention policy has in-built protections to ensure it is compliant with the section 55 duty. The threshold that must be met for individuals to enter or remain in detention following a claim to be a child is a high one and is only met if the benefit of doubt afforded to all individuals prior to any assessment of their age is made is then displaced because the individual has met one or more of the categories listed at the start of section 55.9.3.1."

24. The Assessing Age Asylum Instruction referred to in Chapter 55.9.3.1 provides further detailed guidance in circumstances where an asylum applicant claims to be a child "with little or no evidence and their claim to be a child is doubted by the Agency." Its detailed provisions overall confirm the approach set out in the Enforcement Instructions and Guidance and confirm the general approach that the benefit of doubt will be afforded to persons claiming to be children.

25. The position with regard to the detention of persons who at the time were reasonably assessed to be adults but who ultimately were found to be children, was, on authority, established on the legislative provisions as they stood prior to 28 July 2014. It was established because the matter had been authoritatively decided by the Supreme Court.

26. Paragraph 16 (2) of the 1971 Act, as unamended, gave the power (without statutory fetter but to be exercised in accordance with published policy) lawfully to detain persons if there were "reasonable grounds for suspecting" that the person was someone in respect of whom removal directions may be given. That power thus, on the face of it, would potentially extend to persons who were in fact unaccompanied children but for whom there were reasonable grounds at the time of detention for suspecting to be adults liable to removal. The argument, however, had been raised to the effect that a different conclusion was mandated by reason of s. 55 of the 2009 Act: which included by s. 55 (6) an unvarnished definition of "children" as "persons who *are* (emphasis added) under the age of 18." Consequently, it was argued, in a case where an individual claiming asylum was reasonably assessed as an adult and detained accordingly but it then transpired that such claimant was in fact a child, the detention was unlawful.

27. Such an argument had been accepted at first instance by Lang J in the case of *AAM (A Child) v Secretary of State for the Home Department* [2012] EWHC 2567 (QB). But it was rejected by the Court of Appeal in the case of *R (AA) (Afghanistan) v Secretary of State for the Home Department* [2012] EWCA Civ 1383 and, on appeal, it was again – and conclusively – rejected by the Supreme Court: [2013] 1 WLR 2224, [2013] UKSC 49. It was there held that the guidance published by the Secretary of State complied with s. 55; and since, on the facts of that case, the guidance had been followed there was no breach of s. 55 and the exercise of the power to detain under paragraph 16 of Schedule 2 was therefore lawful. The proposition that detention under paragraph 16 of Schedule 2 made in the reasonable but mistaken belief that the detainee was an adult would of itself involve a breach of s. 55 of the 2009 Act was disapproved: see paragraphs 45 to 50 of the judgment of Lord Toulson (with whom all the other members of the court agreed on this point).

28. In the present case it has not been disputed that, as at 17 February 2015, the detaining officers had on reasonable grounds assessed the claimant to be over the age of 18. It follows that, absent the amendments introduced by the 2014 Act, this claim in so far as it related to the period of detention from 17 February to 23 February 2015 necessarily would have failed. The whole question therefore is as to the effect of the provisions introduced into Schedule 2 to the 1971 Act by s. 5 of the 2014 Act in the form of paragraphs 16 (2A) and 18B.

Discussion

29. Having considered the competing arguments, I consider – with some reluctance but no real doubt - that the plain language of the amended provisions compels the conclusion that where, in point of fact, the detainee is an (unaccompanied) child then detention beyond what is sanctioned in paragraph 18B (1) and (2) is unlawful. It does not suffice that there were reasonable grounds for believing or suspecting at the time of detention that the individual was an adult. The outcome reached by the Supreme Court in *AA (Afghanistan)* has been superseded by the amended legislation.

30. That this is so is, to my mind, demonstrated by the following.

31. Paragraph 16 (2) is, by amendment, qualified by the new paragraph 16 (2A). That the entirety of paragraph 16 (2) is so qualified is made plain by the explicit wording of paragraph 16 (2A) and its commencement with the emphatic word "But". That qualification is then further confirmed by the like qualification to paragraph 18 (1) contained in paragraph 18 (1A). Those qualifications in terms indicate that the power of detention is subordinated to the requirements of paragraph 18B.

32. Paragraph 18B relates to a detained person who "is" an unaccompanied child. With regard to an unaccompanied child, as defined, it imposes mandatory requirements both as to place of detention under paragraph 18B (1) and as to period of detention under paragraph 18B (2). The definition of "unaccompanied child" in 18B (7) is in this regard specific: it requires that the person *is* (emphasis added) under the age of 18. There is no qualification by reference to reasonable grounds of belief or suspicion: which, moreover, is to be compared and contrasted with the language elsewhere used in the same paragraph, at paragraph 18B (4).

33. I thus would agree with Mr Wise's submission that the legal landscape has changed since the decision of the Supreme Court in *AA (Afghanistan)*. As matters stood at the time of that decision there were no such specific legislative provisions with regard to the detention of unaccompanied children. But now there are, and in unambiguous language.

34. Mr Strachan sought to advance an elaborate argument by reference to the use of the words "under paragraph 16 (2)". Those, he says, are critical. He submits that they import an initial decision made, prior to the decision to detain, that there were reasonable grounds to suspect that the individual concerned is an adult. If that has been the (reasonable) assessment then, he submits, paragraph 18B simply has no purchase. In my view, with respect, that is an artificial and strained interpretation, which cannot be derived from the language used. The decision which the executive is empowered to make under paragraph 16 (2) is one of detention: albeit such decision to detain can only be made where there are, objectively, reasonable grounds for suspecting that a person is someone in respect of whom relevant removal directions may be given. Paragraph 18B then deals with the detention itself (as paragraph 16 (2A) and paragraph 18 (1A) also confirm). The references in paragraphs 16 (2A) and 18 (1A) and 18B to "under sub-paragraph (2)" (or "under paragraph 16 (2)") are there in order to identify the power of detention which is being thus qualified.

35. In truth, as I see it, Mr Strachan's interpretation involves writing in words to paragraph 18B – indeed, rewriting it. The definition of "unaccompanied child" cannot properly be rewritten so as to add in the words "*for whom there are reasonable grounds of suspecting*" before the words "is under the age of 18". The opening wording of paragraph 18B (1) also cannot properly be rewritten in such a way or so as in effect to say "where a person detained under paragraph 16 (2) is *being detained as* an unaccompanied child…"

36. For his part, Mr Wise – as had the judge – relied heavily on the decision of the Supreme Court in the case of *R (A) v Croydon London Borough Council* [2009] 1 WLR 2557, [2009] UKSC 8 and also on the prior decision of the House of Lords in *R v Secretary of State for the Home Department ex p. Khawaja* [1984] AC 74. In

particular, the *Croydon* case decided that, in the context of s. 20 of the Children Act 1989, the question of whether or not a person was or was not a child (defined in s. 105 as "a person under the age of 18") was a matter of objective fact, if need be to be decided by the courts. It was not simply a matter for a local authority's (reasonable) determination: see in particular paragraphs 26 to 28 of the judgment of Lady Hale and paragraph 51 of the judgment of Lord Hope. The argument that words could be written in to the statute to reflect the reasonable belief of the local authority was rejected: cf. the decision of the Court of Appeal in that case ([2009] PTSR 1011, [2008] EWCA Civ 1445) to the contrary. So here, said Mr Wise.

37. In my view, however, the decision in *Croydon* supplies only limited support for the claimant's interpretation. It certainly provides some support: not least because it illustrates that Parliament can properly intend the question of age to be treated as an "objective fact" notwithstanding the inherent difficulties in age assessment. But it is limited support just because it was a decision on a different Act of Parliament and in a different context, albeit one relating to children. As Lady Hale said (at paragraph 24): "The task in all these cases is to decide what Parliament intended". That, if I may respectfully say so, is obviously right.

38. For like reasons, Mr Strachan's continued reliance on the decision of the Supreme Court in *AA (Afghanistan)* also, in my opinion, provides only limited support for his argument. True it is that in that case – as, mutatis mutandis, in the Children Act 1989 which was the subject of the *Croydon* case – the definition of "children" in s. 55 of the 2009 Act was "persons who are under the age of 18". But as I see it s. 55 is a *general* statutory provision, requiring that the various functions there specified are discharged "having regard to the need" to safeguard and promote the welfare of children. This general provision cannot, in my opinion, be used to displace, as it were, the *specific* provisions of the 1971 Act, as amended, dealing *specifically*, as a matter of outcome, with the detention of children. Thus it can be seen that the content of the duty in s. 55 of the 2009 Act and the content of the duty in Schedule 2 to the 1971 Act are different.

39. Moreover, Lord Toulson in his judgment in *AA (Afghanistan)* was himself careful, in distinguishing s. 55 of the 2009 Act from s. 20 of the Children Act 1989, to emphasise that the task was one of interpretation of the particular statutory provisions. As he pointed out, at paragraph 46 of his judgment, whilst s. 55 of the 2009 Act and s. 20 of the Children Act 1989 contain the same definition of children (and it is to be noted that he did not suggest that as used in s. 55 it did not have an objective meaning) their structure and language are very different. Whilst of course it is true that *AA (Afghanistan)* itself involved a decision on s. 55 of the 2009 Act by reference to the power to detain under paragraph 16 of Schedule 2 of the 1971 Act, it seems to me inescapable that the structure and language of that Schedule has since been materially altered by the amendments introduced by the 2014 Act.

40. Thus as I see it the outcome for this appeal cannot properly be decided simply by choosing between *Croydon* or *AA (Afghanistan)* – of both of which cases the draftsman of the 2014 amendments is to be presumed to have been aware – as the relevant determinative case. Neither is determinative. The outcome for the present appeal is determined by the proper interpretation of paragraphs 16 and 18B of Schedule 2, as amended in 2014: and the language actually used is clear.

41. In argument, I should add, there was some brief discussion regarding a decision to detain persons who, as children, would not be liable to be returned to a Member State of the European Union under Dublin II. In my view, that factor has no decisive significance on the overall issue of interpretation arising.

42. Mr Strachan powerfully submitted, however, that detention of children reasonably believed at the time of detention to be adult, applying the applicable policy guidance, had been endorsed by the Supreme Court in *AA (Afghanistan)* as lawful and compliant with s. 55 of the 2009 Act and compliant with the Convention and international obligations. There could be, he said, no identified purpose in changing the law in this respect by the amendments introduced in 2014 in the way the claimant has argued so as, in effect, to introduce strict liability. Such an outcome, he said, would be "surprising and unheralded". Certainly no materials were put before us to indicate that Parliament had actively intended any such change. The (essentially neutral) Explanatory Notes on Lords Amendments to the Immigration Bill (6 May 2014) – if admissible at all on the issue of statutory interpretation, which I rather doubt – certainly do not flag up such a change. As to Mr Wise's hopeful reference to the Coalition Programme for Government issued in May 2010 and the statement there contained: "We will end the detention of children for immigration purposes", I regard that as being as irrelevant as it is inadmissible for this purpose.

43. I do see the point Mr Strachan is trying to make. But, with respect, it will not do. The fact remains that paragraphs 16 and 18 of Schedule 2 *have* been amended. It cannot be said that the interpretation advanced by the claimant and upheld by the judge, by reference to those amended provisions, is a senseless or purposeless one such as to permit a radical departure from the words actually used, naturally and ordinarily read in their context. On the contrary, such an interpretation can be said to advance the general aims of s. 55 of the 2009 Act; to encourage scrupulous and cautious assessments of age by immigration officials; and to promote further the welfare of children: which has, generally speaking, been such a powerful consideration in recent times both in domestic law and under international conventions.

44. Mr Wise for his part accepted that the purpose of the amendments was not simply to confer a claim for damages on detained persons who were in fact unaccompanied children. He also did not seek to argue that Chapter 55 of the Enforcement and Instructions Guidance was no longer valid. But he and the Equality and Human Rights Commission were, in my opinion, entitled to point out that Parliament could perfectly properly and rationally decide by these means to strengthen, by primary legislation, the safeguarding of unaccompanied children in immigration detention cases: rather than leaving it to the exercise of the broad power conferred on the executive by paragraph 16 (2) of Schedule 2, in its unamended form, subject to compliance with issued policy guidance and with *Hardial Singh* principles where applicable (*R v Governor of Durham Prison ex p. Hardial Singh* [1984] 1 WLR 704). Greatly circumscribing, as to place and length of detention, the detention of those who are in fact unaccompanied children could rationally be accorded by Parliament precedence over administrative and practical convenience in an (admittedly difficult) evaluation exercise as to age assessment. Moreover, strict liability is a frequent concomitant of unlawful detention cases: and sometimes some hard results can be thrown up (see, for example, *R v Governor of Brockhill Prison, ex p. Evans (No. 2)* [2001] 2 AC 19).

45. It was nevertheless maintained on behalf of the Secretary of State that such an interpretation would in practice give rise to very great difficulties. It would also be likely to generate litigation. It was, indeed, bluntly said by Mr Michael Gallagher, Assistant Director in the Asylum and Family Policy Team of the Home Office, in his witness statement dated 14 January 2016 (which sets out the anticipated difficulties arising from the claimant's arguments) that to permit detention only on the basis of "objective" evidence of age was "unrealistic". (In terrorem arguments of that kind were also no doubt available to be advanced in the *Croydon* case.) I am myself not at all unsympathetic to such arguments. But here too they fall foul, in my opinion, of the explicit wording of the statutory provisions. In any event, I should add, if there is a claim for damages for wrongful detention in such a case then it will ordinarily, I would have thought, still be for a claimant to prove that he was in fact, at the relevant time, under the age of 18.

Conclusion

46. I do not propose to say more. The wording of the relevant provisions of Schedule 2 to the 1971 Act (as amended by the 2014 Act) is, in my view, unambiguous. Since that unambiguous wording gives rise to a conclusion which cannot be said to be devoid of sense or purpose the words must, on conventional principles of statutory interpretation, be given their ordinary meaning.

47. It was difficult, at times, not to gain the impression that much of the argument on behalf of the Secretary of State in essence was to put forward the presumed intention of Parliament as being founded on an endorsement of the decision of the Supreme Court in *AA (Afghanistan)* and then to mould the language of the amended statutory provisions to meet that presumed intention. But it is elementary that the intention of Parliament is ultimately to be derived from the statutory language it actually has used. If the result which I reach in this case is unwelcome to the present Government then its remedy is to amend the statutory provisions. It is not, however, a proper exercise of the judicial function to achieve such amendment by distorting the statutory language, under the guise of a purported process of statutory interpretation.

48. In my opinion, the judge reached the right conclusion. I would dismiss this appeal.

Lord Justice Underhill:

49. I agree.

Lord Justice Lindblom:

50. I also agree.