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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2023] EWHC 1611 (KB)



No. CO/804/2023

Royal Courts of Justice

Wednesday, 17 May 2023

Before:

MS CLARE PADLEY
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE KING
on the application of
BH

Claimant

- and -

LONDON BOROUGH OF NEWHAM

Defendant

MS J LAWRENCE (instructed by Osbornes Law) appeared on behalf of the Claimant.

MS P ETIEBET (instructed by the Legal Services Department) appeared on behalf of the Defendant.

J U D G M E N T

THE DEPUTY JUDGE:

1 This is an application by the Claimant for interim relief in the form of a mandatory order in the following terms:

“Pending determination of the application for judicial review or further order, the Defendant shall treat the Claimant as a care leaver of his claimed age (date of birth 25.02.2005) and maintain the provision of suitable support for a care leaver of that age.”

2 The Claimant is represented by Jenn Lawrence of Counsel and the Defendant is represented by Peggy Etiebet of Counsel. I have a bundle of papers and a bundle of authorities and skeleton arguments from both Counsel, and I am grateful to them for their written and oral submissions.

Procedural background

3 The Claimant is an asylum seeker from Iranian Kurdistan. He says that his date of birth is 25 February 2005, which would mean that he would now be 18. He claims to have arrived in the UK by boat in September 2021 after a traumatic journey through Turkey and across Europe, due to his life being in danger in his home country.

4 He says he was interviewed by the Home Office on arrival in the UK without an appropriate adult present. He initially told them he was 16, but he says that then he got scared when they did not believe him and then told them he was 19 following which he was placed in adult accommodation. I have not seen a copy of the initial Home Office age assessment.

5 After instructing his solicitors in November 2021, the Claimant requested a full age assessment and after that time he was accommodated as a child pending the completion of the age assessment. The age assessment process took place over two days from 12 to 13 September 2022 and the final assessment was provided to the Claimant's solicitors on 1 December 2022. The outcome of the age assessment was that the Claimant's date of birth should be 25 February 2000, so he would then be 22 and now be 23.

6 On 2 February 2023 the Claimant was moved back into accommodation provided by the Home Office for adult asylum seekers. It is common ground that if the Claimant's claimed date of birth is correct, then as the Claimant had been in the Defendant's care for more than 13 weeks prior to turning 18 he would be a ‘former relevant child’ and be entitled to the benefit of the leaving care duties under the Children Act 1989.

7 On 16 December 2022, the Claimant's solicitor sent a letter before claim to the Defendant challenging the lawfulness of the age assessment decision.

The judicial review claim

8 By his claim for judicial review dated 23 February 2023 the Claimant seeks to challenge the age assessment on the following grounds:

Ground 1: It was procedurally unfair and not *Merton*-compliant due to the nature of the questioning and the questioning techniques used, particularly in the minded-to interview.

Ground 2: It was irrational in failing to take into account some relevant considerations and taking into account some irrelevant matters and placing too much reliance on the claimant's physical appearance and demeanour.

Ground 3: It was wrong in fact and so requires a precedent fact determination by the court as per *R(A) v London Borough of Croydon* [2009] UKSC 8.

The Claimant also sought interim relief in terms I have already outlined.

- 9 The application for permission and the claim for interim relief were disputed by the Defendant in the summary grounds of defence dated 24 March 2023. A reply was then served by the Claimant on 27 March 2023.
- 10 It is common ground if the court grants the interim order sought, the Defendant would then be required to conduct a proper assessment of the Claimant's needs to determine the precise/appropriate level of support he requires day-to-day and then provide him with that support.
- 11 Whether the Claimant's needs require the provision of supported accommodation would be one of the matters for the Defendant to assess. I note from the case of *R (O) v Barking and Dagenham LBC* [2010] EWCA Civ 1101, to which I was referred by Ms Etiebet, that if an interim order is made, the Claimant would then be provided with accommodation by the Defendant rather than the Home Office, but that this may be an independent care leavers' accommodation or in supported accommodation. The Claimant contends that he would fall within the Defendant's own criteria for supported accommodation, but that is not accepted by the Defendant, and that issue does not arise for decision today.

Permission decision and directions

- 12 On 23 April 2023 the matter came before me as a paper application and I made the following orders:

- (a) an order granting anonymity to the Claimant which remains in place today;
- (b) an order granting permission to the Claimant to apply for judicial review;
- (c) an order that the application for interim relief be heard at an oral hearing;
- (d) and an order that thereafter the case is transferred to the Upper Tribunal (Immigration and Asylum Chamber)

Witness statements and documentary evidence

- 13 The Claimant relies on his own witness statement dated 24 February 2023 and a witness statement from his friend, Dyari Abbasi, also dated 24 February 2023. The Claimant's evidence includes a full account of his home in Iranian Kurdistan, his journey to the UK and his current living conditions in the UK. The statement of Mr Abbasi, who has had his own age confirmed as 18, relates to their friendship in the UK and the time he spent with the Claimant when they were living together and at college together in the UK.
- 14 I noted and raised with Counsel that the Claimant's original witness statement did not comply with CPR 32.8 and Practice Direction 32 as it was not first drafted in the Claimant's own language and then translated into English, and the signed statement of truth is also not in his own language. The same applies to Mr Abbasi's statement. The translated statements in the bundle are from English to Kurdish, whereas they should have been taken in Kurdish and then translated into English for the court in accordance with Practice Direction 32. I note the Defendant has referred to the decision of Garnham J in *Correia v Williams* [2022] EWHC 2824, which considers this point.

- 15 I also note that in the Reply, the Claimant's solicitors responded on this issue and subsequently provided Kurdish versions of the statements and sought to distinguish *Correia*, as in this case the claimant is illiterate in Kurdish in any event, so the statement had to be read out to him. I do not accept that that explanation addresses the key purpose of Part 32, but I do note that the translation of the original statement in this case was undertaken contemporaneously by an independent interpreter and not by the solicitor, as in the *Correia* case. So, in the circumstances of this interim hearing, and in the absence of any objection from the Defendant today, I have already indicated to the parties that I am prepared to take these witness statements into account.
- 16 By an application notice dated 29 April 2023 the Claimant also sought permission to rely on a second witness statement dated 27 April 2023. I understand the Defendant agreed to this provided they were permitted to file a witness statement in response. In those circumstances, I will also allow the Claimant to rely on his further statement and for the Defendant to rely on the witness statement of Gloria St Jean, the claimant's former social worker, dated 9 May 2023.
- 17 In her statement, Ms St Jean said that she was the social worker while the Claimant was accommodated as a putative child and that she had made enquiries with the Home Office about his current accommodation. They have confirmed that he is currently sharing a room with four adult males, including bathroom facilities, and that the Home Office are not aware of any medical conditions that exempt him from sharing a room. She also confirmed that even if the application for interim relief is granted, the Claimant may be placed in accommodation which entails sharing facilities with adults.
- 18 I have also had regard to the age assessment documentation and supporting documents, although I note that the age observation report from the social worker, which is referenced in the main assessment report, has not yet been disclosed by the Defendant.

Test for interim relief in the form of mandatory injunction

- 19 Both parties agree that the test I should apply is the test set down in the decision of the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396, with modifications to reflect the public law context, namely:
- (a) is there a serious issue to be tried; and
 - (b) if so, where does the balance of convenience lie?
- 20 I note that this approach has been taken in other age determination interim relief cases rather than the application of the higher '*strong prima facie case*' threshold applied in some interim applications for mandatory injunctions against public authorities, and I will adopt the approach agreed by both Counsel. It is also agreed by both parties that the remaining factor in *American Cyanamid*, relating to whether damages would be an adequate remedy to either party, is not a relevant consideration given the nature of this case.
- 21 I also note that although it is the Defendant's position that following the grant of permission, limb (a) above is accepted as being met, the Defendant still contends that the strength of the Claimant's case is a relevant factor under limb (b) above, not least because of the low threshold to be applied in granting permission in age determination cases following the application of the test set down in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59.
- 22 It follows that the key issue to be considered on this application is where the balance of convenience lies, taking into account the overall strength of the Claimant's case.

Relevant legal provisions

- 23 The duties owed by local authorities to care leavers under the 'Leaving Care Regime' are set out in sections 23A to 23C of, and Schedule 2 to, the Children Act 1989, and the associated regulations. As I have already stated, I understand it is common ground that if the Claimant's claimed date of birth is correct, then as he had been in the Defendant's care for more than 13 weeks prior to turning 18, he would be a 'former relevant child' and be entitled to the benefit of those duties. So, I do not need to set out the relevant eligibility provisions in section 23. The duties continue until the care leaver reaches the age of 21.
- 24 The purpose of these provisions was considered by the House of Lords in *R (G) v Southwark London Borough Council* [2009] UKHL 26 at 8, in a passage relied on by the Claimant, in which Lady Hale stated that:

"The general aim of these new responsibilitieswas to provide a child or young person with the sort of parental guidance and support which most young people growing up in their own families can take for granted but which those who are separated or estranged from their families cannot."

- 25 The support includes the appointment of a personal adviser, the preparation of a pathway plan and 'other assistance' as set out in section 23C and the Care Leavers (England) Regulations 2010, which can also include the provision of accommodation, including supporting accommodation in appropriate cases.

Relevant case law

- 26 The parties have also drawn to my attention a number of first instance decisions on interim relief in age determination cases, including *R (AH) v Kent County Council* [2021] EWHC 878, *R (AS) v Liverpool County Council* [2020] EWHC 3531, *R (BG) v Oxfordshire County Council* [2014] EWHC 3187, *R (KA & NBV) v London Borough of Croydon* [2017] EWHC 1723, *R (BAA) v Liverpool County Council* [2023] EWHC 252 and *R (MO) v London Borough of Newham* [2022] EWHC 3224.
- 27 I have looked at all these cases and, whilst they are all first instance High Court decisions which turn on their own facts, I derive the following points of assistance from them:
- (1) The leaving care duties of a local authority are real and important.
 - (2) The fact that a claimant has already turned 18 does not diminish the potential importance of being granted interim relief.
 - (3) The evaluation of the balance of convenience should involve an evaluation of the risk of injustice in circumstances where the claimant continues to be dealt with as an adult alongside adults and is subsequently vindicated at the substantive hearing and found to have been a child, as against any risk of injustice to the defendants if an order is made in terms of the impact on the defendant's limited resources.
 - (4) It is not necessary for a claimant to show a specific vulnerability in order to gain interim relief, given the nature of the duties owed to putative care leavers, but an interim order may be more warranted in cases of vulnerability.
 - (5) In most but not all cases the status quo in an age assessment case where the age assessment is challenged is the status quo before the impugned decision, not the

status quo before the application for interim relief.

I note however in relation to this last point that neither party in this case sought to place any emphasis on the status quo given that the claimant has spent time both in the local authority accommodation and, more recently, in adult asylum accommodation.

Summary of the parties' positions

- 28 The Claimant states it is not necessary for a claimant to show any particular vulnerability in order to obtain interim relief of this kind, but that in fact the Claimant was in a vulnerable position due to his previous traumatic experiences. The evidence indicates that he is illiterate, cannot speak English and is entirely separated from his family. The age assessment report records him as having some degree of trauma from his past experiences and separation from his family, and he suffers from nightmares. He relies on the report from the support worker which was provided during the age assessment process in which it was recorded that staff had asked the claimant if he wanted to be referred to CAMHS because of concerns he was feeling upset due to his past experiences, although I note he declined that referral.
- 29 Ms Lawrence also highlighted the claimant's own evidence about his unhappiness in his current adult accommodation, which he shares with four older adult men and the evidence from his previous placement which indicated that he was comfortable with his peers of the same claimed age and that he did not seek out adult company. The age assessors had documented that the Claimant had no independent living skills on arrival, although I note that it is now accepted that he can cook, clean and budget for himself. It was also highlighted there was no safeguarding risk to other children in this case as any placement would be in independent accommodation or supported accommodation for adult care leavers.
- 30 The Claimant also relied on the Defendant's own 'local offer for care leavers' guidance which sets out its approach to the provision of accommodation to vulnerable care leavers and the additional support on offer including well-being and advocacy services and financial support. The Claimant relied on the strength of his own case and the points made in the summary statement of grounds and facts as challenging the defendant's contentions, which I will turn to in due course.
- 31 The Defendant submits that the key factors to be taken into account when considering where the balance of convenience lies are the strength of the Claimant's case or, as they would say, the weakness; the wider public interest; the assessment that was conducted which the Defendant seeks to rely on; whether there was any material before the court to suggest the Claimant is a particularly vulnerable individual who would be liable to suffer if he was to continue to be housed with his other adults in the current accommodation and where he would remain housed in the interim; and any differences between that and local authority accommodation.
- 32 In relation to those factors, the Defendant relied on the following points:
- (1) That although permission has been granted, the merits of the Claimant's case are not strong; that the age assessment was conducted in a proper and lawful way in accordance with best practice and deference should be given to it.
 - (2) It is not alleged by the Claimant that any of the main procedural safeguards for age assessments, in other words two assessors, an appropriate adult and an interpreter, were not met; there was no documentary evidence and a lack of jigsaw evidence to

support the Claimant's account.

- (3) The Claimant is, on his own case, now over 18 and can properly be accommodated as an adult by the Home Office.
- (4) Although the Claimant reports that he feels tired and hopeless, there is no medical evidence of vulnerability or adverse mental effects attributable to his accommodation with other adults. The Defendant also relies on his accounts of his well-being being inconsistent and the fact that he is described in reports as being quite confident and self-sufficient.
- (5) The Claimant's complaints about his accommodation are only that he does not like the food and has to share the room with adult men of which he is now one, and they are not serious enough to warrant a grant of interim relief.
- (6) If the claimant was to be supported or accommodated under the Children Act, then scarce resources of the Defendant would be diverted from meeting the needs of other children to meeting those of the Claimant.

Discussion and conclusion

- 33 In circumstances where permission has been given for a substantive challenge to the age assessment in this case, which will be transferred to the Upper Tribunal for determination, the focus of the submissions has rightly been mainly on the balance of convenience. The Defendant has properly accepted that there is a serious issue to be tried. In the light of the low threshold for a permission decision set out in *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, I am also satisfied that the first limb of the test in *American Cyanamid* is made out, namely that there is a serious issue to be tried – in other words, the determination of the claimant's age.
- 34 Turning to the balance of convenience, as I have indicated both parties addressed the issue of the strength of the Claimant's case. The Claimant contends that his case is strong, or at least has enough merit not to sway the balance of convenience against him. The Defendant puts it in the reverse way, namely that the strength of the Claimant's case does not sway the case in the Claimant's favour. I accept that for the reasons put forward by the Defendant which I have already summarised, the Claimant's case in relation to procedural grounds is not a very strong one given that there is no challenge based on an absence of any of the key procedural safeguards and no documentary evidence supporting the Claimant's age. However, the Claimant has made a number of legitimate criticisms about the nature of the questioning and the weight attached by the assessors to different considerations, and I start from the position that permission has been given and that the issue of age determination will now be considered by the Upper Tribunal who will have to consider all the arguments that have been raised in coming to their decision.
- 35 In my view, the strength of the Claimant's case would be sufficient to warrant the making of an interim order on the grounds that his age now stands to be determined by the court, if the remaining balance of convenience factors warranted it, but it does not actively sway matters in his favour.
- 36 The Claimant is seeking the provision of section 23 support, which can include accommodation and the wide set of guidance and support I have outlined. I accept and endorse the importance of that support for care leavers, which has been outlined in the cases I have already mentioned. I also accept that in a case such as this which involves a young

asylum seeker who has no other family support in the UK, the significance of such support is even greater.

- 37 I accept, as indeed did Ms Etiebet for the Defendant, the Claimant's submission that vulnerability is not a necessary requirement for the grant of interim relief. However, I also accept that there is evidence that the Claimant is in a vulnerable position due to his previous traumatic experiences, his lack of familiarity with this country and the English language and his illiteracy. I also accept the documented evidence that he has exhibited some signs of previous trauma and has suffered from nightmares, although I acknowledge there is no supporting medical evidence about his current situation. I also take into account that on his claimed age he has only recently turned 18.
- 38 I do not consider that any vulnerability factors need to be directly related to adult accommodation as was suggested in the Defendant's written submissions or that an order would only be warranted if the Claimant met the criteria for supported accommodation. It is sufficient, in my mind, if he would benefit from other section 23 support including provision of a personal advisor, the needs assessment and the well-being support.
- 39 It is agreed by both parties that there are no safeguarding issues to consider in this case as it is not proposed that the Claimant will be placed in accommodation with younger children in any event. So that is not a factor with which I need to be concerned, as was the case in some of the cases to which I was referred, and which mitigated against interim relief being provided.
- 40 I accept that the provision of section 23 support to the Claimant would involve the Defendant in incurring resources and diverting resources from other young people, but I agree with the principle I outlined above from the case law that the evaluation of the balance of convenience should involve an evaluation of the risk of injustice in circumstances where the Claimant is denied the benefit of such support as a care leaver but is instead dealt with as an adult asylum seeker and is subsequently vindicated at the substantive hearing and found to have been a child at the relevant time, and thus now a care leaver.
- 41 Taking into account all the relevant factors raised in the written and oral submissions, although I consider this case to be finely balanced, I am satisfied that the balance of convenience lies in favour of an interim order being made so that the Claimant can benefit from the type of section 23 support that he is assessed to need until his age has been determined. An order will therefore be made in terms sought in the application.
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CERTIFICATE

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