Neutral Citation Number: [2024] EWHC 3079 (Admin)

Case No: AC-2024-CDF-000031

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET
Date: 29/11/2024

Before:

HIS HONOUR JUDGE JARMAN KC
Sitting as a judge of the High Court
Between:

THE KING (on the application of ZHB)	**Claimant**
- and -	
THE CITY AND COUNTY OF CARDIFF COUNCIL	**Defendant**

- -
- -

Mr Becket Bedford (instructed by **Luke & Bridger Law**) for the **claimant**
Mr Iain Alba (instructed by **the defendant**)

Hearing dates: 13 and 25 November 2024
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Approved Judgment

This judgment was handed down remotely at 10.30am on 29 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HIS HONOUR JUDGE JARMAN KC

HHJ JARMAN KC :

1. The claimant renews an application for permission to challenge by way of judicial review an age assessment carried out by social workers employed by the defendant council in October 2023 which resulted in the assessment that he was an adult.

2. The claimant arrived in the UK in October 2022 whereupon the Home Office recorded his date of birth as 20/10/2001 although he claimed to be under the age of 18 at the time. He was deemed an adult and accommodated in adult accommodation in Conwy, North Wales, but continued to maintain that he was a child. He was assessed by social workers in Conwy and found to be an adult. He was then transferred to adult accommodation in Cardiff where he was again assessed by social workers as an adult. The reasons given included the following: He was unable to provide much detail around his journey to the UK; there were inconsistencies as to his account of contact with family in the UK; there were no suggestions of any physical or learning difficulties; the claimant was asked to provide detailed answers but often gave one-word answers and appeared to be deliberately evasive; in the opinion of the social workers in Cardiff and Conwy and of the Home Office officials his appearance and his mannerisms and behaviour all indicated that he was over the age of 18.

3. The claimant had legal representation in respect of his immigration and asylum issues but not during the age assessment. However, the assessor did seek information from those representatives as part of the age assessment process. He had an independent advocate from the National Youth Advocacy Service (NYAS) throughout the process. That is a charity which supports and empowers children and young people in vulnerable situations. The claimant was given opportunities to have private discussions with NYAS and to ask any questions. He was also told during the process that if he was unhappy with the process he had the right to discuss this with his legal representative.

4. Permission was refused on the papers by HHJ Lambert. He had regard to *R (A) v Croydon LBC* [2009] UKSC 8, where the Supreme Court held that whether someone is a child on a particular date is a question of fact to be determined by the court, rather than on conventional public law grounds. He determined that the claimant's factual case on age, taken at its highest, could not properly succeed in a contested factual hearing. The social workers relied upon appearance, but also the claimant's stated background, previous statements to the authorities and social interaction.

5. The grounds for renewal are threefold and are set out in the renewal form dated 14 October 2024 by Mr Bedford, counsel for the claimant, as follows:

> "1. The court has overlooked or ignored the fact that the claim is based on Convention grounds; as such, it is immaterial if the impugned assessment withstands scrutiny at common law, and it remains, whether the test for permission is met for the grounds which allege that the impugned assessment is incompatible with the claimant's Convention rights;
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> 2. In the decision whether the claimant's factual case on age could properly succeed at trial, the court has overlooked or ignored the fact that the claimant did not benefit from any of

> the minimum procedural guarantees inherent in the principle of the presumption of minor age under Article 8 of the Convention as it applied to the claimant in the assessment impugned;
>
> 3. In the assessment at common law, whether the claimant's factual case, taken at its highest, could properly succeed in a contested factual hearing, the court failed to assess the evidence and the materials for itself, and in place of its own assessment of the claimant's factual case, the court gave as its reason for refusing permission instead, a finding that the impugned assessment was not bad for public law error."

6. The oral rehearing first came before me on 13 November 2024 when both parties were represented by counsel, the claimant by Mr Bedford and the defendant by Mr Alba. Both counsel filed skeleton arguments for the renewal hearing.

7. In Mr Bedford's skeleton argument for that hearing he expanded upon the three grounds. In respect of the first ground, he submitted that it is no answer to the claim that the age assessment was incompatible with the protection of the claimant's right under the Human Rights Act 1998 (the 1998 Act) to respect for his private life under Article 8(1), to say that the assessment is not impugned at common law. This is what the defendant asserts. As for the second ground, he submitted that an arguable procedural lapse may support an application for permission to apply for judicial review: see *R (SB) v Royal Borough of Kensington and Chelsea* [2023] EWCA Civ 924 at [86] per Laing LJ. Finally, on the third ground, he submitted that HHJ Lambert fell into error on the papers when answering the question whether the factual challenge is arguable, by reference to a review of the defendant's age assessment for public law error, when the two are entirely separate: see *R (MAA) v London Borough of Hounslow* [2024] EWHC 1894 (Admin) at [10], [11] and [36]-[41].

8. Mr Bedford relied heavily on a decision of the European Court of Human Rights in *Darboe and Camara v Italy*, 5797/17, (21 July 2022), in which the court acknowledged the national and international legal framework applicable at the time in considering whether an age assessment in Italy had been carried out with minimum safeguards. The court referred to Parliamentary Assembly Resolution 1810 (2011) which recognizes the primary importance of the best interests of the child and of the principle of presumption of minority in respect of unaccompanied migrant children reaching Europe. The court said this:

> "153. In the present case, the Italian authorities failed to apply the principle of presumption of minor age, which the Court deems to be an inherent element of the protection of the right to respect for private life of a foreign unaccompanied individual declaring to be a minor.
>
> …
>
> 155. At the time of the facts of the case, these safeguards clearly included, under both domestic and EU law, the appointment of a legal representative or guardian, access to a lawyer and informed participation in the age-assessment

> procedure of the person whose age was in doubt. The guarantees put in place by EU and international law have gone further to ensure a holistic and multidisciplinary age-assessment procedure. The Court welcomes this development, as well as the implementation by the domestic authorities, subsequent to the facts of the present case, of a legal system which appears to be fully consistent with higher international standards."

9. This was followed in *Diakitè v Italy*, 44646/17 (14 September 2023) and *AD v Malta*, 22427/22, (17 October 2023), and *MH and SB v Hungary*, 10940/17 and 15977/17, (22 February 2024), from which Mr Bedford cited at length. He concluded his skeleton by observing that it was not disputed in the present case that at the time of the assessment the claimant did not have a legal representative or guardian, so there is an arguable case that the assessment was carried out in breach of the claimant's rights under the 1998 Act. He quoted *In the matter of an application by Hugh Jordan for Judicial Review (NI)* [2019] UKSC 9 per Lord Reed at [25]-[38]. He further submitted that the claim is not academic despite the claimant now having admittedly turned 18 and relied on *R (HP) v Greenwich RLBC* [2023] EWHC 744 (Admin) and *R (Karma) v Sheffield City Council* [2024] EWHC 93 (Admin) at [12].

10. Mr Alba's skeleton argument did not engage directly with the ECHR authorities. It referred to a toolkit published by the Welsh Government as to what support a local authority is expected to provide for children/young people around the age assessment process. Immigration legislation and policy are not devolved to the Welsh Government, but most services that children or young people receive in Wales are the responsibility of Welsh Government, local authorities and other public bodies in Wales.

11. The toolkit is called The Unaccompanied Asylum-Seeking Children: Age Assessment Toolkit (2021). Mr Alba cited the following extracts:

> "When a child/young person is undergoing an age assessment, case law has determined that they must be afforded the opportunity to have an Appropriate Adult present at the age assessment interview(s)…
>
> Children/young people in Wales do not currently have a system of Guardianship or the support of the Refugee Children Panel. It is essential then, if the child/young person is to be afforded the same UNCRC rights as other looked after children in Wales, the social worker makes a referral to advocacy services and the advocate uses interpretation services, if the child/young person requires them. For statutory advocacy services in Wales, see NYAS."

12. Mr Alba submitted that the defendant complied with the toolkit.

13. During the hearing Mr Bedford conceded that none of the UK case law on age assessment deals with the rights of the person being assessed under the 1998 Act. He

said that this had been missed. In reply he referred to the legal framework in Wales and to the Social Services and Well Being (Wales) Act 2014 (the 2014 Act).

14. This was not referred to or dealt with in either of the parties' skeletons. Rather than dealing with this at the hearing without previous reference, I took the view that the hearing should be adjourned, and the parties should file additional skeleton arguments dealing with this point. I gave directions to that effect, and this they did.

15. Section 7 of the 2014 Act is headed "Other overarching duties, UN Principles and Convention. Subsection (2) refers to section 6(1) (which so far as material applies to individuals who may have a need for care and support and looked after children) and provides:

> "A person exercising functions under this Act in relation to a child falling within section 6(1)(a), (b) or (c) must have due regard to Part 1 of the United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 ("the Convention")"

16. In Mr Bedford's additional skeleton argument, he accepts that the defendant's social workers referred to the Welsh Government toolkit. He refers to authorities dealing with the meaning of "due regard" in various contexts, including *R (Bracking) v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 at [27] and *R (Friends of the Earth) v Secretary of State for Environment, Food and Rural Affairs* [2024] EWHC 2707 (Admin) at [25]. He submits that the defendant ought to have considered that the minimum procedural safeguard for the claimant in the conduct of the age assessment was the appointment of a legal representative or guardian, access to a lawyer and informed participation.

17. He also refers to *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2010] UKSC 45 where Lord Neuberger, giving the judgment of the Supreme Court, stated at [48]:

> "This Court is not bound to follow every decision of the EurCtHR. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the EurCtHR which is of value to the development of Convention law (see e g *R v Horncastle [2009] UKSC 14; [2010] 2 WLR 47*). Of course, we should usually follow a clear and constant line of decisions by the EurCtHR: *R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323* . But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in *Doherty v Birmingham [2009] 1 AC 367* , para 126, section 2 of the HRA requires our courts to "take into account" EurCtHR decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or

> procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line."

18. The defendant accepts that it must have due regard to the UNCRC when undertaking its functions under the 2014 Act and accepts that an age assessment engages rights under Article 8 under the 1998 Act. Mr Alba submits that the court in *Darboe* was dealing with the requirements of Italian law and points to the reference at [83-87] to guidance from the European Asylum Support Office (EASO) which states:

> "A representative is a person, or an organisation appointed by the competent bodies in order to assist and represent an unaccompanied minor in procedures with a view to ensuring the best interests of the child and exercising legal capacity for the minor where necessary. Where an organisation is appointed as a representative, it shall designate a person responsible for carrying out the duties of representative in respect of the unaccompanied minor. In practice, who fulfils this function may vary between Member States, and in some instances could be carried out by more than one individual or organisation. For instance, legal advisors, guardians, social workers and/ or NGO workers may all be appointed as a child's representative. the representative should be appointed at the earliest opportunity and before the commencement of any age assessment examination and cannot be someone whose interests' conflict or could potentially conflict with those of the child."

19. He quotes further from the Welsh Government's toolkit at page 17 dealing with legal representation and sets out considerations to be applied, including a legal representative to be identified to explain the asylum process. However, the toolkit provides that the local authority's role in this is only to assist accessing appropriate legal representation for an asylum claim. This is echoed in The Welsh Government Response to the United Nations Committee on the Rights of the Child's Concluding Observations Report 2023 which at page 80 addresses the issue of legal advice by requiring age-appropriate information and legal advice about their rights, asylum procedures and requirements for documentation.

20. Notwithstanding the detailed submissions of Mr Bedford on the 1998 Act and the UNCRC, in my judgment the age assessment under challenge was carried out in accordance with the 2014 Act and the Welsh Government toolkit. The claimant had legal representation in respect of his asylum claim and an appropriate adult in respect of the age assessment. I am not persuaded that it is arguable that either the UNCRC or the 1998 Act requires any more than what was done in this case in the context of Welsh legislation and guidance.

21. The question remains whether the material before me raises a factual case which, taken at its highest, could properly succeed in a contested factual hearing. In my judgment it does not, and permission is refused.

22. I would be grateful if counsel would within 14 days of hand down file a draft order agreed as far as possible with written submissions on any consequential matter which cannot be agreed.