



Neutral Citation Number: [2024] EWHC 483 (Admin)

Case No: AC-2023-MAN-000097

CO/444/2023

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

Tuesday, 5th March 2024

Before:
FORDHAM J

Between:
THE KING (on the application of HAWBIR MUHAMMADI) **Claimant**
- and -
LIVERPOOL CITY COUNCIL **Defendant**

Helen Foot (instructed by Luke & Bridger Ltd Solicitors) for the **Claimant**
Lindsay Johnson (instructed by Liverpool City Council) for the **Defendant**

Hearing date: 5.3.24
Judgment as delivered in open court at the hearing

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

FORDHAM J

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment.

FORDHAM J:

Introduction

1. This is a permission-stage age-assessment judicial review claim. The Claimant is an unaccompanied asylum-seeking young person from Iran. He arrived in the UK on 21 September 2022, having journeyed here, from Iran, via Turkey and Italy and then across the Channel from France. He gave Home Office officials a date of birth, using the Iranian calendar, of “27 Mordad 1384”. That would be 13 August 2005. The Home Office assessed his actual date of birth as 6 years earlier, on 18 August 1999. Following dispersal to Liverpool, and a solicitors’ referral, two of the Defendant (the “Local Authority”)’s social workers on 3 November 2022 conducted a “brief enquiry” age assessment. It lasted from 15:36 to 16:15 (stage 1) then 16:36 to 17:15 (stage 2). There is a contemporaneous document (“the Assessment Form”) recording key points relating to the assessment. Mr Johnson for the Local Authority has pointed out that there would ordinarily also be handwritten notes which may be accessible, and which may be put in rather more down-to-earth language. The upshot was that the decision-makers agreed with the Home Office’s assessed date of birth (18.8.99). Permission for judicial review was refused on the papers on 12 May 2023.
2. Even on his own case, the Claimant is now 18. But that does not make the age issue academic, as I explained in R (Karimi) v Sheffield City Council [2024] EWHC 93 (Admin) at §12. No renewed application for anonymity has been made and this was not raised in the Claimant’s skeleton (cf. Karimi §13). Nor has interim relief been pursued.
3. Mr Johnson says that there is a knock-out blow based on delay. HHJ Stephen Davies, on the papers, did not agree. Nor do I. The claim was commenced within 3 months. A letter before claim was written (21.12.23) to which there was a response (6.1.23). The legal aid documents show that there was a time lag between an initial decision at the beginning of January and the final relevant approval at the end of January. Any prejudice is primarily to the Claimant, in delaying resolution and making expedition harder to justify.
4. On this renewed application, I have had to consider afresh whether there is an arguable claim, on the basis of all of the materials and the helpful written and oral submissions. Having done so, I am satisfied that this claim crosses the relevant threshold of raising a factual case which, taken at its highest, could properly succeed at a contested factual hearing. I will be transferring the claim to the Upper Tribunal for a factual determination afresh. I will explain why.

Special Features of Permission-Stage Age-Assessment JRs

5. Age assessment judicial reviews at the permission stage have special features. These are the product of this core principle: whether the asylum seeker is, or is not, a child is an objective question of fact for a substitutionary judicial review, on all relevant and including subsequently available evidence. In asking whether the age assessment decision is “lawful”, the key substantive question for the judicial review judge is not ‘was it reasonable, on the then available material, to assess this individual as an adult?’ Instead, the key substantive question for the judicial review judge is ‘on the now available material, was this individual a child?’

6. The special features flowing from this core principle include the following. (1) The test for permission is whether there is, as I have said: a factual case which, taken at its highest, could properly succeed at a contested factual hearing (R (FZ) v Croydon LBC [2011] EWCA Civ 59 at §9). (2) Unless filtered-out at the permission stage, the claim will generally be transferred to the Upper Tribunal, as the specialist judicial review forum for a factual determination afresh on all available evidence. (3) Standalone conventional judicial review grounds – ie. those which would apply to a classic secondary supervisory review of a conclusion involving judgment and appreciation – are “subsumed” in the objective age-assessment: R (MVN) v Greenwich LBC [2015] EWHC 1942 (Admin) at §47. (4) Such standalone conventional grounds remain relevant, however, in determining what weight to attach to the Local Authority’s conclusion: see MVN at §48.
7. To these, I add this. The FZ test is sufficient. But it may also properly be seen as necessary. Suppose a claimant points to a standalone conventional judicial review ground. Any public law error would need to be capable materially of undermining the Local Authority’s age assessment conclusion. Materiality will be considered at the permission stage. But there will be no arguably material public law error if the Court concludes that the factual case, even taken at its highest, could not properly succeed at a contested factual hearing.

Pleading and Age Assessment

8. These special features can have implications for the way a judicial review claim is pleaded, and for how a pleading may fairly need to be understood. The grounds of claim may plead that the decision is incorrect, seeking a substantive age determination on the factual merits. Specific pleaded criticisms of the impugned age assessment decision may be framed in the language of standalone conventional judicial review grounds, so as substantially to undermine the weight which can be given to the Local Authority’s conclusion. But, whether or not they are so framed, the criticism may have traction in a more nuanced way, as part of an attack on the factual merits of the decision. The more open to criticism is an aspect of the decision or decision-making process, the less satisfactorily it is approached, or the less cogently it is reasoned, the greater the reduction in weight which can be placed on the Local Authority’s conclusion.
9. To take an example, the pleaded claim may say that the assessment of credibility was flawed by being unfair or unreasonable. But the judicial review court may conclude – without the decision being unfair or unreasonable in a conventional public law sense – that the age assessment is questionable on its merits; that the approach was unsatisfactory; or that the reasoning lacks cogency. If age-assessment were a classic secondary supervisory review, these weaknesses would be insufficient. But they may be part of a viable judicial review claim, since whether the asylum seeker is or is not a child is an objective question of fact for a substitutionary review, on all relevant and subsequently available evidence, as I have explained.

The Pleading in this Case

10. Mr Johnson argues that: (i) the pleaded judicial review grounds, to which the Claimant should be held, allege only three stand-alone conventional judicial review grounds; and (ii) viewed as stand-alone conventional judicial review grounds, none of the three

grounds gives rise to an arguable claim. I am unable to accept his premise: I do not agree that the pleaded claim has ‘boxed itself in’ in that way. Yes, there are three grounds of challenge. True, each uses language resonant of alleging a conventional public law error. Ground 1 is procedural unfairness in not adopting an adequate and fair “minded-to” stage. Ground 2 is an “unlawfulness” in the approach to credibility, in failing to give the Claimant the benefit of the doubt. Ground 3 is the placing of excessive “weight” on the notoriously unreliable features (see eg. R (AB) v Kent County Council [2020] EWHC 109 (Admin) at §21(7)(8)) of appearance and demeanour.

11. These three Grounds are all advanced within the rubric of an expressly pleaded FZ permission-stage test: that the claim crosses the threshold of raising a factual case which, taken at its highest, could properly succeed at a contested factual hearing. Pausing there, part of the Local Authority’s summary grounds of resistance is the contention that the Claimant had offered no evidence that would demonstrate that he is of his claimed age and that he had not demonstrated any arguable case that the court would reach a different decision from that reached by the Local Authority. The pleaded judicial review claim also cites authority which discusses the role that conventional judicial review grounds play (see §7(3) and (4) above): ie. that they are “subsumed” in the objective age-assessment on judicial review, while remaining relevant in determining what weight to attach to the Local Authority’s conclusion. The very idea of “unlawfulness” (Ground 2), in the context of an objective or precedent fact, itself means and includes that the decision-maker was ‘incorrect on the factual merits’. And a criticism about “weight” (Ground 3) is directly relevant to a substitutionary review. The Local Authority says these are “public law” challenges only. But “public law” includes the precedent fact – or objective fact – principle and engages a substitutionary review. In the end, the real point if viewed in this way – as Mr Johnson correctly and helpfully points out – is to focus on the extent to which a sufficient “positive case” has been put forward by the evidence. That evidence includes the record of the answers that were given to the social workers and the Claimant’s witness statement. Both Counsel have assisted me with the contents of those materials and, as I have already explained, I am satisfied that the relevant threshold is crossed.
12. As HHJ Stephen Davies pointed out when dealing with this case on the papers, it is clear that the Claimant is seeking a substantive determination of his age. I agree. Amended grounds have now added an age declaration as a remedy. This has been opposed on the grounds of its lateness. Ms Foot, at one point, conceded that this was a “necessary” amendment to be included within the pleaded remedies in the grounds. But, in my judgment, it simply spells out what HHJ Stephen Davies rightly recognised has always been there. I will grant permission to amend. But the pleaded claim has, in my judgment, throughout been a proper vehicle to embrace the objective question of fact of whether the Local Authority has assessed the Claimant’s age erroneously.

Credibility

13. Turning to the three pleaded Grounds, I will start with Ground 2. This is a point of substance. The Claimant says the Local Authority’s approach to credibility was “unlawful” and involved a failure to give him “the benefit of the doubt” (see AB at §21(5)). Where, as in this case, there is an absence of documentary evidence of age, “the starting point” for the task of assessing age is “the credibility of [the individual’s] own evidence” (R (AE) v Croydon LBC [2012] EWCA Civ 547 at §44; MVN §25).

That includes whether the relevant account was reasonably consistent and whether apparent inconsistencies were capable of being explained (MVN §48).

14. In the Assessment Form, the social workers listed 8 points on which their adverse conclusion was based. One was that there were no documents in support. Another was that the sole evidence was the Claimant's claim that his father had, once, told him his date of birth and age. Then there were points about how old the Claimant was "three months ago". He had been repeatedly asked about this and had variously said: he did not know; sixteen; or seventeen. It was assessed as not credible that he was unable to say what age he was "just a few short months ago". Another point was that, when asked about his father's age the Claimant had said: "I don't even know my own age so how can I know his?", which was assessed to be an indication that he was guessing or trying to be deceptive. Another point was the inability to remember his age or where he had been fingerprinted, while being able to give a detailed description of his journey. This was assessed as suggesting that he was choosing to evade certain questions.
15. These were two experienced social workers asking questions for more than half an hour (stage 1). But the context includes this: that the Claimant said he was from a family of shepherds in rural Iran; that birthdays were never celebrated including for children; that he had never been to school; that he could not read or write. Mr Johnson made the powerful oral submission that the reference to "three months ago" can be linked to the Claimant's own witness statement evidence: about being told by his father not only his date of birth but also his age as 17; about having been told that just before leaving Iran; and about that being "three months" or so prior to the age assessment. Notwithstanding that powerful point, and the other submissions made by Mr Johnson – which undoubtedly constitute an arguable defence to this claim for judicial review – it is possible, in my judgment, that the Claimant's answers could have been genuine answers given by a young person, for whom and within whose family and community birthdays and ages were unmarked and largely irrelevant, and yet who had once been told his age and date of birth ("27 Mordad 1384") as he consistently claimed. He said his father had a document which recorded this, which the Claimant said was a "Shenesnameh". I cannot accept, beyond argument, that there was no "doubt" of which the Claimant could possibly be given the "benefit". I have noted that there was no objective country information being referred to or relied on by the social workers: for example, to doubt the plausibility of age and birthdays being irrelevant to a shepherding family in rural Iran; or objective country evidence about the holding of a "Shenesnameh". And it is, in my judgment, possible that the Claimant genuinely remembered the countries through which he had travelled, and the length of time in each, without remembering where his fingerprints were taken.

Appearance

16. Two of the eight points relied on by the social workers related to physical appearance. It was assessed that the Claimant appeared, to the social workers, to be significantly older than 17: because of his broad shoulders; because of evidence of shaving; and because of very dark shadows assessed as related to regular shaving. This also links to credibility. It was recorded that the Claimant had been unable to give reasons as to "why you look older than your claimed age". And the social workers observed the "dark shadows from shaving" which they then assessed was evidence of dishonesty because the Claimant had said he "only shaved for the first time the day before". I accept the Local Authority's submission that this was treating appearance as a factor.

But, in my judgment, it is possible that the Upper Tribunal would not agree with this assessment, put alongside the credibility points and all the evidence in the case. That is Ground 2.

Process

17. Ground 1 raises a contested process issue about whether a proper “minded to” procedure was adopted. The word “minded” – including any translation for a young person – is rather technical. This is really about identifying concerns, and allowing a chance to answer them. It means this: no decision has been made; we do have some concerns; we want to give you the chance to help us with these concerns; we will listen; and then we will make a decision. This part of the procedure is especially important where there are issues of credibility (see R (HAM) v Brent LBC [2022] EWHC 1924 (Admin) at §11).
18. The Assessment Form says that stage 2 (16:36 to 17:15) was a “minded-to session”, with the social workers sharing the “provisional outcome”, as the 8 points as to why they were “minded” not to accept the claimed age. The Local Authority submits that this was by way of affording a “genuine opportunity to explain his position to answer questions that may be put to him and to respond to matters adverse to his case” (HAM at §32); and that the Claimant “simply chose not to take that opportunity when offered to him”; he “refused to engage” and picked up his papers and left the room.
19. The problem with that characterisation of events is that the “Minded-To Session” follows the list of 8 points with this:

Conclusion.

Both assessors are minded to believe that you are an adult of 23 years due to your physical appearance and demeanour and your lack of credibility.

It was explained to the [Claimant] that we would not be accepting his claimed age and that he would be able to challenge this assessment through his solicitor if he wishes. It was explained that this would not change his asylum claim.

At this point while we were still talking to him through the interpreter, [the Claimant] picked up his papers and left the room.

20. The social workers are recorded there as saying “minded” and “demeanour” and “credibility” to a young person, through an interpreter. I accept Mr Johnson’s observation that this may be in the way that it has been written up and that any handwritten notes may show more down-to-earth language was used. In the document, the social workers then go on to explain. And what they appear to explain is that they will not be accepting his claim. It is possible that the word “would” (in the phrase “we would not be accepting”) is intended to describe a hypothetical – the reaching of a later decision at a later stage, if not persuaded otherwise. But that is not, in my judgment, the most natural reading of what has been written here: “we would not be accepting his claimed age”. This point about “would” is an elusive point which raises more questions than it answers. Anyhow, it is after that explanation that the Claimant picks up his papers and leaves. Where, precisely, in all of this is the Claimant’s untaken chance to answer the provisional concerns? The Claimant’s witness statement evidence is that he did not understand that he was being given this opportunity. It is possible that greater clarity could have been achieved, had an Appropriate Adult been present (see AB

§21(13)). It is sufficient for today to say that there are concerns in relation to this aspect of the process and that they are concerns which are relevant to the question of whether the weight to be given to the assessment is undermined.

Fresh Evidence

21. There is putative fresh evidence by way of two letters from those who have been working with, or assessing, the Claimant in the period of time subsequent to the impugned decision. The Local Authority resists the admission of this evidence, as being late and irrelevant. In a substantive hearing in the Upper Tribunal, it will be open to the Tribunal to consider any and all evidence that is potentially relevant to its age assessment function. This putative fresh evidence is illustrative of evidence that may assist the Tribunal. What will also assist will be the oral evidence from the Claimant and the Tribunal's assessment of his credibility. I have considered the putative fresh evidence. But, as is clear from my reasons, even without it I would conclude – based on everything that I have read and heard – that there is a factual case taken at its highest which can properly succeed at a contested factual hearing. I am not in the circumstances formally going to grant permission to adduce the fresh evidence, but that is because it is much better for the Upper Tribunal to exercise its own case-management powers and reach its own judgment as to what evidence is to be admitted when the factual merits hearing takes place.

Conclusion

22. For the reasons I have given, I will grant permission for judicial review, setting aside the costs order made on the papers, and transfer the case for fact-finding in the Upper Tribunal.

5.3.24