Neutral Citation Number: [2019] EWHC 2998 (Admin)

Case No: CO/2203/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before :

MR JUSTICE JULIAN KNOWLES

- -

Between :

R(F) **by his litigation friend Maria Houlihan**	**Claimant**
- and –	
Manchester City Council	**Defendant**

- -
- -

Antonia Benfield (instructed by **Greater Manchester Immigration Aid Unit**) for the **Claimant**
Joshua Swirsky (instructed by **Manchester City Council**) for the **Defendant**

Hearing dates: 30 October 2019

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Julian Knowles:

Introduction

1. The Claimant is seeking asylum in the UK. He is a national of Guinea who claims to have been born in Conakry on 9 December 2001 and thus to be a child of 17 years of age. The Defendant assessed the Claimant to be 20 years of age in an assessment which concluded on 12 December 2018. This application for judicial review:

    a. Challenges as *Wednesbury* unreasonable the Defendant's decisions of 8 March 2019 and 18 April 2019 refusing to conduct a reassessment of the Claimant's age in light of new evidence supplied by the Claimant (the Decisions) (Ground 1).

    b. Challenges the Defendant's age assessment and submits that the Court should exercise its jurisdiction to determine his age as a question of precedent fact in accordance with the principles in *R (A) v London Borough of Croydon* [2009] 1 WLR 2557 (Ground 2).

2. By an order dated 14 August 2019, His Honour Judge Stephen Davies granted permission in relation to Ground 1 but refused permission on Ground 2. Ms Benfield on behalf of the Claimant renews the application for permission in respect of Ground 2.

Factual background and the decisions challenged

3. The Claimant entered the UK as an unaccompanied asylum-seeker and was intercepted by the police on arrival. He was then referred to the Defendant and was taken into the Defendant's care under s 20 of the Children Act 1989 (the 1989 Act) as a looked after child.

4. In his witness statement of 20 May 2019 the Claimant said that he was born in Conakry, Guinea. He said that his mother told him before she died that he had been born on 9 December 2001. He said that he had four half-siblings and that his mother had been a Christian and his father was a Muslim. He said this caused conflict in the house. He started school when he was 7 or 8, but stopped going when his mother became ill. He said she died when he was aged about 10. He described attending an evangelical church run by Pastor Richard Goa. He said after his mother died his father would be abusive because of his religion. He described abuse (including violence) that he had suffered at the hands of his father and half-siblings, and that he had gone to live with the Pastor. He then described how the Pastor had arranged for him to leave Guinea, and the arduous journey from Guinea to the UK.

5. The Defendant undertook an assessment of the Claimant's age. This began on 28 September 2019 and concluded on 12 December 2018. The assessment concluded that the Claimant was not a child of 17 years of age, but that he is an adult who is 20 years old.

6. On 15 February 2019, the Claimant's solicitor sent a letter before action challenging the lawfulness and rationality of that age assessment. The Claimant provided the Defendant with written evidence in support from Kathleen Whitehead, a Young People's Support Worker at Greater Manchester Immigration Aid Unit and Carlos Souza, a missionary with the Church of Jesus Christ of Latter-Day Saints. The Defendant was requested to accept the

Claimant's claimed age, or in the alternative, to conduct a reassessment of his age. In either circumstance, the Defendant was requested to provide support and accommodation to the Claimant under the 1989 Act.

7. On 4 March 2019, the Claimant's solicitor sent another letter accompanied by further evidence from Kathleen Whitehead and a document ostensibly issued by a court in Guinea as a form of birth certificate, confirming the Claimant's date of birth as 9 December 2001. The Claimant repeated the request for the Defendant to accept the Claimant's claimed age and that he be placed back into care in light of this new evidence.

8. On 8 March 2019 the Defendant responded to the letters of 15 February 2019 and 4 March 2019, declining the relief sought. In summary:

    a. The Defendant accepted that in certain circumstances it has a duty to consider new evidence which comes to light and to conduct a new age assessment, but it did not accept that the new material provided by the Claimant's solicitor gave rise to a duty to reassess the Claimant's age.

    b. The evidence of Ms Whitehead and Mr Souza did not make it more likely that he was 17 than 20.

    c. The court document was not a pre-existing official birth document, such as a birth certificate, but had been obtained specifically for the purposes of challenging the age assessment.

    d. The document had been applied for by the Claimant's father, OS, and referred to evidence having been heard from two relatives, LS and NS, in support of the application.

    e. This was difficult to reconcile with what had been said on behalf of the Claimant in the letter before action of 15 February 2019, when it had been asserted that relations between the Claimant and the rest of his family had deteriorated to such an extent that he no longer felt safe in Guinea.

9. On 4 April 2019, the Claimant's solicitor sent a further letter before action maintaining that the Defendant had carried out an unlawful age assessment and that a re-assessment should be carried out. It enclosed correspondence from Pastor Richard Goa. This said that he had obtained the court document confirming the Claimant's age. I will quote this letter in full with the Claimant's name redacted (there is a certified translation from the French original) (*sic*):

> "Conakry 23/3/19
>
> Pastor Richard GOA
> Residing in Guineé Conakry
> Commune of Ratoma (Simambossia Neighbourhood)
> Evangelical Church
> [phone number] To

To Mrs Lola

Re: request for witness statement
For [F]

I am writing to you to ask you to provide a witness statement for young [F] who is currently living in your country. I have witnessed the change of religion of the young man in Guinee Conakry who was sent back to his family for this reason after investigations I had to get him out of the country to find peace thanks to the Lord, so he would not be killed or poisoned by these parents, due to lack of less I could not continue to host him in my home for my own safety.

I felt it necessary to take him out of the country via a young friend who drives a lorry and I entrusted him with him. With regard to his birth certificate, I checked these documents that he left me which were stored in my shop, and the mice ate some of them. I did a ruling in lieu of a birth certificate at the tribunal de la première instance of CONAKRY 3-MAFANCO as it was already recorded, they put a certificate copy which was sent.

NB: Since I am a priest I am not allowed to alter the truth

Please contact me for further information.

The person concerned
{signature]"

10. The Claimant's solicitors also enclosed further correspondence from Kathleen Whitehead. The Defendant was again requested to accept the Claimant's age or, in the alternative, to conduct a reassessment of the Claimant's age while providing him with support and accommodation in accordance with his claimed age.

11. By a letter dated 18 April 2019 the Defendant responded to the letter before claim of 4 April 2019 maintaining the refusal to reconsider or review the assessment of the Claimant's age and declining the relief sought. This letter made the following points:

    a. The age assessment had been carried out by two experienced social workers. An appropriate adult and interpreter had been present. The Claimant was given a copy of the age assessment on 17 December 2018. During the process adverse inferences were put to the Claimant. The Defendant was confident there had been compliance with the safeguards in age assessments required by the decision in *R(B) v London Borough of Merton* [2003] 4 All ER 280.

    b. Any challenge to the age assessment was now out of time.

c. The real issue was whether there should be a re-assessment. The new evidence relied on by the Claimant was that from Carlos Souza and Kathleen Whitehead; the court order dated 22 January 2019; and the statement from Pastor Goa.

d. There can be circumstances where a local authority are under a duty to conduct a re-assessment. This is where the authority believes on the basis of new information that 'a significantly different conclusion might be reached and that the child or young person may be notably older or younger than initially assessed': Association of Directors of Childrens' Services (ADCS) *Age Assessment Guidance* (October 2015), Chapter 7, p31 (the ADCS Guidance).

e. Whether or not to undertake a new assessment is a question for the local authority, and is reviewable on ordinary public law principles: *R(BM) v London Borough of Hackney* [2016] EWHC 3338 (Admin), [12].

f. The Defendant considered that Carlos Souza's evidence that F is comfortable when surrounded by young people is just as consistent with him being 20 as being 17, and that it did not believe that it could lead to the Defendant reaching a significantly different conclusion even taken together with other evidence.

g. In relation to Ms Whitehead's evidence that she had seen nothing which caused her to doubt the Claimant's claimed age, and that she had given him the 'benefit of the doubt', she had misapplied the latter principle (see *R(AS) v Kent County Council* [2017] UKUT 00446)) and started from the position that she believed the Claimant. Again, the Defendant concluded that that it did not believe that her evidence could lead it to reach a significantly different conclusion even taken together with other evidence.

h. Most importantly, in relation to the court order and the letter from Pastor Goa, the Defendant concluded as follows:

    (i) It said it had paid particular attention to this evidence and that it set 'great store' by a judgment from an apparently competent court in another jurisdiction. However, the court document was not the same as a birth certificate. It had been obtained in January 2019 specifically for the purpose of assisting the Claimant with his challenge and 'this inevitably weakens the reliability of the evidence'. The evidence from Pastor Goa when read with the court order raised a number of issues.

    (ii) Pastor Goa had obtained the court order. He had arranged for the Claimant to travel to the UK. He was therefore involved in people smuggling and had an interest in the outcome of the age assessment.

    (iii) He said that he had had a copy of the Claimant's birth certificate but it had been eaten by mice. The Defendant asked rhetorically why he had not sent this to the UK either with the Claimant or later.

    (iv) The Pastor had said he had arranged for the Claimant to come to the UK to stop him from being murdered by his parents because of his conversion from Islam

to Christianity. However, his mother had died 10 years previously and the court order recorded his father as having applied for it. It also recorded that two relatives had given evidence in support of the application. The Pastor was not mentioned in the order at all. The Pastor had not explained what the role of these relations had been nor what their evidence was.

(v) The court order was obtained following oral evidence not from a consideration of contemporaneous documentary evidence (eg birth records) and for the purpose of assisting the Claimant to challenge the age assessment.

(vi) The Claimant had said he was a Catholic and yet Pastor Goa is an evangelical Christian and so 'it is therefore difficult to accept their relationship as one of priest and congregant' as claimed by the Pastor.

(vii) Hence, overall the Defendant concluded:

> "In these circumstances, and after careful consideration, the Council believes that the evidence from Guinea (the Court Order and Pastor Goa's statement) is so unreliable that it could not lead to a significantly different conclusion being reached as to [the Claimant's] age.
>
> In these circumstances the Council has decided not to conduct a further age assessment based on the new evidence which, even when taken together, it does not believe would lead it to reach a significantly different conclusion.
>
> It follows that the Council will not accommodate [the Claimant] as a child because he is an adult, and will not provide any further services under the Children Act 1989."

12. On 6 June 2019, the Claimant issued this claim for judicial review along with an application for urgent consideration and interim relief. On 8 June 2019 I granted an anonymity order and interim relief requiring the Defendant to accommodate and support the Claimant as if he were a child pending the outcome of this application for judicial review.

13. On 27 June 2019, the Defendant filed and served an Acknowledgment of Service and summary grounds of defence. The application for permission was considered on the papers by His Honour Judge Stephen Davies on 9 August 2019. As I have said, the judge gave permission in respect of the Defendant's refusal to conduct a reassessment of the Claimant's age but refused permission in relation to the Claimant's challenge to the December 2018 age assessment.

14. On 19 August 2019, the Claimant filed a Form 86B and grounds of renewal seeking to renew the application for permission on the ground on which it had been refused. On 27 August 2019, the Defendant filed and served detailed grounds of defence.

15. Ms Benfield's Skeleton Argument contains a helpful Chronology (C/Claimant, D/Defendant):

DATE	**EVENT**
9 December 2001	C claims to have been born in Conakry, Guinea
22 August 2018	C enters the care of the D
28 September 2018	D commenced an assessment of C's age
12 December 2018	D concluded the assessment which disputed C's age and found him to be an adult aged 20 years of age (DOB: 9 December 1998)
15 February 2019	C's solicitor sent a letter before action challenging the lawfulness and rationality of the age assessment and providing additional evidence in support of C's claimed age (Letters of Kathleen Whitehead and Carlos Souza)
4 March 2019	C's solicitor sent a further letter before action providing a further letter from Kathleen Whitehead and Court documentation obtained from Guinea
8 March 2019	D responded to the letters of 15 February 2019 and 4 March 2019, repudiating the challenge to the age assessment and refusing the request to conduct a reassessment of C's age in the light of further evidence
4 April 2019	C's solicitor sent a further letter before action to the D enclosing further evidence from Pastor Richard Goa and a further letter from Kathleen Whitehead
2 May 2019	D responded to the letter of 4 April 2019 in a letter dated 18 April 2019 maintaining the refusal to reassess
6 June 2019	C issued this claim for judicial review with an application for urgent consideration
8 June 2019	I granted interim relief requiring the D to support and accommodate C as a child of his claimed age pending consideration of the claim or until further order
27 June 2019	D filed an acknowledgment of service and summary grounds of defence
9 August 2019	His Honour Judge Stephen Davies granted permission on a partial basis, granting permission for judicial review in respect of the challenge to the lawfulness and rationality of the D's refusal to conduct a reassessment of C's age
19 August 2019	C filed and served a Form 86B with grounds of renewal
27 August 2019	D filed and served detailed grounds of defence
30 October 2019	The claim is listed for substantive hearing

Legal principles

16. Before turning to the parties' submissions, it is convenient to set out the relevant legal framework.

17. Many of those who come to the UK claim to be children (ie, aged under 18). In particular, young asylum seekers claim to be children when they are not because they believe, possibly

with justification, that being a child will assist them with their asylum claim, and/or because the services they can obtain from local authorities as a child are better and/or more useful than the limited services that are provided to adult asylum seekers.

18. Section 17(1), (2) of the 1989 Act provides:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part) -
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2."

19. Local authorities are given the specific duties and powers in Sch 2 principally for the purpose of facilitating the discharge of the general duty imposed by s 17(1). Section 17 covers a wide range of services. Section 20 is focused more narrowly. It is concerned specifically with the accommodation needs of children in need. Section 20 obliges every local authority to provide accommodation for children in need who appear to need accommodation:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of-
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

20. Age assessments are often necessary because those who claim to be children lack identity or birth documents capable of definitively determining the issue. Such an assessment is a necessary pre-cursor (in cases where there is doubt) to the application of the provisions in the 1989 Act because they are only concerned with children.

21. The importance of a child's age being properly and lawfully determined was emphasised by the Court of Appeal in *R(AE) v London Borough of Croydon* [2012] EWCA Civ 547, [2]:

> "The issue of a young unaccompanied asylum seeker's exact age is legally important for at least three reasons. First, by section 20(1) of the Children Act 1989 local authorities have to provide accommodation for any child (i.e. someone under the age of 18) in need within their area who appears to need it because (amongst other things) there is no person who has parental responsibility for him. The local authority may also have to provide material support beyond the age of 18 and in some cases beyond the age of 21. Secondly, a decision on the young person's exact age is relevant to the way the Secretary of State for the Home Department ('SSHD') is required to discharge her immigration and asylum functions 'having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom*':* see section 55 *of the* Borders, Citizenship and Immigration Act 2009**.** Lastly, a favourable finding will enhance AE's credibility in his claim for asylum".

22. The way in which age assessments are to be carried out was considered in *R(B) v London Borough of Merton*, supra, and *R(FZ) v London Borough of Croydon* [2011] EWCA Civ 59. In the first case Stanley Burnton J gave guidance in judicial review proceedings on appropriate processes to be adopted when a local authority are assessing a young person's age in borderline cases. The assessment does not require anything approaching a trial and judicialisation of the process is to be avoided. The matter can be determined informally provided that there are minimum standards of inquiry and fairness. Except in clear cases, age cannot be determined solely from appearance. The decision-maker should explain to the young person the purpose of the interview. Questions should elicit background, family and educational circumstances and history, and ethnic and cultural matters may be relevant. The decision-maker may have to assess the applicant's credibility. Questions of the burden of proof do not apply. The local authority should make their own decision and not simply adopt a decision made, for instance, by the Home Office, if there has been a referral. It is not necessary to obtain a medical report, although paediatric expert evidence is sometimes provided in these cases, and there is some difference of view as to its persuasiveness in borderline cases. If the decision-maker forms a view that the young person may be lying, he should be given the opportunity to address the matters that may lead to that view. Adverse provisional conclusions should be put to him, so that he may have the opportunity to deal with them and rectify misunderstandings. The local authority are obliged to give reasons for their decision, although these need not be long or elaborate. This decision and its guidance have led to the development of what is sometimes referred to as a '*Merton* compliant' interview or process. In *R(BM) v London Borough of Hackney* [2016] EWHC 3338 (Admin), [44], Leigh-Anne Mulcahy QC (sitting as a Deputy High Court judge) helpfully distilled a number of principles relating to age assessments derived from the authorities; it is not necessary to set these out.

23. It is sometimes the case that new information or evidence comes to light following an age assessment which calls into question the local authority's conclusion. This may suggest that the individual is older or younger than the assessment determined. The Defendant accepts that in such a situation it may have a legal duty to conduct a re-assessment. As I set out earlier, the test it applies when it is invited to conduct a re-assessment is drawn from the ADCS Guidance, Chapter 7, p31 (October 2015) (emphasis added):

> "*Where further information becomes available*
>
> Age assessment is a difficult process for children and young people and for social workers undertaking the assessment; it should only be undertaken when there is significant reason to do so. However, there will be occasions when a further assessment is required. Other than on those occasions when reliable and authoritative information is available, an assessment will not allow the assessing social workers to know the age of a child or young person and will only allow them to come to a balanced and reasonable conclusion based on the information to hand and on benefit of the doubt. Other information may come to light at a later stage, for example, in the form of documentation or as professionals get to know the child or young person over time, which leads them to believe that the assessed age is wrong. *Where you believe that a significantly different conclusion might be reached and that the child or young person may be notably older or younger than initially assessed, then a new assessment should be undertaken*. In most circumstances you will need to talk with the young person about this new information. There may be occasions when a re-assessment does not have to involve further questioning; for example, where new documentation has been provided which supports the child or young person's claim and it can be relied upon, a decision on age can be made on that basis. Any new decision and the reasons for it must be clearly communicated with the child or young person, and if they are to remain in your service, then thought must be given to rebuilding trust and confidence. The Home Office must be advised of any new decision, and the child or young person will need to be issued with new immigration documents which reflect their assessed age."

24. In *BM*, supra, the judge said at [69]:

> "In summary, according to the ADCS Guidance in relation to when it is appropriate to conduct a re-assessment, the Defendant has to consider not simply whether it might have a bearing on the assessment but whether 'a significantly different conclusion

> might be reached'. That is a higher test and involves consideration of the degree to which the material might impact on the existing age assessment."

25. Young persons who wish to challenge an assessment of their age by a local authority may do so by a claim for judicial review. Such a challenge may be on orthodox judicial review grounds, as where, for instance, it is said that for some reason the local authority proceeded unlawfully or adopted a materially unfair or otherwise non-compliant procedure. In *BM,* supra, [12], the judge said that a challenge to a refusal to conduct an age re-assessment was to be assessed according to normal public law principles.

26. Hence, the question for me under Ground 1 is whether the Defendant's conclusion that the new material presented by the Claimant did not lead it to believe that a significantly different conclusion might be reached and that the Claimant might be aged under 18 was one which was reasonably open to it. The Claimant submits that the Defendant's decision not to conduct a re-assessment in light of the new evidence was one which no reasonable local authority could have taken.

27. However, there is another basis on which an age assessment may be challenged. The challenge may be that the decision assessing the claimant's age was factually wrong. The Supreme Court held in *R(A) v Croydon London Borough Council (Secretary of State for the Home Department intervening)* [2009] 1 WLR 2557 that the question whether a person is or is not a child, which depends entirely on the objective fact of the person's age, is subject to the ultimate determination of the courts. It is a fact precedent to the exercise of the local authority's powers under the 1989 Act and on that ground also is a question for the courts. If such a decision remains in dispute after its initial determination by the local authority, it is for the court to decide by judicial review. This means that the court hearing the judicial review claim will often have to determine the fact of a claimant's age by hearing and adjudicating upon oral evidence. Where such a challenge is brought then the practice is to transfer the case to the Upper Tribunal (Immigration and Asylum Chamber), which is better equipped to hear oral evidence than the High Court is on an application for judicial review: *FZ,* supra, [31]. That is not to say a claimant can apply as of right to have the court determine his/her age if s/he disagrees with the local authority's assessment. In the same case the Court said at [6]:

> "Claims for judicial review require the court's permission to bring the claim. If the claim challenges the local authority's assessment of age as a fact, the court has to apply an appropriate test in deciding whether to give permission. The parties presently before the court agree that the claimant is not entitled to permission simply because he asserts that the local authority's assessment was wrong. It is evident that the Supreme Court did not contemplate that permission would be given in every case irrespective of any consideration of the merits. In one sense, the parties to the present appeal agree what that test should be. They agree that it is that formulated by Holman J in *R (F) v Lewisham*

> *London Borough Council* [2010] PTSR CS 13; [2010] 1 FLR 1463 to the effect that the test is whether there is a realistic prospect or arguable case that the court would reach a conclusion that the claimant was of a younger age than that assessed by the local authority. The parties were, however, in imprecise disagreement as to the practical effect of this test, which each of them nevertheless espoused. Mr Luba QC, for the claimant, argued that in cases such as these, where matters of fundamental importance to claimants having wide ranging and lasting consequences are in issue, the test should be liberally applied in favour of any claimant with an arguable factual case. There should be a discretion, as there obviously is, to refuse permission in cases of long delay or where the issue has become academic. But otherwise, if there is some material before the court to support the claimant's case, permission should be given. There should be no starting presumption that the local authority's decision was correct. It would require, he submitted, a peculiarly weak case for permission to be refused."

28. In accordance with these principles, in Ground 2 the Claimant seeks permission to challenge the Defendant's December 2018 age assessment on the ground that it is factually wrong, He says that I should grant permission and transfer the case to the Upper Tribunal for his age to be determined in light of all the evidence, including oral evidence if necessary. The single judge refused permission on this ground because (a) the challenge was out of time: the judicial review challenge was issued on 6 June 2019 whereas the impugned decision was taken on 12 December 2018; (b) the grounds of challenge to the age assessment are not reasonably arguable, or not sufficiently so (given the delay) to entitle the Claimant to have the court determine his true age as a matter of precedent fact.

The parties' submissions

The Claimant's submissions

29. On behalf of the Claimant, Ms Benfield began by emphasising the inexact nature of age assessments and that there can be large margins of error. In relation to Ground 1 she said that the Defendant should have concluded that the fresh material might lead to the conclusion that the Claimant was under 18. That material principally consisted of the court order from Guinea; Pastor Goa's letter; the evidence of Katherine Whitehead, and the evidence from Carlos Souza. She contended that that the cumulative effect of this material is that any reasonable local authority would have accepted that a significantly different conclusion might be reached following a reassessment and consideration of this evidence, such that a reassessment was required. She said it was clearly probative of the Claimant's age. She said that further enquiries could have been made with the Home Office which would have led to the Defendant placing more weight on the court order than it did. The observations of Kathleen Whitehead present a consistent picture of the Claimant displaying behaviour and

interaction in accordance with his claimed age. The court documents, the evidence of Ms Whitehead and of Mr Souza are addressed briefly in turn.

30. The court document is a declaration from the Court of First Instance of Conakry 3 – Mafanco. The original of the document is in French and is provided to the Court (as it was to the Defendant) with a certified English translation. The document is further accompanied by a copy of the envelope in which it was received by the Claimant in the UK and correspondence from Pastor Richard Goa who assisted in obtaining this document from Guinea. Ms Benfield said that the Defendant should have accepted the court document at face value, especially as it did not dispute its authenticity. The document stated on its face that the court had considered evidence on file; that the application for the document had been made by the Claimant's father; and that two relatives had given evidence on oath in the witness box in support of it. The document recorded that the Court had decided and held:

> "… that [the Claimant] was born on the 9 December 2001 in Conakry, the son of [OS] and [CC]
>
> Holds that this judgment will serve as a Birth Certificate and will be transcribed in margin of the Registers of Births, Deaths and Marriages of Matoto-Conakry for the year 2001"

The document is signed by the Presiding Judge and Chief Registrar.

31. Ms Benfield submitted that the Defendant's conduct was irrational in failing to at least consider the document in original form and failing to take reasonable enquiries before rejecting it as unreliable. These documents have also been provided to the Home Office in support of the Claimant's claim for asylum. She said that any local authority acting reasonably would have accepted the importance and value in discussing these documents with the Home Office and seeking the Home Office's opinion on the reliability and authenticity of the same.

32. She said that the importance of a proper consideration of document put forward by a child or young person in support of their claimed age is addressed in the ADCS Guidance (p23):

> *"Benefit of the doubt and presumption of age*
>
> Age assessments cannot be concluded with absolute certainty as there is not any current method that can determine age with 100% accuracy. The only exception to that is if there is definitive documentary evidence, such as a clear history of birth, school records, or other documentation which you accept as valid and authentic …"

33. Ms Benfield criticised the Defendant for not referring the court document to the Home Office to be authenticated. She said that the Defendant's staff members do not have the necessary expertise or experience in the assessment of foreign documents, and therefore should have followed the Joint Working Guidance to request a verification of the documents by the Home Office. This is particularly pertinent in this case given that the Defendant is aware that the

documents are already in the Home Office's possession and as a result, a simple process of enquiry with the Home Office may address the question of authenticity. The Joint Working Guidance of June 2015 between ADCS and the Home Office, states as follows in relation to document verification (p4 of 15):

> **"***LA to verify documents with the Home Office:*
>
> LAs may base their assessment of age, or an amendment to an age assessment, on documentary evidence of the date of birth from the individual's country of origin, or on documentation which originates in another country. LAs must aim to refer documents (for example travel, identity documents or birth certificates) to the Home Office contact to be verified before the LA conducts their age assessment.
>
> When the LA does this it should forward original documents to the Home Office by recorded delivery having first taken a copy of the original. Home Office staff should look to establish the reliability of the documentation, as soon as possible, and relay the findings back to the LA. (This can include referral to internal document fraud experts. The authorities of the individual's country of origin will not be contacted in cases in which an asylum applicant may be at risk of persecution - this means if the country of origin state is the alleged actor of persecution and the asylum claim has not been fully determined or the individual's appeal rights have not been exhausted).
>
> When an individual is granted leave the Home Office must be sure that genuine documentation is returned to the individual. (The Home Office has the power to retain documentation before this in case it is required to facilitate removal from the UK.)"

34. She pointed out that the Joint Working Guidance is not limited to the verification of passports and birth certificates. The guidance cites as examples 'travel, identity documents or birth certificates', however this is not an exhaustive list. In circumstances where the Claimant put forward Court documents that were capable of establishing his age, then she said the Defendant acted unlawfully and unreasonably in refusing to even engage with the process of verifying and considering those documents.

35. In relation to the approach that local authorities should take to the consideration of documentation, the ADCS Age Guidance states that (p63):

> "A local authority should also take into account that the reliable authentication of identity documents can only be undertaken by someone with the necessary expertise and experience of assessing foreign documents and that it is not sufficient to rely on

> employees charged with checking the authenticity of documents generated in the United Kingdom. In addition, a document should not be doubted merely because some other parts of a child's account have not been found to be credible.
> In some cases the local authority may be assisted by a Home Office Country of Origin Report or reports provided by organisations such as UNICEF, the UN Committee on the Rights of the Child or Human Rights Watch, but these reports are unlikely to provide more than very general information about the availability of certain documents in the country in question.

36. Turning to the evidence of Kathleen Whitehead, she is a Young People's Support Worker at Greater Manchester Immigration Aid Unit (GMIAU) and is a qualified social worker. Ms Whitehead has provided a signed witness statement and three letters dated 15 February 2019, 28 February 2019 and 3 April 2019.

37. Ms Whitehead has known the Claimant since December 2018 but first met with him in January 2019. She reports that she has observed him at the monthly youth group, All4One, as well as attending and acting as appropriate adult in a number of meetings with professionals. Ms Whitehead reports that he engages really well with young people, he enjoys being part of a team with other young people and notes that "*his behaviour and demeanour at that group have never caused me to doubt his claimed age*" [WS § 6]. She further notes that he continues to access reassurance and support from her and other adult professionals, he is struggling to look after himself, he needs a lot of emotional support, has been very down and stressed and on one occasion reported feeling suicidal [WS § 7]. Ms Whitehead finally notes that the Claimant has struggled when she has been present in appointments with concentration and in answering lengthy, complex questions.

38. Ms Benfield referred to in *R (AM) v Solihull Metropolitan Borough Council* [2012] UKUT 00118, where the Upper Tribunal held that observations of demeanour over an extended period by a professional or otherwise, including in relation to how a person interacts, are likely to be of assistance in the determination of age.

39. Ms Benfield said Ms Whitehead is clearly highly qualified to provide reliable observation on the Claimant's age. She has known the Claimant for over 6 months, she is herself a qualified social worker and has observed the Claimant among his peers and with professionals. Her observations are clearly supportive of the fact that the Claimant's consistent behaviour is in accordance with his claimed age and her evidence would carry weight in a factual hearing to determine the Claimant's age.

40. Carlos Souza is a full time missionary for the Church of Jesus Christ of Latter-day Saints. Mr Souza met the Claimant on 23 September 2018 and assisted him with accommodation for two nights when he was rendered homeless following the age assessment. Mr Souza's email is brief but does report that the Claimant "*has a good relationship with everyone that he meets and has shown to be comfortable when surrounded especially by young people."*

As with the observations of Ms Whitehead, the observation of a young person among their peers is important in the assessment of age.

41. Overall, Ms Benfield said that in the light of the foregoing, the material put forward by the Claimant, when properly considered, clearly reached the test of evidence of material upon which a significantly different conclusion might be reached and the Claimant may be found to be notably younger than assessed. On that basis, she said that the Defendant's decisions refusing to conduct a reassessment of the Claimant's age should be quashed.

42. In relation to Ground 2 Ms Benfield submitted that the new evidence was of sufficient cogency that a court might conclude that the Claimant was under 18 and that I should grant permission. She said it was proper for the Claimant to have waited for a decision on re-assessment before issuing judicial review proceedings.

The Defendant's submissions

43. On behalf of the Defendant, Mr Swirsky accepted that the Defendant had to consider each item of new evidence on its own merits and also cumulatively. However, he said that the Defendant had undertaken this exercise correctly and that the decision it had reached could not be impugned as irrational.

44. Dealing first with the court order, Mr Swirsky made clear that it was *not* the Defendant's case that it was a fake or a forgery, and he therefore submitted that asking the Home Office to confirm its authenticity would have achieved nothing. Rather, he said that the Defendant had rejected it as providing a sufficient basis for conducting a re-assessment because, on its face, it is inconsistent with the Claimant's case. He said that the evidence which the court had considered before issuing the document had not been specified and so could not be verified.

45. Mr Swirsky pointed out that the application was on the face of the document said to have been made by OS, the Claimant's father, yet the evidence is that Claimant was frightened of being killed by his father; indeed this is said to be his main reason for leaving Guinea. Also, two other members of the Claimant's family appear to have given evidence, although the Claimant said in his witness statement that he was alienated from his family.

46. He also said that according to Pastor Goa, and in particular a letter from him dated 23 March 2019, he (and not the Claimant's father) was the person who instigated the application to the court, as well as arranging the Claimant's travel to the UK.

47. In these circumstances, Mr Swirsky said that the Defendant had concluded that the court order did not meet the triggering threshold test for a new age assessment in the ADCS Guidelines.

48. He also pointed out that there are two further letters from Pastor Goa to Claimant's solicitors: dated 30 May 2019 and 4 June 2019 which appear to to confirm that it was Pastor Goa who

went before the court rather than the Claimant's father, and that Pastor Goa impersonated the father (although the later letter seems to resile from this). I will address these letters later.

49. Mr Swirsky therefore submitted that the evidence surrounding the court order was so unsatisfactory that the Defendant had been entitled to conclude that it was not capable of leading to a significantly different conclusion being reached about the Claimant's age so as to require a re-assessment.

50. In relation to Kathleen Whitehead, Mr Swirsky submitted that her evidence is merely opinion evidence that the Claimant is no older than his claimed age. Ms Whitehead has not had very regular contact with the Claimant nor does she give any positive reasons for her opinion beyond the most general and subjective observations. Her clients seem to be children and young people. The fact that the Claimant gets on with young people with whom Ms Whitehead works does not advance matters very far.

51. He said that Ms Whitehead had taken the approach that the Claimant should be believed unless he can be shown to be being untruthful. He submitted that she had allowed this misunderstanding to cloud her judgement when giving her opinion.

52. Mr Swirsky also said that Mr Souza's evidence added little because, in particular, it did not give any details of the extent of his contact with the Claimant. Save that Mr Souza said that the Claimant 'is comfortable when surrounded especially by young people', he said nothing about the Claimant's age. He said that the Defendant had assessed the Claimant to be 20. That is young by most people's standards. He said that, at best, Mr Souza's evidence was neutral.

53. Overall, Mr Swirsky said that the Defendant considered the new evidence and concluded that it did not meet the threshold for a new age assessment. This was a decision that it was entitled to reach and this application should be dismissed.

54. In relation to Ground 2, Mr Swirsky said that I should refuse permission for the same reasons as the single judge.

Discussion

Ground 1

55. In my judgment it is impossible to characterise the Defendant's decision as irrational. Its evidence did not meet the threshold test to trigger a re-assessment was one which was reasonably open to it. The high point of the Claimant's case is obviously the court document from the court in Conakry. However, on analysis this, together with the various statements of Pastor Goa, raises more questions than it answers, and the Defendant was entitled to reject it as a sufficiently firm basis to require a re-assessment of the Claimant's age. There are aspects of the Defendant's reasoning that I am not persuaded by, as I will explain later, but overall I not satisfied that the Claimant has shown that its determination was *Wednesbury* unreasonable.

56. The court document included the following information: that the presiding judge was Mrs Mariama Balde; that the deputy public prosecutor had been present; that the Chief Registrar had assisted; that court had had regard to evidence on file; that the application had been made by [OS, confirmed in another document to be the Claimant's father]; that the application set out the grounds and the evidence; that the applicant was asking the Court to deliver a judgment to serve as a birth certificate; that evidence from the witness box had been taken from two witnesses, [LS] and [NS], each of whom has the same surname as the Claimant; and that the court decided and held that the Claimant was born on 9 December 2001 in Conakry, the son of OS and CC. Finally, it declared that the judgment 'will serve as a Birth Certificate and will be transcribed in the margin of the Registers of Births, Deaths and Marriages of Matoto-Conakry, for the year Two Thousand and One.'

57. It is immediately apparent that the court document is at odds with what Pastor Goa wrote in the letter which I have already quoted. That is because he said he had had to get the Claimant out of the country to stop him being killed by his parents, and that he 'did a ruling in lieu of a birth certificate at the tribunal de la première instance' (which I understand to mean he applied for the birth certificate). Both of these assertions are inconsistent with the Claimant's father having applied for the court document to assist his son. It is also inconsistent with the Claimant's witness statement in which, as I have said, he describes suffering abuse at his father's hands and that of his family (including half-siblings). All of this makes it highly unlikely that his father would have assisted him by applying for a birth certificate or that other relatives would have come to court in order to testify.

58. Two further letters from the Pastor are relevant. These were received after the Defendant's Decisions but it seems to me that I can properly take them into account because they do not assist the Claimant's case, and would therefore be relevant if I were otherwise minded to grant relief on the basis of the material which was before the Defendant. The first is dated 30 May 2019. It states *inter alia*:

> "My witness statement is that the young man left the country for good reason because he received death threats from his father and family because he changed religion.
>
> ….
>
> Before and after, the breakdown in the relationship between the young man and his family is not a criminal act but rather an issue regarding faith and as far as I am concerned my innervation (sic) is an act of Christ and because of my Christian religion I did it, I am sorry for going before the court to change his paternity."

59. The second letter is dated 4 June 2019 and states that 'the authorities' told him to 'go to the court of first instance of Mafanco for an affidavit of a birth certificate' and that:

> "… when I arrived at court I submitted young [F's] residency certificate to the chief clerk. After, the chief clerk saw me and asked the questions to the chief clerk. After, the chief clerk saw me and asked the questions who is [F] to you ? I answered that I have known [F] since he was a child through his mother, I was his mother's pastor before she passed away and [F] was with me when his mother died, he asked me where [F] is at the moment, I said abroad, after these explanations because I also had the birth certificate which had been eaten by mince, I showed that to him too."

60. Further, the witness statement from the Claimant's solicitor, Laura Gibbons, states at [7] that Pastor Goa had asked to speak to her. She said that:

> "He stated that he had been to the Tribunal and was going to apply for a further document as evidence of the Claimant's age. The Court document was sent in the post by the Pastor to the Claimant who brought it to our offices and an urgent translation of the document was obtained."

61. All of this evidence points to the Pastor having applied for the court document. It therefore undermines the statement on the face of the court document that the Claimant's father applied for it. It follows in my judgment that no reliance can be placed upon the document or, at least, that the Defendant was entitled so to conclude. Although the Defendant accepts it is a genuine court document the circumstances in which it was obtained, by whom, and on the basis of what evidence remains entirely uncertain.

62. Because the Defendant does not take issue with the genuineness of the document, but disputes the reliability of the evidence on which it was issued (and who exactly obtained it), Mr Swirsky was right to say that asking the Home Office to verify it would have achieved little. I pressed Ms Benfield whether the Home Office would have been table to delve into its evidential foundations as part of the verification process but she was unable to say that it would.

63. I do not attach any weight to some of the Defendant's reasons for rejecting the court order. I do not accept – everything else being equal – that just because it was obtained for the purposes of court proceedings this weakens its reliability. Nor was the Defendant necessarily right to say that it was not based on contemporaneous documents because it declared on its face that the court had had regard to evidence on the court file. But, for the reasons I have given, overall, the Defendant was entitled to conclude that the document was not to be relied upon as proof of the Claimant's age. Mr Swirsky was right when he said that some of the problems with the court order had been flagged up by the Defendant in correspondence but no adequate reply had been received from the Claimant.

64. I can deal with the evidence from Kathleen Whitehead and Carlos Souza much more briefly. I accept, as Ms Benfield submitted, that evidence from those who have observed a young

person's demeanour and interactions over a period of time can be of assistance in the determination of age: *AM*, supra, [21]. But everything depends on the facts. Ms Whitehead's and Mr Souza's evidence goes one way; the evidence of the foster professionals (as recorded in the age assessment of December 2018) goes the other way. It was their view that 'based on his demeanour, it is felt that [F] is significantly older than 17. This is also in-keeping with view of the police at the time of his arrest.' The Defendant took into account the evidence of Ms Whitehead and Mr Souza but concluded it did not take matters much further forward. They were entitled to take that view. And there is force in Mr Swirsky's point that Ms Whitehead appears to have misunderstood the 'benefit of the doubt' rule. In *AS*, supra, [20], the Upper Tribunal affirmed that the application of the benefit of the doubt in cases of age dispute is nothing more than an acknowledgment that age assessment cannot be concluded with complete accuracy (absent documentary evidence) and that, where there is doubt as to whether an individual is over 18 or not, the decision-maker should conclude that the applicant is under 18. It does not mean, as Ms Whitehead asserted in her evidence of 3 April 2018, that 'the benefit of the doubt must be applied when assessing age and that age should only be disputed if there is a significant reason to doubt a young person's age'.

65. Ms Benfield submitted that the Defendant's decision not to undertake an age-reassessment was undermined because of weaknesses in its December 2018 determination. These were not pleaded in her Skeleton Argument but were set out in the grounds of challenge which accompanied the Claim Form. She said, firstly, that the Defendant had not conducted a 'minded to' process sufficiently thoroughly or at all. This was a reference to the rule that a fair *Merton*-compliant age assessment requires an applicant to be given a proper opportunity, at a stage when a possible adverse decision is only provisional, to deal with important points adverse to his case and provide an explanation: *FZ*, supra, [21]. I do not accept this criticism. The age assessment of December 2018 makes reference to the Claimant having responded to the 'information analysis' as part of the Defendant's 'Mind to Approach' (sic). The Defendant's letter of 18 April 2019 stated that 'potential adverse inferences were put to [the Claimant]' during the age assessment. In my judgment this is sufficient to show that there was an adequate 'minded to' process during the age assessment. Second, Ms Benfield said that the Defendant's reasons for concluding that the Claimant was over 18 were weak. I do not accept this. The age assessment was full and detailed and gave reasons under a number of headings for reaching the conclusion that it did.

66. Ms Benfield argued her case with conspicuous skill and care. However, overall, I am not satisfied, whether the various strands of her argument are considered separately or cumulatively, that the decision of the Defendant not to carry out an age-reassessment was one which was not reasonably open to it. Ground 1 therefore fails.

Ground 2

67. I refuse permission in relation to Ground 2, essentially for the same reasons which the single judge gave. CPR r 54.5(1) provides that in judicial review cases the claim form must be filed promptly; and in any event not later than three months after the grounds to make the claim first arose. The age assessment was completed on 12 December 2018 and given to the Claimant on 17 December 2018. He had the assistance of adults during the process.

The claim form was not issued until June 2019. It was therefore not filed promptly and in event within three months. Ms Benfield accepted that the proper course would have been to file the claim form whilst the Claimant was engaging with the Defendant over whether there should be a re-assessment. Also, and in any event, the test in *FZ*, supra, [6] for the grant of permission in this context (viz, whether there is a realistic prospect or arguable case that the court would reach a conclusion that the claimant was of a younger age than that assessed by the local authority) is not satisfied. The new evidence put forward by the Claimant in support of his application for a re-assessment lacks cogency. The high point of the Claimant's case, as I have said, is the court document but for the reasons I have given no court could properly place any weight on it given the uncertainty of how, by whom and on what evidence it was obtained.

Conclusion

68. It follows that this claim for judicial review is dismissed.