Neutral Citation Number: [2021] EWHC 256 (Admin)

Case No: CO/3956/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2021

Before:

CLIVE SHELDON QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between:

R on the application of

IBRAHIM AMADU **Claimant**

- and –

ESSEX COUNTY COUNCIL **Defendant**

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- -

Joshua Hitchens (instructed by **Lawstop Solicitors**) for the **Claimant**
David Carter (instructed by **ELS Legal Services**) for the **Defendant**

Hearing date: 4 February 2021

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JUDGMENT

Clive Sheldon QC (sitting as a Deputy Judge):

1. This is a renewed application for permission to seek judicial review brought by Ibrahim Amadu against an age assessment decision made by Essex County Council ("the Council"). The Claimant contends that his date of birth was October 6th 2002, with the effect that at the date of the assessment (in August 2020) he was under 18 and therefore a child. If the Claimant was a child at the date of the assessment, then he would be entitled to be treated by the Council as a former "looked after child" under the Children Act 1989. The Council's decision was that he was over 18 at the date of the age assessment – the Council assessed the Claimant as being at least 23 years old.

2. In considering this application for permission, I am reminded that given that the relevant question in the substantial review will be a pure question of fact, the test for the grant of permission is whether there is "a realistic prospect, or arguable case that at a substantive fact-finding hearing the court will reach a relevant conclusion that the claimant is of a younger age than that assessed by the local authority and is or was on the relevant date a child": see *J and R (F) v. Lewisham LBC* [2010] 2 FCR 292 at [15], per Holman J.

3. In *R (FZ) v. Croydon LBC* [2011] EWCA Civ 59, the Court of Appeal provided the following guidance at [8] to [9]:

> "We do, however, consider that the question now under discussion is broadly analogous with the question in defamation proceedings of when a party is entitled to require issues of fact to be determined by a jury. For the law on this topic, see *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 at paragraph 37. In defamation proceedings, issues of law are for the judge and normally, by section 69 of the Senior Courts Act 1981, the parties are entitled to a jury trial on material issues of fact. In so far as issues depend on an evaluation of evidence so as to determine material questions of disputed fact, these are matters for the jury. But it is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a properly directed jury could not properly reach a necessary factual conclusion. In these circumstances, it is the judge's

> duty, upon submission being made to him, to withdraw that issue from the jury. That is the test applied in criminal jury trials: see *R v Galbraith* [1981] 1 WLR 1039 at 1042C. It applies equally in libel actions.
>
> There is an analogy between the court withdrawing a factual case or matter from the jury in defamation proceedings and the court refusing permission to bring judicial review proceedings upon a factual issue as to the claimant's age. We consider that at the permission stage in an age assessment case the court should ask whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so, permission should be refused. If not, permission should normally be granted, subject to other discretionary factors, such as delay. We decline to attach a quantitative adjective to the threshold which needs to be achieved here for permission to be given."

4. The reference to the test in *R v. Galbraith* is as follows:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred."

5. I need to consider, therefore, whether "the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing". In the instant case, Mr. Hitchens, on behalf of the Claimant, contends that "the material" that I need to consider when making this assessment is that the Claimant has consistently asserted that his date of birth was October 6th 2002 – he gave this date to the Home Office when assessed following his arrival in the United Kingdom in March 2020 – as well as to the Council's officials who were carrying out the age assessment in August 2020. In addition, that the Claimant produced a copy of document which

purported to be a birth certificate issued by the government of Sierra Leone which gave his date of birth as October 6th 2002, and that document has not been undermined by the government of Sierra Leone saying that it is not genuine.

6. I do not consider that that is all that I must do at this stage of the case. I read the decision in *FZ* as requiring me to look at all of the material before the Court, and from that material to ask whether it raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. In my judgment, the overwhelming evidence before the Court is that the Claimant was not under the age of 18 at the time of the assessment, but was well over that age. In my judgment, in spite of what the Claimant said to the Home Office, and maintained before the assessors, and in spite of the copy of what purports to be a birth certificate, when ranged against the other evidence a Court could not properly find that the Claimant was under the age of 18 at the time of the assessment.

7. The other material before the Court consists of the following:

   (i) The Claimant had provided several dates of birth and aliases to the government of the United Kingdom and to the German authorities, including October 6th 1998, October 5th 1997, October 6th 2003, October 10th 2000 and October 6th 2002 (in other words, he had given different dates of birth on different occasions, three of which placed him well over the age of 18 at the time of the assessment);

   (ii) The Claimant claimed asylum in Germany as an adult;

   (iii) When claiming asylum in Germany, the Claimant provided a school photo ID card, which is dated 2010. The Claimant explained to the assessors that this document was from his secondary school in Sierra Leone. If the Claimant was correct about his date of birth, then he would have been 8 years old when he commenced secondary school. In the professional opinion of the Council's assessors, the Claimant looks approximately 14 years old in the photograph;

(iv) When the Claimant first entered the United Kingdom on January 8th 2019, he reported his date of birth as October 6th 1998 (making him almost 22 years old at the time of the assessment).

(v) When the Claimant entered the United Kingdom on March 16th 2020, he provided the date of birth of October 6th 2003. When this date of birth was challenged by a social worker carrying out a needs assessment under the Children Act 1989, the Claimant gave a different date of birth: October 6th 2002;

(vi) In the opinion of the Council's assessors, the Claimant's physical appearance (based on their experience of conducting age assessments and working with unaccompanied asylum-seeking children and in particular those from West Africa, and on their understanding that trauma can have an impact on physical appearance) the Claimant's presentation (his physical presentation, his demeanour and interactions) was not that of a 17 year old, but of an adult.

(vii) When speaking to the assessors, the Claimant gave his age at various events which were inconsistent with his claimed date of birth: he said that he was 15 when he arrived in Germany (in 2015), but on his claimed case he would have been 13.

(viii) The Claimant made no attempt to counter the various points relied upon by the Council's assessors in his witness statement for the purposes of the judicial review proceedings, dated October 28th 2020: in particular, there is no mention of the 2010 ID document, or of the fact that he gave different dates of birth at different times, including when he arrived in the United Kingdom in 2019, or of the fact that he claimed asylum in Germany as an adult. Furthermore, it is notable that in his witness statement the Claimant did not provide his age at the various events in question, including important life events.

8. On the basis of this material, therefore, I consider that the Claimant has no realistic prospect that, at a substantive fact-finding hearing, the Court will conclude that he was a child when he was assessed by the Defendant.

9. Mr. Hitchens also contended that the age assessment conducted by the Defendant was arguably unlawful because the assessors contravened the principle that physical presentation should not be used alone to determine age. In this regard, Mr. Hitchens referred me to paragraph 25 of the decision in *A v. Croydon LBC* [2009] EWHC 939:

> "Dr Stern is a most distinguished paediatrician. He is consultant paediatrician emeritus to the Guy's and St Thomas' Hospitals Trust. Measurements of height and weight are in his view not completely reliable unless carried out by a properly trained paediatric auxologist. In any event, assessments of growth and maturity are in his view unacceptably unreliable. Height is particularly difficult to use as a reliable indication since much will depend on the height of each parent. There is in his view no reliable scientific basis for the estimation of age. That is a view which is entirely in accordance with the guidance given by the RCPCH. A contrary view has no scientific support. Further, as Dr Stern says, and again this accords with the general medical opinion, all the factors relied on to assess age in reality can only assess maturity and maturity and chronological age are two different things."

10. Mr. Hitchens referred me to a passage in the Defendant's age assessment which reads "Physically he is a fully developed man and based solely on his physical appearance the assessors have no doubt that he presents as significantly over the age of 18." I agree with Mr. Hitchens that if that had been the only basis of the Defendant's age assessment, then the conclusion would arguably have contravened the principle set out in *A v. Croydon LBC*. However, as Mr. Carter, representing the Defendant, pointed out, that passage has to be read in its proper context. The passage falls under a heading "Practitioners Comments on Physical Appearance". That heading is one of several headings – the others are "Practitioners Comments on Interaction of Person During Assessment", and "Practitioners Comments on other information" -- which are also relied upon by the assessors in reaching their conclusion. Indeed, the three headed sections are preceded by the words: "The assessors have come to this conclusion [that Ibrahim presents as 23+] due to the following", indicating that the assessors relied on

the matters set out in the three sections for their conclusion and not simply their comments on the Claimant's physical appearance. This point is reinforced when one reads the "Conclusion of Assessment" which comes straight after these three sections, and makes clear that the Defendant was relying on a number of matters. It is states that the assessors reach their conclusion "based on Ibrahim's physical appearance, demeanour and interaction, the information he provided throughout the assessment, and the information shared from other sources".

11. In my judgment, therefore, the contention that the Defendant relied solely on the assessors' views of the Claimant's appearance in reaching their conclusion is not arguable.

12. Finally, Mr. Hitchens contends that the assessment process was flawed – and not *Merton* compliant (*R (B) v Merton London Borough Council* [2003] 4 All ER 280) – because the Claimant was not given the opportunity of answering the points against him. Mr. Hitchens referred me to the passage in *FZ* at [21], where it was stated that:

> "In our judgment, it is axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him. Obvious possible such points are the absence of supporting documents, inconsistencies, or a provisional conclusion that he is not telling the truth with summary reasons for that provisional view... It is theoretically possible that a series of questions appropriately expressed during the course of the initial interview might fairly and successfully put the main adverse points which trouble the interviewing social workers. But that would be a haphazard way of doing it and one which would be intrinsically likely to lead to subsequent controversy in the absence of an expensive transcript of the interview."

13. In my judgment, it is not arguable from a review of the assessment record that the Claimant did not have a fair and proper opportunity, at a stage when a possible adverse decision was no more than provisional, to deal with important points adverse to his age case which may weigh against him. Although the Court of Appeal in *FZ* caution against

interviewers raising the main adverse points during the course of the interviewing process, they do not decide that this is not legally permissible. When looking at the assessment record, it is clear that the main adverse points were put to the Claimant head-on, and he was given a full and fair opportunity to deal with them.

14. I note in particular that the ID card, dated 2010, and which the Claimant was confirmed was his, and was from his secondary school, was the subject of a series of questions to the Claimant. It is recorded that

> "The assessors explained that the ID has 2010 written on it thus according to his claimed date of birth, this would make him 8 years old in the photo. This was explained several times with the assessors expressing their professional opinion that he looks approximately 14 years old in the photo.
>
> Ibrahim confirmed this photo was taken when he started his first year at secondary school. The assessors asked whether Ibrahim was 8 years old when he started secondary school however, he replied no. It was confirmed this ID was not taken from primary school. The assessors asked Ibrahim how old he was in this phot however he replied he doesn't know how old. The assessors clarified that this photo was taken in his first year of secondary school thus asked for his age at this point, however Ibrahim replied he didn't check his age."

In my judgment, the Claimant was plainly given the opportunity to deal with a key point that was troubling the assessors.

15. I note also that the Claimant was asked why there were different locations of birth recorded by the authorities and different variations of his name. He is recorded as saying "he doesn't know; this is his age". It was put to the Claimant that it was concerning that there were different variations of name, different dates of birth, and different places of birth. It was put to him that his date of birth of 1997 (one of the dates that he had claimed) was more consistent, and made sense when referring to the school ID photo in 2010 where he looked approximately 14 years old, but the date of birth which he is

currently claiming would make him 8 years old in the photo. The Claimant was asked if he could explain this and other things discussed and he replied "that is his age".

16. In my judgment, it is not arguable that the Claimant did not have a fair and proper opportunity to comment on the points that were causing concern to the assessors.

17. In the circumstances, therefore, it seems to me that there are no arguable grounds of challenge to the assessment process, and there is no realistic prospect of a Court finding on the available evidence that the Claimant was under 18. I concur, therefore, with the view expressed by Linden J. when considering the application for permission on the papers: "The evidence in relation to his secondary school photo ID card is particularly telling but there were various other features of the case which pointed ineluctably to the conclusion that the claimant is a good deal older than he says he is".

18. For these reasons, permission is refused.