Neutral Citation Number: [2024] EWHC 575 (Admin)

Case No: AC-2023-MAN-000486

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

Wednesday, 13th March 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of KRA)	**Claimant**
- and -	
CHESHIRE EAST COUNCIL	**Defendant**

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- -

Carl Buckley (instructed by Bhatia Best Solicitors) for the **Claimant**
Julian Sidoli (instructed by Cheshire East Council) for the **Defendant**

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Hearing date: 13.3.24
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.

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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. It has been listed for consideration of interim relief. The order sought by the Claimant is that, pending resolution of these judicial review proceedings, the Council is to provide accommodation and support to the Claimant under the Children Act 1989. An anonymity order is in place. Age-assessment claims raise an objective factual question – as to whether a claimant is or is not a child – for substantive determination afresh in the judicial review proceedings (R (FZ) v Croydon LBC [2011] EWCA Civ 59 at §4). Conventional judicial review grounds: (a) are apt to become "subsumed" within this fresh factual determination (FZ at §5); (b) have a materiality which itself calls for confronting the merits (R (SB) v Kensington & Chelsea RBC [2023] EWCA Civ 924 at §85); and (c) should not without good reason be 'hived off' (§86). The permission-stage arguability question is whether the material before the Court raises a factual case which, taken at its highest, could properly succeed in a contested factual hearing (FZ at §9).

The Upper Tribunal

2. In this case the parties have previously expressed agreement that the objective factual question of the Claimant's age should be resolved substantively by the Upper Tribunal ("UT"). That has been the Defendant position since its pre-action response (13.12.23) and is the Claimant's pleaded position in his judicial review grounds (18.12.23). Neither party has invited this Court to transfer the case to the UT for consideration of permission for judicial review. The Administrative Court "will normally decide whether permission should be granted before considering whether to transfer the claim to the Upper Tribunal" (FZ §31; SB §64) but "the matter could be transferred for permission also to be considered" (FZ §31; Senior Courts Act 1981 s.31A(1)(b) and (2)). Neither party has submitted that the issue of interim relief should, or could, be left to the UT. The UT's jurisdiction can be found in ss.15 and 18 of the Tribunals Courts and Enforcement Act 2007 and Article 11(c)(ii) of the First-Tier Tribunal and Upper Tribunal (Chambers) Order 2010. Mr Buckley told me that it is his understanding that the UT would not have the jurisdiction to grant interim relief, but I have not needed to hear argument on that point.

Background

3. The Claimant arrived in the UK on 21.8.23. He has explained to the authorities that he left his country of origin (Sudan) in October 2022, travelling and spending time in Chad, Niger, Algeria, Morocco, Spain and France. On arrival here, he applied for asylum and gave a date of birth of 28.12.06. That meant he was 16 (now 17), turning 18 on 28.12.24. Immigration officials, on his arrival day, assessed the Claimant's date of birth as 28.12.99, so that he was 23 (now 24). A Home Office decision letter said the Claimant had "failed to produce any satisfactory evidence to substantiate" his claimed date of birth and that his "physical appearance and demeanour very strongly suggests that you are significantly over the age of 18".

4. The Claimant was dispersed to the North-West and is currently in shared adult accommodation in Burnley. Dr Sidoli for the Council has emphasised that this is in a

house, with 3 or 4 others, in which the Claimant has his own room. Following a referral to the Council, two social workers conducted a "brief enquiry" age assessment (18.9.23), which was approved and signed off by a team manager. Two documents were generated. The first was incomplete and bore handwritten annotations. It was handed to the Claimant, who later gave it to his solicitors. The second document is the Decision Document. It was obtained by the solicitors from the Council (on 8.12.23). It is complete and contains typed contents from the two social workers, together with the typed observations of the team manager. The Decision Document records the assessment that the social workers had "no doubt" that the Claimant was "significantly over the age of 18", a conclusion approved by the team manager.

Delay

5. A delay objection has been raised. But I am satisfied that there is nothing in it. The Claimant found himself in the shared adult accommodation, having been age-assessed. He was then able to enlist the help of solicitors. They obtained the incomplete document from him. They engaged in correspondence, eliciting the Decision Document from the Council. There was a proper pre-action letter. Legal aid was secured. The papers were prepared and filed within 3 months. Any prejudice from delay has been to the Claimant.

Some 'Working Illustration' Cases

6. Deciding interim relief in an age-assessment judicial review claim is an anxious and difficult task. Remembering the important health warning that public law cases are always intensely fact-specific, I have found it helpful to consider – with the assistance of both Counsel – some recent 'working illustrations'. Here they are:

7. In R (K) v Milton Keynes Council [2019] EWHC 1723 (Admin) (Pepperall J, 9.4.19), the claimant said he was 16 (turning 18 on 25.9.20) but was assessed as "clearly significantly over the age of 18". Interim relief was refused, emphasising that (§§16, 5): (a) there was no properly arguable case; (b) the defendant had agreed to reconsider; (c) there had been delay; and (d) there was no evidence of harm from the current placement.

8. In R (AS) v Liverpool City Council [2020] EWHC 3531 (Admin) (Nicol J, 21.12.20), the claimant said he was 17 (turning 18 on 1.1.21) but was assessed as "20 years or older". That case was at the pre-permission stage. Interim relief was granted, pending consideration of permission for judicial review (§24), emphasising (§§7, 22) the statutory entitlements of a former looked-after child.

9. In R (AH) v Kent County Council [2021] EWHC 878 (Admin) (Heather Williams QC, 25.3.21), the claimant had said he was 17 (having now turned 18 on 16.3.21) but had been assessed as 23. The case was at the pre-permission stage and there was held to be a serious issue to be tried (§20). Interim relief was granted, emphasising (§§22-34): (a) the nature, significance and resource-implications of support and accommodation as a former looked-after child; and (b) evidenced vulnerabilities and concerns.

10. In R (ARM) v Brent LBC [2022] EWHC 1454 (Admin) (Benjamin Douglas-Jones QC, 13.5.22), the claimant said he was 17 (turning 18 on 20.12.22) but was assessed to be aged 23-25. Permission for judicial review was granted and the case transferred to the

UT (§§38-39). Interim relief was refused, emphasising that (§46): (a) the claimant was in housing; (b) there was no medical evidence of psychiatric or psychological suffering; (c) interim relief could compel the use of resources; (d) it would place him as an adult in a children's hostel; (e) the interim order would substantially determine the claim; and (f) the claimant on his own case was due to turn 18 in 7 months.

11. In R (MO) v Newham LBC [2022] EWHC 3224 (Admin) (Philip Mott KC, 29.11.22), the claimant said he was 17 (turning 18 on 21.3.23) but was assessed to be aged 23-24. Permission for judicial review was granted and the case transferred to the UT (§2). Interim relief was granted, emphasising (§§11-17) that: (a) although the claimant would shortly turn 18 on his own case, the duties and benefits for a child and then a former looked-after child were significant; and (b) the local authority was well-equipped to deal with any safeguarding risks.

12. In R (BAA) v Liverpool City Council [2023] EWHC 252 (Admin) (HHJ Pearce, 8.2.23), the claimant said he was 17 (turning 18 on 5.5.23) but was assessed to be over 18. Permission for judicial review was granted and the case transferred to the UT (§1). Interim relief was refused, emphasising that (§§36-41): (a) this could not be said to be a strong claim; (b) resources would be diverted; (c) an adult should not be housed with vulnerable children; (d) there was no evidence of particular vulnerability; (e) the harm from wrongly accommodating an adult with children was greater than that from wrongly accommodating the claimant with adults; and (f) the claimant on his own case was nearly 18.

13. In R (NS) v West Northamptonshire Council [2023] EWHC 1335 (Admin) (UTJ Church, 27.4.23), the claimant said he was 17 (turning 18 on 1.8.23) but was assessed to be over 18. The case was at the pre-permission stage, but there was a serious issue to be tried (§44). Interim relief was refused, emphasising that (§§45-54): (a) the claimant would lose 3 months accommodated as a child and then the prospect of a statutory entitlement as a former looked-after child; (b) if interim relief were granted the claimant would be accommodated with 15-17 year olds and another 16-17 year old would be delayed in being accommodated; (c) the claimant's 18th birthday was imminent; and (d) interim relief would determine the claim.

14. In R (BH) v Newham LBC [2023] EWHC 1611 (Admin) (Clare Padley, 17.5.23), the claimant had said he was 17 (but had now turned 18 on 25.2.23) but had been assessed as aged 22 (now 23). Permission for judicial review was granted, the case would be transferred to the UT and there was a serious issue to be tried (§33). Interim relief was granted (to treat the claimant as an 18 year old former looked-after child), emphasising (§§34-41): (a) the importance of the relevant statutory support; (b) some evidence of vulnerability; (c) the absence of safeguarding issues regarding accommodation with children; and (d) the greater risk of injustice if the claimant were wrongly not treated as a former looked-after child.

Serious Issue to be Tried

15. This is the first question. If the claim is unarguable, interim relief should be refused (as in K at §16). In my judgment, the reliable threshold is the permission-stage arguability test in FZ §9: whether the material before the court raises a factual case which, taken at its highest, could properly succeed in a contested factual hearing. In my judgment, there is no reason to adopt a different test. Permission has yet to be granted, but the Council

has had plenty of time to prepare its case on the serious issue to be tried. Dr Sidoli submitted that there was a high threshold test namely to require "a real prospect of success". He cited ARM at §41. I am not persuaded that there is a higher threshold test; nor one which is established by ARM; still less one consistent with the body of authority as a whole. I have struggled to see how a claim, raising a factual case which taken at its highest could properly succeed in a contested factual hearing, has anything other than "a real prospect of success". In my judgment, the use of the principled arguability threshold from FZ §9 promotes clarity and straightforwardness and is – as I see it – consistent with the case-law as a whole. See BH at §33; AH at §20; and MO at §3.

16. There is no higher threshold requiring a "strong prima facie case", whether by reference to (a) the public law context (b) interim relief as being "mandatory" (c) the extent to which interim relief will resolve the substance of the case or (d) otherwise. Instead, the Court's provisional assessment of the claim's strength or weakness can be a factor which informs the balance of justice. See AS at §13; BH at §§20, 22, 35; and BAA at §38.

17. In this case, I am satisfied that the material before the Court does raise a factual case which, taken at its highest, could properly succeed in a contested factual hearing. I do not think the claim is "weak". I think there is a "very real" prospect of success. This is why:

18. The Decision Document records the conclusion that the social workers 'deemed' the Claimant to be "significantly" over the age of 18 "based on observations of [his] advanced physical appearance, behaviour and demeanour, alongside the credibility of information provided". But there is no specific explanation as to what is meant by "the credibility of information provided". No piece of information is specifically identified as lacking in credibility. Nor is it said why. Also striking are the observations of the approving team manager. She recorded that, having read the information in the Decision Document and having discussed the case with the social workers, the Claimant "provided inconsistent information during the enquiry". But I have been unable to find, recorded in the Decision Document, what it is that is said to have been "inconsistent". I have not been persuaded by Dr Sidoli's answer that social workers are busy and have a lot on their plate, and that it would be to expect perfection for such matters to be identified and addressed in the Decision Document. Added to these points about credibility and inconsistency, there does not appear to have been any 'minded-to' stage of putting to the Claimant any concern relating to credibility, or to perceived inconsistency, so as to give him an opportunity to help. These are features which can undermine the weight which can be placed on the age assessment, in the context of what is now a judicial review seeking directly to raise the objective factual question of age for consideration afresh.

19. Dr Sidoli's skeleton argument says there are now clear inconsistencies undermining the strength of the claim. He points to passages in the Claimant's December 2023 judicial review witness statement. There, the Claimant says he knows his date of birth because of what his mother said when he attended hospital as a child. He also says he had a national ID card, but that everything got burned in the war in Sudan. In the Decision Document, the social workers recorded the mother as the source of the Claimant's claimed understanding of his age and date of birth, but there is no mention of the hospital. There is a reference in the Decision Document to the Claimant not knowing

whether he had an ID card but saying that, if he did, it was burned in the war in Sudan. Points like this – about the hospital, and about what the Claimant thinks and knows about an identity card, can be explored at the substantive hearing. The social workers were conducting a brief enquiry, and were not necessarily seeking elaboration. They were doing so without putting concerns. I have not been persuaded that these features of the evidence, as it now stands, constitute material unanswerable discrepancies or inconsistencies which significantly undermine the apparent strength of the claimed age and date of birth.

20. The Decision Document records very strong reliance placed on physical appearance, alongside references to presentation, behaviour and demeanour. Dr Sidoli had submitted in writing that this was, "exactly", a clear case where physical appearance "alone" could be relied. His further submission is that, in fact, what the social workers did was to "go the extra mile", in going on to ask questions about the Claimant's narrative and background and the basis for his claimed age. For the purposes of today, whichever way one looks at it, in my judgment this is a case where very strong reliance appears to have been placed in the decision on physical appearance. That raises the question as to the implications of this in terms of the prospects of success at a substantive hearing. The social workers record in the Decision Document: that the Claimant "looks significantly over the age of 18"; that "on first impression this seems obvious"; that he "has physical attributes that are detailed within this enquiry that make us confident he is older"; and which "would seem really clear to us". These "physical attributes … detailed within this enquiry" appear under a heading "physical appearance and presentation". They read as follows: "Tall slim build. Hairline is slightly receded with small grey hairs. Expression lines around the eyes. Appeared to have an Adam's apple in the neck. Clean-shaven, strong jaw line."

21. The authorities recognise that there may be a "clear" and "obvious" case where age may be determined by social workers "solely" from physical appearance (see eg. FZ §3). This insight is particularly linked to the procedural question of what sort of process and enquiry are necessary to be undertaken by the local authority decision makers (see eg. SB §§47-49, 69, 71). Reference is made, in this context, to a margin for error (see eg. SB §91). The ADCS October 2015 Guidance itself refers (see ARM §29) to "rare circumstances" where it will be "very clear" that the individual is an adult well over the age of 18, where a prolonged enquiry may not be required, being an assessment based on appearance and demeanour where the social workers have "no doubt".

22. The fact that experienced social workers think the case is "obvious" and "clear" can plainly enhance the degree of confidence in, and the weight which can properly be attributed to, their age assessment. But a judicial review claim challenging their conclusion still raises the objective factual question of age. And there are limits to the restraint and the latitude where the judicial review forum (the UT) becomes the primary decision-maker, when dealing with the claim. I interpose that I have not been invited to 'hold the ring' pending a transfer to the UT who could convene an oral permission hearing and see the Claimant for itself.

23. At this point in the analysis we necessarily encounter a point forcefully made throughout the caselaw. It is that physical appearance is "notoriously unreliable" (see eg. BAA §36; ADCS Guidance p.59). In this case, I have a small passport size photograph in the bundle derived from the Home Office papers. The Decision Document records that, if the answer is "over 18" the social workers should: "Take a

photograph of the presenting adult for Cheshire East records, providing they give their permission for this to be done." This was done in SB: see §10. But I have been provided with no photograph. Also, unlike the Home Office officials, the social workers do not appear, in the Decision Document, to have assessed a specific age or a specific date of birth. The Decision Document records the Home Office as having assessed a date of birth of 28.12.99. I observe that in AS the claimant was assessed to be 20 years or older; in MO the claimant was assessed as being 23 or 24; in BH the claimant was assessed as being 22 or 23. Orders for interim relief were made in all three of those cases. I have also found it helpful to consider as an illustration the case of R (JRZ) v Liverpool City Council JR/885/2021. That is a decision of the UT dated 22.4.22. There the UT, at a substantive hearing, concluded that the claimant had been a child when, on a brief enquiry, he was assessed as "looking significantly older" than the claimed age of 16, with "strong developed features of an adult aged 25 years plus", from which it was assessed as "clear and obvious" that he was an adult who was at least 25 years of age (JRZ §11). This proved unreliable (JRZ §§41, 61). Mr Buckley invited my attention to the passage where the UT Judge specifically addressed the list of physical features that had been relied on (see §62). Also notoriously unreliable is demeanour (see JRZ §64). So, on the one hand, I have the confidence expressed by the experienced social workers. But, on the other hand, I have the notoriously difficult and perilous central feature, of physical appearance, as described in the Decision Document.

24. As a permission-stage High Court judge, considering the case on the papers, I cannot predict who will – or is likely to – succeed at a substantive hearing in the UT. But I do not think the claim is "weak". And I do think there is a "very real" prospect of success.

The Balance of Justice

25. Sometimes called the "balance of convenience", this has – rightly in my judgment – been described in the case-law as "the balance of justice and injustice" (NS §45; ARM §46). It involves balancing the injustices, from the risks to the parties and in terms of the public interest implications, of interim defeat being followed by substantive vindication. This is the evaluation of (a) the risk of injustice in circumstances where a claimant continues to be dealt with as an adult alongside adults but is subsequently vindicated by being found to have been a child; as against (b) the risk of injustice to the local authority (including resource implications) if an interim order is made but the local authority is subsequently vindicated, and the claimant was an adult all along. See eg. BH §27(3), 40; NS §45; MO §9.

26. In the present case, there are – as I see it – these key topics. First, as to accommodation and support. The Claimant is, and has been for 7 months, in state-provided Home Office accommodation. He is not destitute. This is shared accommodation. But it is with adults. It is recognisably unsuitable for someone who, in fact, is a child. It does not provide the nature of the support which would be owed to a child, or in due course a "former relevant child" (see AS §22ii).

27. Secondly, as to vulnerabilities and needs. Dr Sidoli says that there are "no real difficulties" and the case is comparable to the claimant who expressed being "lonely" and "depressed" in ARM §46. He points to the fact that there is no medical evidence. There is certainly no specifically evidenced vulnerability. Showing an evidenced, specific vulnerability is not a precondition to interim relief, though an interim order

may be more warranted in cases of evidenced vulnerability (see BH at §27(4)). The Claimant is not, for example, said to be a victim of trafficking. There is no expert evidence of mental health conditions or implications (cf. AH §§24-25). Having said that, relevant vulnerability can be seen to arise from the previous described experiences as well as the realities of being here as an unaccompanied young person. If the Claimant is a child – as is the clear risk – then the statutory duties owed to him are reflective of those vulnerabilities and needs, which are inherent in being a child, and which arise from being an unaccompanied asylum-seeking child in a foreign country.

28. Thirdly, as to the risks of putting a child with adults, and of putting an adult with children. There is risk inherent in the Court requiring accommodation, as a child, of an individual who later turns out to have been an adult. But this needs to be put alongside the risk of leaving in accommodation, as an adult, an individual who later turns out to have been a child. There is no evidence from the Council of any specific "safeguarding" issue arising from any proposal or need to place the Claimant with younger children (cf. BH §39). I do not accept Dr Sidoli's submission that the Court should adopt the "logical assumption" that the Claimant would be being placed with young teenagers. In the present case, I have not been persuaded of the point (cf. BAA §41) that the "harm" – including to the public interest – through wrongly accommodating a person who is over 18 as a child is "greater" than the "harm" caused by wrongly accommodating as an adult someone who is not. The Council has not produced evidence about the options that would be open and their implications for other teenage children (cf. NS §52). There are risks and balances with which a local authority should be used to dealing (cf. MO §13). One feature which weighs with me (as it did with the Judge in MO at §10), is the principled position identified in the ADCS Guidance itself: "where there is a doubt about whether or not the young person is a child, the dangers inherent in treating a child as an adult are in almost all cases far greater than the dangers of taking a young adult into your care".

29. Fourthly, as to the risks relating to turning 18. There are ongoing implications of the Claimant turning 18 on 28.12.24 (if his claim is ultimately vindicated) without having been a "looked after child" on that 18th birthday, as a "historic fact". This is the point arising from R (GE (Eritrea)) v SSHD [2014] EWCA Civ 1490 [2015] 1 WLR 4123 (see R (HP) v Greenwich RLBC [2023] EWHC 744 (Admin) [2023] PTSR 1499 at §12). Unless accommodated by the Council, as a "historic fact", the Claimant stands to lose a great deal – on an ongoing basis – if later vindicated as to his age. That is because of the statutory entitlements to important ongoing support, as to which he would have to rely on an exercise of "discretion" (see HP at §1). Risks as to loss of these valuable rights (HP §§12-16) can properly feature in the assessment of the balance of justice for the purposes of interim relief (see AS §§7, 22ii; MO §12; NS §§49-50; BH §§23, 38). At my invitation, Mr Buckley was able to indicate that it was possible that, if transferred today to the UT, this case could be substantively determined in the UT before the end of the year. But I cannot have anything approaching confidence that would enable this important concern, about being looked after on the date of turning 18, if vindicated, being allayed or answered. Nor can I accept the invitation from Dr Sidoli to take it that the Council would exercise its GE (Eritrea) "discretion" favourably (cf. NS §50), as to which I have no material.

30. Fifthly, as to resources. There are clear resource implications for the Council if, after 7 months in Home Office adult accommodation, the Claimant is now to be treated as a

child for the 9 months until his claimed 18th birthday in December 2024, and then a "former looked-after child", until his substantive judicial review claim is determined by the UT. At one point Mr Buckley came close to suggesting that resources were not relevant to interim relief but, on reflection, rightly accepted that they do feature in the balance of justice when considering the position from the local authority's perspective. I have given this element careful consideration.

31. Those, then, are the contours of the key topics. The balance of justice is a difficult evaluative exercise. There are features, including public interest considerations, which point in different directions. In the end, and in all the circumstances of the case, I have arrived at the conclusion that the balance of justice (and convenience) favours the grant of interim relief. The risk of injustice, in my judgment, is substantially greater from the Claimant continuing to be dealt with as an adult alongside adults and then be subsequently vindicated at the substantive hearing. It outweighs the risk of injustice to the Council from an order impacting on its limited resources but the Council subsequently then being vindicated at the substantive hearing. The cases in this area are inevitably acutely fact-specific. But my ultimate evaluation on the balance of justice is not dissimilar in its nature to that of Heather Williams QC (as she then was) in AH, Philip Mott KC in MO; and Clare Padley in BH. In these circumstances and for these reasons I will grant the application for interim relief.

Order and Consequentials

32. I will order that the application for interim relief is granted and that: "Until the Claimant's claimed 18th birthday (28 December 2024) or, if earlier, the final resolution of these judicial review proceedings, the Council shall provide accommodation and support to the Claimant as a child, pursuant to the Children Act 1989. Very sensibly, in the light of the reasons that I have given, it is common ground that I should today go on to grant permission for judicial review and transfer the case to the UT. That is where the case will be case-managed and all questions as to timing and so on will be matters for the UT. Also agreed is that the appropriate costs order is costs in the case. That is the Order which I will make.

13.3.24