Neutral Citation Number: [2024] EWHC 93 (Admin)

Case No: AC-2023-LDS-000012

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

Tuesday, 23rd January 2024

Before:
FORDHAM J

- -

Between:

THE KING (on the application of PISHTIAN KARIMI)	**Claimant**
- and -	
SHEFFIELD CITY COUNCIL	**Defendant**

- -
- -

Carl Buckley (instructed by Bhatia Best Solicitors) for the **Claimant**
Brett Davies (instructed by Sheffield City Council) for the **Defendant**

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Hearing date: 23.1.24

Judgment as delivered in open court at the hearing

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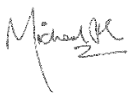
Approved Judgment

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 case about a local authority age assessment of an unaccompanied asylum seeker. Permission for judicial review was refused on the papers. But the case was, rightly, not certified as totally without merit. TWM orders involve a high threshold and have implications in relation to what are otherwise rights of access to the court to engage at an oral hearing. Invoking that right of access, and notwithstanding what is undoubtedly an arguable defence on the part of City Council clearly and powerfully articulated on its behalf by Mr Davies, Mr Buckley for the Claimant has persuaded me today that this claim is properly arguable.

2. Age assessments are unusual in the sense that, alongside any conventional public law 'soft review' principles, there is an objective hard-edged factual question whose correctness is for the reviewing court (or usually the upper tribunal following transfer) to decide, embracing any fresh evidence and where appropriate with oral evidence. The judicial review permission threshold, so far as the objective question is concerned, is identified in R (FZ) v Croydon LBC [2011] EWCA Civ 59 at §9. The permission-stage Court asks whether the material before the court raises "a factual case which, taken at its highest, could not properly succeed in a contested factual hearing". Only where the Court is satisfied on that negative question will there be the 'knockout blow' to justify refusing permission for judicial review.

3. It is unnecessary for me to give detailed reasons for concluding that the claim is properly arguable and should be transferred to the upper tribunal. But it may assist the parties, in the light of the points that have been emphasised to me at this hearing, if I make the following observations.

Physical Characteristics

4. There is, in my judgment, force in the points made by Mr Buckley relating to the emphasis placed in this case on physical characteristics of the Claimant. They came to this: he is 6 ft in height and has stubble. The Age Assessment Form has to start somewhere. It covers a number of topics, of which physical characteristics happen to be the first. The famous case of R (B) v Merton [2003] EWHC 1689 (Admin) explains at §20 that, in the absence of reliable documentary evidence, an age determination will depend on 3 features: the history given, the physical appearance and the behaviour. There is a wealth of case law, as well as important guidance, which warns about the importance of not misunderstanding or overemphasising physical characteristics. In this case, the concern is not so much that the Age Assessment begins with physical appearance, as well as "demeanour". Rather, the concern is that the analysis section – in summarising the reasons – starts with "your physical appearance makes us believe you are older than 17 years of age" and then continues "there are other reasons that make us also feel you are older than what you say you are". This does raise a question about whether a primary, or most weighty, consideration was being identified at the start of the thinking, against which the other points were then considered. The reasoning is not expressed as having regard to a number of features and then stepping back and considering them in the round. And the 'speaking note' which Mr Davies has produced for today itself characterises the age conclusion as one which "rests in large measure" on physical appearance as well as demeanour. Ultimately, given that the objective

question is going to be considered by the upper tribunal afresh, what will matter will be what the tribunal makes of the evidence.

Minded-To Stage

5. The second point which has been emphasised today on which I make observations concerns a 'minded-to' process. The speaking note on behalf of the Council today understandably emphasises the 3 sessions were held (by the social workers with the Claimant, his appropriate adult and the interpreter), to discuss and listen and elicit information. The 'minded-to' stage is well known in the case law and guidance. Although it does not involve any particular prescribed form it does have an important function. Mr Buckley understandably emphasises the importance of that process being clear both (a) in the minds of the decision-makers but also (b) to the putative child. He emphasises that there is a real virtue and significance of the putative child being told that the decision has not yet been made, but that there are concerns, and that this is a final opportunity to respond after which the decision will then be taken. On the papers before the Court today there are summary grounds of resistance from the Council. They are supported by a statement of truth. Those grounds put forward this contention: that "in fact, the minded-to session took place on 11 October 2022". A contemporaneous document is produced which is a case note dated that day. It records an exchange between the social workers and the Claimant and records some points that the Claimant raise after 'listening to the report'. Questions arise from the pleaded characterisation of that stage. They link to a clear description in the ADCS Age Assessment Guidance (October 2015) at chapter 6 pages 27 to 28. That sets out a final stage after the "full analysis" has been conducted and after a "conclusion" has been reached. That stage follows after any minded-to stage (described earlier at page 25). Under the heading "Sharing Results" there are "general principles" set out. These describe the person being aged assessed being "informed of the conclusion, face-to-face", and being given "an opportunity to comment on the conclusion", on "receiving the conclusion of the age assessment". At first sight that appears closely to fit with the contemporaneous case note. The case note opens with the description of the social workers having "shared" the "age assessment report with" the Claimant. It is then said that they "read out the age assessment report including the summary and conclusion" and what the assessment "has concluded". It then records what the Claimant said after listening to it. I am not today making any findings or arriving at any conclusions. But I would not be able to accept, at least beyond argument, that that document was embodying or reflecting a minded-to stage; nor would I be able to accept that it is a point which makes no difference in the case is considered in the round.

Catching Trains

6. There is one further feature which I think it may be helpful for me to mention. Reliance was placed in the decision on the Claimant's ability to have travelled to Birmingham, catching two trains and spending quite a lot of time there with friends. What is said by the social workers is "we feel that a child who is new into the country would have struggled significantly more than you did with this sort of journey and would have needed lots of direct support". There is force, in my judgment, in the submissions made by Mr Buckley about that feature of the case. It arises in the context, as was clearly known to the social workers, of the Claimant having travelled to the United Kingdom originally from Iran and then Turkey, Italy and France. Particularly bearing in mind

that, on his own case, the Claimant's was 17 years old when age-assessed, and had made that journey as a 17 year old.

Permission

7. The threshold for permission for judicial review is a real one including in age assessment cases. It is by no means automatic that the courts grant permission or should grant permission. But, having considered the materials in this case – with the assistance of both Counsel – I have been satisfied that there is no 'knockout blow' and that the case should proceed for consideration by the upper tribunal when all arguments can be advanced and the evidence can be evaluated.

The Timing of Documents and Judicial Pre-Reading

8. That leaves two topics on which I which I wish to make some observations. The first is a point about documents and pre-reading by the Judge.

9. Here is what happened in the present case. This oral permission renewal hearing was listed for Tuesday 23 January 2024. The Claimant had filed a skeleton argument, in accordance with a direction of the Court (7 days before the hearing). The Defendant had filed its summary grounds of resistance. The Administrative Court Judicial Review Guide 2023 at §20.4.3 says that for permission renewal hearings, unless otherwise ordered, any skeleton argument should be served "at least two working days before the hearing". Like any Judge, I wanted to be clear about when I could prepare this case by pre-reading the documents. My clerk had emailed the parties on Wednesday 17 January 2024. She listed the materials that the Court had, including the Claimant's skeleton argument. She asked this question: "If there is anything further, what is it and when can the Judge expect it?" The message from Mr Davies, later on 17 January 2024, was that the listed documents were "complete". In the event, a skeleton argument from Mr Davies came to my clerk and to the Claimant at 16:36 yesterday, Monday 22 January 2024, emailed by his instructing solicitor. I had pre-read this case on Friday afternoon. Yesterday, I was listed in Manchester doing another case. Mr Davies has apologised. He has explained that he had formed the view that, on reflection, it would assist the Court to have a brief further document from him, to assist the Court and Mr Buckley with forewarning of what he was going to say. In fairness to Mr Davies there may also have been a degree of prompting from the fact that the Council had itself sent an email (yesterday at 11:33) saying that it had not yet been served with the Defendant's skeleton argument. I make clear that I accept the apology and explanation from Mr Davies and what I am about to say is no criticism aimed at him. Rather, it is an observation which may illuminate the position for court users, from the perspective of the Court.

10. It is a common misconception that Judges pre-read cases the day before the hearing, or perhaps the evening before the hearing. The true position is that we frequently have to pre-read cases ahead of that. We also have to decide which cases to pre-read, when and in what order. We want to be able to prepare a case by pre-reading, in one sitting, with confidence that we have everything we need, including any skeleton arguments or other materials that are designed to assist us. It is therefore a vice to supply materials late in the day. It is a vice to do so unheralded, with no prior warning. I repeat, that is by way of judicial sharing, in the context of a commonly encountered problem, of information about why all of this matters.

11. In the circumstances, I allowed Mr Davies to deploy his skeleton argument as a 'speaking note' as if delivered orally. That was with one exception. Within the document was a reference and a quotation from a source. This was derived from notes of a meeting. These had never been filed and served in this case, despite several opportunities to place relevant material before the court. I was not prepared to allow that point to be relied upon, in those circumstances. Mr Davies very fairly accepted – when this was pointed out – that it would not be appropriate for him to be able to, in effect, give evidence in that way. The simple solution which we adopted was to treat that part of that paragraph in the speaking note as though it were deleted.

Eighteen Now

12. The other topic which I wish to mention concerns why an age assessment case, in which on any view the Claimant is now over the age of 18, should be proceeding to substantive determination at all. On his own case, the Claimant reached the age of 18 on 21 March 2023. That means he is now 18 years and 10 months old. But that does not make the claim academic, and Mr Davies for the Council rightly does not advance such a discretionary bar. For a discussion of the legal principles which can arise in the context of 'former relevant children', see R (HP) v Greenwich RLBC [2023] EWHC 744 (Admin) [2023] PTSR 1499; including the description of R (GE (Eritrea)) v SSHD [2014] EWCA Civ 1490 [2015] 1 WLR 4123 in HP at §17(iii).

13. When permission for judicial review was refused on the papers, anonymity was refused on the basis that the Claimant was by then – even on his own case – now an adult. No application for anonymity was pursued before me.

Conclusion

14. I will grant permission for judicial review and transfer the case to the upper tribunal for determination substantively. I set aside the order for costs made by the judge in refusing permission on the papers. The case will be case-managed by the upper tribunal. Costs in the case.

23.1.24