



Neutral Citation Number: [2021] EWHC 1345 (Admin)

Case No: CO/1647/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/05/2021

Before:

MR JUSTICE GARNHAM

Between :

**The Queen (on the application of AXA) (by his
litigation friend ROXANNE NANTON)**

Claimant

- and -

London Borough of Hackney

Defendant

Marisa Cohen (instructed by Osbornes Law) for the Claimant
Kuljit Bhogal (instructed by London Borough of Hackney) for the Defendant

Hearing date: 13th May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and others, and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 09:30am on 19 May 2021.

Mr Justice Garnham:

Introduction

1. I heard this application for interim relief yesterday afternoon (13 May 2021) and reserved my decision overnight. A draft of this judgment was circulated on 14 May 2021.
2. The Claimant, who is known in these proceedings as AXA, seeks a mandatory interim injunction requiring Hackney BC to place him in “claimed age appropriate accommodation and provide support for his living needs”. He claims that he is 17 years 1 month. The Defendant, the London Borough of Hackney (“Hackney BC”), has assessed the Claimant to be aged between the age of 21 and 25 and has declined to provide him with accommodation suitable for a 17-year old.
3. I had the benefit of oral submissions by Ms Marisa Cohen on behalf of the Claimant and Ms Kuljit Bhogal on behalf of Hackney BC. I am grateful to both for their careful and courteous submissions.

The History

4. For the purposes of this short judgment on interim relief, the facts can be summarised as follows:
5. The Claimant is a national of Sudan. He claims that his date of birth is 4 April 2004. He says that he and his mother fled from Sudan to Chad when he was young and that he subsequently lived there in a refugee camp. At some point, he says, he travelled to Libya with Sudanese men and was put to work on a farm. He then travelled with others from Libya to Italy by boat. He then made his way to France where he spent a period of time in Paris before travelling to Calais where he resided in the “Jungle” camp. There is no detail as to the dates of any of these events, He says he entered the UK in July 2020 and claimed asylum the same day. On his arrival, the Claimant was found with a sum of money which, he says, the Home Office sought to confiscate on the basis that it was suspected proceeds of crime.
6. The Claimant was referred to Hackney BC in August 2020 and was accommodated from 11 August. Hackney BC asserts that the Claimant was interviewed on four separate occasions in the presence of an interpreter and an independent advocate as part of their age assessment process. The age assessment was carried out by experienced and specially trained social workers. The assessors observed that the Claimant’s account contained a number of inconsistencies and concluded that he lacked credibility in certain areas. The assessors were of the view that he was aged between 21 and 25 and recommended that his date of birth be recorded as 4 April 2000 giving him an age of 21. I deal with the content of the age assessment a little later in this judgment.
7. Following that assessment, the Claimant was moved from local authority accommodation to a hotel, the Holiday Inn in Old Street, London, which accommodation is provided by NASS, the National Asylum Support Service, for the Home Office.

The Duties on Local Authorities

8. By s.17(1) of the Children Act 1989, it is the general duty of every local authority to safeguard and promote the welfare of children within their area who are in need. Pursuant to s.17(10), a child is to be taken to be in need if:
- “a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part,
 - b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services....”
9. S.20(1) imposes a duty on local authorities to provide accommodation to a 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 ..from providing him with suitable accommodation or care.”
10. Ms Cohen asserts that any homeless unaccompanied asylum-seeking child is a child in need for the purposes of s.17. Ms Bhogal disputes that proposition and contends that the question whether the child is in need depends on the facts of the case. Depending on his circumstances, she says, a child asylum seeker may not be in need. She points here to the accommodation the Claimant currently enjoys and argues that this claimant, even if he is a child, is not a child in need.
11. It is not necessary for me to decide this point on this application and I am content to work on the assumption that the Claimant here is indeed a child in need.

The Proper Approach to Age Assessment

12. Ms Cohen helpfully summarises the caselaw relating to assessment of age in her grounds.
13. In *R(B) v London Borough of Merton [2003] 4 All ER 280*, Stanley Burnton J set out detailed guidance as to the process to be followed by local authorities in assessing the age of a putative child. The Court of Appeal, in *R (FZ) v London Borough Council [2011] EWCA Civ 59*, summarised the relevant principles:
- “2. ... Some young people may be obviously and uncontroversially children. Others may accept that they are adult. It is for those whose age may objectively be borderline, between perhaps 16 and 20, that an appropriate and fair process of age determination may be necessary. A process has developed

whereby an assessment is undertaken by two or more social workers, trained for that purpose, who conduct a formal interview with the young person at which he is asked questions whose answers may help them make the assessment. It is often necessary for there to be an interpreter. The young person may or may not be able to establish or indicate his age by producing documents, which themselves may require translation.”

14. As Stanley Burnton J warned in *Merton*; different people living in the same country, with the same culture and diet grow at physically and psychologically different rates. It is, he said,

“difficult...to determine the age of someone born in this country with any accuracy...the difficulties are compounded when the young person in question is of an ethnicity, culture, education, background that are foreign, and unfamiliar to the decision maker”.

15. Opinion evidence of those who have known the individual in question may be of assistance. The view of someone who has known and met the young person over a long period of time may carry particular weight (see *R(AE) v London Borough of Croydon* [2012] EWHC Civ 547 at 54)
16. In *R(A) v London Borough of Croydon* [2009] UKSC 8, the Supreme Court held that the question whether a person was a child was one of objective and jurisdictional fact and, when a decision of a local authority on the issue came before it, the Court would come to its own decision on the balance of probabilities in the light of the evidence (para 33 per Lady Hale and paragraphs 51&54 per Lord Hope). In reaching a determination of a person’s age, in such circumstances, there is no concept of a burden of proof. The Court acts in an inquisitorial role and determines age on the balance of probabilities.

The Test for Interim Relief

17. I am not concerned here with the question of whether permission to apply for judicial review should be granted. To do so now would be premature given that the Defendant is yet to serve its summary grounds. Were permission ultimately to be granted, it is likely that the case would be referred to the Upper Tribunal for the hearing as to age assessment.
18. I am concerned instead solely with the question of interim relief. It is agreed between the parties that the underlying test to be applied is that set out in *American Cyanamid v Ethicon Ltd* [1975] AC 396. There is some dispute, however, as to the extent of which that test should be modified to reflect the fact that this is a public law case.
19. Ms Cohen argued that the appropriate test was simply whether there is a serious issue to be tried and if so where the balance of convenience lies. In response, Ms Bhogal submits that circumstances such as the present are analogous to the issue discussed by Hickinbottom LJ in *R (on the application of Nolson) v Stevenage Borough Council* [2020] EWCA Civ 379.

20. *Nolson* was a case about provision of interim accommodation under s.188 of the Housing Act 1988. Referring to the decisions of the Court of Appeal in *De Falco v Crowley Borough Council* [1980] QB 460 and *Francis v the Royal Borough of Kensington* [2003] 1 WLR 2248, Hickinbottom LJ said that

“...it was this court which, expressly disapproving the application of the balance of convenience test and negative interim relief as set out in *American Cyanamid Company v Ethicon Ltd* [1975] AC 396, had earlier established that an interim mandatory injunction requiring a local authority to perform its statutory housing duty would not be granted unless the applicant could show at least a strong prima facie case...”.
21. Ms Bhogal says that the Claimant here must show a strong prima facie case if he is to be entitled to relief.
22. In my judgment, there is force in the analogy with *Nolson*. However, there are circumstances in which the Court may not insist upon a strong prima facie case before the grant of a mandatory interim injunction. As Nicol J observed at paragraph 11 of his judgment in *AS v Liverpool City Council* [2020] EWHC 3531, “context was everything” and “the context (is) that the Court would have to decide for itself if the Claimant was a child...”.
23. Nicol J concluded that:

“The resolution of this issue is, in my judgment, that there is no hard and fast rule that a claimant like AS must show a strong *prima facie* case, even though the relief sought might be characterised as a mandatory injunction, but that characterisation is one factor which can properly be taken into account in assessing the balance of convenience. The strength of the Claimant's claim (so far as it can be judged) is also a factor to be taken into account in the balance of convenience.”
24. I agree, and I approach the case on that basis.

Discussion of the Grounds of the Claimant's Claim

25. Ms Cohen advances two grounds of claim.
26. First, she says that the Defendant reached the wrong conclusion as to the Claimant's age. His case is that he knows his age because his mother had told him it. His date of birth was set out on a UNICEF identity card which he subsequently lost.
27. In my judgment, that does not take the case much further forward, since it is the accuracy of his own account of his age that is in issue. Nor, in my judgment, does his reference to various events in his childhood greatly assist since there is no way of corroborating that information or accurately dating it.
28. More powerful is his reliance on the opinion evidence of those who have spent significant periods of time with him, notably his English tutor in the UK and the Unit Manager at his accommodation. However, whilst that is something that ought properly be taken into account, in my judgment it does not carry the same weight as the opinion

of social workers trained in age assessment techniques, adopting a *Merton*-compliant approach, as the Defendants assert was the case here.

29. The second ground is that the Defendant's age assessment was unlawful or unreasonable. In support of that contention, Ms Cohen argues, first, that the evidence before the Defendant suggest that the Claimant was the victim of trafficking and that the Defendant failed to appreciate the significance of that in assessing the Claimant's credibility. Second, it is said that the assessment failed to take account of all relevant evidence. Third, it is said that the age assessment was procedurally unfair, notably because information was obtained during a "settling-in" meeting without ensuring that the Claimant was informed about the purpose of the meeting. Finally, it is said that the conclusion as to the Claimant's age reached by the Defendants is "entirely unexplained and unreasoned"
30. The age assessment interviews were conducted by two experienced social workers called Rosemary Musoke and Rumina Ahad. In her report, Ms Musoke explains that the Claimant was seen on four separate occasions. On each occasion there were two qualified social workers present together with an Arabic interpreter and an independent advocate. At the start of the first and second interview the Claimant was informed of the reason why the assessment was being conducted.
31. The assessment considered the Claimant's physical appearance and demeanour noting that on his physical appearance alone and given the presence of facial hair he presented as older than his claimed age. However, it was made clear that the social workers understood that these factors alone could not be used to verify age, because young people's development can vary considerably.
32. Next the report considered the Claimant's family composition and history, his social and emotional presentation, his social and community history, his education, his independent living skills, his health and medical assessments, and his journey to the UK. This was a detailed and thorough assessment.
33. In the analysis section of the report, a number of inconsistencies in the Claimant's story were noted. Consideration was given to "*the difficult circumstances he encountered and the experience of the journey*". It was noted that "*trauma can have a deleterious impact on memory*" but it was also noted that the Claimant did not report any mental health problems, lack of sleep or worries. The Claimant reported no concerns as to his treatment, other than some bullying in Chad. The Claimant said he did not encounter any mistreatment and was not required to do anything against his will during the journey. Sensible and reasoned observations were made about his memory and about his behaviours and demeanour.
34. The social worker's conclusions were that the Claimant was older than he claimed. They assessed him to be between 21 and 25 but recommended that an age of 21 was adopted.
35. In my judgment, this was a careful, skilful and conscientious age assessment by appropriately experienced and qualified social workers. I can see no proper basis on which it can be said that the defendant reached the wrong factual conclusion on the Claimant's age.

36. Nor do I see any sensible ground for the challenge under Ground 2. It is clear that the responsible social workers considered in some detail the circumstances of the Claimant's journey to the UK and there were no indications that the Claimant was a victim of trafficking. Certainly, it does not seem to me that the mere fact that he had e2,000 in his possession could, on its own, ground a conclusion that he had been trafficked.
37. It is right to say that the age assessment does not refer expressly to the views of the manager of the Claimant's accommodation or the Claimant's tutor. It is also right to say that all potentially relevant evidence should have been considered. However, the evidence of the Unit Manager that the Claimant's "cultural looks, body build and his travel experience mean that he may be or appear to be slightly older" is of little weight given its imprecision, the fact that the unit manager was not purporting to carry out an objective assessment and was not qualified so to do, and the fact that all those matters were considered by the social workers.
38. The evidence of the tutor was contained in an email of 25 March 2021. It was to the effect that it was not easy for the Claimant to talk about his asylum claim, that he "appears very vulnerable" and "needing care and support in adjusting to life in the UK", and in effect, that the tutor was in no doubt that he was not misplaced in a class of 16 year olds. The latter amounts simply to an expression of opinion that the Claimant was under 18. Whilst that expression of opinion was a matter which ought to have been taken into account, whether viewed singularly or together with the other matters relied upon by the Claimant, in my judgment it does not get close to establishing that there is here a serious issue to be tried, given the quality of the social work analysis.
39. Furthermore, I see no procedural errors in the way in which the age assessment was conducted. Fundamental to that view is the fact that the Claimant had the benefit of both an interpreter and an independent advocate from the Appropriate Adult Service and that, at the beginning of the first and second interviews, he was informed of the reasons for the age assessment being conducted.
40. Finally, I entirely reject the suggestion that the social workers' conclusion that the Claimant is aged between 21 and 25 was "entirely unexplained and unreasoned". Ultimately, age assessment is not a science capable of precise explanation; the whole content of the report went to explain the conclusion of its authors.
41. In those circumstances, in my judgment, the Claimant is unable to demonstrate that there is a serious issue to be tried here.

Balance of Convenience

42. Even if I had reached the contrary conclusion, I would have dismissed this application in applying the balance of convenience.
43. Applying the approach of Nicol J in *AS v Liverpool*, as explained above, the fact that what is sought here is akin to a mandatory injunction requiring a hard pressed local authority to expend resources on a case where they have assessed such expenditure is inappropriate is something I can take into account in assessing the balance of convenience. On any view, the Claimant's case is not a strong one and that too is relevant to the balance of convenience.

44. I also take into account that, if it turns out that Hackney are right and the Claimant is aged between 21 and 25, the interim order sought by the Claimant would have the effect of placing an adult male with children aged under 18, a situation which is, to put it at its lowest, less than ideal. (In that context I was referred by Ms Bhogal the decision of Ouseley J in *R (M) v Ealing BC* [2016] EWHC 3645 (Admin)).
45. I also bear in mind that the Claimant is currently housed by the Home Office in a hotel in which he has his own room with en-suite bathroom facilities. He is able to lock the door of his room. There is no evidence of intimidation or threats from other occupants. He has been provided with an Oyster card which enables him to travel freely around central London. He is able to visit his college for tuition.
46. It is right to say that because his current accommodation is provided by NASS, he is at risk, at least theoretically, of being moved. There is, however, at least as yet, no evidence that that is likely in the near future. It is also right to say that he does not have the additional services which he would be entitled to if he was accommodated as a child.
47. Nonetheless, viewing the matter as a whole, in my judgment, the balance of convenience would not favour the grant of interim relief.

Conclusions

48. In my judgment, there is here no serious issue to be tried. Even if there was, the balance of convenience does not favour the grant of interim relief. In those circumstances, this application is refused.