Neutral Citation Number: [2020] EWHC 384 (Admin)

Case No: CO/225/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/02/2020

Before :

DAVID LOCK QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

HJ (By her Litigation Friend Ron Brejier)	**Claimant**
- and -	
LONDON BOROUGH OF CROYDON	**Defendant**

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MARISA COHEN (instructed by **Scott-Moncrieff & Associates Ltd**) for the **Claimant**
HILTON HARROP-GRIFFITHS (instructed by **Croydon legal Team**) for the **Defendant**

Hearing dates: 6 February 2020

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Approved Judgment

DAVID LOCK QC :

1. The Claimant is a young woman from Vietnam. She says that she arrived in the United Kingdom on 24 October 2019 having travelled from Vietnam partly by air and partly in the back of lorries. She states that she was born on 17 January 2003 and is presently 17 years old. I have made an anonymity order in this case and direct that the Claimant shall be known as HJ. Those are not her initials.

2. The primary facts are summarised in HJ's Amended Statement of Facts and Grounds. There was no objection to HJ having permission to amend her original Statement of Facts and Grounds and therefore I give permission for the amendments. This document explains that her case is that she is an unaccompanied asylum seeking child who has an outstanding claim for international protection and further that there are indicators that she is a potential victim of trafficking.

3. HJ's Grounds set out that her family followed the Hoa Hoa religion, and had encountered persecution as a result from the Vietnamese authorities. She says that her mother was hounded out of Vietnam some years previously, and she understands that her mother was living in the United Kingdom. Part of her motivation in coming to the United Kingdom appears to be that she is hoping to be reunited with her mother, although she does not have an address for her mother.

4. HJ has given the authorities and her solicitors an account involving a series of accidental meetings with various Vietnamese individuals in the United Kingdom which led her to living at a property in Greenwich under the supervision of a man she was only able to identify by his first name and I will refer to as "CC". The property where she was staying accommodated various other Vietnamese nationals and her room had a padlock on the outside of the door. Until her arrest, she says she was working in a nailbar, as arranged by CC, but does not appear to have been paid for this work. HJ is represented in these proceedings by a Litigation Friend. Her Litigation Friend has expressed concern that this account may not be entirely accurate, with the implication that she is telling her solicitors what she has been told to say. The Litigation Friend is concerned that she may have been trafficked from Vietnam to the United Kingdom but has not yet had the confidence to tell her full story to her solicitors.

5. HJ was discovered by police officers on 15 January 2020 who were attending the property in Greenwich where she lived for an unconnected purpose. HJ says that she was extremely frightened when she was arrested and informed the police that she was aged 15 because she hoped that this would mean that they were less likely to beat her.

6. On the same day as she was arrested, she was also interviewed by two social workers from the Royal Borough of Greenwich ("RBG") who asked her a series of questions about her background and how she came to be in the United Kingdom. The social workers concluded that there were inconsistencies in her account and reached the view that she was not a child and may well have been in the UK for longer than she claims. Despite the social workers undertaking an age assessment, the papers presently available do not suggest that the purpose of this interview was clearly explained to HJ and she does not appear to have been accompanied by an appropriate adult who was there to look after her interests. Further, it is presently unclear whether any alleged inconsistencies in her account were put to her or whether the social

workers explained that they had concluded that she was an adult and asked her for her reaction.

7. HJ has alleged in her amended Grounds that a series of errors meant that this age assessment was unlawful in that it was not carried out in accordance with guidance provided by the High Court in *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin) ("*Merton").* However, the Claimant's solicitors are not seeking a Declaration that RBG acted unlawfully in concluding that she was an adult. Their case is that the Defendant to these proceedings, the London Borough of Croydon ("LBC") should not rely upon the assessment carried out by RBG social workers because it was legally defective for the reasons set out at paragraph 49 of the Amended Grounds.

8. Following that assessment, HJ was advised to contact immigration solicitors. She contacted Wimbledon Solicitors who assisted HJ to claim asylum. Wimbledon Solicitors referred HJ to the Refugee Council who, in turn, referred her to LBC. They were erroneously told that HJ had to be referred by immigration services and they were advised to make an application to Lunar House. By that time Lunar House had closed and the Refugee Council took HJ to a police station. They were unable to assist her.

9. Between 15 and 19 January 2020 HJ states that she returned to reside at the address of the man she previously stayed with in Greenwich. On 20 January 2020 HJ found her way back to the Refugee Council, which is located within the area of LBC and the Refugee Council referred her to her present solicitors. They sent a pre-action letter to the LBC requesting that they assist HJ by conducting an assessment to determine whether she was a child in need. The solicitors asserted that HJ was within their area within the meaning of Part III CA 1989 and thus LBC owed a duty to assess her needs.

10. HJ also presented in person to LBC with a support worker from the Refugee Council but says that she was told by LBC staff to present to the National Asylum Support Service ("NASS") or, if she continued to claim that she was a child, she says she was told she should pursue the matter with RBG on the basis that she was residing in Greenwich. HJ's solicitor responded to LBC by asserting that HJ was within LBC's area and that she should not return to Greenwich because the Refugee Council had concerns about the nature of the relationship between HJ and the man at the property in Greenwich. The Refugee Council thus suggested that it would not be desirable for her to return there.

11. On the evening of 20 January 2020 HJ returned again to the address in Greenwich because, it seems, she had no practical alternative place to stay. On 21 January 2020 HJ returned once more to the offices of the Refugee Council in Croydon and there was further email correspondence with LBC. HJ was given £10 for food as she had no money and she was taken once again to the LBC social services offices.

12. LBC have continued to maintain that HJ should present to RBG and that LBC owe her no duties under Part III of the Children Act 1989. At this point LBC had reached this view in reliance upon the terms of a voluntary Pan London Protocol for Unaccompanied Asylum Seeking Children. In reliance on that Protocol, LBC staff were insistent that HJ should seek support from RBG and not LBC. LBC no longer

appear to suggest that they are entitled to rely on this voluntary Protocol to require her to seek assistance from RBG.

13. On 21 January 2020 HJ's solicitors commenced these proceedings and made an application for urgent interim relief to the duty judge. By Order dated 21 January 2020 Mrs Justice Steyn granted interim relief and ordered that LBC was to provide HJ with age-appropriate accommodation and support. Mrs Justice Steyn ordered that an oral hearing should take place to consider whether interim relief should continue and if so, for how long and to consider permission.

14. The legal case advanced by HJ is straightforward. She claims to be a child who is physically present in the area of LBC and who is a "child in need" who looks to LBC to discharge their assessment duties and, if she is found to be a child in need, to provide her with accommodation and support. She relies on the duty imposed on each local authority under section 17 of the Children covered 1989 to safeguard and promote the welfare of children "within their area who are in need". Her counsel, Ms Cohen has referred me to the observations of Mr Justice Cobb in *R (AM) v Havering LBC and another* [2015] EWHC 1004 (Admin) at paragraph 33(iii) that:

> "Section 17 and Schedule 2, para 1 and para 3 together create a duty on the authority to assess the needs of each child who was found to be in need in their area *R (G) v Barnet* at [32]/[77]/[110]/[117]; *R (VC) v Newcastle.*"

15. I specifically raised the question as to whether LBC disputed that HJ was a person who was "*within the.. area*" of LBC. Mr Harrop-Griffiths has confirmed that he does not take any point on behalf of LBC that HJ's presence within the Croydon area is so fleeting as to mean that she was not a person who is "*within the.. area*" of LBC. Accordingly, if HJ is a child, it seems clear to me that there is at least an arguable case that LBC had a duty to conduct an assessment of her needs in order to determine whether she was a child in need and, if so, to determine how her needs were to be met by LBC.

16. Mr Harrop-Griffiths argues the case on behalf of LBC primarily on two primary grounds. First, he argues that if HJ is an adult, as RBG has concluded, LBC does not owe her any duties under the Children Act 1989 ("the 1989 Act"). It seems to me that, whilst this submission is correct, it does not meet the Claimant's case. The complaint by HJ is a complaint over a failure by LBC to conduct an assessment, not a complaint about their failure to reach a conclusion after a *Merton* compliant age assessment that HJ is not a child and thus LBC owes no duties to her under the 1989 Act. The possible adverse outcome of an assessment does not appear to me to prevent a duty to assess arising in this case. It thus seems to me that this proposed defence does not prevent the Claimant's case being arguable that LBC have acted unlawfully in refusing to assess the Claimant.

17. As an alternative, Mr Harrop-Griffiths argues that LBC does not need to carry out its own assessment because it is entitled to rely on the conclusion reached by RBG that HJ was an adult. Mr Harrop-Griffiths primarily relies upon a passage in the judgment

of Mr Justice Bean, as he then was, in *R (HA) v LB Hillingdon* [2012] EWHC 291 (Admin). That was a case in which an unaccompanied asylum seeker was originally assessed by Hillingdon Council who reached the view that he was over the age of 18. He was therefore referred to NASS and accommodated in Birmingham. HA continued to assert that he was a child and, in accordance with the decision of the Supreme Court in *R (A) v Croydon LBC* [2009] 1 WLR 2557, that matter fell for determination by the court as a matter of objective fact. Thus, at the stage that the case came before Bean J, it was unclear whether HA was a child or an adult.

18. Prior to a hearing to determine HA's age, the issue arose as to whether HA should be provided with accommodation under the 1989 Act by Hillingdon Council or by Birmingham Council. Thus, in that case, Hillingdon Council were the first local authority, who had made the initial assessment, and Birmingham were the second authority.

19. Bean J decided that, on an interim basis prior to the trial of the age issue that HA should be accommodated by Hillingdon as opposed to being accommodated by Birmingham. As the first authority, Hillingdon was advancing a positive case that "*if anyone was liable to provide accommodation and support to HA, it was Birmingham City Council, in whose area HA have been living since being moved thereby UKBA*" [see paragraph 4]. Bean J thus identified the key question in that case as to whether any duty that Hillingdon may have owed to HA had ended because he was now accommodated in the area of Birmingham City Council [see paragraph 10].

20. The Judge considered the relevant authorities and rejected the submission that no relief could be claimed against Hillingdon because any duty they had to HA under the 1989 Act had come to an end. The Judge said at paragraph 14:

> "In my view Parliament cannot have intended a simple geographical test to be applied. It would mean that an applicant dissatisfied with his age assessment by the original authority (or with the standard of s20 accommodation and support supplied by them) could simply travel to another authority and demand to be reassessed, or provided with better accommodation. It would also encourage dumping of applicants by one authority on another: in Lady Hale's phrase, passing them from pillar to post."

21. The Judge concluded that a local authority could not discharge its duties under section 20 of the 1989 Act to a putative child by asserting that the person was not a child prior to that issue being determined by the court. Accordingly, the Judge decided that Hillingdon may continue to owe duties to HA in that case, and in the exercise of his discretion decided that Hillingdon should be responsible for providing accommodation on an interim basis. However no decision was made in that case that Birmingham City Council did not also owe duties to HJ. Bean J appears to have accepted that it was fully arguable that a correct decision had been made by HHJ Farmer QC in *R (A) v Leicester City Council and Hillingdon LBC* [2009] EWHC 2351 (Admin) when that Judge in that case had concluded that, in a case where a child has been within the area of consecutive local authorities, both local authorities could

have concurrent duties to a child under Part III of the 1989 Act: see paragraph 22 of the decision in *HA*.

22. It follows that *R (HA) v LB Hillingdon* [2012] EWHC 291 (Admin) supports the Claimant's case that it is arguable that both the first authority, in this case RBG, and the second authority, in this case LBC, may owe duties to HJ under the 1989 Act. If that is the case, it seems to me that there is an arguable case that HJ can decide which local authority she seeks to hold to the performance of any duties which are owed to her. It is thus arguable that it is no answer for LBC to argue that HJ is under a legal duty to seek accommodation and support from RBG so as to relieve LBC of any responsibility to do so.

23. That approach appears to me to be consistent with the explanation of the scheme of the Children Act 1989 as explained by Lady Hale in *R (G) v Southwark LBC* [2009] 1 WLR 1299 as follows:

> “"(3) Is he within the local authority's area? This again is not contentious. But it may be worth remembering that it was an important innovation in the forerunner provision in the Children Act 1948. Local authorities have to look after the children in their area irrespective of where they are habitually resident. They may then pass a child on to the area where he is ordinarily resident under section 20(2) or recoup the cost of providing for him under section 29(7). But there should be no more passing the child from pillar to post while the authorities argue about where he comes from.”

24. Mr Harrop-Griffiths raised the entirely understandable concern that the transfer of responsibility provisions and the recoupment provisions under the 1989 Act operate under an “ordinary residence” rule. He thus expressed the concern on behalf of LBC that they may not be applicable in circumstances where an individual is not lawfully present in the United Kingdom and who thus may not be able to secure any “ordinary residence” in the area of another local authority. I express no view as to whether the transfer of responsibility provisions and the recoupment provisions under the 1989 Act operate in the way feared by LBC. However, even if those provisions limit the ability of LBC to obtain recoupment of its costs from RBG if it were to be proven that HJ had a greater connection to Greenwich than Croydon, I consider that it is hard to see how that consideration can prevent concurrent duties arising on both authorities. I therefore do not consider that this is a full answer to the Claimant's case.

25. I am mindful that this is only a permission hearing and accordingly nothing in this short judgment should be taken as expressing a concluded view on any of the above matters. However, for the reasons set out above, I am satisfied that HJ has a fully arguable case that LBC has failed to comply with its duties to her under the Children Act 1989 by refusing to undertake an assessment and therefore I grant the Claimant permission to proceed to judicial review on the grounds set out in her Amended Statement of Facts and Grounds.

26. LBC urged me to recognise that HJ had a greater connection to Greenwich and therefore to either substitute RBG as the effective Defendant in this case or to add Greenwich as an additional Defendant under CPR 19.2. The court only has power to order a new party to be substituted for an existing party if "*the existing party's interest or liability has passed to the new party*". That is not the position here because nothing appears to have happened to have passed a liability owed by LBC to HJ to RBG. LBC's case is that liability never passed from them to RBG, not that it passed from LBC back to RBG. I therefore decline LBC's application to substitute RBG as the effective defendant to these proceedings.

27. Alternatively, Mr Harrop-Griffiths argues that RBG should be added as an additional defendant to the proceedings under CPR 19.2(2) on the grounds that it is desirable for RBG to be added as a party "*so that the court can resolve all the matters in dispute in the proceedings*" or "*there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue*". Whilst I have considerable sympathy for the position that LBC find themselves in, it does not seem to me appropriate to add a party to proceedings as a defendant unless another party is actively seeking relief against the new proposed defendant. I invited LBC to indicate whether it was prepared to advance a positive case that the primary duty to HJ was owed by RBG and that LBC should be excused liability because any duties to HJ should have been discharged by RBG. For entirely understandable reasons, LBC declined to do so.

28. HJ has made her position clear. She does not seek any relief against RBG. Her case is that the age assessment carried out by the social workers from the RBG was unlawful because it was not *Merton* compliant. She therefore asserts that this assessment should not be relied upon by anyone else, especially LBC. However, HJ does not wish to return to live in Greenwich because of the circumstances in which she was residing there and wishes to cut her ties with Greenwich.

29. HJ's solicitors have rightly raised the question as to whether, on further examination, the circumstances in which she was living in Greenwich suggest that HJ may have been a victim of trafficking. As I indicated in the hearing, I consider that there are a number of fairly obvious "red flags" which suggest that this issue should be investigated. It may well be that, once HJ has settled in her foster accommodation, further details will emerge which support a concern that she may have been trafficked. It is, for example, entirely unclear on her present account who is alleged to have paid to transport her from Vietnam to England, why she was working in a nailbar without payment and exactly what relationship she had with the Vietnamese man who was providing her with accommodation and a job. These are matters that will have to be investigated in due course but the Guidance "Safeguarding children who may have been trafficked: Practice Guidance" recommends a low threshold before referrals are made and appropriate steps are taken to protect potential victims of trafficking. It seems to me that this is a further reason why HJ should not be required to seek a remedy solely against RBG. Thus, if RBG were to be added as a defendant, it would be a defendant in proceedings where neither of the other parties is seeking relief against RBG. In these circumstances it seemed to me inappropriate to exercise my discretion to join RBG as a defendant.

30. However, I agree with LBC that RBG should be added to these proceedings as an Interested Party so that it can take whatever part it considers appropriate in these proceedings and also will be bound by any decisions made by the court in this action. If HJ is established to be a child, one outcome of these proceedings is that the Court may conclude that she is owed duties by both local authorities. If that situation arises, even though no relief is claimed against RBG by either party for past decisions, decisions may have to be made as to which local authority should discharge any duties to HJ in the future.

31. I have invited LBC to consider whether it should conduct an assessment of HJ's needs, which may well include an age assessment if they considered that there was an issue concerning the Claimant's age. However, I do not order it to do so because that is the final relief sought by HJ in these proceedings and it would be premature to order that the Claimant obtain the relief she is seeking by way of an interim order. Depending on the outcome of any trial of these matters, LBC may or may not be under a duty to conduct such an assessment. Nonetheless, if LBC did decide to conduct such an assessment and, after doing so, concluded that HJ is not a child, and HJ continued to assert that she was a child, it seems to me that the issue as to whether she is or is not a child will have to be determined by the Court. In that event it seems to me appropriate that the matter should be transferred to the Upper Tribunal in order to make that decision. If that position were to be reached, I would expect the parties to make a joint application to the High Court to have this case transferred to the Upper Tribunal in order for the issue of HJ's age to be determined.

32. Given that it is arguable that LBC owes duties to HJ under the Children Act 1989 and in circumstances where no party is seeking relief against RBG on the basis of any past allegedly unlawful acts by RBG, it seems to me that the interim relief granted by Mrs Justice Steyn in her order of 21 January 2020 should continue. HJ appears to be a vulnerable young woman who, if she is a child, is highly likely to be determined to be a "child in need" under the 1989 Act. I accept the submissions made on her behalf that her previous accommodation is far from satisfactory and I therefore consider that, pending a further order in these proceedings or a trial of this matter, LBC should continue to provide accommodation for her. The Defendant shall continue to be at liberty to apply to vary or discharge the order on two full days' notice to HJ's solicitors.