Neutral Citation Number: [2022] EWHC 465 (Admin)

Case No: CO/3021/2021

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

Thursday 3rd March 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of GB)	**Claimant**
- and -	
LEEDS CITY COUNCIL	**Defendant**

- -
- -

Steven Galliver-Andrew (instructed by Bhatia Best Solicitors) for the **Claimant**
Sam Karim QC (instructed by Leeds City Council) for the **Defendant**

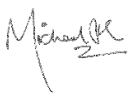
Hearing date: 3.3.22

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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THE HON. MR JUSTICE FORDHAM

Note: This judgment was produced and approved by the Judge, after using voice-recognition software during an ex tempore judgment in a Coronavirus remote hearing.

MR JUSTICE FORDHAM:

Introduction

1. This is a renewed application for permission for judicial review in a local authority age assessment case. Permission for judicial review was refused on the papers by HHJ Gosnell on 20 December 2021. HHJ Saffman had refused interim relief on 8 September 2021. The Claimant asks the Court to grant permission for judicial review and to make an order for interim relief requiring him to be treated as a child by the Defendant until substantive resolution of the judicial review claim. There is also an application to adduce fresh evidence in the form of a witness statement of Ms Swadling (to whom I will come); and an application for anonymity. The Defendant invites the Court refuse permission for judicial review on the grounds of delay and in any event because the claim lacks viability viewed against the applicable permission stage test. The Defendant also submits that, even if permission for judicial review were granted, it would not be appropriate in the circumstances to order interim relief. If the question of interim relief were to arise – that is, following the grant of permission for judicial review – I would hear further argument on it.

2. The mode of hearing was by Microsoft Teams. Counsel were satisfied, as am I, that this mode of hearing involved no prejudice to the interests of their clients. The open justice principle has been secured through the publication of the case and mode of hearing, and an email address usable by any member of the public or press who wished to observe this public hearing, in the Court's cause list. The start time was published in the cause list as 10:00am but the parties had been notified of a 10:30am hearing. The hearing took place at 10:30am. No prejudice arose from that, for anybody, since anyone making contact with the Court asking to observe the hearing will have been told of the later start time. I am satisfied that a remote hearing was appropriate and justified in the present case.

Anonymity

3. I deal first with anonymity. This is a case in which, as I have mentioned, two Court Orders have already been made. Mr Galliver-Andrew, very properly and fairly, has accepted that he did not flag up clearly for the two previous judges who dealt with this case (HHJ Saffman and HHJ Gosnell) the question of anonymity. The judicial review grounds did make one reference to "anonymity order sought" but the point was not developed or explained anywhere. It was unsurprisingly not picked up by anyone. Mr Karim QC has appropriately recognised today as "entirely appropriate" the making of an anonymity order. I made such an Order towards the start of today's hearing. Had it been a question of the Claimant's age my anonymity order would have been the provisional one, revisited in light of the Court's decision as to whether there is found to be an arguable basis of a judicial review challenge. But, in my judgment, the anonymity order is necessary under CPR 39.2 for a freestanding reason, in circumstances where the Claimant is seeking asylum. It is no accident that all of the many authorities contained in the bundle for this hearing are anonymized cases. The precise terms of the anonymity order will need to be addressed in a draft which I will ask Mr Galliver-Andrew to circulate to Mr Karim QC and then to provide to the Court for approval, later today.

Context

4. The Claimant is an Iranian national whose case was referred to the Defendant local authority after he arrived in the UK hidden in a lorry on 9 April 2021. His story involves a long and arduous journey over the period of a year, after leaving Iran in April 2020, spending a significant period of time in Turkey, before ultimately arriving at "the Jungle" (in Calais) and then finally being able to board a lorry and make his way to the UK. He has made an asylum protection claim here. He was removed into adult accommodation under the responsibility of the Home Office on 14 July 2021 and then "dispersed" to Middlesbrough on 29 October 2021. This judicial review claim is about whether he was (and still is) a "child for" whom the Defendant as the local authority had (and still has) legal responsibility. I stay "still is" because on his case he is now 17 years and 8 months old. The fact that by the time of a substantive hearing – possibly with a transfer to the Upper Tribunal – it may be that the Claimant would be on the verge of 18, even on his own case, is not a factor in my judgment which should influence in any way the Court's approach today. Age assessment issues are important, as are the legal protections that follow from age assessment decisions. They may, moreover, have an enduring significance, even after the individual in question has reached the age of 18. There would, moreover, be the question of interim relief.

5. After a "Brief Enquiry" (by social workers Sandford and Gozzard) in April 2021, which reached the view that the Claimant "appeared visually likely to be over 25", he was then subject to a full age assessment process with sessions taking place on 28 April 2021 and 5 May 2021 conducted by two social workers (Holroyd and Wright). As at 5 May 2021 his age was being assessed as "20" with his date of birth assessed as 8 July 2000. His claimed date of birth was (and is) 8 July 2004 (the social workers having conducted the appropriate conversion to the Gregorian calendar). A further 'minded-to' session was convened, to communicate adverse impressions and to give the Claimant the opportunity to respond, to what had been recorded and what had provisionally been assessed against him. That took place on 12 May 2021. On 24 May 2021 the Claimant met, for the first time, Ms Swadling. She is a "Young Person's Development Worker" at PAFRAS (Positive Action for Refugees and Asylum Seekers) in Leeds. Ms Swadling subsequently wrote a letter on 21 June 2021 in which she explained that: "Having spent lots of time with [the Claimant] and other young people I find no reason for [his] claimed age not to be accepted". As I have already mentioned, the fresh evidence put forward is Ms Swadling's witness statement. In it she expands on a number of points, and explains that in her "opinion regarding [the Claimant's] age": "I believe [him] to be his claimed age of 17". That witness statement is dated 10 February 2022.

6. The Claimant had instructed his solicitors on 16 June 2021. On 2 July 2021 they wrote requesting the Defendant to undertake a "reassessment" in the light of Ms Swadling's letter, which they attached. An "Addendum assessment" was conducted and produced (by social workers Holroyd and Wotherspoon) on 12 July 2021. I put to Counsel at today's hearing that what happened fits within a description in the ADCS Age Assessment Guidance ("Guidance to assist social workers and their managers in undertaking age assessments in England", October 2015) at internal page 31. There, the Guidance describes a procedure "where further information becomes available", and in which a "new decision" with "reasons" is then "communicated", but without the process necessarily involving any "further questioning" of the individual (the putative

child). Following pre-action correspondence, judicial review proceedings were commenced on 2 September 2021.

The FZ test

7. It is common ground that a principal basis on which a local authority age assessment can be challenged by way of judicial review is the argument that the assessment was 'wrong as a question of fact'. It is agreed that the test for the permission Judge, so far as concerns a claim of that nature, derived from R (FZ) v Croydon LBC [2011] EWCA Civ 59, involves asking:

> "whether the material before the Court raises a factual case, which, taken at its highest, could not properly succeed in a contested factual hearing".

This test for refusing permission for judicial review arises in the context of a hard-edged question of fact for the judicial review court to decide (R (A) v Croydon LBC [2009] UKSC 8 [2009] 1 WLR 2557), and where there is the practice of transfer to the Upper Tribunal for the substantive hearing, where fresh evidence and oral evidence can properly be considered. Mr Karim QC rightly accepts that in the application of the FZ test this Court clearly has to have in mind the prospect of success at a future factual hearing of that nature and with evidence of that kind. As he rightly points out, the FZ test nevertheless focuses on "the material before the Court" at the permission stage, in order to evaluate whether "taken at its highest" the "factual case" being advanced could "properly succeed". So far as the permission-stage Judge is concerned, the context includes appreciating the significance of the age assessment decision for a child. My role, as a Judge dealing with a renewed application for permission for judicial review, involves considering the question of permission for judicial review "afresh". That takes care of any point made about whether or not a previous Judge on the papers was focusing on the FZ question.

8. There is another basis on which a local authority age assessment can be challenged on judicial review. That is as to its lawfulness, judged by reference to applicable legal standards as a matter of conventional judicial review challenge. Those include legal standards of fairness and due process, sufficiency of enquiry and legally adequate reasons. A particularly helpful summary of legal principle is the judgment of Thornton J in AB v Kent County Council [2020] EWHC 109 (Admin) at §§18-24 ("Legal Framework") and §§31-46 ("The law"). In the present case, I can put conventional judicial review challenge to one side. Mr Galliver-Andrew for the Claimant accepts that there is no arguable ground with a realistic prospect of success on which the age assessment in the present case could be so impugned. This case is squarely a factual issue challenge engaging the FZ permission stage test.

Fresh evidence

9. I am entirely satisfied that it is appropriate for this Court to have in mind the witness statement evidence of Ms Swadling. It is properly part of "the material before the Court". It is part of the evidence which could properly be put before the Upper Tribunal at any substantive hearing. Mr Karim QC rightly did not seek to resist it being considered. I have considered, with Counsel's assistance, what its contents tell the Court. I have borne in mind, including in fairness to the assessing social workers, that

the statement was not before them and that it expands on and updates points that Ms Swadling had made in her June 2021 letter.

Delay

10. I would not shut this case out on grounds of delay. Mr Karim QC has rightly reminded me that the rules and discipline of judicial review require focus on when it was that the grounds for judicial review "first arose" (CPR 54.5(1)(a)). His submission is that the "decision" in this case was "primarily" taken in May 2021 and that the Claimant is out of time, with no good reason for an extension of time, in having commenced judicial review only on 2 September 2021.

11. I am not convinced that it suffices for Mr Galliver-Andrew to describe the local authority's "duties" to a child as "ongoing". Age assessment is a public law decision-making context in which concrete decisions are arrived at and communicated. The Court, in my judgment, ought not to encourage the idea that claimants and their representatives can delay judicial review and then point to a 'continuing duty' as a basis for concluding that there has been no delay. But it is not necessary to arrive at any firm conclusion in relation to any of that, because I am quite satisfied in relation to delay by reference to the other way that the point has been put on behalf of the Claimant (to which I turn).

12. There was an age assessment in May 2021 (though in fact 12 May 2021 rather than 5 May 2021 would have to be the operative date given the deferred 'minded-to' process that was adopted). The Swadling letter was put by the Claimant's solicitors to the Defendant and the Defendant properly decided to revisit the age assessment in the light of that material. That process, where "further information becomes available" is – as I have explained – described in the Guidance as a "new decision". The Defendant, properly, adopted an "Addendum Assessment", leaving as the starting-point (and principal focus of the decision being maintained) the documented Age Assessment dated May 202. Judicial review is a "last resort", and it would not have been appropriate to commence a judicial review claim when the "alternative remedy" was available, and was being pursued, of further consideration in light of the new information. Promptness in judicial review is important. But a letter before claim was promptly written on 14 July 2021, two days after the Addendum Assessment. That letter was responded to by the Defendant, even more promptly, on the same day. There was then a 6-week period before judicial review proceedings were commenced (2 September 2021) and the approach to timing weighed heavily in the mind of HHJ Saffman in refusing interim relief (8 September 2021). But, in all the circumstances – and having regard to the important interests of a putative child, and the importance of the legal duties that arise – my conclusion is: (a) these proceedings were commenced "promptly"; and (b) in any event, were it necessary to do so, I would have granted an extension of time on the basis of "good reason". I am quite satisfied that the outcome in this Court of this case should turn, not on a procedural question of timing, but rather on the substantive question of whether or not the claim has viability. It is to that question that I turn.

Viability

13. In my judgment, having considered all the materials put before the Court in all the arguments made in writing and orally to the Court, this is a case in which the FZ test for refusing permission for judicial review is applicable. The claim for judicial review,

in my judgment, is not viable. The material before the Court does raise a "factual case" but it is, in my judgment, a case "taken at its highest" which "could not properly succeed in a contested factual hearing". It is for that reason, referable to the substance and viability of the challenge, that I will refuse permission for judicial review. In recognition of the importance of these cases, and in recognition of the arguments that have been put forward on the Claimant's behalf, I will explain below the key reasoning that has led me to that conclusion.

14. The starting-point, in my judgment, is to recognise that this was a case in which there was no documentary evidence that could provide any direct support for any assessment of age. Mr Galliver-Andrew has drawn to my attention some documentary material. In particular of course there is the witness statement of Ms Swadling which gives her opinion on the Claimant's age and her reasons for arriving at it. But that 'documentary evidence' is in the nature of an opinion of her own, with her reasons, which the Court can put alongside the assessment of the social workers. I was shown objective country information which supports the statement which the Claimant had made to the social workers at the 'minded to' session when he said that, if he had been aged 18 when he was still in Iran, he would have faced being conscripted for national military service. I was also directed to news reports which evidence an earthquake in the relevant region in Iran (where the Claimant's family lived) in November 2017. That supports the Claimant's description of an earthquake in which he lost his mother and sister. Reliance can properly be placed on this document as supporting the Claimant's ability to 'count back' and 'count forward' a period of "four years" in his description to the social workers. Those are relevant materials properly put before the Court. But there is nevertheless no reliable documentary evidence being produced of the Claimant's date of birth or of the Claimant's age. That was also the position before the assessing social workers. It is in those circumstances that, as the well-known case of B v Merton LBC [2003] EWHC 1689 (Admin) [2003] 4 All ER 280 put it (at §20):

> "In a case [where] the applicant does not produce any reliable documentary evidence of his date of birth or age … the determination of the age of the applicant will depend on the history he gives, on his physical appearance and on his behaviour."

This point was picked up specifically at the heart of the Age Assessment document, where the "Social Worker analysis" also recorded that the social worker assessors had "followed the guidance in the case of [Merton]" and "also been mindful of the … 2015 Age Assessment Guidance", the Guidance document to which I have referred.

15. Next, in my judgment, it is important to have in mind some points relating to the process that was adopted. Following the Brief Enquiry in April 2021 by two social workers (Sandford and Gozzard), the position was adopted that a full age assessment would take place. That was felt to be appropriate, even though in "normal circumstances there would be no need to assess further" an individual in respect of whom the view of two social workers was that he "appeared visually likely to be over 25". A full age assessment was adopted "in order to give [the Claimant] the benefit of the doubt following his difficult journey". Moreover, the Defendant took the position that it was appropriate to "be fair and start from an unbiased [and] uninfluenced stance", with "two separate social workers to those initially involved" (ie. Holroyd and Wright) undertaking the full age assessment. Mr Galliver-Andrew has sought to build on that a criticism of the Defendant for subsequently using one of the same social workers (Ms

Holroyd) again for the Addendum Assessment. There is nothing in that point. What the Defendant was properly and fairly doing was "start[ing]" a full age assessment with two new social workers. What the Defendant went on appropriately and fairly to do was to consider the fresh material in the Swadling letter by means of an Addendum report. There is, in my judgment, no conceivable criticism or unfairness that can be said to have arisen from that course.

16. So far as the approach that was taken to this case is concerned the age assessment is, in my judgment, conspicuously balanced in its nature and approach. I have to posit a substantive hearing considering the question of age, as a matter of fact on all the evidence, as a hard edged question. Nevertheless, it is a key and weighty feature of the context – for the court (or tribunal) conducting that exercise – to be considering the assessment that has been arrived at by qualified and experienced social workers. And that includes the approach that has been taken by them. That is a key part of "the material before the Court" for the purposes of the FZ test. To give examples:

    i) The assessing social workers recognised that the Claimant "struggled to engage in conversations around his family and the deaths of particularly his mother, sister and friend". What the assessing social workers did was to allow breaks, and changes of topic, but – most importantly – not to hold against the Claimant his difficulty in 'engaging in conversations' on those topics. I do not accept Mr Karim QC's invitation to treat the Age Assessment as embodying a 'failure' on the Claimant's part, to 'provide detail', which failure was being held against him.

    ii) Similarly, the assessing social workers referred to the Claimant's "confusion" and "short responses … lacking in detail". But they specifically said that those were assessed as "much more likely to be due to [communication] skills being underdeveloped and a lack of worldly experience, rather than due to a younger age". In other words, the assessing social workers – again in a fair and balanced way – deliberately did not hold those features of presentation in the sessions against the Claimant, so far as age was concerned.

    iii) A further example is in the deferral of the 'minded to' session, that being a session at which the provisional assessment was going to be read out to the Claimant to ensure that he had a full and fair opportunity to respond to it. In my judgment, there is nothing in the criticism made by Mr Galliver-Andrew of that situation, namely that: given the recognised difficulty that had come to light as to "different phrases" used by the Iraqi Kurdish interpreter, compared with an Iranian Kurdish interpreter, what the social worker assessors ought to have done was to have 'started all over again' with a new substantive interview session and an Iranian Kurdish interpreter. In my judgment, it was conspicuously fair and balanced, and nothing further was necessary than, for the social workers to recognise – as they did – that although the Claimant "continued to say that he understood the [Iraqi Kurdish] interpreter fully", the assessing social workers felt (as did the appropriate adult in attendance) that the 'minded to' meeting should be "continued on another date, when a full read back of the assessment could be undertaken with an Iranian Kurdish interpreter, ensuring that [the Claimant] fully understood the assessment and that any changes could be amended or additional information provided". By way of an illustration the Age Assessment document records that it was during the deferred 'minded to'

meeting that "more specific detail" was provided as to age and how the Claimant was saying that "he knew he was below the age of 18". It is relevant that one feature of that information elicited from him was that he "only knew the numbers between 1 and 10".

iv) A final feature of this type is found at the end of the Age Assessment. The assessing social workers said:

> "It is the assessing social workers' opinion that [the Claimant] is most likely to be closer to 25 years of age [than being under the age of 18 as claimed]. However, in order to give [him the] benefit of the doubt due to his rural largely outdoor living experiences, we conclude that he is assessed to be 20 turning 21 on the 8th July [2021]."

Mr Galliver-Andrew, in my judgment clearly rightly, has accepted that those sorts of features ("rural largely outdoor living experiences") are the sorts of concerns which have informed what is described in some of the authorities as a "five year margin of error", referable to November 1999 Guidelines for Paediatricians published by the Royal College of Paediatrics and Child Health: see Merton at §22. Once that is recognised though, in my judgment, there is nothing in the criticism which Mr Galliver-Andrew has sought to make, about there being a need to apply a "five year margin of error" to the assessment of age "20", at which the social workers arrived.

17. By reason of its nature, this is a case which centrally involved an evaluative assessment depending on history given and physical appearance and behaviour, as identified in the passage from Merton at §20, which passage I have set out above and which was included within the age assessment decision document. The facts are that, on the Claimant's own evidence: birthdays were not celebrated; dates of birth were not used; nor was he able to read a date of birth; nor could he count above 10. These are closely and cogently reasoned age assessment documents. The assessing social workers, the lead one of whom has been working in this area since 2009 and as a lead worker since 2012, and has completed a "vast number" of age assessments, reached the clear conclusion by reference to a long series of features which they identified that – even giving the Claimant the benefit of the doubt – he was to be assessed as aged 20 and nearly 21. The experienced and trained social workers who conducted the evaluation clearly faithfully followed the proper approach identified in the case law and guidance. In her own way, and based on her own experience and observations of the Claimant's demeanour and behaviour, Ms Swadling has undertaken a similar exercise and has arrived at a view and opinion of her own. The nature of the assessment in this case does not in my judgment permit a viable challenge for a substantive hearing by way of judicial review. Having considered with care the points made and arguments raised at there is in my judgment no factual case taken at its highest which could properly succeed at a contested factual hearing.

18. So far as "Merton compliance" is concerned, Mr Galliver-Andrew submitted that: there was an over-reliance by the assessing social workers on physical appearance and demeanour; based on short meetings with the strangers; whose expertise could not mitigate for the perilous fragility of reliance on such factors; that the position was further undermined by the Covid pandemic and the use of masks at the sessions; that these features called for the use of the five year margin of error; and that what was

required was an assessment of credibility (and not just reliability) as to a key point being made about what the Claimant was saying his mother had told him about being aged 12, which he was saying was some time shortly before she died in the earthquake. The answer to those points is this. The approach that was taken, reflecting Merton itself and the 2015 Guidance involved proper, but not exclusive, reliance on physical appearance and demeanour. The Age Assessment decision document expressly said: "We do acknowledge that it is not possible to ascertain a person's age based on physical appearance alone" and that "physical appearance on its own can never be effectively relied on to determine chronological age". In the same way, nor was exclusive reliance placed on "demeanour". So far as "credibility" is concerned, what the assessor social workers did, both in the Age Assessment and the Addendum Assessment was to explain the difficulties with the reliance being placed on a single oral statement from the Claimant's mother telling him that, at a stage in the past, he had been aged 12. The social workers, entirely properly and fairly, did not conclude that the Claimant was being untruthful; rather, they focused on the 'reliability' of that, placed alongside the other material and factors in their assessment.

19. I have already dealt with Ms Galliver-Andrew's criticisms regarding the interpreter, and regarding the use of the same social worker for the Addendum as for the Age Assessment.

20. So far as Ms Swadling's evidence are concerned, the social worker assessors addressed the features of her letter. They made fair and proper points: including about the training and experience that she was describing in her letter; and including a fair and proper point about the difference between an advocate and trained social workers assessing age. Even if I focus on the fresh and updating witness statement of Ms Swadling, positing a substantive hearing, and taking it at its highest, in my judgment the factual points made an opinion – expressed by reference to observed demeanour and behaviour – are not ones which could properly succeed, at a contested factual hearing alongside the other factors and circumstances of the case, to displace the conclusion that the Claimant was over the age of 18 in May 2021.

21. I have already referred to the materials relied on by Mr Galliver-Andrew as 'objective corroborating evidence' so far as military conscription and the earthquake are concerned. The point that caused me most pause for thought and concern was this. I was anxious to consider, in the Claimant's favour, whether this case could be reasoned in the following way (the encapsulation is mine):

> *The Claimant was clearly saying that his mother had told him he was aged 12. He was clearly saying that that was something she told him around four years ago. He was also clearly saying that she had died in an earthquake which must have been shortly afterwards, because he described that as being four years ago. The date of the earthquake can be pinned – based on the materials – to November 2017. This supports him as to the earthquake being four years earlier and it supports the conclusion that he was in a position, notwithstanding his numeracy limitations, reliably to say that something was four years earlier. The assessing social workers did not disbelieve the Claimant – they did not conclude that he was being untruthful – when he described that conversation with his mother. Picking up the case in that way, and looking at it from that angle, there can be said to be an important question of "credibility". If the Upper Tribunal at a substantive hearing focused on that question of credibility, and if they*

> *concluded that they believed the Claimant and found him truthful, then from that the conclusion would – or at least could – flow that his age would be accepted to have been as he had claimed.*

22. In my judgment, that point is truly the high watermark of this legal challenge. However, I am quite satisfied – by reference to the other points in the case and the necessary evaluative exercise that the social workers have undertaken together with the considerable weight which that assessment would undoubtedly bear in such a substantive hearing – that, even put in this way, the material before the Court does not raise a factual case taken at its highest which could properly succeed at a contested factual hearing. The line of reasoning which I have identified would not, in my judgment, lead at a substantive hearing to a favourable outcome when viewed alongside the other features of the case and the other reasoning of the experienced social workers undertaking their legally-compliant appraisal. That is not a prediction of what is likely (or not likely); it is an application of what is possible (or not possible). I am satisfied that this case "could not properly succeed" at a contested factual hearing.

23. In these circumstances, I must and do refuse permission for judicial review. That being so, the question of interim relief does not arise.

3.3.22