Neutral Citation Number: [2023] EWHC 163 (Admin)

Case No: CO/2661/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2023

Before :

SUSIE ALEGRE SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

The King on the application of AF	**Claimant**
- and -	
MILTON KEYNES COUNCIL	**Defendant**

- -
- -

David Gardner (instructed by **Instalaw Solicitors**) for the **Claimant**
Matthew Feldman (instructed by **Legal Services, Milton Keynes Council**) for the **Defendant**

Hearing dates: 19 January 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday 30th January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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SUSIE ALEGRE SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

Susie Alegre:

1. This case concerns a challenge to the decision of the Defendant, Milton Keynes Council dated 5 July 2022 not to conduct an age assessment on the Claimant, AF, a Syrian Asylum Seeker claiming to be a child at the time of the decision.

A - Factual Background

2. AF is a Syrian national who claimed asylum on entry to the UK on 16 November 2021. He informed the Home Office on arrival that he was a child. It is understood that he was age assessed by the Kent Intake Unit (KIU) which determined he was over 18 years of age. The only documentation available to the parties and to the Court related to that age assessment is a letter, provided by the Defendant, dated 28 November 2021 which states that this assessment took place.

3. The Home Office recorded AF as an adult and allocated him to emergency accommodation suitable for adults under s. 98 of the Immigration and Asylum Act 1999 within the Defendant's local area. It is understood that AF was referred to the Defendant sometime in March 2022 when he was contacted by phone and attended the Defendant's offices but left as he did not understand why he was there and he did not speak English. No further contact was made by the Defendant.

4. On 20 May 2022, AF's solicitors contacted the Defendant requesting copies of the age assessment documentation in order to understand why the Defendant was not providing services for AF under the Children Act 1989 (the 1989 Act) as AF was a reported putative child in their area requesting services under the 1989 Act. On 24 June 2022, AF's solicitors followed up with a letter before claim again requesting disclosure of age assessment documentation and noting that AF said he was 17 years old at the time and was residing in inappropriate NASS accommodation.

5. The Defendant responded on 28 June 2022 to say that it had not undertaken an age assessment and did not hold any age assessments conducted by the Home Office or the KIU. AF's solicitors responded with a formal request for services as a child under the 1989 Act and that an age assessment be conducted by the Defendant.

6. On 5 July 2022, the Defendant replied to say that it relied on the Home Office letter of 28 November 2021 and that, therefore, it considered any claim should be against the Home Office for its determination. AF's lawyers responded the same day reiterating the request for an age assessment and drawing the Defendant's attention to the judgment in *R (MA and HT) v Secretary of State for the Home Department* [2022] EWHC 98 (Admin). This was followed on 6 July 2022 with a pre-action letter that noted that AF remained in the Defendant's area and claimed to be 17 years old. The letter reiterated the request for the Defendant to conduct an age assessment and requested that AF be provided with accommodation and support under the 1989 Act pending final determination of his age.

7. There was no response to the letter of 6 July 2022 and, as such, AF's solicitors sent a follow up letter on 13 July 2022 indicating that in the absence of a satisfactory response by 4pm on 15 July 2022, this claim would be filed the following week. In response to a follow up letter, on 14 July 2022 the Defendant sent a pre-action response stating that it had no duty to undertake an age assessment in the circumstances.

8. The claim was issued in this court on 22 July 2022. Permission was initially refused on the papers by Order of Honourable Mr. Justice Wall on 6 November 2022 but permission was granted following a renewal hearing by Order of Mr. Jonathan Glasson KC sitting as a Deputy Judge of the High Court on 27 October 2022.

B - Application to Extend Time

9. On 12 January 2023 the Defendant applied for permission to extend the time limit for submission of a detailed statement of grounds. After hearing submissions from the parties, in line with the principles set out in *Denton* [2014] EWCA Civ 906 at the start of the hearing on 19 January 2023 I allowed the application and granted relief from sanctions.

10. I found that the failure to submit the detailed statement of grounds was a serious and significant failure to comply with the Order of Mr Jonathan Glasson KC of 27 October 2022 and was part of a pattern of failures on the part of the Defendant to engage with the proceedings in this case. The reasons given for the failure, that the Defendant's lawyer tasked with handling this case was outside the country and unable to work remotely, did not explain delays of several weeks. That the Defendant's resources are stretched is not a good reason for failing to comply with a court order. However, taking account of all the circumstances of the case, in particular the fact that Mr Gardner, Counsel for the Claimant confirmed that the Claimant would not be prejudiced by the extension of the time limit and in light of the desirability of hearing both parties' submissions in the interests of justice, I decided that it would be proportionate to grant the application as requested and to permit Counsel for the Defendant to participate in the hearing.

C - Grounds and relief sought

11. The Claimant contends that the failure or refusal by the Defendant to assess his age is unlawful on the following grounds:

    a. The decision was an unlawful failure of the Defendant to ensure that it had adequate information to determine whether the Claimant was a child to whom the Defendant owed a duty to provide services. This failure was unlawful as contrary to the principles in *Tameside* and *AB*.

    b. The decision is Wednesbury unreasonable in that any reasonable public body would have determined that it must properly assess the Claimant's age itself in the circumstances - without sight of an age assessment, and with full knowledge of the unlawfulness of the KIU assessment process.

12. Should the claim succeed, the Claimant asks for relief in the form of:

    a. A mandatory order that the Defendant should carry out an age assessment on AF in good time; and

    b. Pending final resolution of AF's age, a mandatory order requiring the Defendant to provide support akin to that which would be provided under s.23C of the 1989 Act.

D - The Law

A) *The Tameside Duty*

13. The law relating to the substance of the claim was set out by Mr Gardner in his skeleton argument and at the hearing and was not disputed by the Defendant. I will summarise the most relevant elements of the law here.

14. There is a duty on the local authority, subject to certain exceptions, to provide accommodation and support for a child in need in its area under ss.17 and 20 of the 1989Act.

15. Where a request is made for such services, the local authority may refuse to provide such services where it determines the applicant is not a child, but in doing so it must properly inform itself as whether the applicant is a child in accordance with the principles in *Secretary of State for Education Science v Tameside Metropolitan Borough Council* [1977] AC 1014.

16. The duty is summarised by Lord Diplock in *Tameside* at 1065B:

> [T]he question for the Court is, did the [Defendant] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?

17. In *R (RP) v Brent London Borough Council* [2011] EWHC 3251 (Admin) at paragraph 239, Mr Justice Stadlen described the Tameside duty as "a requirement of general application to all relevant decision makers and a necessary condition for a decision to be characterised as lawful".

B) The Tameside Duty in Relation to Age Assessments

18. To properly inform itself as to whether it owes duties under the 1989 Act, the Local Authority must consider and determine the putative child's age. For that purpose, local authorities are primary fact finders and will generally undertake an age assessment to determine age.

19. Age assessments must be undertaken in accordance with the principles set out in *R (B) v The Mayor and Burgesses of the London Borough of Merton* [2003] EWHC 1689 (Admin) ("Merton") and built upon by subsequent cases (see *R (AB) v Kent County Council* [2020] EWHC 109 (Admin) at paragraph 21).

20. The Tameside duty was considered in the context of age assessments by Mrs Justice Thornton in *R (AB) v Kent County Council* [2020] EWHC 109 (Admin) at paragraph 31-32:

> "[31] When deciding to treat a young person as an adult instead of a child in circumstances where the young person is claiming that he or she is a child, the decision maker is under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person's age. Failure to discharge this duty lawfully gives rise to a public error of law

> rendering the decision unlawful (Secretary of State for Education and Science v Tameside MBC [1977] 1 AC 1014).
>
> [32] The law now proceeds on the basis that the most reliable means of assessing the age of a young person in circumstances where no documentary evidence is available is by a so-called "Merton compliant" assessment (See Underhill LJ in BF(Eritrea) at §53). The guidelines constitute a judge developed code, laid down in the leading case of Merton, and built upon in subsequent caselaw. I have summarised them at paragraph 21 above. In Merton Stanley Burton J characterised the guidelines as "safeguards of minimum standards of inquiry and fairness" (§36). In BF (Eritrea) the Court of Appeal referred to a Merton compliant assessment as 'providing a sophisticated and disciplined form of subjective assessment'.

21. In Thornton J's analysis of the Tameside duty in the context of age assessments she noted at paragraph 21(19): "In coming to the conclusion the local authority must have adequate information **to make a decision independent of the Home Office's decision"** [bold emphasis added].

22. This builds upon the dictum of Mr Justice Stanley Burnton in Merton at paragraph 39:

> "[T]he social services department of a local authority cannot simply adopt a decision made by the Home Office. It must itself decide whether an applicant is a child in need: i.e. whether the applicant is a child, and if so whether he or she is in need within the meaning of Part III of the Children Act 1989. A local authority may take into account information obtained by the Home Office; but it must make its own decision, and for that purpose must have available to it adequate information. It follows that if all the Defendant had done was, as stated by its letter of 13 February 2003, to have taken the stance of the Home Office, its decision would have been unlawful."

23. The importance of a child's age being properly and lawfully determined was emphasised by the Court of Appeal in *R (AE) v London Borough of Croydon* [2012] EWCA Civ 547 at paragraph 2:

> "The issue of a young unaccompanied asylum seeker's exact age is legally important for at least three reasons. First, by section 20(1) of the Children Act 1989 local authorities have to provide accommodation for any child (i.e. someone under the age of 18) in need within their area who appears to need it because (amongst other things) there is no person who has parental responsibility for him. The local authority may also have to provide material support beyond the age of 18 and in some cases beyond the age of 21. Secondly, a decision on the young person's exact age is relevant to the way the Secretary of State for the Home Department ('SSHD') is required to discharge her immigration and asylum functions 'having regard to the need to

> safeguard and promote the welfare of children who are in the United Kingdom': see Section 55 of the Borders, Citizenship and Immigration Act 2009. Lastly, a favourable finding will enhance AE's credibility in his claim for asylum."

C) *Wednesbury Unreasonableness*

24. The test of unreasonableness in judicial review is a long-standing test as set out in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223. It is well summarised in the more modern context in *R (Razgar) v Secretary of State for the Home Department (No.2)* [2003] Imm AR 529 at 40-41 as a decision being "*within the range of reasonable responses."*

D) The Discretion to Provide Services

25. The Court of Appeal in *R (GE (Eritrea)) v Secretary of State for the Home Department* [2014] EWCA Civ 1490 discussed the importance of support services that may be provided to a young person once they have turned 18 under 23C of the 1989 Act at paragraph 17:

> "The purpose of these provisions is to ensure that a relevant or eligible child is not simply left without support the moment he reaches his 18th birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults.[54] I accept that a local authority may use its discretionary powers to make good any unlawfulness that it has committed in the past and may, in some circumstances, be obliged to do so..."

26. The Court of Appeal went on to clarify the nature of the discretion to provide such services in paragraph 55 of GE:

> "There is no general rule that, wherever it has acted unlawfully, a local authority must undo its past errors to the fullest extent that it can. Much will depend on the circumstances, including whether or not the claimant had sought interim relief and been refused (as here), whether he was guilty of unacceptable delay, and whether and to what extent the authority or the claimant should be regarded as blameworthy. There may be countervailing considerations of public interest which would entitle it to refuse any relief at all..."

F- Arguments

A) Arguments on Substance

27. Mr Gardner, for the Claimant, argued that, in order to comply with the *Tameside* duty, the local authority must satisfy itself as to whether the applicant is a child and the way in which it does that is to undertake an age assessment. Simply relying on the Home Office's assessment is, he submitted, insufficient. He drew my attention to the Home Office Guidance, *Assessing Age* (14 January 2022) that states that it is not the purpose of a Home Office assessment to be relied upon to prevent access to Local Authority

services. He pointed out that there is no mention in this guidance of a local authority refusing to age assess on the basis that it accepts the conclusions of the Home Office that the putative child is an adult, only in the circumstances where the Local Authority accepts the putative child is a child (see pages 62-63 of the Guidance).

28. In relation to the Home Office age assessment that the Defendant relied upon in this case, Mr Gardner argued that the principles above were even more acutely relevant because:

    a. Neither the Claimant nor the Defendant had seen the actual age assessment, the only evidence that any kind of age assessment had been carried out was the letter from the Home Office dated 28 November 2021; and

    b. The letter indicated that an age assessment had been carried out at the Kent Intake Unit (KIU) and the Guidance relating to such age assessments had subsequently been found to be unlawful as per Mr Justice Henshaw in *R (MA and HT) v Secretary of State for the Home Department* [2022] EWHC 98 (Admin) (see paragraphs 17 and 109-113 of the judgment).

29. The Defendant's failure or refusal to carry out an age assessment on AF when he claimed to be under 18 was therefore unlawful in his submission.

30. Mr Feldman for the Defendant did not challenge Mr Gardner's submissions as to the unlawfulness of the failure or refusal of the Defendant to carry out an age assessment on AF in the period between March and July 2022 before AF says he turned 18.

B) Arguments on the Academic Nature of the Claim

31. The Defendant's primary argument is that the claim should be rejected on the basis that it was now academic. This is because AF is, on his own case, now no longer a child and would therefore not be entitled to support and accommodation under sections 17 and 20 of the 1989Act. As the Claimant has not yet requested support that might be available to him under section 23C of the 1989 Act if he were to be found to be a young person of the age he claims to be, Mr Feldman argued that the current claim 'put the cart before the horse' and did not justify the mandatory order sought by the Claimant in relation to the provision of services.

32. He relied on the case of *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 1 A.C. 450 at 457, in which the House of Lords held that academic appeals should not be heard unless there was good reason in the public interest for doing so. The Defendant argues that there is no such good reason in the public interest in this case.

33. In response, Mr Gardner for the Claimant argued that the claim was not academic. He put forward several reasons why that was the case. Firstly, he argued that age is a crucial part of identity for children and young people so that an age assessment disagreeing with the Claimant's age essentially took his identity from him. There was, therefore, practical merit in carrying out an age assessment on the Claimant even though he was over 18 now as the failure to do so would mean he would go through life categorised with the wrong age. Secondly, he pointed to the case of *R (GE (Eritrea) v Secretary of State for the Home Department* [2015] 1 WLR 4123 which he said

demonstrated that a local authority can still exercise its discretion to provide services for someone over 18 even if they had not been classified as a 'former relevant child' for the purposes of s23C of the 1989Act. Finally, he pointed to the benefit of a lawful and proper age assessment carried out by a local authority as highlighted by the Court of Appeal in *R (AE) v London Borough of Croydon* [2012] EWCA Civ 547 at paragraph 2:

> "The issue of a young unaccompanied asylum seeker's exact age is legally important for at least three reasons. First, by section 20(1) of the Children Act 1989 local authorities have to provide accommodation for any child (i.e. someone under the age of 18) in need within their area who appears to need it because (amongst other things) there is no person who has parental responsibility for him. The local authority may also have to provide material support beyond the age of 18 and in some cases beyond the age of 21. Secondly, a decision on the young person's exact age is relevant to the way the Secretary of State for the Home Department ('SSHD') is required to discharge her immigration and asylum functions 'having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom': see Section 55 of the Borders, Citizenship and Immigration Act 2009. Lastly, a favourable finding will enhance AE's credibility in his claim for asylum."

34. In addition, Mr Gardner submitted that the claim was in the public interest as it could clarify the position for other local authorities that might seek to rely on similar evidence of a Home Office age assessment as justification for a failure to conduct their own age assessment. Mr Feldman argued that any issues with the Home Office age assessment should be addressed through a challenge to that assessment, not to the Defendant local authority and that the facts of this case would not meet the public interest test in *Salem*.

C) Arguments on Relief

35. In the event that the claim was successful, the Claimant sought a mandatory order that an age assessment takes place (or that the local authority accept the Claimant's asserted age). Mr Gardner submitted that this would be "the only appropriate course" (per *R (TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) at paragraph 44).

36. In addition, the Claimant sought a mandatory order requiring the Defendant to provide support akin to that which would be provided under s.23C of the Children Act 1989 pending final resolution of AF's age. Mr. Gardner argued that this would be in line with the principles set out in ADCS Guidance (p.33) which states that, *"[w]here there is doubt 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."* While recognising that this guidance referred to a child, he argued that it was analogous for a young person in AF's situation.

37. The Defendant submitted that the relief sought in the form of a mandatory order pending final resolution of AF's age was not within the power of the court as the decision to provide such support was contingent on the request of such services and on the discretion of the Defendant local authority. Mr Gardner, for the Claimant conceded

that the question of the provision of services is at the discretion of the Defendant and that, therefore, either a mandatory order for the Defendant to take a decision in the exercise of its discretion to provide services pending the final resolution of AF's age, or a mandatory order requiring such a decision to be made in the event that the age assessment showed AF's age to be as he claimed.

G - Findings

A) Substance of Claim

38. It is clear on the facts of this case that the Defendant had a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of AF's age (*Tameside*) as a reported putative child requesting services under the 1989 Act. That duty should have been discharged by way of a *Merton* compliant age assessment. The failure to discharge this duty lawfully gives rise to a public error of law rendering the decision not to make inquiries unlawful (*R (AB) v Kent County Council* [2020] EWHC 109 (Admin)).

39. The Defendant does not seek to argue that the letter from the Home Office dated 28 November 2021 indicating that an age assessment had been carried out by the Kent Intake Unit (KIU) was a sufficient basis for an informed decision on the fact of AF's age. Neither the Defendant nor the Claimant has seen the age assessment referred to in the letter. Further, in light of the judgment of Mr Justice Henshaw in *R (MA and HT) v Secretary of State for the Home Department* [2022] EWHC 98 (Admin) (see paragraphs 17 and 109-113 of the judgment), which was drawn to the Defendant's attention by the Claimant's solicitors on 5 July 2022, it is clear that the kind of age assessment that the letter refers to was, itself, unlawful. For these reasons, the claim succeeds on the substance.

B) Academic Nature of the Claim

40. I turn, then, to the question of whether the claim is now academic as AF is, on his own case, now 18 and half years old and no longer a child. Mr Feldman for the Defendant argued that delays in bringing the claim had now rendered it academic. But many of the delays in this case were due to failures of the Defendant to respond to correspondence from the Claimant's solicitors or, indeed, to engage properly with the legal proceedings. I therefore give no weight to assertions that the Claimant was responsible for delays that could have rendered the claim academic.

41. I find that, despite the fact that AF is now, on his own case, over 18, there is still practical value in the Defendant conducting a *Merton* compliant age assessment. A new age assessment would serve to clarify whether the Defendant should make a decision on the exercise of its discretion in providing services to AF as a young person under section 23C of the 1989 Act. As outlined in the judgment in *AE*, there could be wider positive consequences for AF, if he is found to have been under 18 when he arrived in the UK as he asserts. Such an assessment could have implications for the way he is treated in his ongoing asylum claim.

42. It is impossible to know what consequences will flow from the age assessment without first conducting it, but remedying the unlawful failure to conduct an age assessment on AF is still of practical value and therefore I find the claim is not academic. As the claim

is not academic, there is no need to consider whether it meets the public interest requirement outlined in *Salem*.

C) Relief

43. Having found that the decision not to carry out an age assessment was unlawful and that the claim is not rendered academic by AF's current stated age, a mandatory order for a *Merton* compliant age assessment to be carried out within good time, or for the Defendant to accept AF's stated age appears to me to be "the only appropriate course" (per *R (TI) v Bromley Youth Court* [2020] EWHC 1204 (Admin) at paragraph 44) in the circumstances.

44. As the discretion to provide services to the Claimant is broad and flexible (as per *GE*), it seems that any decision to exercise that discretion in the absence of a new age assessment would be premature. In light of the unhelpful way that the Defendant local authority has behaved so far in relation to this claim and its limited responses, it may also be counter-productive. I am concerned at the Defendant's failure to respond to requests and correspondence from the Claimant and, indeed, failure to follow procedure in a timely fashion in these proceedings. Therefore I find it appropriate to make a mandatory order for it to take a decision within good time in the exercise of its discretion to provide services in accordance with s.23C of the 1989 Act should the new age assessment confirm AF's stated age. In my view, this is the only appropriate course in the circumstances.

Conclusions

45. Having considered the facts and the submissions before me, I find that the Defendant's failure to carry out its own age assessment of AF was unlawful. I consider that the claim is not academic because a new age assessment, even at this stage, could, at the Defendant's discretion, give rise to access to important services for the Claimant as well as broader positive consequences for the Claimant's treatment as an asylum seeker dependent on the outcome of that assessment.

46. Having already heard from Counsel on the appropriate relief in the event that the claim for judicial review was allowed, I will order relief in the manner described in paragraphs 43 and 44 above.

47. I am grateful to both parties' Counsel for their helpful written and oral submissions.