Neutral Citation Number: [2023] EWHC 359 (Admin)

Claim No.CO/233/2023

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

Sitting at Manchester

In the matter of an application to vary the order of HHJ Davies dated 20 January 2023

THE KING

on the application of

MA

(by his litigation friend, MARIA HOULIHAN)

Claimant

-and-

LIVERPOOL CITY COUNCIL

Defendant

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Mr Vijay Jagadesham instructed by **Greater Manchester Immigration Aid Unit** for the **Claimant**

Mr Michael Paget (instructed **by Liverpool City Council Legal Services**) for the **Defendant**

Hearing date: 9 February 2023

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Before:

His Honour Judge Pearce

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Approved Judgment

This judgment was handed down remotely at 9am on 21 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

INTRODUCTION

1. This is my judgment on the Defendant's application to set aside an order of His Honour Judge Davies dated 20 January 2023. That order required the Defendant, as soon as reasonably practicable and in any event by not later than one week from the service of the order upon it, to provide accommodation and support to the Claimant pursuant to section 20 of the Children Act 1989. The order contained a liberty to apply provision which is considered below.

2. The Defendant did not give effect to that order and applied to set it aside. The Claimant cross applied to enforce the order, but in the event did not press that application given that determination of the Defendant's application would resolve whether the Claimant should obtain the relief sought.

BACKGROUND

3. The Claimant is a Syrian national. It would appear that he entered the United Kingdom on 3 November 2022. He asserted his date of birth to be 20 June 2005 and that he was therefore 17 years old. However, representatives of the Home Office considered him to be 28 years old, ascribing a notional date of birth of 20 June 1994.

4. The Claimant was dispersed to asylum accommodation in Liverpool, initially at the Seel Street Hotel and latterly at the Richmond Hotel. Once in Liverpool, he contacted the Greater Manchester Immigration Unit who asserted on his behalf to the Defendant, as the relevant authority with responsibilities for those under the age of 18, that the Claimant maintained that he was indeed under 18.

5. On 21 November 2022, the Defendant undertook an age assessment, recorded in an "Age Brief Enquiry Form." The assessment was carried out by two social workers who appear to have relevant experience. The Age Brief Enquiry Form records that he was interviewed with an interpreter (attending by telephone) whom the Claimant said that he understood.

6. The conclusion of the assessment was that the Claimant's age as assessed by the Home Office was indeed correct. The Age Brief Enquiry Form records that "*Both assessors agreed that [MA]'s physical appearance and facial features were not that of*

a 17 years old but that of an adult years old (sic) *coinciding with the view of the immigration officer during his Asylum interview by Home Office*." The conclusion is said to be based not just on physical appearance but on information provided in the assessment. However that other information is not expressly identified in the conclusion section, leading the reader to have to speculate.

7. A pre-action protocol letter before action was sent on behalf of the Claimant on 13 December 2022 challenging the Defendant's decision. The letter of response, dated 21 December 2022 gives much fuller reasoning than the Age Brief Enquiry Form. I shall deal later with the merits of those reasons.

PROCEDURAL HISTORY OF THE CLAIM

8. The Claimant's claim for permission to bring judicial review proceedings was issued on 20 January 2023 and was accompanied by an application for urgent consideration. It was supported by witness statements from the Claimant himself (in respect of which a language issue arises), Mr Peshwar Rashid Sado (a fellow-Syrian asylum seeker), Ms Helene Santamera, a project coordinator working in refugee support for the British Red Cross, and Mr Rory Goldring, a project leader for Asylum Link Merseyside.

9. The application for interim relief came before His Honour Judge Davies on 20 January 2023, when he made the following order:

> "*1. As soon as reasonably practicable and, in any event, by no later than one week from the service of this order (which may be effected by email to the email address identified in the N463 form) the Defendant shall provide accommodation and support to the Claimant, pursuant to section 20 of the Children Act 1989, until the final determination of these judicial review proceedings or further order.*
>
> *2. Permission to the Defendant to apply on 3 working days' written notice to the Claimant to set aside or to vary this order. Any such application shall be listed as an urgent hearing by Teams ELH 1.5 hours. If the Defendant does file and serve within 3 working days of service of this order an application to set aside or vary then pending the determination of such application or further order in*

the meantime the Defendant shall not be required to comply with paragraph 1 of this order."

10. The Defendant issued and served an application to set aside Judge Davies' order on 27 January 2023, the fourth working day after the order was made. On the obvious reading of Judge Davies' order, the result of this was that the order had by then taken effect and the Defendant was therefore obliged to accommodate the Claimant under Section 20 pending determination of the application. However, the Defendant has declined to do that, leading to an application by the Claimant to enforce the order. The Defendant countered that the purpose of Judge Davies' order was to ensure that any application to vary was made reasonably promptly and that an application made before the "trigger date" (that is to say the date on which the Defendant was obliged to accommodate the Claimant in accordance with the order, i.e. 7 days after service of the order) was sufficient compliance with the order so as to trigger the suspension pending determination of the application to set aside or vary. The Defendant also contended that the order is in effect unworkable because it required the Defendant to give three workings days' notice to the Claimant that it was going to apply to set aside but also required such application to be made within the same three day period, an obvious impossibility.

11. In the event, I was not required to rule on this issue. However, as I indicated in the hearing, I have some difficulty in accepting the Defendant's interpretation of what the order requires and what amounts to compliance. I would have thought it obvious that the reference in paragraph two of the order to "3 working days' written notice" was a reference to notice of the hearing, not notice of the intention to make the application. Further, I fail to understand how the obligation to apply with 3 working days service of the order can properly be said to mean that application simply has to be made "reasonably promptly". The determination of these interesting questions will seemingly have to await another day or another case, as may be.

12. In any event, I do not consider that the Defendant requires relief from sanction in order to be permitted to apply to set aside the order of 20 January 2023. Paragraph 2 of the order does not place a time limit on application to set aside or vary. There are good public law reasons why such an application should be made promptly and

promptness is capable of being a relevant issue in the exercise of the court's power to set aside the original order. Nevertheless, the Defendant is not in breach of any sanction, whether express or implied, by reason of its application being made on the fourth working day.

13. Two other procedural issues have requiring consideration:

13.1. As to the provision by the Defendant (as applicant) of a bundle;

13.2. As to the language in which the Claimant's witness statement is written.

14. On the first issue, the Defendant did not provide a bundle in advance of the hearing. Rather it sought to rely on various documents that had been filed at court electronically. Paragraph 21.3 of the Administrative Court Judicial Review Guide 2022 sets out the obligation on an applicant to file a bundle. Paragraph 21.4 makes the point that the court requires both hard copy and electronic bundles unless otherwise directed. In this case there was no hard copy bundle and no bundling of the electronic documents.

15. The failure to provide bundles threatens the efficient determination of issues. The court file is not an adequate substitute for a properly ordered and paginated bundle which the judge can access and mark up as necessary. In the event, the Defendant provided an electronic bundle of most (not all) of the relevant documents within a few minutes of the omission being pointed out through the court office. The judge should not have to deal with such administrative matters but, where the rules as to the filing of bundles are not complied with, often has to do so because the respondent party will have their own access to the relevant material and may not have been intending to rely on the bundle provided by the applicant such that the judge is the only person inconvenienced by the non-compliance. Litigants who do not attend to the service of bundles risk being subject to adverse orders by way of costs or, worse, to the court refusing to deal with their applications. If I had felt that I could not deal with this case fairly because of the absence of the bundle, I would, at the very least, have adjourned the application at the Defendant's expense. In the event that was not necessary and I was grateful to whoever on behalf of the Defendant sorted the matter out so quickly.

16. The Claimant's witness statement is written in English, and signed by him with a certificate of translation, saying that an interpreter had read over its contents to the Claimant and he appeared to understand it. Presumably, the interpreter translated it into Kurdish Kurmanji (the Claimant's native tongue) since he says that the statement was "*taken face to face with a Kurdish Kurmanji interpreter."*

17. It was accepted by the parties that the statement does not comply with Practice Direction 32, since it is not in the Claimant's own language if he does not speak English. As Garnham J pointed out in Correia v Williams [2022] EWHC 2824 (KB), this requirement is mandatory. Accordingly, the statement offends against CPR 32.8 and is subject to the sanction that it is not admissible unless otherwise permitted by the court.

18. The Defendant did not object to the Claimant's application in the face of the court to rely on the statement. In my judgment, it was appropriate to allow reliance for the following reasons:

    18.1. The failure to comply cannot be said to be so minor that the court should disregard it but appears to have been as a result of overlooking the requirement in PD32.

    18.2. The translator's statement makes clear that the statement was read over to MAA, that he appeared he understood it and that he approved it as accurate. No issue of inadmissibility on the grounds of evidence being hearsay would arise since this is an interlocutory application to which the requirement to give notice of hearsay evidence under CPR Part 33 does not apply. Accordingly the translator could have given hearsay evidence in a witness statement in English that the Claimant had approved the statement in its English translation and the Claimant could have relied on that as evidence of the truth of the contents of the statement in the bundle even though no hearsay notice had been served. The translator's statement as the interpretation of the statement is so close to a statement to this effect that it can reasonably be read in that way, in which the event the statement would have been admissible in any event. In those circumstances, it would be artificial and not consistent with the overriding objective to decline to admit the statement and/or to require the Claimant to correct the procedural error.

THE LAW

19. The contested issue here is as to the interim relief that the court had granted. The Court's starting point in considering interim relief such as this is the decision of the House of Lords in American Cyanamid v Ethicon [1975] AC 396. In summary that decision requires the court which is invited to grant interim injunctive relief to consider three issues:

    19.1. Does the case of the party seeking injunctive relief show a serious issue to be tried? If not, the court goes no further in considering the application. If there is:

    19.2. Would damages be an adequate remedy to a party who is injured by the wrongful grant or refusal (as the case may be) of an interim injunction?

    19.3. Where does the balance of convenience lie?

20. The Defendant accepts that the threshold for bringing judicial review proceedings in respect of an age assessment is low – see R (on the application of FZ) v Croydon London Borough Council [2011] EWCA Civ 59. Further, it concedes on the facts of this case that it is highly likely that permission will be granted in due course.

21. However, in the context of an application for a mandatory injunction, in particular in the public law sphere, there is some authority for the proposition that an enhanced merits test should be applied. In the context of an application for an interim order providing accommodation to a homeless person under Section 188 of the Housing Act 1996, Hickinbottom LJ noted in R (on the application of Nolson) v Stevenage Borough Council [2020] EWCA Civ 379 that the Court of Appeal "*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 (De Falco v Crawley BC [1980] QB 460 at 478 and 481, as confirmed in Francis v Kensington and Chelsea RLBC [2003] EWCA Civ 443; [2003] 1 W.L.R. 2248 at [16], both homelessness cases).*" The Court of Appeal in Nolson was invited to find that Francis had been decided *per incuriam* the decision of the House of Lords in R (on the application of Factortame Ltd) v Secretary

of State for Transport (No. 2) [1991] 1 AC 603. The court declined to make this finding, drawing attention to the risk of determining the issue in a case where it had become academic.

22. Nolson, De Falco and Francis are all homelessness cases rather than cases involving an age assessment. Since the Court of Appeal in Nolson expressly declined to consider whether those authorities were rightly decided in any event, I am not persuaded that there is authority binding on the High Court that requires me to apply an enhanced merits test in an application of this nature involving an age assessment. Mr Paget did not seek to persuade me otherwise.

23. The relevance of the merits of the claim, particularly in an application for a mandatory injunction, were considered by the Privy Council in National Commercial Bank Jamaica Limited v Olint Corporation. Having noted the principles stated by Lord Diplock in American Cyanamid itself, Lord Hoffman, delivering the judgment of the Board went on:

> *"18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.*
>
> *19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 270, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in*

> *Shepherd Homes Ltd v Sandham [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."*
>
> *20. For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the Films Rover case, ibid."*

24. In the commercial context of the decision in American Cyanamid itself (and many other applications for injunctive relief), the second of the questions identified in the that case, namely the adequacy of damages as compensation, is often in sharp focus. An applicant who cannot show that it would suffer harm beyond that which can be adequately compensated in damages is liable to be refused injunctive relief; equally a respondent that could be adequately compensated in damages were it to be wrongly enjoined by court order might find that this factor justified the making of an injunction. In contrast, often in the sphere of public administrative law there is little doubt that either party would be harmed by the wrongful grant or refusal (as the case may be) of injunctive relief in a way that cannot be adequately compensated in damages. That is the position here.

25. A number of cases in the Administrative Court have applied similar flexibility in considering the merits of the claim in the context of an application for a mandatory injunction in an age assessment case. In AS v Liverpool City Council [2020] EWHC 3531 (Admin), Nicol J in an age assessment case said:

> *"The resolution of this issue (*sc. whether an enhanced merits test applies to a claim for a mandatory injunction*) 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."*

26. This approached was followed by Garnham J in R (on the application of AXA) v London Borough of Hackney [2021] EWHC 1345, where he noted the strength of the analogy of age assessment cases with the decision in Nolson but went on "*there are circumstances in which the Court may not insist upon a strong prima facia case before the grant of a mandatory interim injunction*", agreeing with Nicol J in AS on the flexible approach that the court should take. I too followed this approach in BAA.

27. As to the third question, namely the balance of convenience, it is necessary for the court to consider a wide range of factors including (for the reasons identified above) the merits of the Claimant's case, but also the wider public interest.

28. In considering the merits of the claim, I bear in mind the fact that a well conducted age assessment by appropriately qualified social workers is likely to be far superior to any assessment that a court can make on an application for interlocutory relief. The analysis by Garnham J in R (on the application of AXA) v London Borough of Hackney [2021] EWHC 1345 is an example of the court giving due deference to the opinions expressed in a properly conducted assessment.

THE MERITS OF THE APPLICATION FOR INTERIM RELIEF – THE CLAIMANT'S CASE

29. The Claimant contends that the following factors weigh in the balance of convenience.

30. First, the merits of the underlying claim. The Claimant contends that this is a strong case. The court should be cautious about allowing physical appearance to be seen as a guiding factor in assessing age. Setting that aside, the material relied on by the social workers in the age assessment is relatively thin.

31. Balanced against that, the witnesses whose statements have been served in support of the Claimant's claim give compelling reason to think that the Court will ultimately find him to be under the age of 18. In so far as the Defendant suggest that their evidence may be partisan, my attention is drawn to the judgment of Thornton J in AB v Kent County Council [2020] EWHC 109, where at paragraph 53, she considers and rejects criticism on similar grounds of the evidence of a person from the Refuge Council.

32. Further, the Claimant says that it is surprising that the social workers carrying out the age assessment should come to the same conclusion as to the Claimant's age as had been the conclusion of the assessment by the Home Office. This suggests that the social workers have failed to bring their independent judgment to the process.

33. Second, the risk of harm to the Claimant if he is wrongly treated as an adult. In this regard, the Claimant points in particular to the evidence of vulnerability. The

Claimant's own statement speaks to his nightmares and sleeplessness when he was first accommodated at the Seel Street Hotel and how he would deal with this by going to Mr Sado's room. Mr Sado also speaks of such incidents occurring. The obvious point made on the Claimant's behalf is that such behaviour in accommodation housing adults risks his being exposed to undesirable behaviour from adults who do not (unlike Mr Sado) have his welfare as their main concern.

34. The decision of Lang J in R (on the application of NG) v Hillingdon LBC [2020] EWHC 2847 (Admin) is a helpful analysis of the risk to the young asylum seeker if they are wrongly housed as an adult. At paragraph 12 of her judgment, Lang J says:

> "*One of the reasons why the statutory and non-statutory guidance advises that putative children should be accommodated according to their claimed age is that teenagers may be vulnerable to abuse by adult asylum seekers displaying disturbing behaviour who share their accommodation. Although this issue has arisen in the context of bed and breakfast and hostel accommodation, I consider that hotels pose similar risks, though I accept that individual en suite rooms and room service meals reduce the contact with other residents. Although this risk could perhaps have been ameliorated if the child asylum seekers were accommodated in separate wings or floors of the building, with a dedicated lounge/dining area, there is no suggestion that this has been done at the hotel and the communal facilities are open to everyone."*

35. The Claimant invites me to look at the Age Assessment Guidance of the ADCS[1] dated October 2015 which is intended to assist social workers in undertaking age assessments. Such an approach is consistent with the judgment of Lang J in NG because of the focus on the protective approach to be taken where age is in doubt. At page 192 of the Guidance, the following passage appears:

> *"Everyone involved in this process (sc age assessment) would like children assessed to be children and adults assessed to be adults. However, there will be times when, even after assessment, you have some doubt about the age of the person you are assessing; you cannot be expected to know the age of everyone you assess. In these circumstances you are advised to give the benefit of the doubt, and this is partly because of the different implications for children and adults in getting the decision wrong. Children in the UK are afforded extra levels of protection compared to adults both in terms of how they are cared for and in terms of how they are treated in the immigration system, and it is vitally important that children are able to access this protection.*

[1] Association of Directors of Children's Services

> *"Social workers are justifiably concerned about the implications of taking an unknown adult into their care, and potentially placing them with vulnerable children. Many social workers have limited options when it comes to placement, but any placement decision should be taken carefully, taking into account the needs of anyone already in the placement, of the carers, and of the child or young person about whom you may know little at the start. The risks of placing a relatively unknown child or young person are mitigated by the fact that they will be supervised, either closely or at least on a regular basis by those employed to care for and support them. Where it becomes apparent that the placement is unsuitable because your understanding of the child or young person's age and/or needs changes, you are able to intervene and make the necessary changes, through further planning and assessment. However, if your initial assessment means that the young person is no longer in your care then you will have no opportunity to continue to assess and change your perception unless the young person is supported in challenging your decision. This can prove difficult and time consuming, and irreparable damage may have been done before any challenge is resolved. Safeguarding the welfare of all children is the primary responsibility of social workers and any decisions about age and placement must be made with this in mind. Similarly, section 11 of the Children Act 2004 places other professionals under a duty to have regard to the need to safeguard and promote the welfare of children.*
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> *"The dangers inherent in not taking a child into your care are multiple. With regard to their care, a child who is being treated as an adult will not receive the support given by local authorities which is deemed necessary for other children and includes having safe accommodation, the support of a social worker and a foster carer or keyworker/support worker, and support with all the other things a child needs, including access to education and health care.*
>
> *"... Where there is doubt about 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. "*

36. In AS, the court rejected the suggestion that the ADCS guidance was not relevant once the Defendant had reached a conclusion on the age assessment process. Citing Picken J in R (on the application of MVN) v Greenwich LBC [2015] EWHC 1942 (Admin), Nicol J said that to do this would be "*to ignore the particularly high level of scrutiny that the court must pay"* to a decision on an age assessment.

37. Third, the evidence would suggest that the Claimant is unsophisticated and relatively immature. For example, Ms Santamera describes him as "*shy,"* "*tentative"* in forming relationship and "*bashful."* This not only tends to support the argument that his age is being overstated, it also suggests that he is unlikely to be a risk to others if housed with children.

THE MERITS OF THE APPLICATION FOR INTERIM RELIEF – THE DEFENDANT'S CASE

38. The Defendant contends that, though the Claimant's case is arguable, it could not be said to be strong. It draws attention to the following features of the age assessment:

    38.1. The Claimant's appearance was of a man of a significantly greater age than his claimed age, with a deep voice, aged skin, a prominent Adam's apple and a defined beard line.

    38.2. The Claimant was inconsistent as to when he first started shaving, initially saying that he could not remember and then saying it was when he was 17.

    38.3. The Claimant gave an inconsistent account of his age, stating first that he was 10 when his mother had told him his date of birth (suggesting that he is now 12) and that this was in 2020, later changing this to saying that he had been 15 when his mother told him his date of birth (consistent with his stated age of 17).

    38.4. The Claimant's account of being called up for the army is implausible if, as he says, he was under 18 since only those over 18 are the subject of compulsory military service in Syria.

    38.5. The Claimant was unable to give a convincing chronology as to how old he was when he worked with his father as a farmer.

39. Further, the Claimant has adduced no medical assessment to support his case as to his age. Those witnesses who have come forward are either people who work with young asylum seekers or an asylum seeker himself. Such people are liable to be partial and to hold entrenched views.

40. The Defendant cautions the court against "putting the cart before the horse" in assuming that the Claimant is a child when examining the balance of convenience. That question is of course the very fact in issue in the case. It would be wrong to assume that the Claimant was a child and therefore (for example) to apply passages in the ADCS Guidance that are intended to apply where an age assessment has not yet

been carried out. My attention is drawn to paragraph 66 of the judgment of Judges Ockelton VP and Blundell sitting in the UTIAC in R (on the application of BG) v London Borough of Hackney (unreported) case number JR-2022-LON-000273. I accept it to be self evidently correct that, in deciding where the balance of convenience lies, the court should not presuppose the answer to the question which it has determined to be no more than arguable.

41. The Defendant says that this error of reasoning infects the judgment of Michael Fordham QC as he then was in R (on the application of BG) v Oxfordshire County Council [2014] EWHC 3187. At paragraph 38 of the judgment, it is stated, "*So far as the inapt placement of the claimant with children when she been assessed to be an adult, what I need to evaluate in the balance of the convenience is the risk of injustice in which one of the scenarios is that the claimant is treated as a child in the interim but ultimately fails on the substantive challenge but where, on the other hand, the claimant continues to be dealt with as an adult alongside adults and is subsequently vindicated at the substantive hearing and is found to have been a child*." The Defendant accepts that this to be a correct statement of the balancing exercise that the court is carrying out. But in paragraph 39, the judge goes on, "*In all the circumstances of this case and in the context of the best interests of the child, the protective precautionary approach which the law for good reason, expects and the benefit of the doubt, as it is sometimes described in the authorities, having regard to each of the points that have been put forward by the parties, in my judgment, the balance of convenience comes down clearly in favour of the grant of interim relief*." This analysis falls into error, the Defendant says, by assuming that this protective precautionary approach can properly be invoked where the age of the relevant person is unknown and where a competent body has already assessed his age to be at least 18.

42. I suggested to Mr Paget that the true meaning of the judgment might be that the judge was only saying that if the Claimant proved to be a child, the protective precautionary approach would weigh heavily in favour of granting interim relief and that therefore in considering the balance of convenience, the Court should consider the risk that, if interim relief were not granted, it might subsequently be proved to be the case that the Claimant was a child and therefore would have been denied the protection that they were entitled to. He accepted that this was a proper factor to bear in mind providing

the court is not making any assumption as to the ultimate finding on the Claimant's age.

43. In analysing the balance of convenience, the Defendant points to the following factors:

    43.1. The Claimant is being accommodated in premises where he has his own bedroom.

    43.2. Whilst it is contended that he is vulnerable, there is no medical or other evidence that tells the court that, regardless of his age, any particular type of accommodation is appropriate.

    43.3. It is the Claimant who is seeking to persuade the Court to make a mandatory order against a public body that will have resource and other implications. He bears at the very least a persuasive burden. On the material before the court he fails to show any good reason why the court should exercise its power in his favour.

DISCUSSION

44. In considering the merits of this case, I am satisfied that the Claimant shows that there is a serious issue to be tried as to whether he is in fact under the age of 18. I bear in mind in particular the following:

    44.1. I consider the evidence of Mr Sado, Ms Santamera and Mr Goldring as consistent and supportive of the Claimant's case. I reject the suggestion that they are partisan such that their opinions ought to be ignored. There is no material before me to causes me to view them as partisan or entrenched in the assumption that the Claimant is under the age of 18. Clearly Mr Sado does not have professional experience of assessing people's age, nor does he have the duties of a professional lawyer or social worker. His evidence is however most significant for his factual account of the Claimant coming to his room. There is nothing before me to undermine the credibility of that account. Ms Santamera and Mr Goldring are both professionals who have experience of working with young people and who make observations that appear reasonable in the light of their interaction with the Claimant. I would

no more reject their evidence as being potentially partisan than I would reject the evidence of the social workers who carried out the age assessment on the grounds that they work for the organisation which, if the Claimant is found plausibly to be under the age of 18, will have to fund his accommodation and support.

44.2. The opinions as to the Claimant's age given by the witnesses on whose statement he relies are based not merely on his appearance but also on his behaviour in several contexts. There is no obvious reason to doubt what the witnesses have described and, if accurate it would tend to support their visual assessment.

44.3. On the other hand, professional social workers have, through the age assessment process come to a differing conclusion. That process might be criticised because it places too great emphasis on physical appearance, that the other factors said to be supportive of the conclusion as to the Claimant's age are not identified in the brief enquiry form, and that it is surprising that assessors acting independently should come to the same conclusion as to the Claimant's age as had been initially reached by the Home Office. But there is no material that leads me to suspect that the social workers were partisan or themselves approached the case with an entrenched view.

44.4. The evidence of the Claimant's physical appearance is clearly capable of supporting the conclusion of the Defendant's social workers but none of the indicators are particularly strong. Further, absent other material, would one expect appearance alone to be determinative save in the most clear cut of cases (see R (on the application of B) v Merton LBC [2003] EWHC 1689). Indeed, physical appearance has been described as a "*notoriously unreliable factor*" (see the material summarised by Picken J in MVN v Greenwich LBC [2015] EWHC 1942).

44.5. The additional points that have been made by the Defendant (that the Claimant gave inconsistent or vague accounts as to his age, gave an inconsistent account as to shaving and gave an implausible account of being asked to join the army when, on his own case, he was not yet 18 years old)

> are unpersuasive, As to the first, I am unconvinced that either a reply to a question that would have made the Claimant younger than his stated age and which was later corrected or a vagueness about when he had worked with his father are compelling pieces of evidence that he is lying by understating his age. As to the second, I see some force in the suggestion that the Claimant's vagueness undermines his credibility but I am not persuaded that there is any frank inconsistency such as to cause me to think his evidence will be rejected as unreliable. As to the third, the Claimant shows, though the material referred to in paragraph 25(ii)(c) of the Detailed Statement of Facts and Grounds that children under the age of 18 have been recruited into the armed forces in Syria, even though it would appear that those under the age of 18 are not by law required to undertake military service. Therefore, whilst capable of being taken account in the balance of material on the issue, it is a relatively weak point.

45. Were it necessary for the Claimant to meet the "strong prima facie case" test referred to in Nolson, I would not have been so satisfied. This is certainly a stronger case than many contested age assessment cases that come before the court for interim relief, but the very fact that an age assessment has been performed by apparently competent social workers points in the direction of the case being finely balanced. The criticisms of the assessment noted above are certainly factors to be weighed but do not bring the balance down so much in the Claimant's favour as to call his case "strong."

46. However, I am not satisfied that a "strong prima facie" case is the proper threshold to be applied in an application for interim relief in an age assessment case. I say so for the following reasons:

    46.1. I consider it at least arguable that De Falco and Crawley were wrongly decided in light of the judgment of the House of Lords in Factortame and the judgment of the Privy Council in National Commercial Bank Jamaica v Olint;

    46.2. De Falco and Crawley are not binding authority on the High Court in the context of an age assessment case;

46.3. On the other hand, the principles in Factortame and National Commercial Bank Jamaica v Olint are regularly applied to applications for interim injunctions (including in the Administrative Court) and provide an appropriate fashion in which to have regard to the merits of the underlying case in looking at the balance of irremediable prejudice likely to be caused to each party if the injunction were wrongly granted or refused as the case may be.

47. In considering the balance of convenience in a case such as this, it is in my judgment relevant to bear in mind the protective precautionary approach referred to by Fordham J in BG. I do not accept that this involves pre-supposing that the Claimant is a child. Rather, it looks at the proper approach that would be taken were the Claimant in fact to be under the age of 18. The point was put this way by Mr Roger Ter Haar KC siting as a Deputy High Court Judge in R (on the application of LYB) v Kent CC [2021] EWHC 663 where, having considered Fordham J's judgement in BG, he said at paragraph 31:

> *"In my judgment, there is a considerable similarity between that case and this. In both cases there is an acute factual dispute as to whether the claimant is or is not a child. In consequence in both cases, if the original assessment is upheld, the claimant would have been held to be an adult not entitled, and possibly unsuited for, the regime applicable to a child. On the other hand, if the assessment is wrong, and the claimant is a child, he falls within the class of persons for whom Parliament regards it as necessary and desirable to make provision."*

48. I accept that this protective precautionary approach can only go so far. It could be said that in any case where a person alleges that they are under the age of 18, however strong or weak their case, they would benefit from being treated as a child so that, if they are in fact proved to be under 18, the proper protection is afforded to them. But this would be to ignore the countervailing factors, identified by the ADCS in the passage from the guidance set out above, that harm might be done by wrongly housing an adult with vulnerable children. As I pointed out in BAA, the wrongful accommodation of an adult with children by a Local Authority not only diverts resources from meeting the ends of children to meeting those of adults, it potentially jeopardises the welfare of looked after children, who are highly likely to have significant needs and who may be vulnerable. In R (on the application of M) v Ealing

London Borough Council [2016] EWHC 3645, Ouseley J found that it is preferable to err in favour of accommodating someone who is in fact a child with other adults than it is to accommodate someone who is an adult with children. Whilst I do not consider this to be self-evidently the case, there is reason to bear in mind that it is not necessarily worse to err in favour of housing an adult as a child.

49. It follows that, whether the court wrongly grants interim relief to someone who is in fact an adult or refuses interim relief to someone who is in fact a child, there is a risk of failing to protect young people. Whilst one would hope and expect that no one would come to harm in the vast majority of the cases, I have been unable to identify any clear basis for concluding that the risk is greater if one errs in one direction or the other. I do not accept that, all other things being equal, the proper application of the protective precautionary principle points more towards granting relief or more towards refusing it.

50. Rather, the correct approach (as both counsel have urged on me in this case) is to look at the particular factors in the case so as to determine where the balance of convenience falls having regard to the merits of the case and the specific material as to risk that is before me. Having concluded that, on the limited material before me, the case is finely balanced on the merits, they do not weigh either for or against granting interim relief.

51. As to other factors, in my judgment, the following matters point in favour of the grant of interim relief on the facts of the particular case.

    51.1. There is plausible evidence that the Claimant is vulnerable. Whilst his description of his own fears is difficult to assess, the evidence of his behaviour in seeking out the support and company of Mr Sado is an obvious cause for concern. It is to be hoped that the Claimant would avoid behaving like this towards a person who (unlike Mr Sado) posed a risk to his welfare, but that cannot be guaranteed.

    51.2. The grant of interim relief will divert public resources to the Claimant's support. However, it is accepted that, even if not financially supported by the Defendant, he would remain as he is now accommodated by the Home

Office. Whilst it may matter to the individual paymaster who is bearing that cost, ultimately the cost is funded by the taxpayers either way.

51.3. I accept that, as general proposition wrongly to grant interim relief may create a risk to the welfare of other children, there is no evidence of any such specific risk here. The description of the Claimant's behaviour within the witness statements suggest that he is childlike in any event (see for example paragraphs 11 and 16 of Ms Santamera's statement) and he is described as "*sweet and gentle"* (see paragraph 20 of the same statement). This specific information about the particular Claimant would tend to indicate that the risk he might present to the welfare of other people is less here than it might be in other cases.

52. Whilst I acknowledge the diversion of resources that would follow the grant of interim relief and the possibility that housing the Claimant with children might raise welfare issues, the overall balance of the case leads me to conclude that interim relief should be granted.

CONCLUSION

53. It follows the Claimant is entitled to the relief sought from HHJ Davies and I decline to set aside his order.

54. As to costs, the successful Claimant seeks an order for costs in the case. I do not consider that there is good ground to reserve costs as suggested by the Defendant and therefore accede to the Claimant's proposed order.