Neutral Citation Number: [2024] EWHC 1894 (Admin)

Case No: AC-2024-LON-000177

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 July 2024

Before :

Dexter Dias KC
(sitting as a Deputy High Court Judge)

- -

Between :

THE KING	**Claimant**
on the application of	
MAA **(anonymity granted)**	
- and -	
LONDON BOROUGH OF HOUNSLOW	**Defendant**

- -
- -

Avril Rushe (instructed by **Bison Solicitors**) for the **Claimant**
Joshua Swirsky (instructed by **HB Public Law**) for the **Defendant**

Hearing date: 18 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30 am on 24 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Dexter Dias KC :

(Sitting as a Deputy High Court Judge)

Section	Contents	Paragraphs
I.	Introduction	1-10
II.	Public law challenges Grounds 1-3 *(Rationality)* Ground 4 *(procedural fairness)*	11-35
III.	Ground 5 (*Factual challenge)*	36-42
IV.	Disposal	43-44

§I. Introduction

1. This is the judgment of the court, following an oral renewal hearing in a judicial review claim.

2. The claimant MAA (anonymity granted) is a Sudanese national. He arrived in the United Kingdom on 10 October 2023 without entry clearance, as an asylum seeker travelling on a lorry. He was "unaccompanied", a particularly significant fact if he was a child, which is the central dispute between the parties.

3. The defendant is the London Borough of Hounslow, the local authority to which the claimant was finally dispersed, after an initial dispersal to Westminster. The defendant assessed his age and deems him an adult. However, the claimant states that although he may be an adult now, he was a child at the time of his arrival in the United Kingdom and the subsequent age assessments, with a date of birth of 11 April 2006. Both parties are represented by counsel: the claimant by Ms Rushe; the defendant by Mr Swirsky. The court is grateful to them both for their focused submissions.

4. Permission was refused on the papers by Upper Tribunal Judge Elizabeth Cooke sitting as a Deputy of this court on 19 March 2024. The claimant filed a renewal notice and grounds on 26 March, and on 1 May the case was listed for a renewal hearing on 18 June. However, Richard Clayton KC, sitting as a Deputy of this court, granted permission for further evidence filed by the claimant and the case was relisted for a renewal hearing on 19 June 2024 – today's date.

5. The Grounds advanced by the claimant are five-fold:

   (1) Irrelevant considerations taken into account;

   (2) Material considerations not taken into account;

   (3) Failure to reassess;

   (4) Procedural unfairness (no appropriate adult; no minded-to process);

   (5) Factual challenge (*R(FZ) v London Borough of Croydon* [2011] EWCA Civ59 ("*FZ*")).

6. Age is always a question of fact (*R(A) v London Borough of Croydon* [2009] 1 WLR 2557 at para 27, per Baroness Hale). This is an entirely binary question: either the claimant is a child or is not. The significance is that being legally classified as a child is a vital precedent fact opening the door to a range of important protective public law duties that fall on public bodies. As was spelled out helpfully in *FZ* at para 2:

> "If [the claimant] is a child under 18, he must be provided with accommodation and maintenance under sections 20(1) and 23(1) of the Children Act 1989, which comprise a wider range of services than other forms of housing and benefit provision available for those over 18."

7. The age assessment process is simply speaking a species of the well-known *Tameside* duty to enquire (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 ("*Tameside*")). As Lord Diplock framed the matter at 1065:

> "the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

8. Therefore, *Tameside* mandates that public body decision-makers take such enquiry steps as are reasonable, an approach summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2014] EWHC 1662 (Admin) at paras 99-100:

> "(1) The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.
>
> (2) Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).
>
> (3) The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).
>
> (4) The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R(Khatun) v Newham LBC (supra)* at paragraph [35]).

> (5) The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in *(R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).
>
> (6) The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G)."

9. As noted in *FZ* at para 5, and recently repeated by Fordham J in his judgment in an age assessment interim relief application (*R (KRA) v Cheshire East Council* [2024] EWHC 575 (Admin) at para 1), "orthodox" judicial review grounds may be forensically swallowed up ("subsumed") by the factual determination question, and this court should not without good reason "hive off" the factual determination from the public law challenge by way of judicial review. The arguability of the factual question of the claimant's age, using the *FZ* test set out at para 9, is:

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

10. While the substantive determination of age is usually for the Upper Tribunal, the Administrative Court "will normally decide whether permission should be granted before considering whether to transfer the claim to the Upper Tribunal" (*FZ* at para 31). Therefore, the claimant relies on four public law grounds along with a factual challenge. The order of consideration is the order pleaded by the claimant and argued at the oral hearing. I examine the arguability of each ground in turn, dealing with the three irrationality challenges together (Grounds 1-3), then the procedural fairness challenge, before analysing the arguability of the *FZ* factual challenge. I emphasise, however, that the arguability of the factual challenge is critical.

§II. Public law challenges

Grounds 1-3 (Rationality)

11. For the public law challenges, the conventional permission test of arguability applies. There must be an arguable ground for applying for judicial review with a realistic prospect of success, as set out by the Privy Council in *Sharma v Brown-Antoine* [2006] UKPC 57 at para 14(4). The same arguability standard applies on renewal (*Administrative Court Guide 2023* at para 9.6.5). The question is whether any of these four grounds is arguable. The rationality grounds are essentially *Wednesbury* challenges (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 K.B. 223 at 229, per Lord Greene MR). The duty to have regard to relevant

considerations and not consider irrelevant one, as set out by Lord Greene in *Wednesbury,* has subsequently been widely acknowledged in the public law jurisprudence (see, for example, Lord Goff in *Tameside* at 1064-65 and Laws LJ in *R (Khatun) v Newham London Borough Council* [2005] QB 37).

12. The claimant states that at the time of the impugned decision he was aged 17. The defendant contests his claimed age and assesses him at between approximately 23-25 years old and clearly not a child.

13. The evidence relied upon by the claimant may be summarised as:

    (1) The opinion evidence of Ms Erinc Argun Kayim;

    (2) The defendant's wristband from a French hospital with his claimed age on it and further hospital records to the same effect;

    (3) The evidence of Mr Gerhard Boer;

    (4) The claimant's own accounts.

14. Against this, the defendant relies on:

    (1) A Home Office official (Ms Omar) assessing his date of birth as being 1 January 1999, resulting in an age of 23 and approaching 24;

    (2) On dispersal to Westminster, two age-assessment-trained social workers assessed his age on behalf of the local authority, concluding him to be "obviously" an adult and aged 23;

    (3) On further dispersal to the defendant's borough, two further social workers made age assessments on 17 October 2023 on behalf of Hounslow; they concluded that he is an adult aged 25, and in any event significantly over the age of 18.

15. The claimant submits that the assessments are arguably unlawful because they are not *Merton*-compliant (*R (B) v Merton London Borough Council* [2003] EWHC Admin 1689 ("*Merton*")). They are impermissibly and irrationally based on physical appearance and demeanour, and thus "carry no weight". The note of the 17 October assessments states:

> "…on the basis of a visual assessment of your appearances and demeanour by two qualified social workers, and the assistances of an interpreter, it is our opinion that your appearance and demeanour strongly suggest that you are significantly over 18 years of age."

16. In addition, the case note records:

> "SW Observation:
> Body Type: Ectomorph

> His facial features are very developed and distinctive. He has fine lines under his eyes with no swollen or puffy.
> He has moustache and beard with sideburn which appear to have had evidence of shaving for a while.
> He spoke with broken voice.
> Well defined Jaw Line Chest Hair
> He presented with frown lines on his forehead even when not expressing himself with receding hairline.
> He has got Nasobial lines which indicated that he is older than his claimed age."

17. It is complained that the assessment form includes the following line that tails off without a nominated age:

> "Overall view is that his physical appearance is suggestive of an adult of between"

18. I do not consider there to be much force in this point. It is in truth a drafting oversight because the next page details that the two social workers' conclusion:

> "Social workers Raghu and Elis have visited the hotel, they met with [the claimant] and are clear that he is not a child of 17 years. Raghu and Elis are both in agreement that he is very likely to be over the age of 25 years and therefore in accordance with the ruling under Merton an age assessment is not necessary.
>
> **'There are cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for a prolonged enquiry.'**
>
> It is not the intention therefore, of the London Borough of Hounslow, to undertake an age assessment and in our opinion [the claimant] should continue to be treated as an adult."

19. On 10 October 2023, two social workers assessed the claimant's age on behalf of Westminster Council.

> "Following a brief enquiry, due to his physical appearance, demeanour and mannerisms, we deemed [the claimant] to be the age of 23 years old or older."

20. It should be noted that on 18 June 2024, Richard Clayton KC, sitting as a Deputy of this court, granted the claimant permission to rely additionally on the evidence of Ms Erinc Kayim. I have fully considered this evidence. Ms Kayim states:

> "We do not accept every referral into the project. We conduct a thorough referral process to ensure we only take on the cases of young people who we believe to be children."

21. I have no doubt that Ms Kayim (and indeed her colleagues) genuinely believe the claimant to be his claimed age. She had daily contact with the claimant from 20 March by telephone, but she only met him once face-to-face. She documents her professional experience at para 2 of her statement:

> "I have been employed as a Children's Advisor in the Age Dispute Project at Refugee Council since May 2023. Before joining the Refugee Council, I qualified as an attorney-at- law in Turkey in 2017 and worked for UNHCR in Turkey between 2017 and 2022, at positions including Protection Associate (Child), Protection Associate (CP/SGBV) and Senior Field Associate. I conducted best interests assessments, directly supported refugee children through provision of advice and referral to service providers with a view to ensuring that children access services in a holistic and age-appropriate manner, in accordance with their best interests."

22. This is wide-ranging and impressive work to support and vindicate the rights of vulnerable children. But it is accepted that Ms Kayim is not trained in age assessment, nor are any of her colleagues, whose evidence is not in any event before the court. Ms Kayim further states that the NGO she works for is very careful about which people to support due to limits on funding. As she puts it in para 9 of her statement:

> "We know that the referral screening process is no substitute for a lawful age assessment and we do not consider it to be determinative of age. We assess referrals thoroughly in this way as the project has very limited resources and we need to ensure that those resources are directed to those who could benefit most from our support. The referral screening process means that we only accept referrals in respect of children who we believe are under the age of 18."

23. It can be readily accepted that Ms Kayim's organisation is careful about whom to support. But the fact remains that she is not age-assessment-trained and the decisions made do not appear to be based on any professional training in assessing age. This can be contrasted with the evidence relied on by the defendant. The defendant authority relies on the assessments of two social workers acting on behalf of Westminster, who have specific training in age assessment, as set out in the assessment record:

> "Louise Njie is a qualified social worker and trained age assessor with the Westminster Unaccompanied Asylum-Seeking Children's Team.
>
> Ambeel Omae is a qualified social worker and trained age assessor with the Westminster unaccompanied asylum-Seeking Children's Team."

24. The defendant relies on two further assessments by social workers on behalf of Hounslow, who are also age-assessment-trained. I accept the defendant's submission

that Ms Kayim's evidence is "pretty slight". Ms Kayim is, it is submitted, in the end making a visual assessment.

25. As to Ground 3, Gerhard Boer is Lead Coordinator of the Refugee Response at Hillsong Church. Despite Mr Boer's evidence being accompanied by a statement of truth, I do not consider that it adds anything of material or persuasive significance: he met the claimant once in a café without an interpreter. Mr Boer is not trained in age assessment. Mr Boer's opinion evidence does not provide a sufficient or rational basis to conduct a further assessment. I cannot see that this evidence, insubstantial as it is, materially adds to the overall picture or "might" lead to a different conclusion about the claimant's age.

26. Having considered everything, I conclude that the claimant has advanced no arguable rationality argument on Grounds 1-3. This is so particularly in light of the decision by this court in *R (HAM) v LB Brent* [2022] EWHC 1924 Admin, per Swift J ("*HAM*"). This decision is in contrast with the older authorities that the claimant relies upon, including *R (AM) v Solihull Metropolitan Borough Council* (AAJR) [2012] UKUT 00118 (IAC) and *GE (Eritrea) v Secretary of State for the Home Department & Bedford Borough Council* [2015] EWHC 1406 (Admin).

27. In *HAM* at para 14, Swift J held that *Merton* compliance was not determined by checklists but rather by ensuring that the process was fair. Swift J made plain at para 34 that the court will not take an unduly "technical" or regimented approach. If there is a case where it is clear that the person is at one end of the age spectrum or the other - whether obviously a child, or obviously not a child - it is unnecessary to mechanistically descend into an exhaustive assessment (see *Merton* at paras 27 and 38; also Thornton J in *R(AB) v Kent CC* [2020] EWHC 109 at paras 34-35 ("*AB*")). I have had particular regard to the 21 propositions enunciated Thornton J at para 21 of *AB*, and especially the "clear case" exception in proposition (6). Further, as Swift J stated in terms in *HAM* at para 32:

> "There will be some instances where lawful decisions can be taken on the basis of appearance and demeanour alone."

28. Indeed, while the guidance from the Association of Directors of Children's Services (2015) speaks of circumstances where age assessment can be based purely on physical appearance and demeanour as being "rare", it recognises that where age over 18 is "very clear", prolonged enquiry is not necessary.

29. The defendant's evidence is that the claimant does not fall into what might be called the "grey area" (what in *FZ* at para 2 was called the "borderline") where there might be a genuine or live doubt about whether he is a child. The assessors the defendant relies on found that he plainly was not. The criticism made by the claimant is that there is no articulation about what aspects of demeanour resulted in the defendant's judgement. There is some force in this submission. It would certainly have been better if the relevant signposts in a person's demeanour are set out. That said, modern authorities make clear that it is open to the defendant to rely on those assessments even if they are short-form rather than extended long-form assessments and based physical appearance and demeanour. As Pepperall J said in *R(K) v Milton Keynes Council* [2019] EWHC 1723 at para 14:

> "The full rigour of *Merton* assessments are reserved for cases of doubt where, the authorities suggest, the young person appears to be between 16 and 20 and where there is real scope for error when acting simply on physical appearance and demeanour."

30. On the defendant's assessments, there is no arguable "scope for error"; this is not a case of "doubt". It is a "clear case" (*AB*, proposition (6)). The Hounslow social workers met the claimant face-to-face, and assessed age in that superior way rather than a reliance on photographs (*AB*, proposition (9)). The Westminster social workers did the same. There is no need for a formulaic approach mandating a full assessment where the facts, as here, are "clear" (in *AB*, terms). I cannot accept that claimant's submission that the assessments relied upon are "nothing more than an unreasoned assertion". The complaint is that the defendant did not "substantiate" why a "full assessment" was not required. But the law is plain: in cases where the age is obviously beyond the band of doubt, it being clear that the person is significantly beyond the age of a child, the facts of the case do not justify a more extensive assessment process.

31. Permission is refused on Grounds 1, 2 and 3.

Ground 4 (Procedural fairness)

32. The claimant's complaint is that the defendant has not set out why an appropriate adult was unnecessary in the context where the claimant was vulnerable as an unaccompanied asylum seeker.

33. It is now settled law that the lack of an appropriate adult is not necessarily fatal to the fairness of an age assessment (per Court of Appeal in *R (SB) v Royal Borough of Kensington & Chelsea* [2023] EWCA Civ 924, which approved *HAM*). In submissions, the claimant recognises that the effect of HAM is that "an appropriate adult is not required in each and every age assessment and that the absence of an appropriate adult does not automatically render an age assessment procedurally unfair". It is always a case-sensitive question, the essential requirement being procedural fairness. Here the claimant's case has been advanced without application for a litigation friend and given the obviousness of his age, it is not arguable that there was a need for an appropriate adult.

34. Similar considerations apply to the minded-to process. The question is what would be achieved by taking such a step. The claimant submits that the advantage of the process is that "key points against the Claimant's case" could be put to him. But here the issue revolved around the visual assessment of the claimant's physical appearance and demeanour. It is difficult to envisage what would have been gained by a minded-to procedure in such circumstances, which has as its rationale "the opportunity to explain any inconsistencies" (*AB*, proposition (17)). While Ms Rushe points to the claimant being deprived of the opportunity to point out the hospital wristband, this is of limited value. As the claimant accepts, the date on the wristband was the result of the claimant's self-report. Counsel was right to concede that "a minded-to meeting may have been of less value here."

35. Permission is refused on Ground 4.

§III. Factual challenge

Ground 5

36. I have already set out the permission test derived from *FZ* (see para 9 above). Ms Rushe makes the point that the defendant did not take the wristband into account and the hospital records were not available, so the Upper Tribunal would be able to consider all this evidence. This is true, but taking a factual issue at its "highest" does not entail blinding oneself to the countervailing evidence.

37. The court in considering permission must look at the matter carefully and fairly and in the round, and take the "material" at its highest in that way. I note that Sir Anthony May stated in *FZ* (at para 9), giving the judgment of the court when President of the Queen's Bench Division, that:

> "We decline to attach a quantitative adjective to the threshold which needs to be achieved here for permission to be given."

38. Therefore, while questions of fact are for a fact-finding tribunal, this court cannot simply pass on every age assessment challenge (*R (AM) v Solihull MBC* [2012] UKUT 00118 (IAC), paras 11-13). The duty is to scrutinise disputed claims and give permission where, taken at its highest, the claim could be properly successful.

39. A difficulty with the claimant's evidence is that there is reliance on Ms Kayim and Mr Boer, neither of whom are trained in age assessment. The age recorded on the wristband from a French hospital relies on the claimant's assertion about his age. The claimant was in a hospital at Calais from 19-29 September 2023 being treated for kidney failure and receiving renal interventions. It is right that the focus on admission to a hospital is treatment rather than seeking to persuade anyone of the age, but I am not convinced that this point much advances the claimant's case. However, I do recognise that the claimant has been consistent in the accounts of his age both in the United Kingdom and in France and this supports his credibility. This is the significance of the wristband and hospital records. Indeed, in his skeleton argument at para 12, the claimant concedes that the date is "self-reported". Naturally, that is not fatal. However, it is not an independently arrived at age. It is complained that this material was not considered "at all" by the defendant. However, being a self-report, objectively it adds very little beyond a consistency of account, which carries the obvious risk of being self-serving.

40. Against this, the defendant has two assessments from age-assessment-trained and experienced social workers from Hounslow (*AB*, proposition (10)), an assessment which is consistent with these assessments from the Home Office, and two age-assessment-trained social worker assessments by Westminster. As a group of assessments, they uniformly conclude that this is not a marginal case, but one where the claimant is obviously an adult.

41. There is no burden of proof on either party in an age assessment case *(R (CJ) v Cardiff City Council* [2011] EWCA Civ 1590). I do not need to rehearse the flaws and weaknesses in the claimant's accounts here (how he knew certain dates and not others, for example, and was familiar with the "Western calendar", as Mr Swirsky put it). The court must assess, without finally determining, the likely effect of the

evidence as a whole. Ultimately, the claimant relies on his self-reports in the UK and France and two opinions from people who work with refugees but have no training whatsoever in age assessment, and against this, the defendant has five very broadly consistent age assessments, where four are from social workers specifically trained in age assessment. Perhaps most significantly, the two Hounslow social workers independently reached a very similar conclusion about the claimant's age to the two social workers from Westminster, not knowing that such earlier assessments had taken place because the claimant failed to mention it. Therefore, the court concludes that on the "material" before the court taken at its highest, which is the correct test, the factual challenge could not properly succeed.

42. Permission is refused on Ground 5.

§IV. Disposal

43. There is no arguable public law error here. Further, the court is not satisfied that the *FZ* test is met in respect of permission for the defendant's factual challenge. Permission being refused on all five grounds, there remains nothing for the interim relief sought to be interim of. Interim relief is also refused.

44. The claimant must pay the defendant's costs of preparing the acknowledgement of service. It is necessary work, and reasonable in amount. I invite counsel to agree a draft order to reflect the court's judgment.