

IN THE UPPER TRIBUNAL
IMMIGRATION & ASYLUM CHAMBER
JR-2023-LON-00164

B E T W E E N :
THE KING

on the application of AY

Applicant

- and -

**HACKNEY LONDON
BOROUGH COUNCIL**

Respondent

ORDER

Before Upper Tribunal Judge Macleman, sitting at Field House, Breams Buildings EC4A 1DZ in the fact-finding hearing on the Applicant's application for judicial review, held on 26th, 27th and 28th September 2023

AND UPON hearing Phil Haywood for the Applicant and Joshua Swirsky for the Respondent.

IT IS DECLARED that the Applicant's date of birth is 13th February 2000.

CONSEQUENTLY IT IS DECLARED that:

- (i) The Applicant was an adult when he entered the UK;
- (ii) The Applicant was aged 23 as at the date of the hearing in the Upper Tribunal on 26th, 27th and 28th September 2023.

IT IS ORDERED that:

1. The application for judicial review is dismissed.
2. The order for interim relief made by David Lock QC dated 21st October 2021 is discharged.
3. The order protecting the Applicant's anonymity shall remain in place. Pending the further orders of a tribunal or Court, it is prohibited to publish details which shall directly or indirectly identify the Applicant.
4. The Applicant shall pay the Respondent's costs of the judicial review proceedings and the proceedings before the Upper Tribunal, with such order not to be enforced without the permission of the Upper Tribunal.
5. There will be a detailed assessment of the Applicant's publicly funded costs.

Hugh Macleman

UT Judge Macleman
20 October 2023



Case No: JR-2023-LON-000164

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

20 October 2023

Before:

UPPER TRIBUNAL JUDGE MACLEMAN

Between:

THE KING
on the application of
A Y

Applicant

- and -

HACKNEY LONDON BOROUGH COUNCIL

Respondent

Mr P Haywood, instructed by Osbornes, Solicitors, LLP, for the applicant

Mr J Swirsky, instructed by Legal Services, London Borough of Hackney, for the respondent

Heard on 26 – 28 September 2023

J U D G M E N T

1. The applicant is a citizen of Sudan. He came to the UK by small boat across the Channel on 6 June 2021. He says he was born on an unknown date in 2004 and was a child on arrival.
2. The Home Office carried out an age assessment on 6 June 2021, which records the applicant as saying he was born on 13 February 2004, but assigns a date of birth of 13 February 1997. That assessment, and the applicant's challenge to it, have been withdrawn.
3. On 19 -20 July 2021, two assessors for the respondent considered that the applicant was an adult. They had not seen the Home Office assessment but agreed that the applicant was "significantly older than 18".

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4. Parties have settled a statement of issues:-

The primary issue for the Tribunal is to determine as a matter of fact the applicant's probable age and date of birth.

In considering the issue, the Tribunal is likely to have to consider:

- a. The credibility of the applicant's account as to his age;
 - b. The lawfulness of and / or weight to be placed upon the respondent's assessment of the applicant's age, including in light of the procedural deficiencies argued by the applicant;
 - c. The weight, if any, to attach to the record of assessment ... by the Home Office;
 - d. The weight to be attached to witness evidence.
5. The legal principles are not in any material dispute. It is no longer contended that procedural shortcomings should result in an assessment being set aside as unlawful. Deficiencies go simply to the weight an assessment should bear.
6. The applicant says that he is from the village of Rehayd Alberdi in South Darfur, where he did not attend school, other than *halwa* to learn the Koran for about a year and a half. He was unfamiliar with the concepts of years and months, but understood Friday as the day to attend the mosque. He left the village in November 2020 with his older brother, Anoor, after threats from herders who had brought their cows onto the family farm. His mother, two other older brothers, and his younger sister remained. While in Libya, some weeks later, Anoor and he tried to register for charitable assistance. He was asked for his age. He called his mother to find out, using Anoor's phone. His mother told him he was born in 2004. That is his entire knowledge of his date of birth.
7. The applicant led the evidence of four witnesses. Mr David Shewry, a teacher, taught the applicant in a class of young people in 2021 - 22. Ms Catarina Lopes, a keyworker and teaching assistant, saw him at college several times a week over about a year, April 2021 to April 2022. Mr Atsu Tettevi, a care services team leader, worked in the applicant's placement from late 2021 until 27 May 2022. Mr Ibrahim Munu, a support worker in a housing association, saw the applicant twice a week in his placement from May 2022. None of these witnesses has expertise in age assessment, but all have solid experience in working with young people. They all observed the applicant to fit in well with others aged around 17 to 18, saw nothing to suggest that he was not a teenager like the rest, and were surprised that his age was disputed. Mr Haywood submitted that these were professional observations of considerable credit. Mr Swirsky did not suggest that the witnesses were anything but genuine, but said that their evidence amounted only to the applicant accommodating himself to the groups in which he was placed.

8. The applicant's 4 witnesses were all sympathetic to him, but their views were genuine, consistent, based on relevant experience, and worthy of respect. However, ability and desire to get on with others and to match their appearance and behaviour is not restricted within a narrow age range. This evidence is not a powerful indicator that the applicant was in the same age bracket as others in his classes and placements, rather than a few years older.
9. The Home Office age assessment was undertaken by social workers on the applicant's day of arrival. It is accepted that no "appropriate adult" was present; no "minded to" process was followed; and a telephone interpreter was used, with some interruptions. Obviously there are practical difficulties when the SSHD has to deal promptly with significant numbers of irregular arrivals, but this was less than ideal. The assessment has been withdrawn, but it remains relevant evidence for present purposes.
10. The procedural shortcomings have not been shown to impact on the quality of the assessment of age, which was based primarily on direct observation by trained assessors.
11. It is also relevant to compare what the applicant is recorded as saying soon after arrival with what he has said since.
12. Mr Haywood drew attention to the record of the applicant coming ashore at 5.55 am and being interviewed from 10.35 to 11.58 am on the same day (pages 358 and 366 of the combined bundle). He also observed that the record was not typed and signed until 31 July 2021.
13. The record at page 360 shows that the applicant confirmed that he had "an opportunity to have drinks, food and a rest" before the start of the assessment. That counts for something, although he plainly had a difficult sea journey into the early hours, before being interviewed in the late morning. This is a textbook example of an anxious, youthful and inexperienced asylum seeker required to give a summary account of himself in a stressful situation soon after arrival, such that considerable caution must be exercised in drawing adverse conclusions from inconsistencies and later contradictions.
14. Having put the interview in context, it remains plain that the assessors obtained a clear and quite detailed account, in rather greater depth than might have been expected. This evidence raises major questions.
15. The applicant is recorded at page 360 as giving not only a year but a date of birth - 13 February 2004 - which he now denies and, by his subsequent account, could not possibly have known. He is recorded as providing the further details that he would be 18 in seven months; his mother told him his age when he was 15; he was circumcised when he was 12 or 13; and he attended *halwa* when he was 12 to 13. He gave dates such as leaving Libya on 18 February 2021, and France on 20 March 2021.
16. The applicant says in his written statement that he was interviewed while tired and confused, without rest or refreshment; the interpreter was not Sudanese, and he did not understand him well; he just made up the date of

- 13 February; and he was not given the chance to respond to the points against him. In cross-examination he said he was taken straight to interview without anything to eat or drink. He denied saying he knew his age when he was 15, or when he was circumcised, or providing dates or periods of time.
17. In cross-examination, the applicant was pressed closely on the dates and periods of time he has variously stated for his travels through Libya, Italy and France. Mr Swirsky submitted that several discrepancies undermined his evidence. While it is plain that discrepancies exist, and those are points the respondent was entitled to take, I do not find them illuminating as to whether he is broadly truthful.
18. What is instructive, however, is that clear details were recorded from the applicant of dates and periods of time, which are completely inconsistent with his claim that he had no knowledge of calendars, months and dates.
19. I would recognise a wide latitude for the taking of a “rough and ready” initial account, as explained above, but this case discloses irreconcilable differences between what the applicant says now and what was set down at the interview.
20. Mr Haywood faced up to this difficulty and suggested that it might even turn in the applicant’s favour. He pointed out that nothing in the account went against the applicant on his age or entitlement to asylum, and that if deceitful, on being shown the record later in proceedings, he might readily have adopted it rather than denying it; which indicated that he is telling the truth. That submission made the best of the applicant’s position but it is not, in the end, persuasive.
21. Imperfect interpretation, fatigue and so on cannot rationalise the applicant being recorded as agreeing that he had the chance to rest, eat and drink, if he did not, or giving an account in terms of specific events and a life history. Apart from the date of 13 February, which he says he invented, the applicant denies saying what is recorded. Points such as when he knew his age, age when attending *halwa*, and age when circumcised cannot be explained away as clerical or interpreting slips. This is not in the zone of genuine error. Either the appellant provided such information, or the assessors made it up. There is no reason for them to have done so.
22. I find that the record of the Home Office assessment is reliable as to what was said on that occasion. The applicant’s denial of it shows that he is not a credible or reliable witness.
23. The applicant is recorded as calculating dates and periods of time from when he knew his age, including the 7 months to go until he became 18. This tends strongly to confirm that he gave his date of birth to the assessors not simply as 2004, but as 13 February 2004.
24. The applicant has a Facebook profile which states that he attended the University of Khartoum. He said in cross-examination that this was picked from options offered in a drop-down list, which is no explanation at all. This tends to show that his antecedents are not as he claims.

25. The applicant's Facebook profile also says that he is "from Nyala". In cross-examination he said that this was one of Sudan's biggest cities, where he has never been, and this was another selection from a drop-down list. He denied that he is, in reality, from Nyala and has studied at the University of Khartoum. Mr Swirsky submitted that the Facebook information is inconsistent with the applicant's claimed origins in Rehayd Alberdi, South Darfur. Mr Haywood submitted that there is nothing adverse, because Nyala is the main city of Nyala province, which includes the applicant's village. Mr Swirsky replied that it was not accepted that there is a province of Nyala, and Sudan is not divided into provinces.
26. Both representatives were content for the position to be verified by reference to information in the public domain through an internet search. I noted, after the hearing, that Wikipedia describes Nyala as "the capital of the state of South Darfur in the south-west of Sudan". It is not found as the name of a province or state.
27. This is another point adverse to the applicant, although I give it only minor significance.
28. Mr Haywood submitted that the applicant's willingness to have the Red Cross try to contact his family demonstrates that he had no concerns about exposure. I am not persuaded. It is not shown that he has provided reliable details as a starting point or has shown much interest in pursuing contact. Rather, the absence of expression of any real concern over his mother and siblings tends to suggest that he is unreliable as to the extent of his ongoing contact with his family members.
29. The applicant's account was that he had no real idea where he was going or why, but was carried along with companions he picked up along the way, and placed on a boat to cross the channel without being asked to pay. A young person may mindlessly "go with the flow", to some extent, but long and difficult journeys usually involve some intent and some expense. I find it unlikely that events brought the applicant more or less by accident to the UK. Similarly, I do not accept that he had no notion of any advantage in claiming to be under 18.
30. Although one age assessment has been withdrawn, and both have their procedural shortcomings, the observations were professionally and conscientiously conducted. The conclusions in both assessments bear significant weight.
31. I return to the applicant's best evidence of his age, which is what he says he was told by his mother. Even at face value, or at highest, this could not amount to much. Both western and Islamic calendars are used in Sudan. His mother is said to be an illiterate member of an Islamic community with little interest in dates or ages and no record-keeping. Without any imputation against her or against the appellant, she could not be expected to know his date of birth or age with any accuracy in either calendar. Such hearsay evidence of his year of birth has a margin of error of several years, either way.
32. Drawing all the above reasons together, I resolve the issues thus:-

the evidence of the applicant's witnesses is well intended, and carries some weight;

the age assessments were not procedurally ideal, but they are not flawed in any way which substantially undermines their conclusions;

both assessments are to be given significant weight;

the applicant's evidence that he was born in 2004 is neither reliable nor credible;

it is likely that his date of birth is 13 February;

he was an adult when he arrived in the UK;

a year of birth cannot be assigned with any degree of confidence, but only within a margin of error of several years; and

in so far as it is necessary to assign a specific date, I select 13 February 2000.

33.The application for judicial review is dismissed.

34.The case involves only the straightforward resolution of a factual issue. It raises no point which merits the attention of the Court of Appeal. Permission to appeal is refused in the order accompanying this judgement. That order deals also with the discharge of interim relief, preservation of the anonymity order, and costs, all in agreed terms.

35.I am obliged to the representatives for their careful preparation of the materials, and to both counsel for their full and helpful submissions.

Hugh Macleman

UT Judge Macleman
20 October 2023