



**In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review**

In the matter of an application for Judicial Review

The King on the application of
A R I A
(By his litigation friend Ms Erinç Argün Kayım)

Applicant

And

London Borough of Hounslow

Respondent

ORDER

BEFORE Upper Tribunal Judge Frances and Upper Tribunal Judge O'Brien

HAVING considered all documents lodged and having heard Ms Benfield of counsel, instructed by Bindmans LLP, for the Applicant and Mr Swirsky of counsel, instructed by HB Law, for the Respondent at a hearing on 19 – 21 November 2024

AND UPON the Upper Tribunal hearing oral evidence from the Applicant

AND UPON the Upper Tribunal having notified the parties of its decision to declare the Applicant's date of birth as being 1 January 2007 at the conclusion of the final day of hearing on 21 November 2024

AND UPON the Respondent informing the Applicant's solicitors and the Upper Tribunal that, in the light of the judgment, it intended to exercise its discretion to provide leaving care services pursuant to s23C ff of the Children Act 1989 to the Applicant regardless of the fact that he did not qualify as a former relevant child.

IT IS DECLARED THAT

The applicant's date of birth is 1 January 2007

IT IS ORDERED THAT:

- (1) The application for judicial review is allowed for the reasons in the attached judgment.
- (2) The Respondent shall hereafter treat the Applicant in accordance with his claimed age and provide him with support and services on that basis in accordance with the Children Act 1989.
- (3) The Respondent's age assessment dated 1 August 2023 is hereby quashed.
- (4) The order for anonymity made by the Administrative Court remains in force.

Costs

- (5) The Respondent shall pay the Applicant's costs of the claim on a standard basis, to be assessed if not agreed.
- (6) There shall be a detailed assessment of the Applicant's publicly funded costs.

Permission to appeal

- (7) There was no application for permission to appeal.
- (8) Permission to appeal is refused because there is no arguable case that we have erred in law or that there is some other reason that requires consideration by the Court of Appeal.

Signed: **J Frances**

Upper Tribunal Judge Frances

Dated: **28 November 2024**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): **28/11/2024**

Solicitors:

Ref No.

Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).



Case No: JR-2024-LON-000862

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

28 November 2024

Before:

UPPER TRIBUNAL JUDGE FRANCES
UPPER TRIBUNAL JUDGE O'BRIEN

Between:

THE KING
on the application of
A R I A
By his litigation friend, Ms Erinç Argün Kayım
(anonymity direction made)

Applicant

- and -

LONDON BOROUGH OF HOUNSLOW

Respondent

Antonia Benfield
(instructed by Bindmans LLP) for the applicant

Joshua Swirsky
(instructed by HB Law) for the respondent

Hearing date: 19 – 21 November 2024

J U D G M E N T

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Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the applicant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the applicant, likely to lead members of the public to identify the applicant without his express consent. Failure to comply with this order could amount to a contempt of court.

Judge FRANCES:

1. The applicant challenges the assessment dated 1 August 2023 in which the respondent concluded the applicant is “an adult male significantly over the age of 18”. The applicant claims his year of birth is 2007 and he does not know the day or month. The Home Office assigned him a date of birth of 1 January 1998.

Issues

2. On 22 February 2024, permission was granted by McGowan J. who directed the application be set down for a fact-finding hearing. The issues to be determined are:
 - (i) The credibility of the applicant’s account of his age and date of birth;
 - (ii) The weight to be placed on the respondent’s assessment dated 1 August 2023;
 - (iii) The weight to be placed on the assessment by Aberdeenshire Council dated 7 September 2023;
 - (iv) The weight to be placed on the independent age assessment conducted in July 2024. The report is dated 20 September 2024.
 - (v) The applicant’s age and date of birth.

Relevant law

3. In R (B) v Merton London Borough Council [2003] EWHC 1689 (Admin), Stanley Burnton J. stated that there may be cases where it is very obvious that the person is over or under 18 and, in such cases, there is normally no need for prolonged inquiry. Physical appearance, behaviour and the credibility of the applicant’s account were all matters which reflect on each other. The age assessment could be done informally as long as ‘safeguards of minimum standards of inquiry and of fairness’ were observed. Except in clear cases, a decision could not be made on the basis of appearance alone. In an obvious case, appearance alone might provide the answer, ‘in the absence of compelling evidence to the contrary’.
4. In R (Z) v Croydon London Borough Council [2011] EWCA Civ 59, the Court of Appeal considered an appeal against the refusal to grant permission for judicial review. They made a distinction between obvious cases and borderline cases. It was for those whose age may be objectively borderline, between perhaps 16 and 20, that an appropriate and fair process of age

determination may be necessary. The court concluded that the claimant claimed to be a child and was known to have mental health problems and therefore he should have had the opportunity to have an appropriate adult present. This was a factor to be considered when deciding whether permission should be granted.

5. In R (HAM) v Brent London Borough Council [2022] EWHC 1924 (Admin), Swift J. held that even though a young person's age is a question of fact for the reviewing court, that does not reduce the need for a fair procedure. Fairness did not require a full Merton compliant assessment in every case. He concluded that professional guidance, stating that an appropriate adult must be provided, was not a legal requirement. Whether it was unfair not to provide an appropriate adult would depend on the circumstances of a case. If credibility was an issue, the applicant must be given a chance to address points relevant to that. In considering a 'short-form assessment' he stated that what was required was such 'investigation as is reasonable on the facts of the case'. If the case was an obvious one, the inquiry may be brief and, in some cases, decisions may be based on appearance and demeanour alone. The local authority was obliged to do a reasonable investigation.
6. In R (SB) v Royal Borough of Kensington and Chelsea [2023] EWCA Civ 924, Elisabeth Laing LJ. reviewed the authorities, a summary of which is set out above. At [86], she concluded:

"Once permission to apply for judicial review has been granted, it seems to me that the norm should be that the whole case is transferred to the UT, for the UT to consider any procedural challenges in the context of its decision on the merits. In most cases, the UT's decision about the claimant's age will enable the UT properly to consider the legal significance of any procedural flaw. It is undesirable for litigants to take up scarce court resources with two separate hearings in the same case, if, on analysis, the court is best placed to deal with the whole case in one hearing."
7. Laing LJ. considered the observations of Swift J. in HAM were useful guidance in cases where points about fairness may be relevant to the Upper Tribunal's assessment of the applicant's age. There was no 'one size fits all' Merton compliant assessment. All assessments must follow a fair process and reasonable investigation. What constituted a fair process and a reasonable investigation was specific to each case. For example, there was no legal requirement to have an appropriate adult present in every case.

Agreed facts

8. For the purposes of this hearing, the following facts are agreed: The applicant is a Sudanese national from Darfur. He does not have any documents that record his age or date of birth. He fled Sudan in 2022 travelling through several countries in North Africa, Spain and France before entering the UK by small boat on 20 July 2023. The applicant was interviewed by the Home Office on 25 July 2023 and stated his date of birth was 1 June 2007. His age was disputed by the Home Office on the basis of an assessment of his physical appearance and demeanour which was

deemed to very strongly suggest that he was significantly over 18 years of age. The Home Office recorded his date of birth as 1 June 1998.

9. On 1 August 2023, the applicant met with two social workers employed by the respondent, Nadia Chernev and Raghu Baskaran. He signed a document stating that his age was disputed on the basis that “your appearance and demeanour overwhelmingly suggest that you are an adult”. The applicant was thereafter dispersed to adult asylum support accommodation in Aberdeenshire where he is currently living.
10. On 7 September 2023, the applicant met with two social workers employed by Aberdeenshire Council who conducted a brief enquiry after which they determined, on the basis of his physical appearance and demeanour, that the applicant was significantly over 18 years of age.
11. On 10 and 11 July 2024, the applicant was interviewed by two independent social workers, Josephine Schofield and Daniel Absolon, who formed the view that there was more evidence to support the applicant’s claimed age than there was to dispute it. They recommended the applicant’s date of birth of 1 January 2007 be accepted.

Applicant’s case

12. The applicant claims to have been born in 2007 but he does not know the day or month of his birth. He lived in a village in Darfur with his mother, brother, sister and grandfather. His father left when he was young and he has no memory of living with him. The applicant’s mother and grandfather are farmers and he would help his mother work on the farm. He did not go to school. He did not think about his age or date of birth and did not celebrate his birthday. In 2018, he was playing with friends when one asked how old he was and he asked his mother who said he was born in 2007. She remembered the year because there was an attack on the village by the Janjaweed and one of her friends was killed.
13. The applicant left Sudan because his family were attacked at home and his grandfather was killed. The applicant went to Chad in February 2022 and then travelled through Niger, Algeria and Morocco where he crossed into Ceuta. He met a man who told him to say he was in his twenties otherwise he would not be allowed on the boat to mainland Spain. He lived in a hotel in Madrid where he met other Sudanese people who were going to France, so he went with them. He was separated from the group in Paris and he went to Calais. He got on to a boat undetected because he did not have the money to pay the agent. He was caught and sent back to France. He crossed the Channel on his second attempt and was rescued by the British coastguard. He claimed asylum on arrival.

Evidence and submissions

14. We heard evidence from the applicant, his litigation friend Erinc Argun Kayim (‘EK’), Josephine Schofield (‘JS’) who prepared the independent age assessment report and Nadia Chernev (‘NC’), social worker employed by

the respondent. We have taken into account all the evidence before us, in particular that referred to by counsel in submissions and in the course questioning the witnesses.

Conclusions and reasons

15. The issue to resolve is the applicant's age and date of birth. We make no determination whatsoever on the merits of the applicant's protection claim. Any finding or observation regarding the credibility of the applicant's account is in the context of the limited issue of dispute between the parties: the applicant's age and date of birth.
16. The relevant legal requirements are set out in detail in the grounds of application at [32] to [64] and the respondent's summary grounds at [16] to [42]. In summary, it is for the Tribunal to determine the applicant's date of birth as a matter of fact and the Tribunal's role is inquisitorial. There is no burden of proof on either party and it is open to the Tribunal to reach a conclusion that is different from both the claimed age and the assessed age. The Tribunal should conduct a holistic assessment and decide the applicant's age on the balance of probabilities. The local authority was obliged to do a reasonable investigation and what constitutes a fair process and a reasonable inquiry is specific to each case. In obvious cases, the inquiry may be brief and may be based on appearance and demeanour alone.
17. In coming to our conclusions, we have taken into account all of the evidence before us and considered it in the round. We have considered the applicant's evidence with care making allowances for the traumatic experiences he is likely to have suffered in travelling from Sudan to the UK. We have considered the oral evidence and that set out in the witness statements in the context of the evidence as a whole. We have also made allowances for the fact that a child or young adult may have problems giving a coherent account of their history.

Applicant's credibility

18. The applicant has given a consistent account of how and when he became aware of his year of birth. It is not unusual that he does not know his exact date of birth because there is not a great deal of attention paid to dates of birth in Sudanese villages and the significance of dates of birth in Sudan in general is considered less important than in the UK. Birth certificates are not issued automatically and in many villages births go unregistered at the time.
19. The applicant and his family did not celebrate birthdays. His account of becoming aware of his year of birth is a simple one. He was playing outside with friends when one friend asked his age so the applicant asked his mother and she told him he was born in 2007. The applicant has maintained this account throughout his many interviews, his various witness statements and in cross-examination. His account of why his mother remembered the year was plausible given she suffered a traumatic event; her friend was killed at the market in an attack by the Janjaweed.

20. There are some variations in the applicant's account of how he travelled from Sudan to the UK which is understandable given the applicant has limited education, he has experienced conflict in Darfur and he spent over 15 months travelling to the UK. The respondent accepted the applicant is genuinely distressed by the journey to the UK and leaving his family in Sudan.
21. There was no indication the applicant had rehearsed his account or learned a false narrative. We accept the evidence of JS that he would not have been able to do so because he did not have the academic ability to create a false narrative that would stand up to scrutiny. We conclude it is not uncommon for the applicant to refine his account over time. We accept JS's opinion that the applicant presents dates as fact when they are actually estimates because he gathers information from other people retrospectively and then works out the date. For example, the applicant accepted in cross-examination that he worked out he was 11 years old in 2018 after arriving in the UK. We accept the applicant has tried to provide information when asked and that there have been some difficulties with interpretation.
22. Mr Swirsky submitted there were two significant discrepancies in the applicant's account in relation to leaving Sudan and travelling through Niger. He accepted the applicant had been consistent in stating he left Sudan after the attack in Kabkabiya when his grandfather was killed. However, the applicant had been inconsistent about the date of the attack and which country he was in when he learned of the date he left Sudan.
23. In his first witness statement the applicant said the attack in Kabkabiya was in 2022, but in his second statement he said the attack was in November 2021. In oral evidence he said he found out about the date he left Sudan when he looked at someone's phone in Sudan, but in his first witness statement he said he was in Chad.
24. We do not find these differences in the applicant's account to be significant. The applicant suffered numerous attacks while living in his village which caused his family to move to Kabkabiya a year before he left Sudan. The applicant has consistently stated he decided to leave Sudan after the attack in Kabkabiya. There is no inconsistency in his evidence, at [12] and [13] of his first witness statement, that his mother was aware of his decision to leave Sudan and he left in the night without telling her. There is no significant difference in the attack occurring in November 2021 or February 2022 or whether he was in Chad or Sudan when he looked at someone's phone to learn the date. These inconsistencies do not affect the applicant's consistent core account that he left Sudan in February 2022 after the attack in Kabkabiya.
25. The applicant failed to mention he travelled through Niger in his first witness statement dated 14 November 2023. In his statement made in support of his asylum claim, dated 15 January 2024, he stated he was detained in a warehouse in Niger for five months and managed to escape when the warehouse was left unguarded. In his second witness statement, dated 13 June 2024, the applicant stated he was travelling with a group of adults who wanted to cross the border into Niger and he wanted to work in Niger with them because he did not have any money. He was detained for

approximately six months in a warehouse and escaped when a large fight broke out and the warehouse was knocked down. Mr Swirsky submitted the timeline only worked if those five or six months were accounted for and the timeline was the key to an age assessment.

26. Ms Benfield accepted there was an omission in the applicant's first witness statement and his explanation was that he was not asked about Niger. His journey to the UK would be the focus of his asylum statement and so it was likely he would have been asked about travelling through Niger. It was also possible he did not want to talk about it until asked given his traumatic journey to the UK. She submitted the omission was not significant because the applicant had been consistent in his evidence that he left Sudan in February 2022 and he arrived in the UK in July 2023. The timeline was not significant in this case because there was no advantage to the applicant in omitting this information. It was more likely than not that the applicant was not asked about Niger in his first witness statement and he did not want to talk about it until he was asked direct questions.
27. We are persuaded by Ms Benfield's submission. The addition of an account of five to six months in Niger does not affect the applicant's consistent evidence that he left Sudan in February 2022 and there was no dispute he arrived in the UK in July 2023. It is not unreasonable for the applicant to fail to mention a traumatic memory until specifically asked. The applicant was reluctant to give details about his time in Niger in oral evidence. It was apparent his distress was genuine and Mr Swirsky quite properly did not press the point.
28. The applicant told the Home Office when interviewed on 25 July 2023 that he lied about his age in Spain. We find his failure to mention this in his asylum statement did not undermine his credibility. The applicant stated in his asylum statement that the interpreter in Spain did not understand him. In his first statement he said he did not understand what was said to him in Spain and there was no interpreter when Spanish officials asked about his age. This inconsistency is not significant in the context of the applicant's claim as a whole.
29. We attach no weight to references to the applicant's father in the respondent's record of the applicant's meeting with the social workers from the London Borough of Hounslow. It is apparent the applicant corrected this error during the course of the meeting on 1 August 2023. The reference to 'mum and dad' in the notes made by EK of the meeting on 17 May 2024 was inconsistent with the answers to questions which followed and could be down to a misinterpretation given the applicant denied having asked his father about his age in cross-examination.
30. In conclusion, there are no stark credibility concerns in the applicant's account. The inconsistencies are explicable and understandable. They are not relevant to the assessment of age and they do not undermine the applicant's core account that in 2018 his mother told him he was born in 2007, he left Sudan in 2022 after his grandfather was killed in an attack, he travelled through North Africa, Spain and France and arrived in the UK in July 2023.

31. The applicant's account is supported by the evidence of EK who has known the applicant since he arrived in the UK. She has stayed in touch with him by telephone and video calls since he moved to Aberdeenshire. She stated that the applicant is uncomfortable speaking about his journey to the UK and it was not unusual that he revealed more information over time. He was confused and scared in the hotel and needed a support mechanism. His 17-year-old friend in Aberdeen had been a positive influence.
32. EK gave reliable and valuable evidence that the applicant requires her support in dealing with the hotel in which he lives and that he has made strong and lasting friendships with two other young people aged 17. Her evidence is consistent with the conclusions drawn by JS and we are not persuaded that it is undermined by her position with the Refugee Council supporting age disputed young people. She gave clear, consistent and objective evidence of the applicant's reliance on her and his friendships with others under the age of 18. We attach weight to her evidence.

Independent Age assessment

33. There was no dispute that JS is a very experienced social worker and she has conducted age assessments for local authorities over many years. The independent age assessment report is Merton compliant and we attach significant weight to her opinions and conclusions.
34. JS stated that this was not just a case where the applicant was seeking out other young people, but also that they were actively associating with him notwithstanding they had their own support networks. They were making the effort to come to the hotel and keep in contact with him which they would not do if the applicant was significantly older. The applicant relied on the advice of others and wanted to remain in a group. He was dependent on others to make decisions for him. For example, he was told to say he was over 18 years old in Spain and he did so. The applicant continued to be dependent on adults and had not developed the necessary skills, that an adult would possess, to be independent.
35. JS was of the opinion that the applicant's physical presentation was well within the range of 17-22 years old. She was of the view his behaviour and demeanour were in line with his claimed age and at times he presented as younger and more immature than his claimed age. She found his level of immaturity was reflective of his age and experiences. He had a level of confidence of that expected in adolescents and he lacked the skills commonly witnessed in an established adult. He was reliant on professionals in his life to support him and he sought out other adolescents to socialise with. JS concluded there was more evidence to support than dispute the applicant's claimed age and his physical appearance was well within the margin of error. She did not consider him to be significantly over the age of 18 years old and his behaviour was in line with other young people from Sudan.
36. We are not persuaded by Mr Swirsky's submission that JS misconstrued the margin of error or the benefit of the doubt. Her report is consistent with the guidance in Merton and R (AS) v Kent County Council (age assessment; dental evidence) [2017] UKUT 446 (IAC).

37. JS employed visual techniques to gather information and she considered whether the applicant had falsified his account. She found that the applicant had provided a sufficiently detailed account of his journey to the UK and there were no areas of discrepancy that she would expect to see in someone attempting to create a false narrative. This conclusion is not undermined by any lack of challenge to the applicant's failure to mention Niger before January 2024 because, for the reasons given above, this did not show the applicant was being untruthful about his age or the duration of his journey to the UK. We are satisfied JS looked at the applicant's case holistically and there were no defects in her methodology.

Respondent's evidence

38. We attach little weight to the decision of the Home Office attributing a date of birth of 1 January 1998 because it was made after a very brief interview and was based on physical appearance which is a notoriously unreliable basis for assessing age.

39. We attach little weight to the assessment dated 1 August 2023 because it was based on physical appearance and demeanour. The description of the applicant failed to take into account his recent arrival in the UK on a small boat after a 15-month journey to the UK. The description was at odds with that given by Aberdeenshire Council some five weeks later. We attach little weight to the brief enquiry by Aberdeenshire Council for the same reasons.

40. NC stated she received the documents from the Home Office before the welfare meeting on 1 August 2023. She assumed the Home Office interview was conducted with an experienced social worker present because that was Home Office policy. She didn't challenge the applicant on what he said to the Home Office because she was satisfied on his appearance and demeanour that he was well over 18 years old. An appropriate adult was not necessary and the decision was not unreasonable at the time. At the subsequent meetings in May 2024, the applicant was forthcoming and made eye contact until he was asked questions about his age when he ceased eye contact and gave one word answers. Taking this into account together with appearance and demeanour it was unnecessary to change the earlier decision.

41. We attach little weight to the evidence of NC because she accepted her decision was primarily based on physical appearance and demeanour. In cross-examination NC accepted she had not made notes on 1 August 2023 and she was relying on the notes of the other social worker present at the meeting which he had put into the system. She had not asked detailed questions about leaving Sudan as that was not the purpose of the meeting. The level of inquiry was not that of an age assessment and, after her meetings with the applicant in May 2024, NC went on to comment on the applicant's credibility without following a fair procedure. These adverse credibility points were not put to the applicant and a Merton compliant assessment was not conducted.

Summary of conclusions

42. The task of the Tribunal is to reach our own assessment of age informed by all of the evidence. There is no hurdle which the applicant must overcome and we have to decide whether, on a balance of probability, the applicant was a child when he arrived in the UK.
43. Looking at all the evidence in the round, we accept the applicant's year of birth is 2007 as he claimed because his account is credible and we attach significant weight to the independent age assessment report. We find the applicant was a child when he arrived in the UK.
44. For the reasons given above, we find it more likely than not that the applicant's year of birth is 2007. We determine that the applicant's date of birth is 1 January 2007 so that on arrival in the United Kingdom on 20 July 2023, he was 16 years of age.
45. There was no application for permission to appeal to the Court of Appeal. We refuse permission to appeal to the Court of Appeal because there is no arguable case that we have erred in law or that there is some other reason that requires consideration by the Court of Appeal.
46. The parties were invited to make written submissions on costs by 12pm on 27 November 2024. We are not persuaded by the applicant's submissions to make an order on an indemnity basis. Having considered all the circumstances and the relevant case law referred to in the costs submissions we find that the respondent's conduct was not manifestly unreasonable. The particular circumstances of the case were not something outside the ordinary and reasonable conduct of age assessment proceedings which justified an order for indemnity costs.
47. The respondent accepts it should pay the applicant's costs on the standard basis. The circumstances do not justify a departure from Bahta v SSHD [2011] EWCA 895 and M v Croydon BC [2012] EWCA Civ 595 that the unsuccessful party will pay the costs of the successful party. The applicant is entitled to his reasonable costs.

J Frances

Signed: _____

Upper Tribunal Judge Frances

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