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IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 3224 (KB)



No. CO/3824/2022

Royal Courts of Justice

Tuesday, 29 November 2022

Before:

PHILIP MOTT KC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

THE KING
on the application of
MO

Claimant

- and -

LONDON BOROUGH OF NEWHAM

Defendant

MS A PATYNA (instructed by Osbornes Law) appeared on behalf of the Claimant.

MR D BEDENHAM (instructed by the London Borough of Newham) appeared on behalf of the Defendant.

J U D G M E N T

THE DEPUTY JUDGE:

- 1 The claimant, who has been granted anonymity, is referred solely by the initials MO. He claims to have been born on what in the western calendar is 21 March 2005, making him 17 years of age, and approaching his 18th birthday in March next year. The age assessment under challenge by the London Borough of Newham gives a range which puts him at not less than 20 years of age and assigns a date of birth as 21 March 1999, which would make him 23 years old now and 24 next March. So there is a six year difference between the parties.
- 2 As to this age assessment, on 18 November 2022 Miss Clare Padley, sitting as a Deputy High Court Judge, gave permission to bring judicial review proceedings and ordered that age assessment to be transferred to the Upper Tribunal following this oral hearing for interim relief because, of course, an age assessment is a precedent fact and the Upper Tribunal will need to hear evidence.
- 3 The principles for granting interim relief are not in dispute. They are governed by the classic case of *American Cyanamid Company v Ethicon Limited* [1975] AC 396, modified by the public law element in judicial review cases. I have been referred to various authorities in relation to that but, in summary, it is accepted there are two stages. First is whether there is a serious issue to be tried, and it is accepted that is settled by the grant of permission; there does not need to be a higher test on this first stage than that. The second stage is whether the balance of convenience favours granting interim relief. The strength of the claimant's case, insofar as it can be assessed at this stage, may be relevant to that assessment.
- 4 The underlying facts that I take into account are these. The claimant arrived in the UK shortly before 12 October 2021 in a small boat. He was initially assessed in Kent as an adult and accommodated accordingly. On 19 November 2021, after solicitors for the claimant had become involved, the claimant started to be accommodated as a putative child because it was accepted that the Kent method of age assessment was not Merton compliant. Initially he was placed with foster parents, then in April or May 2022 moved to a supported placement with other young people.
- 5 From April 2022, so for a term, he attended Newham College in Year 12. At the end of that summer term Newham conducted the further age assessment which is under challenge in this case and the result of which was communicated to the claimant on 29 July 2022. That led to his being moved, in due course, to a hotel for adult asylum seekers. Then on 14 October 2022 he was moved again to Napier Barracks. He is now sleeping in a hall with eight to ten others aged, he thinks, around 18 to 22 years old. It is a bit like a dormitory with some curtaining between the beds. Older residents are apparently in a different block, but they meet up at mealtimes. It is, the claimant suggests, and I accept, worse than a hotel if he is a child.
- 6 The claimant points to various features of the evidence that are significant, both as to the strength of case, but also particularly as to the balance of convenience. The foster carer has said that the claimant was suitable for her provision (which is up to the age of 18). She said that the claimant had skills which appeared to her appropriate for his age. She said that the claimant got on well with the other child in her placement who was a child under the age of 18.
- 7 The social worker assigned to the claimant said that he was keen to learn English and that seems to be supported by the evidence from the school. I note that his personal education

plan dated 24 May 2022, when he was at Newham College, says that he had settled into class well and got along well with other students, who would, of course, be students of around his claimed age. He said he wanted to return in September 2022 but, of course, did not because of the new age assessment and his move.

- 8 Further, the claimant points to the fact that there is positive evidence from friends that he has made in the UK who are of a similar age to that which he claims and whose ages have been accepted by the local authority.
- 9 Ms Patyna, for the claimant, referred me to various authorities. I note, in particular, *BG v Oxfordshire County Council* [2014] EWHC 3298 (Admin), a decision of Michael Fordham QC (as he then was); *AS v Liverpool City Council* [2020] EWHC 3531 (Admin), a decision of Nicol J; and *A v Manchester City Council* [2021] EWHC 1872 (Admin), a decision of Matthew Gullick KC. Paragraph [39] of the judgment in *BG*, which is of relevance here to how I should approach the balance of convenience, is as follows:

“...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.”

- 10 In addition to that, my attention is drawn to the age assessment guidance to social workers and their managers undertaking age assessments. At p.33 of that guidance, p.114 of the bundle, it concludes with the following words:

“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.”

Of course, the age assessment in this case does not leave doubt about whether the claimant is a child, but the fact that permission has been given to review that and there will be a fresh age assessment by the Upper Tribunal, means that at the moment that age assessment is in doubt.

- 11 The defendant points to a number of matters as to practicality, that on his own account the claimant will be 18 in less than 4 months' time, and that there are potential safeguarding risks if he is, in fact, as assessed, an adult and is placed with 16/17 year olds also in the defendant's care as a result of this application. The defendant points to a delay of a month between the challenged age assessment and the first contact with the defendant and the fact that we are now about 4 months from that date to the date of this hearing. The defendant says this is a weak case in which there are serious issues about the account given by the claimant. I take those in turn.
- 12 The fact that the claimant will, even on his own claimed date of birth, shortly turn 18 and cease to be a child should not, in my judgment, deter the grant of interim relief. The claimant has drawn my attention to other cases in which interim relief has been granted, even in one case where the claimant had already turned 18 by the time of the interim relief hearing. The significant feature is that there are continuing duties to former looked-after children imposed by s.23C of the Children Act 1989. They are duties to keep in touch and to find the claimant again if he loses touch with the local authority; to continue the appointment of a personal advisor; to keep his pathway plan under regular review; and to

provide other assistance if his welfare requires it, which may be assistance in kind or, in exceptional circumstances, in cash. It is accepted that that, which in insurance terms might be called run-off assistance, may include the provision of accommodation to a child, even after the age of 18.

- 13 As to safeguarding risks, the theory is absolutely correct; but the reality is much more fact specific. Children, even those born and brought up in the UK, may be very streetwise by the age of 17 in some cases, particularly those that are being looked after by a local authority. A local authority has to deal with safeguarding risks because one child of 17 may be as risky and streetwise as a 23-year-old, whereas another child of 17 may be extremely naive and more akin to somebody of a younger chronological age. Those are the sort of balances that a local authority should be used to dealing with. The position is often exacerbated by the inclusion of asylum-seeking children because, even in cases where there is clear evidence that they are under 18, many may have been involved in fighting, in using weapons, certainly in fending for themselves in hostile environments, and in travelling halfway across the world with minimal creature comforts. In this case the claimant says that for a while he assisted his father in a smuggling operation. Yet children, where they are clearly children, who arrive in the UK may, despite those outward experiences, still internally be suffering from PTSD and other psychiatric issues, have little or no English, have limited education and be very much in need of help. So their welfare needs are high and care is vital to their future development. Any local authority which handles asylum seekers, as well as children born and bred in the UK who are in care, will have to deal with the safeguarding risks that exist because of the varied development of children from their early teens right up to their mid-20s.
- 14 The delay that occurred is unfortunate, in the sense that in an ideal world this hearing would have been taking place three months ago, at the end of August, so that the claimant, if he succeeded, could return to college. But it has not and I do not, in the light of the explanations, see that there is any reason that it should be a bar to the claimant succeeding if otherwise the balance of convenience is on his side.
- 15 I take seriously the points made by Mr Bedenham for the local authority as to the strength of the case. There is no documentary proof to support the claimed date of birth. I note what he has said to me about the serious inconsistencies in the claimant's account - about how he learnt of his date of birth and who told him; about whether he was shown a birth document of some form by his parents; about him saying on his arrival that he came from Iraq and was in possession of a taskira, which is a document providing proof of age; and about whether he had assisted his father to sell fruit and vegetables or had simply done some preparatory work at home to assist in that business. Those are differences that will no doubt be examined in detail by the Upper Tribunal, who will have to consider them carefully.
- 16 Overall, I have come to the conclusion, despite the arguments against it, that the balance of convenience is firmly on the side of granting interim relief. In this case, there are no actual safeguarding risks identified by evidence. In fact, the claimant has been reported throughout as engaging well with people of his own claimed age. He has shown himself keen to engage in education and to learn English and has been suitably respectful and well-behaved when dealing with both foster carer and social workers who are involved in his welfare. It is, it seems to me, hugely in his interest that he should continue to have access to education and welfare support from the local authority even if it turns out to be for a limited period, because the Upper Tribunal decision ends up against him. That hearing is not likely to take place for at least six months and it may be longer than that.

17 But it is also, it seems to me, in the wider interests of society that the claimant, whatever his age is finally proved to be, should have access to education and welfare support. The risks are ones which a local authority should be able to manage. It, of course, involves tying up a bit more of their limited funds and facilities and accommodation, but overall I am convinced that the balance of convenience is on the side of granting interim relief and I will do so.

CERTIFICATE

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This transcript has been approved by the Judge