

Case No. CO/2060/2010

Neutral Citation Number: [2010] EWHC 1765 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 15 June 2010

B e f o r e:

MR JUSTICE BLAKE

Between:

THE QUEEN ON THE APPLICATION OF PRENGA

Claimant

v

LONDON BOROUGH OF BARNET

Defendant

Computer-Aided Transcript of the Stenograph Notes of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street London EC4A 2DY
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(Official Shorthand Writers to the Court)

The Claimant was not represented, did not attend
Miss S Davies appeared on behalf of the Defendant

J U D G M E N T

1. MR JUSTICE BLAKE: This is an application for judicial review of an age assessment conducted by the defendant, London Borough of Barnet, in the following circumstances.
2. The claimant is a national of Albania. Although he has given different accounts of the year of entry into the United Kingdom, it would appear that his predominant account and some supporting data suggests that he arrived in the United Kingdom from Albania in April 2009 (probably on 21 April) and presented himself to the Home Office at Croydon, applying for asylum that day or the following day.
3. On 23 April, two events occurred. First, the UK Border Agency issued him with a national identity document stating that his date of birth was 5 December 1990 although the precise basis for that assessment is not before the court. Second, the London Borough of Croydon, under an arrangement made with other local authorities to relieve the burden upon Croydon, assigned the question of assessment of this claimant and his eligibility for social support under the Children Act to the defendant London Borough of Barnet.
4. An initial assessment was made on 28 April 2009. It was decided that this was a case in which a full assessment needed to be made. That full assessment, known as a Merton-compliant assessment, following the well-known authority of this court dealing with the criteria that should be used for age assessments, was made on 5 May 2009. The social workers, experienced in making age assessments, concluded that the claimant was not a child, that his claimed date of birth of 5 December 1992 was not accurate and that December 1990 reflected his true chronological age. That would have made him 18 years and five months approximately at the date of the assessment, a young adult but over the age of 18.
5. As is well known, an age assessment of an unaccompanied asylum seeker who claimed to be a child has significant implications for the way that he is treated by the Home Office. In this particular case the Home Office was investigating whether he could be returned to another member state of the European Union for assessment of his asylum claim under the European Union legislation known colloquially as the Dublin II Regulation. It is not material to the present case, but it is to be observed that transfers under that Regulation are not generally possible if a person is under 18 and has first made his asylum claim in the United Kingdom.
6. It appears that when the claimant first presented himself to the Home Office he was in possession of a document which was a form of official certificate as to his date of birth. The English translation of the document, a photocopy of which is before the court, states that it is a birth certificate. The document itself appears to be dated 2 April 2009. The text of the document reads as follows:

"On the basis of the Central Register of the Citizens of Vaudejus No 10/573 of Year 1974 is hereby certified the following:

Name and surname: Edward Prenga [is given]

Father's name: Preng

Date of birth: 05.12.1992

Place of birth: Vig-Shkoder."

7. The original Albanian is a pro-forma bearing the coat of arms of the Albanian Republic and has at least two stamps, which appear to be Albanian Republic stamps, around a photograph but the body of the text is completed by hand. The social workers who conducted this case subsequently had the chance in the latter part of 2009 or the early part of 2010 to have inspected the original in which it appears that there may be a manuscript amendment to the month of birth. Moreover the social workers who subsequently conducted the assessment noticed that the photograph of the appellant attached to the birth certificate appeared to show a young man who was younger than the person they were examining. There was no challenge taken to the 5 May assessment of the London Borough of Barnet by the immigration solicitors then acting for the claimant.
8. By June 2009 it was apparent that the Home Office, in the immigration context, was informing the claimant that it had evidence that he had been to Hungary on two occasions in 2007 and 2008 and had made asylum claims there. On that basis he would be returnable to Hungary.
9. On 17 August 2009 the solicitors who acted in initiating this judicial review, Harter & Loveless, wrote a letter to the claimant's school in Albania. On 17 September those solicitors received a response from the school which they in due course provided to the defendant council. It is that response from the school that appears to have inspired pre-action correspondence and subsequently an application for judicial review that was lodged on 12 February 2010. It will be necessary to return to that letter in a little while.
10. Following the receipt of that letter, there were exchanges of correspondence between the solicitors acting for the claimant at that time and the council from which it emerged that the defendant local authority was willing to make a further assessment or a re-assessment of the claimant's age in the light of the documentary information that had been received from Albania. But various questions were being sought as to that document and the other inquiries that needed to be made either of the Foreign Office in this country or with the school or with any other relevant authority in Albania. In general terms the solicitors were pressing in the latter part of 2009 for that assessment to take place.
11. Not being satisfied with answers, this application was lodged on 12 February, as indicated, and there was an application for expedition. Mr Justice Blair on that date did direct that the case was suitable for expedition. Permission was granted by Mr Justice Bean on 22 March 2010.
12. During the period of correspondence before the initiation of this judicial review application there was a significant legal development in that on 26 November 2009 the Supreme Court gave its judgment in R (on Application of A) v London Borough of

Croydon and R (on Application of M) v London Borough of Lambeth [2009] UKSC 8, whereby claimants - parties - to age-disputed judicial reviews of decisions of local authorities succeeded in their appeal to the extent that it was established that the question of whether a person was a child within the meaning of the relevant legislation was a question for the court. Lady Hale said:

"27 But the question whether a person is a 'child' is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers."

13. Following the application for judicial review the local authority, the defendant, had entered an acknowledgement of service on 26 February saying it was premature because it intended to perform a re-assessment applying the law as had been clarified. That re-assessment began on 8 March 2010 where there was an interview with the claimant by fresh social workers. It seems that that interview could not be completed. It was intended to continue by a telephone interview on 9 April - and there were problems with completing the assessment there - but there was a further live interview of the claimant in London on 10 April 2009. There are full notes of the contents of those interviews.
14. The end result was that the defendant maintained its assessment that the claimant was not a child under 18.
15. This being a case in which the court was being asked to assess for itself what age the claimant was, the directions given by Mr Justice Bean contemplated that live evidence may be needed, and a skeleton argument from the claimant setting out its case was directed to be lodged seven days before the hearing of this application. This application was accordingly fixed for three days of hearing starting today 15 June through to 17 June. However on 26 May 2009 the claimant's solicitors Harter & Loveless wrote to the court and the defendant indicating that they were no longer able to act and that their name should be taken off the record. Since that time the claimant has not had any further legal representation. As the date for this hearing was approaching, there appears to have been some communication between him and the defendant council, the gist of which is that the claimant was stating that he wanted the case to continue but he was indicating that he was not willing to attend. Some information as to the possible consequences of that were communicated.
16. The claimant was informed of the address of the court and how to contact the court in case he wished to make any application to the court, but no such application has been received by the court. In the immediate period before the hearing of the application again there was either telephone communication or a message had been left. But the broad position has not advanced from that described above.

17. This morning the case was called on and there was no appearance from the claimant. In the light of the indications that he had made orally to the council previously, that was perhaps not surprising.
18. The first question that falls for determination is what course should the court adopt in this case. I concluded that the court should continue to determine this application albeit without the benefit of the presence of the claimant, without the benefit of any skeleton argument putting his case in the light of all the information which had come to light from the subsequent age assessment and without the benefit of any oral evidence on his behalf. But the reasons for that conclusion were that this was a case in which the jurisdiction of the court had been prayed in aid by someone who was a young Albanian asylum seeker and who alleged that he was born in December 1992 and could produce some document to that effect.
19. It is apparent now that it is for the court itself in the case of a dispute to decide the issue. It may have been open for the court to have concluded that by his conduct the claimant was not really intending the case to be proceeded with, but he has not expressly withdrawn the case. The intimations are that he wanted it to continue. It is in the public interest that there is certainty and finality in this matter that has involved quite considerable activity by the defendant to meet its duties.
20. In the event, I conclude that the determination of the case in the absence of the claimant this case does not raise any real difficulties. The judicial review very much proceeded on the basis that there was documentary evidence that was reliable emanating from Albania that was sufficient to counteract any adverse impression that the defendant authority and its social workers may have had of the claimant's own narrative in the case. It is not necessary to detail the cogent reasons why both in May 2009 and in March and April 2010 no fewer than five experienced social workers came to the conclusion that the claimant was not under 18. His demeanour, his conduct, his apparent ability to live alone on NASS support in a different town and to cope with independent living were all material parts of that assessment. Moreover there were a great many inconsistencies and contradictions in important parts of the claimant's narrative as to when events happened to him and when he was in various places.
21. It is apparent that if conventional judicial review principles had been applied to this case, the basis of the evidence filed and the full interview notes which have been provided to the court would certainly have justified a reasonable defendant, properly directing itself, to have reached the conclusions that it did. Moreover I am satisfied, having seen the totality of the material that has been provided before the court in the context of this application for judicial review, that the defendant reached the right conclusion. It is a conclusion with which the court agrees.
22. Confining this judgment to simply what appears to this court to be the most material reasons for that conclusion, I would first address the topic of the claimant's reliance upon the letter that his former solicitors received from his school. The letter received in September 2009 was in Albanian but with an English translation. The English translation says:

"We confirm that Edward Prenger, born on December 05, 1992 had finished the Eighth Grade School near our institution on June 2007. The student had started the studies on September 1, 1999 in the Firs [I think there is a mis-spelling for 'first' F-i-r-s] Grade and he had finished the studies in the Eighth Grade on June 2007."

23. The envelope in which that letter was sent was helpfully preserved by the claimant's solicitors. It has a manuscript address. On the back there is a name in manuscript, "P-r-e-n-g P-r-e-n-g-a". The defendant understandably was curious about the writing in manuscript on the back of the envelope and inquired of the solicitors on 24 November 2009 who the person was whose name appeared and whether he was related in any way. On 4 December 2009 Harter & Loveless wrote in the following terms:

"We have now our client's instructions in relation to the reverse of the envelope in which we received the letter from the head teacher of our client's school. The reverse says that the letter was posted by somebody called 'Preng Prenga'. Our client says that this person works at Vaudejus School. He is not related to our client."

Those were the instructions the claimant gave his solicitors. That was a lie.

24. In subsequent communications that the local authority received from the school - as it happens it received a reply to questions before it had asked them - it was confirmed that Mr Preng Prenga was a teacher at the school.
25. The claimant himself was interviewed on 8 March 2010 in the context of the fresh assessment. The manuscript notes of that interview read as follows:

"Q. Father, does he work? He never worked?"

A. No.

Q. is he working at this present time?"

The notes continue:

"He [I take that to be a reference to the claimant] changed his mind and said father is working. Made a mistake. Father works.

Q. What does he do?

A. Teacher.

Q. Where does he teach?

A. Biology and chemistry.

Q. Where?

A. Vaudejus.

Q. Do you know the name of the school?

A. There is no school name; it's the school of Vaudejus.

Q. How long has he been teaching there for?

A. Many years."

The interview continues though the notes are not particularly easy to read thereafter.

26. Understandably, a letter signed by the head teacher of the school that gives a narrative of the attendance at the school but also refers to the date of birth may carry considerably less weight if it appears that the claimant's father was a teacher at the school, was concerned in the sending of that letter and the communication with the solicitors and may also indeed have prompted or played a role in the second letter that was sent from the school to the local authority.
27. In those circumstances self-evidently that letter does not have the weight of independent assessment that it might otherwise have had. Moreover there is no getting away from the fact that the claimant was party to a very clear and serious misrepresentation of fact. It can be pointed out that as part of the discrepancies in the case he had earlier in 2009 told the first social worker team assessing his age that his father did not work and he had told the Home Office that his father worked at a farm.
28. Since it appears that that letter played an important role in the instigation of this application for judicial review, the lies told about the name on the back of the envelope and the implications it has for the weight that can be attached to that letter are significant and in itself undermine the first and fundamental plank of this application.
29. Secondly the letter itself suggests that the claimant left school in 2007. Putting that alongside answers he gave in interview on two occasions, it may be that as to the age he was when he left school that that is itself a significant factor against the claimant's claimed age. In May 2009 he says he left school in January 2007 when he was 15½. If he was born in December he could not be a half of anything in January the following month. If he was in fact 16 in 2007 it would suggest that his sixteenth birthday had taken place in January 2006, making him 18 in December 2008.
30. His answers on the age he was when he left school were much more specific in March 2010 and were in the following terms:

"Edmund reported that he attended primary school and two years at secondary school. According to Edmund he started primary school when he was 7 and spent eight years there. He said that he attended school between 1999 to 2007. When asked when he finished primary school, Edmund stated that he was 14 years of age. After completing primary school, Edmund reported that he started at secondary school where he was meant to stay until he was 18. According to Edmund, he left during his second year at secondary school due to family problems. he said that he now does not remember the month or the year he left school. When

asked how old he was when he left school, Edmund replied that he was 16 years old."

A little later it continues:

"Edmund reported that he spent two years at home between 2007 and 2009 because of family problems until he left for the UK in 2009. Based on the fact that he said he was 16 at the time he finished school and spent two years at home on leaving school, this would make him 18 years old when he arrived in the United Kingdom."

31. It thus appears that there are three independent routes to the conclusion that he was 18 when he arrived in the United Kingdom. First, if he is right in that later interview that he was 16 when he left school, and if the information provided by the school is correct he left school in June 2007, he was 16 then and became 18 in December 2008. Secondly, if he is right when he says that he left primary school at 14 and went to secondary school and spent two years there, again that would suggest that he was 16 when he left secondary school. Thirdly, if he is right that he normally would leave school at 18 but he left school early and spent two years at home, again that would make him 18 when he arrived in the United Kingdom.
32. There was one other small piece of evidence that may be of some significance suggesting that the claimant himself acknowledged that his year of birth was 1990 rather than 1992. That is because in March 2010 he was asked to sign a receipt for his travel expenses to come to the interview that has just been referred to. He did so, signing a compliments slip presented by the defendant borough. He signed his name and, unrequested, he signed after his name a date. The date was 05.12.90, but then he amended the "0" by over-writing a "2". He was subsequently asked about this. He said he made a mistake after a long interview. If the claimant thought it was necessary to give his date of birth alongside his signature for identity purposes even though he had not been specifically asked to do that by the defendant when signing the acknowledgement, he appears to have slipped up and given 1990 as his year of birth before rapidly amending it.
33. The third significant topic is that in the original narrative that the claimant had given in May 2009, both to the local authority in terms of its age assessment interview process and to the Home Office in terms of his asylum screening interview, he says that the events giving rise to his asylum claim happened in the summer and autumn of 2008 and he had sought asylum in the United Kingdom, coming overland. No mention had been made of any earlier trips outside Albania to seek protection. But in due course the Home Office was able to ascertain from the fingerprints it took from him in the asylum screening process that his narrative was incomplete.
34. It appears that the Hungarian authorities were able to confirm to the Home Office that he was registered as an asylum claimant whose claim was processed in Hungary on two occasions, on 21 August 2007 and 21 April 2008. His non-disclosure of those two matters is significant in terms of the credibility of his account. Further it tends to suggest that he may well have left school in June 2007 but was certainly not consistent

with the claim to have been at home from 2007 to 2009 and makes it unlikely to have been in the United Kingdom in 2008 as at one stage he claimed to have been. That may have been simply an error. It would also suggest that by the time he arrived in the United Kingdom this would be his third claim to protection and he might have sought to equip himself with some sort of support for it.

35. As indicated, he did arrive with the birth certificate mentioned earlier in this judgment. That birth certificate by itself is a starting point for the assessment of age and depending upon the country and the material in the certificate and may well be a very important document available to a claimant to demonstrate age, but it may not always be conclusive. It is not conclusive in the present case because it was clearly obtained shortly before the travel to the United Kingdom. It was obtained with a photograph that appears to have been well out of date when it was obtained. We have no information as to the original state of the register and the national provisions relating to the register from which any inference could have been drawn as to whether that was an authentic copy of an entry made much earlier on the register or simply a late registration of a claimant's date of birth for the purpose of travel to the United Kingdom.
36. The third document in the case upon which some reliance was placed was a letter dated 22 April 2009 that the claimant appears not to have been in possession of when he first entered the United Kingdom but was sent it by his family by one means or another after arriving here. The letter is headed the Republic of Albania, Committee of Nationwide Reconciliation. It mentions in the first paragraph:

"The Committee of Nationwide Reconciliation certifies that they had registered the case of blood feud between the family of Edmund Prenga, born 5 December 1992, from Shkoder district and another family."
37. This case is not concerned with the substance of that letter but merely with the reference to the date of birth. There is no information as to where the writer of the letter obtained the date of birth from, but given the date of the letter and the date of the birth certificate document to which reference has been made, it is quite likely that it would have been the basis of that document. The letter therefore provides no better support than the birth certificate itself for the actual age of the claimant in the case.
38. In my judgment therefore there are cogent reasons for rejecting or not attaching any weight to the averrals in the three documents to which reference has been made emanating from Albania that state that the year of birth is 1992. Putting aside those documents, there is some good evidence that the claimant's own answers by reference to when he left school suggest that he left school in summer of 2007 when he was 16 and so was over 18 by the time he was being age-assessed by the defendant authority; further the very substantial discrepancies in family details and the narrative of his travels which legitimately give rise to doubts both as to his credibility and his reliability as a historian of his own age.
39. Finally it is pointed out that he refused on the second re-assessment process to give information about his siblings - his brother and sister - because he did not consider that

to be relevant. That would have been further material which would have been available to the social workers to draw together their conclusions.

40. In my judgment, this has been a very careful and thorough assessment conducted by the defendant of the question of age. It was willing to re-examine, re-open and conduct the whole assessment again in the light of the representations made reliant on the documents. It was entitled to reach the conclusions it came to both on the documents and the impact of the documents upon its original assessment and its subsequent assessment. For reasons already given I conclude that that assessment is the correct one.
41. I therefore dismiss this application for judicial review. I refuse the declaration sought in it that the claimant is under 18. It is apparent from what I have already said that I am satisfied that the claimant is over 18 and the assessment of his true year of birth as 1990 is accurate. There is no reason to doubt his month of birth as December, that that is the reference point to his age for the purpose of any obligation which the social services might otherwise have over him. For these reasons this application is dismissed.
42. MISS DAVIES: There are two consequential matters. The first matter your Lordship alluded to in relation to the order was that the claimant be identified only as P. I would apply for that order to be discharged, that now he having been found to be an adult - and not advancing any reason why his identity should be protected as an adult - he can be identified in any reporting of these proceedings.
43. MR JUSTICE BLAKE: Yes. I propose to grant that order. I will give brief reasons for doing so.
44. The presumption is that litigants in this court do so using their name and identity. The court does have powers to depart from that presumption or to adjust it where there is good reason to do so. The protection of the welfare of children is one such good reason. But since I have concluded that the claimant is not a child that reason has disappeared and the normal course should be given effect.
45. MISS DAVIES: I am grateful. The final matter is the question of costs. It is of course noted that the claimant had until 26 May the protection of Legal Services Commission funding. Having succeeded in defending the claim, the council seeks an order that the claimant should pay its costs.
46. MR JUSTICE BLAKE: From 26 May?
47. MISS DAVIES: The council seeks an order that the claimant should pay its costs in their totality. In relation to the period

when he had protection of public funding, the council would need the leave of the court to enforce that costs order, the usual provisions in Section 11 of the Access to Justice Act 1999 applying. In relation to the period after 26 May, the claimant is simply liable down to any assessment if his means.

48. MR JUSTICE BLAKE: The prospects of you getting anything back, I would imagine, are optimistic. I hope you do not spend too much of your client's money in getting that.
49. In principle, having regard to the findings of fact in this case, I will direct that the claimant pays the council's costs of this litigation. For the costs incurred up to 26 May he litigated with the benefit of Legal Services Commission funding. I direct that such costs do not be enforced without leave of the court or full assessment. From the 27 May through to today he had no such protection. He appears to have been warned in the correspondence inquiring as to what course of action he was proposing to take that there were costs implications, but he did not seek to withdraw this application to avoid those costs implications or seek to avoid those costs implications. Accordingly, there is no basis for qualifying that order with any other condition or restraint.
50. Was there an interpreter here this morning?
51. MISS DAVIES: There is an interpreter.
52. MR JUSTICE BLAKE: I should have cleared that up. Thank you for arranging for an interpreter.
