



Neutral Citation Number: [2011] EWHC 3313 (Admin)

Case No: CO/7435/2011

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2011

Before:

MR JUSTICE EDWARDS-STUART

Between:

The Queen on the Application of
RS
- and -
SECRETARY OF STATE FOR HOME
DEPARTMENT

Claimant

Defendant

LONDON BOROUGH OF CROYDON

Interested Party

Ms Shu Shin Luh (instructed by **Scott Moncrieff**) for the **Claimant**
Mr Bilal Rawat (instructed by **Treasury Solicitors Department**) for the **Defendant**
Ms Barbara Hewson (instructed by **London Borough of Croydon Legal Department**) for the
Interested Party

Hearing dates: 9 December 2011

Approved Judgment

Mr Justice Edwards-Stuart:

1. This is an application for permission to apply for judicial review in an age assessment case. Since the argument did not finish until about 5:30 pm on Friday, 9 December 2011, I said that I would reserve my decision over the week-end.
2. Although the claim is made by way of judicial review, it is now settled that the task of the court when assessing a claimant's age is to do just that. It is not a review of an age assessment carried out by another body: see *R (A) v London Borough of Croydon* [2009] 1 WLR 2557.
3. In *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59, the Court of Appeal gave clear guidance on the test to be applied at the permission stage in an age assessment case. The President of the Queen's Bench Division, giving the judgment of the court, approved, at paragraph 6, the test formulated by Holman J in *R (F) v Lewisham Borough Council* [2010] FCR 292, namely whether there is "*a realistic prospect or arguable case that the court would reach a conclusion that the claimant was of a younger age than that assessed by the local authority*".
4. In considering how this test would be applied in practice, the Court considered that it could be compared with the test applied in a defamation case on when a judge should withdraw an issue from the jury. The President went on to say, at paragraph 9:

"We consider that at the permission stage in an age assessment case the court should ask whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing."
5. So, in an age assessment case such as this one, this means that I must consider whether the material before the court raises a factual case that the Claimant is under 18 which, taken at its highest, could not properly succeed in a contested hearing on that question of fact. If not, permission will be granted.

The facts

6. The Claimant, an Afghan national, arrived in the United Kingdom on 2 June 2011. He claimed asylum on the same day and was placed in the care of the Second Defendant ("the Council"). On 7 June 2011 he obtained advice from the Refugee Council's Children's Panel.
7. On 20 and 27 June 2011 two social workers from the Council carried out an age assessment on the Claimant. An interpreter was present, together with an adult volunteer observer from the Refugee Council. On 7 July 2011, the Council served the Claimant with a notice of its assessment that he was over 18. This consisted of a three page document, the second page of which was headed "Summary of Decision" which set out the assessors' reasons in six paragraphs. At the end there was a declaration to be signed by the Claimant which was in the following terms:

"I, [RS], confirm that I have been advised of the outcome of my age assessment. I understand that a full write up of the age assessment will follow forthwith. Signing this document as below does not suggest that I agree with the decision made about my age however it does show that , where I wish to

challenge this decision, I understand that I have 3 months from the date of this decision to bring my claim. Further I have been advised that, if I decide to challenge my assessed age, I can seek independent legal advice either through the Refugee Council, a law centre, the Citizens Advice Bureau or a firm of solicitors of my choice.”

This was followed by spaces for the relevant people, including the Claimant, to sign the document. The Claimant declined to sign it. The Summary of Decision said that “*A full written decision will follow*“. Subsequently, I was not told when, the full assessment was written up. That ran to about a dozen pages. It was done on a special form that had the main points of the *Merton*¹ guidelines set out in a margin on the left hand side of each page.

8. Having assessed the Claimant as being over 18, the Council then terminated the provision of the services previously made available to him under the Children Act 1989.
9. On 15 July 2011, the Secretary of State received a NASS 1 application for asylum support from the Claimant. The Claimant also provided the Council’s age assessment. I was told that the NASS 1 form included a section covering a number of special circumstances, one of which was a box marked “Age dispute” which had not been ticked. Ms Shu Shin Luh, who appeared for the Claimant, objected when this point was raised because she said that the form had not been disclosed to those acting for the Claimant. However, this fact was expressly mentioned in the skeleton argument of Mr Bilal Rawat, who appeared for the Secretary of State, and Ms Luh had that skeleton argument when she prepared her own skeleton argument. Unfortunately, it seems that she had not picked up the point. In those circumstances, I felt that I could properly permit Mr Rawat to rely on it.
10. On 25 July 2011, the Secretary of State received a copy of the Council’s Summary of Decision giving its assessment that the Claimant’s age was over 18. Relying on that assessment (not having been told that his age was disputed), the Secretary of State treated the Claimant as an adult and provided him with accommodation under section 95 of the Immigration and Asylum Act 1999. On the same day the Claimant was notified of the approval of his application for asylum support.
11. On 29 July 2011, the Secretary of State notified the Claimant of her intention to disperse him to alternative adult accommodation in Liverpool. On 2 August 2011, by an e-mail to the Council, the Secretary of State asked for confirmation that the age assessment was *Merton* compliant. Confirmation was duly given.
12. On 4 August 2011, the Claimant issued an application for permission to apply for judicial review seeking interim relief against, among other things, the decision to move him to Liverpool and citing the Council as an interested party. That application was refused on the following day but it had resulted in the disclosure by the Council of the full age assessment report the previous day.

¹ *R (B) v Merton London Borough Council* [2003] 4 All ER 280, in which Stanley Burnton J gave guidance on the process to be followed when carrying out an age assessment of a young person.

13. On 10 August 2011 the same judge allowed an application by the Claimant to amend his grounds and to join the Council as a second defendant. The judge made a number of further orders pending determination of the application for judicial review including the following:
- (1) The Council was to provide the Claimant with suitable accommodation and support in accordance with his claimed age.
 - (2) The Secretary of State was restrained from dispersing the Claimant to Liverpool.
 - (3) The Secretary of State was to treat the Claimant as a child for all immigration matters.
14. These orders are still in force. Since they were made until "further order", it is probably unnecessary for me to make any order for their continuance, but if I am wrong about that, and such an order is necessary, I will make it. In addition, and in any event, I direct that the Council is to take steps forthwith to ensure that the accommodation that is provided for the Claimant is suitable accommodation for a child of his claimed age as the order requires. Those representing the Claimant say that the present accommodation is unsuitable. If that is the case, it must be put right straight away.

This application

15. Ms Luh submits that there is a case, which when taken at its highest, demonstrates that the Claimant is under 18 and, accordingly, that it is reasonably arguable that his claim will succeed at a full hearing. She relies on the following matters.
- (1) The Claimant knows his age because he says that it was written down on the back of the family Koran by his father.
 - (2) The Claimant gave a clear account of his life history before he left Afghanistan some three months before he arrived in this country. That was to the effect that he started school when he was about 7-8 and remained there for about 8 years until he left Afghanistan during or (according to a very recent witness statement) just before year 8.
 - (3) His account of events thereafter was that he and his family went to Pakistan for about 3 weeks, and then he left to come to England under the direction of agents, together with his mother and younger sister. His mother had his tazkira (the Afghan document giving proof of age). Unfortunately, at some point when the party had to cross some water, the men and women were separated and the Claimant never saw his mother, or the tazkira, again. The journey took about 3 months, he says.
 - (4) This account, when taken at face value, means that the Claimant must have been 15 or 16 when he arrived in this country.
 - (5) The Claimant was treated as a child on his initial reception in this country, indicating that he did not strike anyone then dealing with him as being clearly over 18.

- (6) Although the Claimant's account is uncorroborated, no one has suggested that he has been lying about his life history. The Summary of Decision said: "*He was consistent with the account of events he gave but vague in relation to the countries that he travelled through*".
 - (7) The age assessment procedure was not *Merton* compliant, principally because the Claimant was not given any opportunity to deal with the provisional conclusions of the social workers who were assessing his age.
16. Against this, Ms Barbara Hewson, who appeared for the Council, submits that there is no material which suggests that the court would reach a different conclusion from that reached by the Council's age assessors. Accordingly, she submits, there is no real prospect of this claim succeeding. In this she is right to the extent that there is no really material evidence beyond that which was given to the age assessors. Further, she submits that the Claimant's case is not assisted by the fact that his account at the age assessment interview is now contradicted in some respects by what he said to a psychologist (whose report was disclosed very shortly before the hearing) who saw him about three months after the assessment interview. She submitted that the age assessment interview was properly conducted, a submission accompanied by a cogent analysis of the full assessment, and that Ms Luh's criticisms of it are not well founded.
 17. On behalf of the Secretary of State, Mr Rawat effectively adopted Ms Hewson's submissions on the age assessment issue. However, he made further submissions about the Secretary of State's participation in this action to which I will return later.
 18. On the question of the age assessment, in spite of Ms Hewson's trenchant submissions I consider that looking at the material as a whole the application for permission admits of only one answer. The limited experience of these cases shows already that it is not self evident that the court will simply follow the path of the social workers who carried out the age assessment.
 19. The Claimant's case, at its highest, is that he knows his age because it was written down on the family Koran and that he spent about 15-16 years in Afghanistan before he left the country, arriving some 3 months or so later in the United Kingdom. That history is entirely consistent with his claimed age and there has been no direct challenge to it. The Claimant also submits, and to some extent this is apparent from the documents, that the conclusion that he was over 18 was based substantially on his physique, appearance and demeanour as they appeared to the social workers carrying out the assessment. It is submitted by Ms Luh that such indicia are known to be unreliable, or at least suspect, as indicators of the age of young men in their late teens.
 20. In my judgment, this is a claim which, as it is put by the Claimant, could properly succeed at a hearing before a court. There is a realistic prospect that a court would reach a different conclusion. That is not a prediction that it will do so: it is merely a conclusion that the Claimant has a properly arguable claim.
 21. I do not think that it is appropriate, in a judgment on a permission hearing, for me to explore the question of whether or not the age assessment exercise was *Merton* compliant. I have already said enough about it for the purposes of this application.

22. Accordingly I give permission for the claim against the Council to proceed.

The position of the Secretary of State

23. In spite of the strenuous submissions of Ms Luh, I am wholly unable to see how the Claimant has any reasonable prospect of succeeding against the Secretary of State (apart from on the age assessment issue). I have already set out the history. Having been notified by the NASS 1 form that age was not in dispute, the Secretary of State received the Summary of Decision giving the brief reasons for the age assessment on 25 July 2011. A week later her department asked for confirmation that the age assessment was *Merton* compliant and was told that it was. It was not until 4 August 2011, when the Claimant made his application for interim relief, that the full age assessment document was disclosed. Indeed, an e-mail sent on behalf of the Council on the same day suggested that the social workers had been late in completing the full assessment document.
24. The Claimant's case is that it should have been apparent from the full age assessment that it was not a lawful assessment (see paragraphs 4 and 27 of the Amended Statement of Facts and Grounds).
25. Even if the Secretary of State, after considering the Summary of Decision document, had concluded that she could not safely rely on the age assessment carried out by the Council (which is probably higher than the Claimant's case is actually being put), the only course open to her would have been to arrange for another age assessment interview to be carried out by someone independent. It is hard to see how this could reasonably have been done, and a formal conclusion reached, by 4 August 2011 - 10 days later - when these proceedings were started. If it was only a reading of the full age assessment that should have put the Secretary of State on notice that the assessment was not *Merton* compliant, as the Claimant's skeleton argument appears to suggest, then this point falls away altogether.
26. In these circumstances, I cannot see that the Claimant has any prospect whatever of establishing any breach of any duty owed to him by the Secretary of State. Even if I thought that he had an arguable case that there had been a breach of duty, it is difficult to see what loss he might have suffered as a result of it. The fact that he might have been wrongly classified as an adult for a period of a few days would be unlikely to attract an award of anything other than very, very modest damages. To pursue the claim in those circumstances would be entirely disproportionate to the costs involved and in breach of the overriding objective. In any event, most if not all of the redress sought by the Claimant will probably follow the age assessment - if determined in his favour.
27. At the hearing I understood Mr Rawat to be submitting that the Secretary of State should not remain a party to the action largely, I think, for reasons similar to those that I have already given. However, paragraphs 19 and 20 of his skeleton argument appeared to reflect a different position. At paragraph 20 Mr Rawat submitted that in the event of permission being granted, the Secretary of State would seek leave to be joined as an interested party because she would be directly affected by the outcome of the proceedings and would be able to assist the court in relation to the issues raised.
28. If it is the position of the Secretary of State that she wishes to be joined as an interested party, as opposed to a defendant, then I am prepared to make the appropriate order.

However, if the Secretary of State is content to leave the issue of the Claimant's age to be dealt with by the Council in these proceedings then, subject to one point, there would be no useful purpose in keeping the Secretary of State in this action as a defendant for the reasons that I have already given.

29. The one point is that if the Secretary of State is not willing to be bound by the court's decision on the question of the Claimant's age, then she must be taken to be challenging it and must remain a party to these proceedings as a defendant.
30. I therefore provisionally refuse permission to continue the claim against the Secretary of State but only on receipt of an undertaking to the court by the Secretary of State that she agrees to be bound by the decision of the court in relation to the age assessment. Mr Rawat submitted that the hearing that such an undertaking was not necessary, but I am not satisfied that it can be safely assumed that the decision of the court would be binding on any person who is not a party to the proceedings. I understand that this is a question that has not been conclusively decided, and so out of caution I consider that it is appropriate to obtain the necessary undertaking from the Secretary of State as a condition of her release from the action. I see no prejudice to the Secretary of State by being put to this election: she can either give the undertaking or remain in the action in order to participate in the challenge to the age assessment.
31. Pursuant to CPR 39.2(4), I direct that the identity of the Claimant is not to be disclosed, directly or indirectly, until further order. In the meantime, the case will continue to be known as shown in the title to this judgment.
32. If any further directions are required, any party may apply in writing for an appropriate order within 5 working days. If opposed, the other party is to respond within 3 working days thereafter.