Neutral Citation Number: [2021] EWHC 663 (Admin)

Case No: CO/193/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2021

Before :

ROGER TER HAAR Q.C. SITTING AS A DEPUTY HIGH COURT JUDGE

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Between :

THE QUEEN **on the application of LYB** **by his litigation friend Ms MARIAN SPIERS**	**Claimant**
- and –	
KENT COUNTY COUNCIL	**Defendant**

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- -

THEO LESTER (instructed by **Duncan Lewis**) for the **Claimant**
ANDREW LANE (instructed by **Invicta Law**) for the **Defendant**

Hearing dates: 10th March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 2.00pm on 22nd March 2021.

Roger ter Haar Q.C.:

1. In this claim the Claimant seeks permission to challenge an age assessment carried out by the Defendant ("Kent CC").

2. In the course of the hearing of this matter on 10 March 2021, I granted an order for anonymity: the Claimant will be referred to hereafter in this judgment and in any record of these proceedings as "LYB". I also granted an application for the appointment of a Litigation Friend.

3. LYB claims that he is now 16 years old. Kent CC says that he is now 20 years old. If LYB's claim as to his age is justified, Kent CC has an obligation to provide accommodation under Section 20(1) of the Children Act 1989 and other important duties under Sections 22A to 22G of that Act. If Kent CC's assessment is accurate, the duties under the 1989 Act do not arise.

4. This is a renewed application; the application having been refused by Mr Justice Murray on the papers in an order dated 20 January 2021. The reasons given by Mr Justice Murray were as follows:

> "1. Having reviewed the papers, including the Defendant's detailed response dated 18 December 2020 to the Pre-Action Letter, I am not persuaded that the Claimant's application for permission is arguable, much less that there is a "strong prima case", as is claimed in the Grounds. It is not, in my view, properly arguable that the age assessment was not *Merton*-compliant.
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> "2. The assessment needs to be viewed as a whole. The assessors were appropriately qualified and apparently took care in carrying out the assessment, giving reasons that were open to them for their conclusions.
>
> "3. The weight to be given to the evidence of the Claimant's foster carers and his allocated social worker was a matter for the assessors and was certainly not determinative. The fact that the paediatrician who conducted his UASC health assessment "raised no issues" is not particularly compelling evidence, given that it was not part of the paediatrician's task to assess the Claimant's age. These matters were not ignored by the assessors."

5. LYB is originally from the Niala region in West Sudan and is of the Fur tribe. It is an important part of his case that he was told that he was born on 20 November 2004.

6. The account which he has given is that he has a younger brother who was born in 2010 and a younger sister born in 2008. He grew up in a house with only one room. He remembers washing clothes by hand by the riverside. His family were farmers and during his childhood the Claimant worked on the family farm, gathering vegetables. He had no formal education but went to "Khalwa" for one hour per day and was taught the Qu'arn and mathematics, for about two years. His family were uneducated, and their circumstances were difficult.

7. LYB never had any documentary evidence of his date of birth or any identification, and his birthday was not celebrated when he was growing up.

8. A central part of what I have to consider are conflicting accounts given by LYB of what he was told about his age. I revert to this in more detail below. In summary he said that his father told him at around the time when his parents divorced in 2010 that his date of birth was 20 November 2004. At that time LYB's mother left with his siblings. His mother wanted to take LYB as well, but his father refused. He said that he did not remember exactly when he was told his date of birth, but he remembered his brother was still a baby at the time and therefore he believed that it was 2010 when he was told. He said that he also remembered his father telling his mother during an argument that he was born in 2004. However, he also stated that in an argument at about the time of his parents' divorce he heard one of his parents saying he was then 9 years old and the other saying he was then 10 years old. He said that he heard a neighbour say something about 9 years and 10 years. He did not know what those statements were about.

9. After LYB's mother left, his father was married twice albeit for only short periods. In 2013 his village was attacked, and his family's house was burned down, and he sustained a burn to his hip whilst trying to hide in the house. LYB's father was killed in 2017 when the market in which he sold vegetables was attacked by 'the army'. LYB has spoken about a hostile tribe in relation to his father's death. He said that he was around 11 or 12 years old when his father died in 2017. Following his father's death, the tribe came to burn down his village. He escaped, but whilst fleeing he was arrested with others, detained and was injured. He went to live with his mother for a few months, before going to his uncle with whom he left the country in around 2018.

10. LYB travelled to Libya with his uncle and spent around a year there. He worked on a farm in Libya with his uncle. He was forced to work in Libya, and he was physically abused. The 'military' began to attack and detain people, so he left, travelling in a boat to Malta and arriving in 2019.

11. LYB was fingerprinted in Malta on 7 July and 19 July 2019. He said that he gave an incorrect date of birth to German officials when in Malta, because he was told that he would not be taken to Germany if it was thought he was too young. He initially gave his claimed age, 15 years old, but was told that unless he changed it he would not be taken to Germany. He was relocated to Germany and the German authorities record him as giving a date of birth of 20 November 2004. LYB was fingerprinted in Germany on 26 August 2019. He travelled through France to the UK, arriving on 8 August 2020. He claimed asylum and gave his date of birth as 20 November 2004 at a Home Office welfare interview on 9 August 2020.

12. The Home Office disputed LYB's age. Kent CC's social services department interviewed LYB on 21 and 25 September and a 'minded-to' meeting was held on 30 September 2020. At a meeting on 26 October 2020, LYB was informed the decision had been made that he was then 19 years old with a date of birth of 20 November 2000. Kent CC made the decision to terminate support and care of LYB from that date of the meeting.

The Grounds of Challenge

13. The decision under challenge is the decision to terminate LYB's accommodation and support. That decision relied upon the precedent fact of LYB's actual age.

14. LYB relies upon four grounds:

    (1) Kent CC's decision is based on an age assessment that was not 'Merton' compliant or compliant with guidance;

    (2) Kent CC's decision was irrational or otherwise unlawful;

    (3) Kent CC's age assessors further failed to apply the benefit of the doubt in making their decision;

    (4) Kent CC's termination of accommodation and support of LYB was unlawful.

The proper approach to the grant of permission

15. In *R (on the application of A) v Croydon London BC, R (on the application of M) v Lambeth London BC* [2009] UKSC 9; [2009] 1 WLR 2557; [2010] LGR 183; [2010] 1 All ER 469, the Supreme Court considered the approach to be adopted when the Court is asked to consider whether a person claiming to be a "child" for the purposes of the Children Act 1989 is indeed a child for those purposes. In her judgment Lady Hale said this:

> "[26] …. The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child in 'in need' requires a number of different value judgments. What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the 1989 Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and *Wednesbury* reasonableness there are no clear cut right or wrong answers.
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> "[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.

"[28] The arguments advanced by Mr Béar might have to provide an answer in cases where Parliament has not made its intentions plain. But in this case, it appears to me that Parliament has done just that. In s 20(1) a clear distinction is drawn between the question whether there is a 'child in need within their area' and the question whether it appears to the local authority that the child requires accommodation for one of the listed reasons. In s 17(10) a clear distinction is drawn between whether the person is a 'child' and whether that child is to be 'taken to be' in need within the meaning of the Act. 'Taken to be' imports an element of judgment, even an element of deeming in the case of a disabled child, which Parliament may well have intended to be left to the local authority rather than the courts.

….

"[32] However, as already explained, the 1989 Act does draw a distinction between 'child' and a 'child in need' and even does so in terms which suggest that they are two different kinds of question. The word 'child' is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited extensions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it.

"[33] The final arguments raised against such a conclusion are of a practical kind. The only remedy available is judicial review and this is not well-suited to the determination of disputed questions of fact. That is true but it can be so adapted if the need arises: see *R (on the application of Wilkinson) v Responsible Medical Officer Broadmoor Hospital* [2001] EWCA Civ 1545, [2002] 1 WLR 419. That the remedy is in judicial review does not dictate the issue for the court to decide or the way in which it should do so, as the cases on jurisdictional fact illustrate. Clearly, as those cases also illustrate, the public authority, whether the children's services authority or the United Kingdom Border Agency, has to make its own determination in the first instance and it is only if this remains disputed that the court may have to intervene. But the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence. If the other members of the court agree with my approach to the determination of age, it does not mean that all the other judgments involved in the decision whether or not to provide services to children or to other client groups must be subject to determination by the courts. They remain governed by conventional principles."

16. In *R (on the application of FZ) v Croydon London Borough Council* [2011] P.T.S.R. 748; [2011] LGR 445 the Court of Appeal considered the procedural implications of the Supreme Court's decision. Sir Anthony May P., giving the judgment of the Court said:

> "[4] Young persons who wish to challenge an assessment of their age by a local authority habitually and understandably do so by a claim for judicial review. Such a challenge may be on orthodox judicial review grounds, as where, for instance, it is said that for some reason the local authority proceeded unlawfully or adopted a materially unfair or otherwise non-compliant procedure. The challenge may, however, be that the decision assessing the claimant's age was factually wrong. The Supreme Court held in *R (on the application of A) v Croydon London BC, R (on the application of M) v Lambeth London BC* [2009] UKSC 9 that the question whether a person is or is not a child, which depends entirely on the objective fact of the person's age, is subject to the ultimate determination of the courts. It is a fact precedent to the exercise of the local authority's powers under the 1989 Act and on that ground also is a question for the courts. If such a decision remains in dispute after its initial determination by the local authority, it is for the court to decide by judicial review. This means that the court hearing the judicial review claim will often have to determine the fact of a claimant's age by hearing and adjudicating upon oral evidence. This may be an extensive and time-consuming process. The Supreme Court does not seem to have been concerned with the administrative consequences for the court of this. The judgments of Baroness Hale and Lord Hope are expressed in terms which appear sanguine about this: see for example Baroness Hale (as [33]) and Lord Hope (at [54]). The Administrative Court does not habitually decide in orthodox review proceedings questions of fact upon oral evidence, although it has power to do so in appropriate individual cases. It stretches the court's resources to have to do so more than occasionally. Yet there were, on 12 January 2011, 64 age assessment cases in the Administrative Court's list at various stages of progress.
>
> "[5] A judicial review claim challenging a local authority's assessment of age may thus be on various grounds. Some of them may be orthodox judicial review grounds. But the core challenge is likely in most cases to be a challenge to the age which the local authority assessed the claimant to be. Thus, most of these cases are now likely to require the court to receive evidence to make its factual determination. It is therefore understandable that Mr Hadden, for the respondent local authority in the present appeal, submitted that orthodox judicial review challenges are likely to be subsumed in the court's factual determination of the claimant's age. If the claimant succeeds on his factual case, the orthodox judicial review challenges fall away as unnecessary.
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> …

> "[8] We do, however, consider that the question now under discussion is broadly analogous with the question in defamation proceedings of when a party is entitled to require issues of fact to be determined by a jury. For the law on this topic, see *Alexander v Arts Council of Wales* [2001] EWCA Civ 514 at [37], [2001] 4 All ER 205 at [37]. In defamation proceedings, issues of law are for the judge and normally, by s 69 of the Senior Courts Act 1981, the parties are entitled to a jury trial on material issues of fact. In so far as issues depend on an evaluation of evidence so as to determine material questions of disputed fact, these are matters for the jury. But it is open to the judge in a libel case to come to the conclusion that the evidence, taken at its highest, is such that a properly directed jury could not properly reach a necessary factual conclusion. In these circumstances, it is the judge's duty, upon submission being made to him, to withdraw that issue from the jury. That is the test applied in criminal jury trials: see *R v Galbraith* [1981] 2 All ER 1060 at 1062. It applies equally in libel actions.
>
> "[9] There is an analogy between the court withdrawing a factual case or matter from the jury in defamation proceedings and the court refusing permission to bring judicial review proceedings upon a factual issue as to the claimant's age. 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. If so, permission should be refused. If not, permission should normally be granted, subject to other discretionary factors, such as delay. We decline to attach a quantitative adjective to the threshold which needs to be achieved here for permission to be given."

17. In the numerous age assessment cases which come before this Court, reference is usually made to paragraph [9] of Sir Anthony May's judgment. For my part, in understanding the full import of paragraph [9] of that judgment, it is useful if not essential to read it in the context of paragraph [8] which makes the mental exercise required clear. Reading those two paragraphs together also serves to emphasise the last two sentences of paragraph [5] of the judgment.

Judicial Guidance as to the Assessment of Age

18. In *R (on the application of B) v Merton London Borough Council* [2003] EWHC 1689 (Admin); [2003] 4 All ER 280, Stanley Burnton J. gave important guidance as to assessment of age. At paragraphs [27] to [30] he said this:

> "[27] Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the

possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.

"[28] Given the impossibility of any decision-maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of say, 16-10, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision-maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country or origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other.

"[29] In this context, as in others, it would be naïve to assume that the applicant is unaware of the advantages of being thought to be a child. Draft *Practice Guidelines or Age Assessment of Young Unaccompanied Asylum Seekers* (issued by the London Boroughs of Hillingdon and Croydon) state:

> 'Assessment of age is a complex task, which is a process and not an exact science. This is further complicated by many of the young people attempting to portray a different age from their true age.'

It advises the decision-maker/interviewer: 'It is also important to be mindful of the "coaching" that the asylum seeker may have had prior to arrival, in how to behave had prior to arrival, in how to behave and what to say.'

"[30] The lack of a passport or other travel document may itself justify suspicion, as it did in the present case, particularly if the applicant claims to have entered this country overtly, for example through an airport, in circumstances in which a passport must be produced."

19. A useful summary of the applicable case law is to be found in the judgment of Leigh-Ann Mulcahy Q.C., sitting as a Deputy High Court Judge, in *R (on the application of BM v London Borough of Hackney* [2016] EWHC 3338 (Admin):

> "[44] In carrying out an age assessment, local authorities are primary fact finders. The following principles drawn from the case-law in relation to the conduct of an age assessment and relied upon by the Claimant were not in dispute between the parties:
>
> "(i) The decision makers cannot determine age solely on the basis of the applicant, except in clear cases (*Merton* at [37], *R (NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin at [27],

R(R) v London Borough of Croydon [2011] EWHC 1473 (admin) at [15]);

"(ii) Demeanour can also be notoriously unreliable (*NA* at [28]). It will generally need to be viewed together with other things (*A and WK v London Borough of Croydon & ors* [2009] EWHC 939 (Admin) at [56];

"(iii) If the chronological information derived from the child's oral history is credible, believable and plausible, any observation about physical appearance or demeanour is unlikely to tip the balance against the claimed age (*R(QM) v London Borough of Croydon* [2011] EWHC 3308 (Admin) at [44]);

"(iv) There should be no predisposition, divorced from the available information and evidence, to assume that an applicant is an adult or a child. Any decision must be based on the particular facts of the individual and therefore the decision-maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important (*Merton* at [37-38]).

"(v) The assessors must try to establish a rapport with the applicant and questioning should be open-ended and child-friendly (*A and WK* at [13]);

"(vi) There is no burden of proof imposed on the applicant to prove his age during the assessment (*Merton* at [38],

"(vii) Benefit of the doubt is always given to the child since it is recognised that age assessment is not a scientific process (*A and WK* at [40]). There should be no assumption that a child is lying;

"(viii) The child must have an appropriate adult during the age assessment (*FZ v Croydon*) [2011] EWCA Civ 59 at [23-25]; *R (GE) v Secretary of State for the Home Department* [2015] EWHC 1406 (Admin) at [22]);

"(ix) It is a point of elementary fairness that the applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is only provisional, to deal with important points adverse to his case and provide an explanation (*FZ* at [21]; *R (NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin));

"(x) The decision must be based on firm grounds. Assessments devoid of details and/or reasons for the conclusion are not compliant with the *Merton* guidelines; the conclusions must be *'expressed with sufficient detail to explain all the main adverse points which the fuller document showed had influenced the decision'* (*FZ* at [22]; *A and WK* at [12])."

> "[45] In *R (AM) v Solihull MBC (AAJR)* [2012] UKUL 00118 (IAC) at [20], the Upper Tribunal held that 'A person such as a teacher or even a family member, who can point to consistent attitudes, and a number of supporting instances over a considerable period of time is likely to carry weight that observations made in the artificial surroundings of an interview cannot carry."

The application of those principles to the present case.

20. For Kent CC, Mr Lane points out that this is an unusual case because the written grounds as framed are principally traditional judicial review grounds rather than *FZ* grounds.

21. There seems to me some strength in that submission, and it is apparent from the reasons he gave for refusing permission that Murray J. regarded this as being a challenge on traditional grounds.

22. Unlike Murray J., I, of course, have had the benefit of oral submissions from Mr Lester. As developed orally, the *FZ* approach is, understandably, at the heart of his submissions.

23. It is helpful to start by considering Kent CC's summary grounds for contesting the claim, which were supplemented by Mr Lane's written and oral submissions. Kent CC submits in the Summary Grounds as follows:

> "3. The Council notes the Claimant's "Factual Background" in his Grounds but for the purposes of these Summary Grounds would wish to emphasise:
>
> "(a) The Claimant has been in the United Kingdom only since 8 August 2020. He had travelled from his home country of Sudan and had a claimed date of birth of 20 November 2004.
>
> "(b) The Home Office disputed his claimed age and he was referred to the Council and placed in foster care.
>
> "(c) The age assessment under challenge in these proceedings involved two assessment interviews with the Claimant on 21 and 25 September 2020 as well as a "minded to" meeting on 30 September 2020 and was concluded on 26 October 2020 when an outcome meeting was held with the Claimant on that date.
>
> "(d) The Claimant's date of birth was assessed as being 20 November 2000, 4 years older than the claimed age."
>
> ….
>
> "5. One of the overarching difficulties with the Claimant's challenge is that it ignores the fact that on his own description of his life story and chronology to date this was inconsistent both with his claimed age and the assertion that he in in any event a child. For example,

he claimed to be 9 or 10 years of age when his parents separated in 2010, comparing himself to his foster carer's granddaughter (who was aged 8 years).

"6. The Claimant was given a full and proper opportunity to respond to any concerns or provisional views of the assessors as to his claimed age, and to any relevant information. Indeed, a "minded-to" meeting was held to this end. Evidence was received from the Home Office after this meeting, but it was not significantly new information and indeed the Claimant had previously advised the assessors as to its broad contents.

"7. As for the views of the foster carer and social worker as to the Claimant's age, they had not spent significant time with him and did not have the in-depth knowledge of him arising from a professional assessment. That does not mean that their evidence is of no value of course and there is no evidence that their views were disregarded at all, quite the contrary, and the difference in conclusions as to age cannot of itself demonstrate the same.

"8. Finally, the "Summary of process" explains the efforts that the assessors went to ensure the process was fully 'Merton compliant' and understood what was being said and asked. For example, at [47] it is recorded in the assessment:

"Clarification was sought at the commencement of each interview with him confirming that he fully understood the interpreter in his first language of Sudanese Arabic."

"9. In short:

> "(a) The Council carried out a careful and 'Merton compliant' age assessment.
>
> "(b) The Claimant was given ample opportunity to come back on information previously provided, or in response to any provisional views of the assessors.
>
> "(c) The conclusion as to age was consistent with the Claimant's own stated version of events, coherent and in keeping with the wider assessment.
>
> "(d) The view of others have been expressly considered but they are not and cannot be here determinative.
>
> "(e) There was no failure to give the Claimant the benefit of the doubt."

24. In these submissions, the point which stands out is that LYB gave inconsistent accounts of his age. It seems to me that the process adopted probably was *Merton* compliant. In those circumstances, applying conventional or traditional judicial

review principles, challenging the age assessment made by Kent CC in respect of LYB might be difficult.

25. However, applying the *FZ* approach, it seems to me that I should grant permission. As set out above, the question I must ask myself is whether the *"material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing"*. Unless that question is answered affirmatively, permission should be granted.

26. In this case I am satisfied that there is a case on the material before the court which amounts to a case that could succeed in a contested factual hearing. The features which seem to me to point to that conclusion are as follows:

    (1) Most importantly, whilst LYB has given inconsistent accounts, he has on more than one occasion said that he had been told that his date of birth was 20 November 2004;

    (2) His foster carers' impressions of his age support his case: whilst he was not in foster care for a long period, it was long enough for a view to be formed. The social worker's observations were also supportive of his claim;

    (3) In a contested hearing, a court or tribunal would be able to assess the extent to which the trauma which he appears to have suffered affected his history of events;

    (4) The assessors themselves noted that LYB has a "petite body frame with small fingers and feet" and that his "body size is small, which may sometimes visually present as a teenager";

    (5) They also noted the absence of stubble and that LYB did not appear to have a regular shaving habit.

27. For these reasons I am satisfied that I should grant permission to apply for judicial review. In accordance with normal practice, the case will be transferred to the Upper Tribunal to consider the case on its merits.

Interim Relief

28. LYB seeks interim relief by way of mandatory order that Kent CC provides the support and accommodation to which he would be entitled if he is in fact a "child".

29. The application is opposed by Kent CC.

30. My attention has been drawn to the decision of Mr Michael Fordham Q.C, then sitting as a Deputy High Court Judge, in *R (BG) v Oxfordshire County Council* [2014] EWHC 3187 (Admin), in which he said:

> "[30] I turn to deal with the question of interim relief. The claimant seeks a mandatory order that the Authority should, from now on, treat her as being a child on the basis of the date of birth that she puts forward. I have already dealt with the arguability of the point. Neither counsel submits that in this case it would be appropriate or necessary

for me to apply a "degree of arguability" approach, though were it necessary for the case to be more than arguable, that is to say a "strong **prima facie** case", then I would have been satisfied that this does indeed constitute a "strong **prima facie** case".

"[31] Mr Gullick submits that I ought not to order interim relief. It would, as he submits, involve the mandatory interference with the conscientious assessment of those within the Local Authority who are charged with that function. It is true that interim relief in this case would involve a mandatory order. This is a case in which the age assessment was speedily implemented and there was not the step taken on behalf of the claimant to seek to restrain its implementation.

"[32] The court, on interim relief, will always have close regard of course to the implications of what it would be ordering. On the other hand, even in areas where the courts have a more indirect supervisory jurisdiction on review, that is to say the more conventional standards of reasonableness review, it is inevitably always the case that a court considering interim relief is being invited to dictate to the public authority concerned a step which the public authority itself has decided is not necessary or appropriate. The homelessness context would be a classic example where interim relief will have that consequence. That of itself, in my judgment, cannot suffice to deter the court in granting interim relief if satisfied by reference to arguability and the "balance of convenience", modified to apply in the public law context, that interim relief is appropriate.

"[33] In my judgment, there is though, a further consideration that arises in the present context. Parliament, as explained by the Supreme Court, has imposed in the present area a heightened duty on the reviewing court to evaluate objective facts for itself. As it seems to me, once the court has reached the position at the permission stage filter that there is a properly arguable case which ought to proceed to a hearing, the court is squarely seized of a matter which falls within what can properly be described as a primary judgment of the court. In my judgment, in that context there are limits on the weight that can be given to the submission that the Local Authority has reached its own conscientious view and would, were there interim relief, be making provision which it is satisfied is unnecessary and inappropriate.

"[34] Mr Gullick, for the Local Authority, submits that in the present case there is no particular vulnerability identified on behalf of this claimant. He points to what he says is the absence of urgency with which the judicial review was initially pursued. He points to the implications for what will happen next if there is to be a tribunal hearing, which I have been told could be a matter of several months, possibly up to six months, and he makes the submission, given the Local Authority's assessment in this case, that interim relief would logically be putting an individual they have assessed as being an adult inappropriately alongside children in accommodation which is designed for children.

"[35] I have carefully considered and evaluated all of those matters in relation to the balance of convenience but I am satisfied that it is appropriate in this case to make an order for interim relief in circumstances where I am satisfied, for the reasons that I have given, that there is an arguable case and a realistic prospect that a court would find in favour of the claimant. In my judgment, it is not necessary that the claimant go further and show that there is particular vulnerability arising from the arrangements which are being applied to her but, in any event, there is material, both from the November letter of the Orientation Programme Coordinator and also from the claimant herself, as to the implications of her position and treatment of her as an adult.

"[36] As to delay, I accept that the proceedings were not commenced within three months, although it is true to say that various steps were taken in the interim, including pre-action correspondence and the seeking of notes. That is not a matter that is weighed against the appraisal of the realistic prospect of success and it is not a matter, in my judgment, that should be visited against the claimant herself in the context of whether interim relief is appropriate, particularly in circumstances where the age assessment decision was, on the face of it, implemented with reasonable speed and the matter no doubt needed to be carefully evaluated before proceedings were commenced."

"[37] So far as the other features are concerned, it seems to me that those are at best double-edged. The claimant is entitled, as Mr Suterwalla does, to submit that the function of ongoing delay, far from indicating that interim relief is inappropriate, supports its grant for that would suggest that there could be a prolonged period during which the claimant, with her properly arguable claim, continues to be treated as an adult and on one view, depending on the lapse of time, could give the utility of the claim diminishing return significance.

"[38] So far as the inapt placement of the claimant with children when she been assessed to be an adult, 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.

"[39] In all the circumstances of this case and in the context of the best interests of the child, the protective precautionary approach which the law for good reason, expects and the benefit of the doubt, as it is sometimes described in the authorities, having regard to each of the points that have been put forward by the parties, in my judgment, the balance of convenience comes down clearly in favour of the grant of interim relief. I accept, as did Mr Suterwalla, that it would not be

> appropriate for any court to impose any unrealistic requirement upon a local authority and, therefore, I accept that the form of the order will be to order that the claimant should be accommodated as soon as reasonably practicable rather than forthwith. What I propose to do is to pause and ensure that no one leaves today in any doubt as to what the appropriate wording is and I will hear counsel on that and any other consequential matters."

31. In my judgment, there is a considerable similarity between that case and this. In both cases there is an acute factual dispute as to whether the claimant is or is not a child. In consequence in both cases, if the original assessment is upheld, the claimant would have been held to be an adult not entitled, and possibly unsuited for, the regime applicable to a child. On the other hand, if the assessment is wrong, and the claimant is a child, he falls within the class of persons for whom Parliament regards it as necessary and desirable to make provision.

32. For the reasons expressed by Mr Fordham in paragraph [37] of the above judgment, it seems to me in this case as in *BG* that the balance of convenience comes down clearly in favour of the grant of interim relief.

Conclusion

33. Because I am differing from Murray J. having had the benefit of oral argument, I have set out my reasons in somewhat greater length in this judgment than I might otherwise have done.

34. I assume that the parties will be able to agree the terms of the order flowing from this judgment.