Neutral Citation Number: [2023] EWHC 252 (Admin)

Claim No.CO/3483/2022

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

**Sitting at Manchester**

**In the matter of an application to vary the order of HHJ Pearce dated 14 October 2022**

**THE KING**

**on the application of**

**BAA**

**Claimant**

**-and-**

**LIVERPOOL CITY COUNCIL**

**Defendant**

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The **Claimant** in person

**Ms Tara O'Leary** (instructed **by Liverpool City Council Legal Services**) for the **Defendant**

Hearing date: 26 January 2023

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**Before**:

**His Honour Judge Pearce**

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**Approved Judgment**

This judgment was handed down remotely at 10.00 am on Wednesday 8 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

## INTRODUCTION

1. This is my judgment on the hearing of the Defendant's application to set aside my order of 14 October 2022. By that order, I granted the Claimant permission to apply

for judicial review on ground 5 of the grounds set out in the application (with consequential directions for transfer to the Upper Tribunal Immigration and Asylum Chamber) and directed that, pending further order or the conclusion of the claim, the Defendant was required to treat the Claimant as a child and make arrangements for the provision of support and suitable accommodation for him in accordance with its statutory duties. The Defendant seeks to set aside only the second part of this order requiring it to provide interim relief by way of supporting the Claimant.

## BACKGROUND

2. The Claimant is a Sudanese national. He contends that his date of birth is 5 May 2005 and that he is therefore now 17 years old, though not far from being 18. It appears that he left Sudan for Chad in 2019, on account of the war in his native country. He was in Chad for about one year then he travelled to Libya where he remained for about another year. He then travelled to the United Kingdom via Italy and France.

3. He arrived at Dover on 17 July 2022. He was interviewed and it would appear that his interviewers thought he was lying about his age. They considered him to have been born in 2000. The Claimant travelled first to London where he stayed in a hotel for a short while and then to Liverpool, where again he was housed as an adult in a hotel.

4. On 4 and 5 August 2022, he was the subject of an age assessment by the Defendant. The social workers who conducted that assessment concluded that he was over 18 and he was therefore housed as an adult until my order of 14 October 2022.

5. This claim was brought by Claim Form dated 23 September 2022, naming the Defendant as the relevant local authority charged with the statutory duty of housing those under the age of 18 in Liverpool. The application for permission comprised five grounds:
   - 5.1. The Defendant failed to provide adequate and intelligible reasons for its decision;
   - 5.2. The Defendant failed to comply with its duty of reasonable enquiry;
   - 5.3. The Defendant's assessment procedure was procedurally unfair due to the unexplained absence of an Appropriate Adult;
   - 5.4. The Defendant's assessment decision was tainted by the absence of a fair and effective 'minded to' procedure; and
   - 5.5. The Defendant's decision was wrong as a matter of precedent fact.

   Interim relief was sought bye way of order requiring the Defendant to support the Claimant.

## PROCEDURAL HISTORY OF THE CLAIM

6. The Claimant's application for permission to bring judicial review proceedings and for interim relief came before Upper Tribunal Judge Plimmer sitting as a Judge of the High Court on 27 September 2022. She gave expedited directions for consideration of the application which brought the case back before me on 14 October 2022.

7. At that time, there was no Acknowledgment of Service or other communication from the Defendant before the Court. It appeared that the Defendant had been served with

the order for expediting the time for the acknowledgement of service yet had not complied. In fact, it is the Defendant's case that it was not served with the order of 27 September 2022 and accordingly was unaware of the expedited timetable. Coincidentally, it served an Acknowledgement of Service, in accordance with the timetable that would have applied but for Judge Plimmer's order, on 14 October 2022 (the document is dated the previous day) but that had not been processed and placed before me at the time that I considered the application.

8. The material before the court on 14 October 2022 was therefore limited to that which the Claimant had filed. That included details of a pro forma decision on the Claimant's age from the Defendant which stated, so far as relevant:

"*You have presented to the local authority claiming to be a child aged with a date of birth as stated 05/05/2005 (Persian or Gregorian calendar) or no date of birth stated. In accordance with the ruling under Merton, that states "there are cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for a prolonged enquiry" a full assessment of your age is deemed unnecessary.*
*In this instance, on the basis of a visual assessment of your appearance, demeanour and a brief enquiry with the assistance of an interpreter, it is our opinion that your appearance and demeanour strongly suggest that you are significantly over 18 years of age.*
*It is not the intention, therefore, of the Local Authority to undertake a full assessment of age and in our opinion you should be treated as an adult. We have informed the Immigration Officers responsible for your case and they will now be responsible for making arrangements for you."*

9. In fact, in carrying out the age assessment, the Defendant had completed a rather fuller enquiry than this letter suggested, recorded in an "*Age Brief Enquiry Form*". This had not been served on the Claimant by the time of his original application for permission and, because the Defendant was seemingly unaware of the order of Judge Plimmer, it was not provided in advance of my decision on 14 October 2022. It follows that the contents of that document were not a factor in my decision to grant permission on ground 5 and to grant interim relief as referred to above.

10. On 30 November 2022, the Defendant applied to set aside the order of 14 October 2022, seeking relief from sanction in so far as that application was required and citing material, including the Age Brief Enquiry Form in support of an argument that permission should not be granted and no interim relief should be provided. The Defendant also filed a witness statement from Mr Steve Moutray, containing material of significance to the assessment of the balance of convenience. It follows that the material before the court now is significantly different to that which was before the court when I made my order of 14 October 2022.

## THE HEARING OF THE APPLICATION

11. The Defendant's application came before me on 16 January 2023. The Claimant attended with a support worker but without a putative litigation friend, any legal representation or a translator. Given that he has poor English, the last of these made a fair hearing impossible and I adjourned to 26 January 2023. A litigation friend did not appear to be necessary for a fair hearing but I explored with the support worker who accompanied the Claimant the possibility of obtaining legal advice or representation.

12. On 26 January 2023, the Claimant attended with a translator and the support of a social worker. At the beginning of the hearing on that day, I ruled on four issues:
    12.1. Whether to adjourn the hearing to allow the further opportunity for the Claimant to get legal representation.
    12.2. Whether it was appropriate to proceed with the hearing without a litigation friend having been appointed for the Claimant;
    12.3. Whether the Claimant's statement was admissible; and
    12.4. Whether the Defendant's application amounted to an application for relief from sanction, requiring the application of the test in Denton.

13. On the first issue, I refused the application giving a reasoned judgment at the time. I shall not repeat it here. Suffice it to say that I have endeavoured to consider all matters that could properly be argued on his behalf in an attempt to avoid any prejudice through the hearing having proceeded with out legal representation on his behalf.

14. On the second issue, the Claimant had, in issuing this application, sought the court's permission to proceed without a litigation friend. Of course, on the Defendant's case a litigation friend is not required, since it is only for reason of his age that he would fall within the ambit of CPR Part 21. I had had no difficulty in making my first order without his having a litigation friend, given in particular what Lane J said in paragraph 84 of his judgment in R (on the application of JS) v SSHD [2019] UKUT 00064 (IAC). These comments were made in a context where when one of the Applicant's before the court was legally represented therefore the potential for prejudice to the Claimant/Applicant was less than here.

15. Nevertheless, given the following factors, it was in my judgment appropriate to permit this application to proceed without the Claimant having a litigation friend:
    15.1. He had launched the claim itself without a litigation friend;
    15.2. He has not sought to have one appointed;
    15.3. A social worker was present in this hearing to support him;
    15.4. He is, on his own case, very nearly 18 years old;
    15.5. He appears an intelligent person who would, barring language issues, have been as able to deal with the case as many people aged 18 or more.
    15.6. The court could seek to protect his position by taking an inquisitorial role as to his case.
    15.7. To require a litigation friend might significantly delay the hearing, since it is not obvious who would act for him. There are not identified family members and he is currently accommodated by the Defendant who therefore

clearly could not fill the gap. Thus finding a litigation friend might take some time whilst, in the interim, the Defendant would continue to be required to accommodate him as child when it says that this is wrong and inappropriate.

16. On the third issue, it was apparent that there were two problems with the statement upon which the Claimant sought to rely:
    16.1. The copy of the statement in the hearing bundle was unsigned, therefore not a statement with the meaning of CPR32 at all (since CPR 32.4(1) defines a witness statement as "*a written statement signed by a person which contains the evidence which that person would be allowed to give orally*" – my emphasis).
    16.2. The statement was in English, whereas the Claimant does not speak or write in that language, thereby offending paragraph 18.1 of PD32 which provides that a witness statement must "*if practicable be in the intended witness' own words and must in any event be drafted in their own language"* – see the judgment of Garnham J in Correia v Williams [2022] EWHC 2824 in support of the proposition that the latter requirement is mandatory.

    I have subsequently caused the court file to be checked. It would appear that the purported statement from the Claimant served in support of the application was also unsigned.

17. For the purpose of the hearing and this judgment, I treat the document as though it contains the Claimant's case on the material issues before the court. To do otherwise might have harmed his ability to have his case properly considered. However, in certain significant respects the Claimant's witness statement is unhelpful to his case since it introduces certain inconsistencies. I deal with these below but in my judgment there is force in the Defendant's argument that, even if unsigned, the Claimant's statement has been advanced in support of his case and therefore must surely reflect his contemporary instructions on the material issues.

18. On the fourth issue, relief from sanction, Ms O'Leary accepted that it was arguable that the order made by the court for interim relief was to be treated as an order made by the court of its own motion (because the Defendant had not been given an opportunity to make representations) and that accordingly CPR3.3 applies. This would in the usual course have required an application to set aside or to vary to be made within 7 days of service of the order on the party so applying. This order was served no later than 28 October 2022 (see the Defendant's position in its skeleton argument) therefore if the time limit for compliance was 7 days of service of the order, the application was well out of time.

19. The Defendant argued that in fact the order itself provided no limit on the making of an application to set aside or vary so that the effect of CPR3.3(6) was varied or alternatively that the Defendant should have relief from sanction.

20. In my judgment, the application made by the Defendant is one under a general liberty to apply provision in the express terms of the order which is not time limited. Whilst delay in applying to set aside or vary such an order might be relevant to the exercise of the court's power to do so or to costs issues, there is no time bar that required an application for relief from sanction.

21. I turn to the substantive issue in the case, namely whether the court should set aside the order for interim relief. Given that the court did not have in front of it highly relevant material in the form of the Age Brief Enquiry Form at the time of reaching the decision to grant the order of 14 October 2022, it is necessary for the court to reconsider the issue of interim relief in the light of the contents of that document.

## THE LAW

22. In considering the grant of interim relief, the Court's starting point is the decision of the House of Lords in American Cyanamid v Ethicon [1975] AC 396. In summary that decision requires the court which is invited to grant interim injunctive relief to consider three issues:
    22.1. Does the case of the party seeking injunctive relief show a serious issue to be tried? If not, the court goes no further in considering the application. If there is:
    22.2. Would damages be an adequate remedy to a party who is injured by the wrongful grant or refusal (as the case may be) of an interim injunction?
    22.3. Where does the balance of convenience lie?

23. The Defendant accepts that the threshold for bringing judicial review proceedings in respect of an age assessment is low – see R (on the application of FZ) v Croydon London Borough Council [2011] EWCA Civ 59. It does not invite me to set aside my grant of permission on ground five. It follows that, for the purpose of the American Cyanamid test, the first threshold requirement is met.

24. However, in the context of an application for a mandatory injunction, in particular in the public law sphere, there is some authority for the proposition that an enhanced merits test should be applied. In the context of an application for an interim order providing accommodation to a homeless person under Section 188 of the Housing Act 1996, Hickinbottom J as he then was noted in R (on the application of Nolson) v Stevenage Borough Council [2020] EWCA Civ 379 that the Court of Appeal "*had earlier established that an interim mandatory injunction requiring a local authority to perform its statutory housing duty would not be granted unless the applicant could show at least a strong prima facie case (De Falco v Crawley BC [1980] QB 460 at 478 and 481, as confirmed in Francis v Kensington and Chelsea RLBC [2003] EWCA Civ 443; [2003] 1 W.L.R. 2248 at [16], both homelessness cases).*" The Court of Appeal in Nolson was invited to find that Francis had been decided *per incuriam* the decision of the House of Lords in R (on the application of Factortame Ltd) v Secretary of State for Transport (No. 2) [1991] 1 AC 603. The court declined to make this

finding, drawing attention to the risk of determining the issue in a case where it had become academic.

25. Since the authorities cited to me are in the context of homelessness and not an age assessment, and since the Court of Appeal in Nolson expressly declined to consider whether those authorities were rightly decided in any event, I am not persuaded that there is authority binding on the High Court that requires me to apply an enhanced merits test in an application of this nature involving an age assessment.

26. However, in a number of cases the courts have pointed out that the strength of the case is likely to be a factor in determining the balance of convenience, in particular where the relief sought is by way of mandatory injunction. By way of example, in AS v Liverpool City Council [2020] EWHC 3531 (Admin), Nicol J in an age assessment case said:

> *"The resolution of this issue (*sc. whether an enhanced merits test applies to a claim for a mandatory injunction*) is, in my judgment, that there is no hard and fast rule that a claimant like AS must show a strong prima facie case, even though the relief sought might be characterised as a mandatory injunction, but that characterisation is one factor which can properly be taken into account in assessing the balance of convenience. The strength of the claimant's claim (so far as it can be judged) is also a factor to be taken into account in the balance of convenience."*

27. In the commercial context of the decision in American Cyanamid itself (and many other applications for injunctive relief), the second of the questions identified in the that case, namely the adequacy of damages as compensation, is often in sharp focus. An applicant who cannot show that it would suffer harm beyond that which can be adequately compensated in damages is liable to be refused injunctive relief; equally a respondent that could be adequately compensated in damages were it to be wrongly enjoined by court order might find that this factor justified the making of an injunction. In contrast, often in the sphere of public administrative law there is little doubt that either party would be harmed by the wrongful grant or refusal (as the case may be) of injunctive relief in a way that cannot be adequately compensated in damages. That is the position here.

28. As to the third question, namely the balance of convenience, it is necessary for the court to consider a wide range of factors including (for the reasons identified above) the merits of the Claimant's case, but also the wider public interest.

29. In considering the merits of the claim, I bear in mind the fact that a well conducted age assessment by appropriately qualified social workers is likely to be far superior to any assessment that a court can make on an application for interlocutory relief. The analysis by Garnham J in R (on the application of AXA) v London Borough of Hackney [2021] EWHC 1345 has been cited to me as an example of the court giving due deference to the opinions expressed in a properly conducted assessment.

30. I also bear in mind the argument, to which Ouseley J gave weight in R (on the application of M) v Ealing London Borough Council [2016] EWHC 3645, that it is preferable to err in favour of accommodation someone who is in fact a child with other adults than it is to accommodate someone who is an adult with children. Whilst I do not consider this to be self-evidently the case, there is reason to bear in mind that it is not necessarily worse to err in favour of housing an adult as a child. I consider this further below.

## THE MERITS OF THE APPLICATION FOR INTERIM RELIEF – THE CLAIMANT'S CASE

31. The Claimant's case is that the age assessment was erroneous and that he is in the age of 18, having been born on 5 May 2005. A number of criticisms were made of the age assessment process within his original summary grounds. In light of the documentation now produced it is difficult to maintain those since:
    31.1. Contrary to ground one, adequate reasons for the decision were given;
    31.2. Contrary to ground two, the assessors explored the claimant's account at some length;
    31.3. Contrary to ground four, the assessors gave the Claimant the opportunity to respond to their concerns about the case being advanced.

32. However, the Claimant can make the point that no appropriate adult was present during the assessment. Further, it is the Claimant's case that the interpreters provided for his assistance were not fluent in Sudanese Arabic and that therefore there were difficulties in communication that may have reflected in erroneous or confused interpretation of his answers. Insofar as the Defendant relies upon consistency in his account, the Claimant so that it would be unfair to hold this against him. However, I note below that the Defendant says that the Claimant's case is incorrect and that at the very least, the interpreter on the second day had a good understanding of the Claimant's language.

## THE MERITS OF THE APPLICATION FOR INTERIM RELIEF – THE DEFENDANT'S CASE

33. The Defendant's case is that the Age Brief Enquiry Form shows that this was a proper and fairly conducted procedure. It draws attention particular to the following:
    33.1. The social workers who carried out the age assessment had suitable experience in the process.
    33.2. The age assessment process was conducted over two days. On the first day, the interpreters were available online; on the second day the interpreter was present in person.
    33.3. All interpreters spoke Sudanese Arabic.
    33.4. The interpreter present on the second day confirmed that the Claimant could understand his dialect.

34. As to the argument that the assessors have wrongly reached the conclusion that Claimant was over 18 years old, the Defendant drew attention to the following:
    34.1. Whilst the Claimant says in the unsigned witness statement that the meeting with social workers could not go ahead on 4 August because the social workers could not get an interpreter over the phone and that the interview went ahead with an interpreter on the phone on 5 August, the record of interview shows that interpreters were present by phone on 4 August and that an interpreter was present in person on 5 August. This indicates that the Claimant is an unreliable witness.
    34.2. Further, the Claimant's assertion that he could not be properly understood in the assessment process because the interpreters did not speak Sudanese Arabic is contradicted by the general statement in the Age Brief Enquiry Form that the interpretation was of Sudanese Arabic and the specific assertion in that documents that the interpreter on 5 August said he could understand the Claimant's dialect.
    34.3. The Claimant had no documentary evidence of any kind to support his asserted age.
    34.4. There is a contradiction between his assertion during the age assessment process that he had had identification documents were that they were taken from him in Chad and his assertion in his oral submissions that he had never had any such documents
    34.5. The Claimant's physical appearance was that of somebody who shaved and his facial features, including a receding hairline, defined lines on his forehead and a fully formed jawbone, were said to be more typical of someone aged at least 21 years old. as noted above, the assessors are experienced in work of this kind.
    34.6. There is no evidence from anyone who has had contact with the Claimant to contradict the social workers' assessment of his age.
    34.7. The Claimant acknowledged having cut of his dreadlocks. Those conducting the assessment process concluded that this was an attempt to make himself look younger.
    34.8. Further, although he denied that he shaved, social workers pointed out presence of a razer in his room and, while saying that this belonged to somebody else who would come to his room, he then accepted that a barber had shaved his beard whilst cutting his hair.
    34.9. Twice during interview for the age assessment, he said that he was aged 13 in 2014 (which would of course make him well over 18 years old now);
    34.10. At one point in interview, the Claimant said that he was 9 years old when a Sheikh asked about attending the mosque, whereas at another point started that he had started attending the mosque in 2011 – if both of these are correct, it would again make him well over 18 years old now.
    34.11. On several occasions during interview he either asserted his year of birth to be 2005 or asserted an age that was consistent with that year of birth, but on a number of occasions he appeared to have to count with his fingers to verify his asserted age.

34.12. The Claimant stated during interview that his mother had told him that he was born in May 2005 without identifying the specific date; on the other hand, in his draft witness statement, in oral submissions on 26 January 2023 and indeed at a time prior to the age assessment (as recorded in the Age Brief Enquiry Form) he stated his date to be specially 5 May 2005.

35. The Defendant points out that, if the order requiring it to house the Claimant is discharged, the Claimant will return to being housed at public expense but as an adult. Therefore his fears of being homeless are not well founded.

## DISCUSSION

36. The Defendant provides a powerful set of arguments in support of the contention that the Claimant is probably aged over 18. Some of the points taken individually are not that strong. For example, assessment by way of physical appearance is notoriously unreliable. Further, some of the inconsistencies relied upon by the Defendant are not overly convincing – for example the claimant's supposed statement of his age at the time that the Sheikh is said to have spoken to him (9 years old) coupled with the interpretation of the Claimant's account as being that he started to attend the mosque in 2011 strikes me as somewhat vague and well capable of being a misunderstanding and/or misinterpretation what was being said.

37. However, other factors, particularly his assertion twice that he was 13 years old in 2014 as well as a contradiction about whether his mother ever told him a specific date of his birth are in my judgment more compelling. Further, the evidence of his changed explanation for the presence of the razer as well as his account of cutting off his dreadlocks suggest that he is willing to deceive in order to achieve the end of people believing that he is still a child. It is of course the case that such conduct (if I have interpreted it correctly) could be explained by a desire to bolster a true case rather than to support a fabricated one, but they are clearly matters that weigh against him in the balance of his reliability. When one brings into the equation the absence of any documentary or independent supporting evidence for his account, it is simply not possible to say that this is a strong case.

38. For reasons that I have identified above, even if he is able to pass the threshold test of showing an arguable case, the weakness of the Claimant's case is a factor to be taken account in the balance of convenience. The other obvious point is the balance between the harm that is done through the court refusing relief to someone who is in truth under the age of 18 on the one hand and granting relief to someone over the age of 18 who is in fact a child on the other.

39. I have indicated above that I do not agree that it is self-evident that it is wrong to err in one direction rather than the other in this regard. However, in the passage from R (on the application of M) v Ealing LBC referred to above, Ouseley J may well have had in mind a point that was made to me. A local authority such as the Defendant has statutory duties to house those under the age of 18. Its discharge of those duties is

expensive and involves a high workload for social workers (as verified by the witness statement of Mr Moutray at paragraphs 31 to 36). The accommodation of someone such as the Claimant as a child has two significant implications:

39.1. Resources are diverted from meeting the needs of other children to meeting those of the Claimant;

39.2. Children looked after by a Local Authority are highly likely to have significant needs and will often be vulnerable. It would be wrong to house an adult with such children.

40. In contrast, the Claimant is someone who has had the fortitude to travel to the United Kingdom from Sudan. Whilst no one would wish to understate the difficult experiences that he is likely to have suffered, there is no material before the court to suggest that the Claimant is a particularly vulnerable individual who would be liable to suffer if wrongly housed with adults.

41. The Claimant himself made the point that, if accommodated with adults, he would potentially be exposed to people smoking and/or drinking alcohol, whereas that is not (or at least should not) be the case if he is housed, as now, with 16 and 17-year-olds. This is not a factor to be ignored. But having considered the evidence of Mr Moutray, I am satisfied that the harm to the public interest through wrongly accommodating someone who is over 18 years old as a child is greater than the harm caused by wrongly accommodating as an adult someone who is nearly 18 years old, who appears to have significant coping strategies and who on the evidence before me will remain housed at public expense in any event.

## CONCLUSION

42. It follows from the above that, whilst I am satisfied that the Claimant makes out the basic threshold for the granting of interlocutory relief, namely an arguable case coupled with the fact that damages would not be an adequate remedy if injunctive relief is wrongly refused, I am satisfied that the balance of convenience on the facts of this case points in the direction of the refusal of interlocutory relief.

43. For these reasons I am satisfied that the order of 14 October 2022 should be discharged. It was conceded by the Defendant that there should be a phased period for such discharge and I direct that the current order should remain in force until 4pm on 24 February 2023 to permit this.

44. I am asked to make a cost order in favour of the successful Defendant. The Claimant has previously been publicly funded and it is highly unlikely that he has the means to meet an order. That of course is not a principled reason for refusing the order sought. However, there are two factors which persuade me that I should not make a costs order in favour of the Defendant:

44.1. The Defendant's failure to apply to set the order aside at the first reasonable opportunity, whilst not a reason to refuse relief, is a factor which weighs against the making of an order. Whilst an earlier application to set aside may not have had any effect on the costs incurred in these proceedings, the

refusal of costs to those who do not act with appropriate dispatch in litigation is a tool that assist the court in enforcing time limits.

44.2. The Claimant has been refused relief on the balance of convenience. Where interlocutory relief is granted or refused on matters based on the exercise of judgment. That is often seen as a ground for adjourning the determination of costs until the determination of the final issue. However on the facts of this case, it may be that the determination of this interlocutory application will in effect end the substantive dispute in these proceedings. In those circumstances, the principles of finality in litigation would favour making a final costs order at this stage.

45. For the second of these reasons, I conclude that I should make a final determination of the issue of the costs of the application at this stage. For the first reason, I make no order as to costs.