Case No: CO/8688/2011

Neutral Citation Number: [2012] EWHC 291 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil Justice Centre
2 Park St, Cardiff CF10 1ET

Date: 17/02/2012

Before :

MR JUSTICE BEAN

- -

Between :

The QUEEN on the application of "HA" (by his litigation friend James Whitehouse)	**Claimant**
- and -	
LONDON BOROUGH OF HILLINGDON	**Defendant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Interested Party**

- -
- -

Azeem Suterwalla (instructed by Public Law Solicitors, Birmingham) for the **Claimant**
Andrew Sharland (instructed by **Hillingdon Legal Services**) for the **Defendant**
Jonathan Cowen (instructed by **Birmingham City Council Legal and Democratic Services**) for **Birmingham City Council**
The Interested Party did not appear and was not represented

Hearing date: 13 February 2012

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Judgment

Mr Justice Bean :

1. The Claimant is an asylum seeker from Afghanistan who arrived in the UK in March 2011. He claimed to be 14 years old. He was placed by the Defendant ("Hillingdon") with a foster family for about six weeks. On 25th March 2011 Hillingdon completed a core assessment of his needs. The social workers considered that he appeared to be the age he had claimed, namely 14 years old.

2. On 14th June 2011 Hillingdon concluded a more detailed age assessment. This time the Claimant was assessed as being over 18. He was placed by the UK Border Agency in hostel accommodation in Birmingham.

3. By this claim, issued on 12 September 2011 against Hillingdon as sole Defendant, the Claimant argues that the June 2011 age assessment was erroneous and unlawful. An application on the papers for interim relief, lodged together with the claim form, was refused by Judge Owen QC who took the view (rightly, if I may say so) that the Court should not make any order until the Defendant Council had had a proper opportunity to respond. When Hillingdon had acknowledged service Judge McKenna QC considered the case on the papers and adjourned the applications for permission and interim relief to be listed in open court. The Secretary of State is named as an interested party because of the involvement of UKBA, but it is not suggested by anyone that relief should be granted against the SSHD, and she was not represented at the hearing.

4. By the time the oral hearing of the application for permission and interim relief came before me in Birmingham on 20th January there was a body of evidence on each side on the question of whether the Claimant is an adult or a child. After hearing submissions for the Claimant and for Hillingdon I granted permission for judicial review. Both sides were agreed that the age issue was appropriate for trial in the Upper Tribunal. But interim relief was a more complicated question. Mr Azeem Suterwalla for the Claimant asked me to grant interim relief against Hillingdon. Mr Andrew Sharland, for Hillingdon, had as his primary case the argument that the Claimant was correctly assessed to be an adult; but alternatively, he submitted, if anyone was liable to provide accommodation and support to the Claimant, it was Birmingham City Council, in whose area the Claimant has been living since being moved there by UKBA.

5. I directed that the interim relief issue be considered at an adjourned hearing and that Birmingham should forthwith be given notice and the opportunity to make representations. At the resumed hearing, which took place on 13 February, I heard submissions from Mr Jonathan Cowen for Birmingham as well as from Mr Suterwalla and Mr Sharland. At the end of the hearing I announced that I would refuse Hillingdon's application that Birmingham should be joined or substituted as Defendant; that I would transfer the claim to the Upper Tribunal; and that I would grant interim relief against Hillingdon alone. The terms of that relief were not in dispute, namely that Hillingdon must provide suitable accommodation and support to the Claimant until 14 days after the Upper Tribunal has made a determination of his age.

6. Section 17(1)(a) of the Children Act 1989 imposes a general duty on every local authority "to safeguard and promote the welfare of children within their area who are in need." Section 20 of the Act, so far as material, provides:-

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of-
>
> > (a) there being no person who has parental responsibility for him;
> >
> > (b) his being lost or having been abandoned; or
> >
> > (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> (2) Where a local authority provide accommodation under subsection (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within-
>
> > (a) three months of being notified in writing that the child is being provided with accommodation; or
> >
> > (b) such other longer period as may be prescribed.
>
> ….
>
> (6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare-
>
> > (a) ascertain the child's wishes [and feelings] regarding the provision of accommodation; and
> >
> > (b) give due consideration (having regard to his age and understanding) to such wishes [and feelings] of the child as they have been able to ascertain."

7. If the Claimant is indeed a child, it is clear that no one in the UK has parental responsibility for him; he requires accommodation; and he is a "child in need" as described in s 20(1). Pending the determination by the Upper Tribunal of whether or not he is a child, the question is whether any s 20(1) duty currently falls on Hillingdon, Birmingham or both authorities concurrently.

8. In *R(A) v Croydon LBC* [2009] 1 WLR 2557 the Supreme Court held that whether a person is a child is a question to which there is a right or a wrong answer. Lady Hale said at para [27]:-

> "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 court. That does not prevent them from being questions for the courts rather than for other kinds of decision makers."

9. It follows from this, as Beatson J observed in *R(MWA) v Birmingham City Council* [2011] EWHC 3488, that if the relevant local authority gets the decision as to whether the Claimant is a child wrong, "it cannot give itself a jurisdiction which it does not have, and cannot as a result of that decision decline a jurisdiction which it does have."

10. At the time of the assessment in June 2011 the Claimant was "within the area" of Hillingdon. He is now physically "within the area" of Birmingham. Mr Sharland's basic submission is very simple. Since the Claimant is now "within the area" of Birmingham, any s 20 duty owed by Hillingdon has ended and it is now for Birmingham to provide s 20 accommodation and support.

11. There is a good deal of case law on the s 20 duty, none of it providing a conclusive answer to the issue before me. In considering it, it is convenient to refer to the Council first carrying out an age assessment as the original authority, and any Council into whose area the applicant for support moves as the transferee or host authority.

12. Both sides relied on the same paragraph in the speech of Baroness Hale of Richmond in *R(G) v Southwark LBC* [2009] 1 WLR 1299. She approved a series of six questions for determining the existence of a s 20 duty, the third of which is the critical one for present purposes;

> "(3) Is he within the local authority's area? This again is not contentious. But it may be worth remembering that it was an important innovation in the forerunner provision in the Children Act 1948. Local authorities have to look after the children in their area irrespective of where they are habitually resident. They may then pass a child on to the area where he is ordinarily resident under section 20(2) or recoup the cost of providing for him under section 29(7). But there should be no more passing the child from pillar to post while the authorities argue about where he comes from."

13. Mr Sharland relies on the fourth sentence, saying that local authorities have to look after the children *in their area* irrespective of where they are habitually resident. Mr Suterwalla, supported by Mr Cowen, relies on what Lady Hale says about not passing the child from pillar to post.

14. In my view Parliament cannot have intended a simple geographical test to be applied. It would mean that an applicant dissatisfied with his age assessment by the original authority (or with the standard of s 20 accommodation and support supplied by them) could simply travel to another authority and demand to be reassessed, or provided with better accommodation. It would also encourage dumping of applicants by one authority on another: in Lady Hale's phrase, passing them from pillar to post.

15. So even if Mr Sharland is right in principle, there must, as he agreed in argument, be some exceptions. One would have to be a dumping case. Another would be where the original authority quite properly places the child elsewhere in order for him to receive specialist services.

16. The earliest case cited to me was the decision of Mr Beatson QC (as he then was) in *R(Stewart) v Wandsworth, Hammersmith and Fulham and Lambeth LBCs* [2001] EWHC Admin 709. This was a homelessness case involving the claimant mother and her two children, the issue being which Borough Council owed the s 17 general duty to the two children as being children in need "within their area". The family, who had previously lived in Hammersmith and elsewhere, applied to Hammersmith for housing assistance. Hammersmith accommodated them at a hostel owned and managed by Hammersmith but located in Lambeth. The children attended a school in Wandsworth: so they were physically present in Wandsworth during school hours but otherwise in Lambeth. Mr Beatson, applying a simple geographical test, held that both Lambeth and Wandsworth concurrently, but not Hammersmith, owed the s 17 duty to the children. This decision was followed by Crane J in *R(BM) v Barking and Dagenham LBC* [2002] EWHC 2663 (Admin), another case concerning the s 17 duty. In neither case was there any dispute about the age of the children.

17. *R(Liverpool City Council) v Hillingdon LBC* [2009] EWCA Civ 43 is an important case, both because it reached the Court of Appeal and because it was a dispute between the two local authorities as to who bore responsibility for carrying out a re-assessment of the Claimant's age and providing accommodation under s 20. The Claimant had originally been assessed as an adult by Liverpool and placed within Hillingdon's area. On the basis of new evidence, he sought a re-assessment of his age, which Hillingdon refused to undertake. Hillingdon, having ascertained from the Claimant a preference to live in Liverpool, removed him to Liverpool and contended that as he was now "within the area" of Liverpool, they (Hillingdon) could no longer owe any duties to him under s 20.

18. The Court of Appeal rejected Hillingdon's argument. It held that there had been a complete failure by Hillingdon to discharge their duty. Counsel for Hillingdon conceded that if the Court were to find that his clients did not discharge its s 20 duty, then they continued to be under the duty and Liverpool were under no concurrent duty. The correctness of that concession was expressly doubted by Rix LJ. Dyson LJ (with whom Wilson LJ agreed) simply recorded the concession and said no more than that the question of possible concurrent duties raised "interesting issues".

19. Mr Sharland relies on the case to show that where the original authority has carried out a full age assessment and found the applicant to be over 18, it has discharged its s 20 duty. That was what Dyson LJ said in paragraph 20 that Liverpool had done; but paragraph 20, as I read it, lists issues which were not in dispute. Hillingdon were arguing that Liverpool had come under the s 20 duty for a second time because of the applicant being returned there in accordance with his preference. They were not arguing that there would have been any continuing s 20 duty on Liverpool otherwise.

20. Mr Cowen submits that on this point *Liverpool v Hillingdon* has been overtaken by the decision of the Supreme Court in *R(A) v Croydon LBC*. Were *Liverpool v Hillingdon* to be decided now, Liverpool would be unable to discharge their duty by assessing the applicant's age as 18, as the issue of his age would have to be decided

by the Court; and if the Court decided that he was a child, Liverpool's assessment would have been unlawful.

21. Indeed, Mr Suterwalla and Mr Cowen argued that *Liverpool v Hillingdon* is a decision in their favour. It shows, they say, that a local authority cannot discharge a s 20 duty by relying on their own unlawful act – in that case, the dumping of the applicant by Hillingdon outside their area; in the present case, if the Claimant is found to be a child, the refusal of services to him by Hillingdon in June 2011 following their assessment of him as an adult.

22. I accept these submissions, at any rate for the purposes of the present claim. This judicial review challenge is to Hillingdon's termination of services following their age assessment which is argued to be unlawful. I am not ordering Hillingdon to provide suitable accommodation and support to HA on a permanent basis, but only until the Upper Tribunal determines his age. If the Tribunal finds that he was an adult in June 2011, Hillingdon will have discharged their s 20 duty and no such duty will fall on Birmingham either. If they find that he was, say, 14 years old then and 15 at the time of their determination, an issue will arise as to whether Hillingdon's s 20 duty to him will continue up to and, in some respects, beyond his 18th birthday. It may be (assuming that he remains physically present in Birmingham) that Hillingdon and Birmingham will then owe him concurrent duties. In *R(A) v Leicester City Council and Hillingdon LBC* [2009] EWHC 2351, a case in which the claimant child had moved from one authority's area to the other and there was no dispute about her age, HHJ Farmer QC held that concurrent duties were owed. But that is not for decision now, nor in this claim. No one argued that I should grant interim relief against both councils: it would be cumbersome and disproportionate for a relatively short period.

23. I have a good deal of sympathy for Hillingdon: as the local authority for Heathrow airport and Harmondsworth immigration detention centre they have to bear more than their fair share of the burden of providing services to asylum-seekers, including those claiming to be children. But that cannot be the basis of decision. I consider that on facts such as in the present case, in the period between an age assessment and the determination before this court or the Upper Tribunal of a challenge to the correctness of that assessment, it should be the original assessing authority against whom interim relief is granted. For these reasons I granted interim relief against Hillingdon and declined to join Birmingham as a defendant.