AGE ASSESSMENTS, THE LOCAL AUTHORITY AND LITIGATION

BACKGROUND

Recently in the litigation department, we received a flurry of instructions from a local authority client to represent them in threatened age assessment judicial review cases.

Prior to this, I only had one age assessment case a year and so I considered them among my less common instructions in a general civil litigation caseload. This is in part due to our geographical location – we are far from the coast, as are many of our clients, where any purported unaccompanied asylum-seeking children (UASC) may finally land after their long and arduous journey to get to the UK. Local authorities situated along the south coast, such as Kent, have been dealing with a steadily increasing volume of UASC as the years have passed, but for in-land local authorities, these claims are relatively new and having to find places for UASC is a yet another challenging demand on their resources.

Everyone who enters the UK as an illegal immigrant, and is detained, is housed while any application they make is considered and initial assessments are conducted by the Home Office. Often this initial accommodation is in hotels used by the Home Office which can be located anywhere in the country. It is for this reason that our client has found themselves on the receiving end of many judicial review pre-action letters as cohorts of people were placed by the Home Office in hotels in their county.

This is beyond the control of our clients and as such, their position is reactive, finding their already stretched public services, staff and finances are to be stretched even further.

Additionally, some individuals within these cohorts claim to be children, contrary to the assessments conducted by the Home Office upon arrival in the UK, and later by the relevant local authority. These individuals are entitled to legal representation, and their solicitors make the case that the purported UASC should be treated by the local authority as children '*in need*' as per section 17 of the Children Act 1989 pending a full *Merton* compliant age assessment. It follows therefore, that the local authority should then exercise its duty under section 20 of the Children Act 1989 to provide appropriate care for these putative children.

It is essential that an accurate determination of age is made by those public bodies, as much as is possible, as the consequences of the assessment are both critically important and ongoing. For safeguarding reasons, it would put other children at

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serious risk if someone who was not a child was housed with them. Further, if they are found to be a child, the duties implied by section 20 are ongoing and therefore take up valuable public resources for several years.

THE LAW

This is an evolving area of law and as practitioners in this field, we are mindful of new decisions which may affect our local authority clients. Case law is very helpful, and we can see from old and recent decisions, there remain issues which need further clarification. Some important cases which assist us are summarised below.

The case of *B (R on the application of) v Mayor and Burgesses of the London Borough of Merton [2003] EWHC 1689* is essential reading for those of us working in this sphere. This case laid down some general guidelines for how an age assessment should be conducted and what considerations should be made. These include the fact that two experienced and appropriately trained social workers should conduct the assessment and that the entire history of the UASC should be taken into account.

The case of *R (FZ) v London Borough Council of Croydon [2011] EWCA Civ 59* further defined what is required of the local authority when conducting age assessments, such as allowing the purported UASC an opportunity to respond to adverse points against him, and that a putative child should be offered the opportunity to have an appropriate adult present for the assessment interview.

More recently, the case of *R (HAM) v London Borough of Brent [2022] EWHC 1924 (Admin)* concerned a Sudanese national who claimed to be 17 but was assessed as being 23 by both the Kent Intake Unit and the London Borough of Brent. Brent assessed the individual by way of a short interview believing it to be tantamount to what is known as a 'short form assessment' as opposed to a full *Merton* compliant assessment. Brent successfully resisted 7 of the 8 grounds of challenge but was found to have acted unlawfully on the facts by not conducting a 'minded-to' session with the claimant. Importantly for us, this case defined more clearly what is meant by an assessment. There will no longer be a distinction between long, *Merton* compliant or short assessments – all assessment should be fair and what is fair will depend on the circumstances of each case.

This most recent case of *R (HAM)* is particularly instructive to us as the bulk of threatened judicial review claims our local authority client has received over the past few months have been because full *Merton* age assessments were not conducted. Solicitors threatening litigation stated that this fact alone made the decision of the local authority illegal, irrational, and procedurally improper and therefore capable of being subject to judicial review. Following *R (HAM)*, we have an authority which states that any assessment of age, provided it is fair, can constitute a valid assessment.

Unfortunately, for our local authority client every single letter received incurs time and money for them, taking money away from other resources for the communities. We therefore try to deal with these letters as efficiently as possible for our client, and act decisively to spare them the costs of embarking on active litigation. Happily, we can report that we have managed to defend our client on the majority of these pre action letters, and only a handful of these cases have gone on to the permission stage for judicial review in the Administrative courts. This is a significant success for our client and shows that local authorities can adopt a tougher stance in cases where it is clear to them that the individual is an adult, and that they will be supported by judges when it comes before the court. If there is any doubt that the person is a child, local authorities would be well advised to house that individual, pending a full age assessment, as our client has done here.

OUTCOME

Our firm has put certain actions in place to assist our client in this situation:

- We have set up a direct email inbox and address and have notified our client and claimant solicitors of this for the purpose of sending pre action letters and any other initial correspondence. Judicial review claims deadlines are strict and must be adhered to to avoid adverse consequences. Having a dedicated inbox which is monitored daily helps us, as a busy public law firm, and our client, as a busy large local authority, monitor new cases coming in and correspondence on existing ones.

- Regular meetings between our client and our Litigation Team to keep everyone up to date on all the existing cases and any new ones, and to provide an open forum for questions and discussion of this complex and evolving area of law.
- Involving an experienced public law barrister at an early stage, so we are prepared if any cases go on to be actively litigated.

In being clear on the law and the facts of each individual case, we can swiftly and thoroughly defend our client and their actions and in doing so, we save valuable public resources.

Notwithstanding the above, much is published daily in our national news on the subject of illegal immigration and it is a divisive issue. It remains the case that care must be taken when working with vulnerable adults or children to ensure that appropriate support is in place and in line with local authority statutory duties.

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