

Case No: CO/4962/2016

Neutral Citation Number: [2017] EWHC 265 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2017

Before:

MR. JUSTICE LAVENDER

Between :

The Queen
on the application of

S (by his litigation friend, Francesco Jeff)

Claimant

- and -

London Borough of Croydon

Defendant

Equality and Human Rights Commission

Intervener

Azeem Suterwalla (instructed by **Bhatia Best Solicitors**) for the **Claimant**
Hilton Harrop-Griffiths (instructed by **Yomi Molake**) for the **Defendant**
Caoilfhionn Gallagher (instructed by **Rosemary Lloyd**) for the **Equality and Human Rights**
Commission

Hearing date: 18 January 2017

JUDGMENT

Mr. Justice Lavender:

(1) Introduction

1. The Claimant is a national of Iraq. He arrived, unaccompanied, in the United Kingdom on 7 September 2016 and claimed asylum. He was detained overnight and then accommodated by the Home Office at Brigstock House in Croydon, where he remains. He claimed that he was 15 years old, having been born in 2000. The Defendant does not accept this, but proposes to carry out an assessment of his age. The Defendant has refused to provide accommodation and support to the Claimant pending the conclusion of that age assessment.
2. The Claimant seeks judicial review of that refusal. The Claimant brings this claim by his litigation friend, Francesco Jeff, who is an employee of the Refugee Council. On 23 November 2016 Leigh-Ann Mulcahy QC gave the Claimant permission to bring this claim. An expedited hearing was fixed for 14 December 2016. It was adjourned because of the illness of the Claimant's counsel.
3. Meanwhile, the Equality and Human Rights Commission sought permission to intervene to the extent of making brief written and oral submissions. Despite the Commission's efforts, this application, which was opposed by the Defendant, only came before me on the day before the hearing, and I refused it, as the Commission had not then produced its written submissions and I was concerned not to jeopardise the hearing on the following day. However, the written submissions were produced, Ms. Gallagher appeared at the hearing to renew the application and the parties agreed that no adjournment would be necessary. I therefore granted permission to the Commission to make written and oral submissions. The Commission's submissions supported the Claimant's application.

(2) Background

4. When he arrived in the United Kingdom on 7 September 2016, the Claimant said that he was 15 years old. It appears that the Home Office did not accept this, but instead formed the view that his physical appearance and/or demeanour very strongly suggested that he was significantly over 18 years of age. This appears to be the case because paragraph 2.1 of the Home Office instruction of March 2011 on *Assessing age* would have required him to be treated as a child unless such an assessment had been made. The Home Office did not treat the Claimant as a child, but instead accommodated him in Brigstock House, pursuant to its power to provide accommodation for adult asylum-seekers.
5. The Home Office then proposed that the Claimant move to alternative accommodation in Cardiff on 19 September 2016. On that day the Claimant was referred to the Refugee Council. In the event, the Claimant did not go to Cardiff. He has remained at Brigstock House ever since, apart from a brief period to which I will refer.
6. On 20 September 2016 the Claimant first contacted the Defendant, both in person and through the Refugee Council. He requested accommodation and support. The Defendant's initial response was that it was for the local authority in Cardiff to carry

out an age assessment. However, on 21 September 2016 the Defendant accepted that it would carry out an age assessment. Regrettably, this assessment has not progressed. Interviews commenced on 27 September and 13 October 2016, but could not be completed, because of the Claimant's health issues. It has taken some time for the Claimant to obtain medical treatment, but he is now in receipt of treatment.

7. Meanwhile, the Claimant commenced this claim on 30 September 2016. On that day, Simler J. refused the Claimant's application for interim relief, noting that the Claimant had been accommodated safely in Home Office accommodation for 7 weeks.
8. On 31 October 2016 one of the Defendant's staff telephoned Brigstock House and was told that the Claimant had settled in well and that there had been no concerns about vulnerability, risks or safeguarding.
9. On 18 November 2016 the Claimant left Brigstock House. He alleges that he was punched by another resident. The Defendant's enquiries of Brigstock House have not revealed any record of this incident. The Claimant did not return to Brigstock House until 2 December 2016, after the alleged aggressor had left. The Claimant has remained at Brigstock House ever since.
10. There is no evidence before me of any other such incident since then. However, the Claimant's evidence is that he shares a room with adults, his room-mates are regularly changing, they usually speak different languages so that he cannot communicate with them, they are sometimes angry and aggressive towards him and he feels scared and intimidated.

(3) Brigstock House

11. Many asylum seekers are screened by the Home Office at Lunar House in Croydon. Brigstock House is a hostel in Croydon for adult asylum-seekers. It is managed by the National Asylum Support Service, which is part of the Home Office. It usually provides temporary accommodation pending the "dispersal" of its residents to other parts of the country.
12. The Home Office only offers accommodation at Brigstock House to individuals who accept that they are, or whom the Home Office considers to be, adults. Where an asylum seeker is screened at Lunar House and the Home Office has doubts about his age, the Home Office will refer him to the Defendant, who will provide him with accommodation and support pending the completion of his age assessment.
13. When a resident of Brigstock House approaches the Defendant claiming to be a child, then:
 - (1) if the Defendant accepts that the individual is a child, the Defendant will provide accommodation and support to that individual; but
 - (2) otherwise, the Defendant will carry out an age assessment (or persuade another authority to do so), but will not offer accommodation or support to the individual pending the completion of that age assessment.

14. The Claimant contends that Brigstock House is unsuitable for children. The practice of the Home Office and of the Defendant tends to support this contention. The Home Office would not provide accommodation in Brigstock House to a person whom they believed was or might be a child. The Defendant would remove a person from Brigstock House if it believed him to be a child.

(4) The Defendant's Statutory Duties and Powers

15. The Claimant relied, in particular, on sections 17 and 20 of the Children Act 1989 and section 11(2)(a) of the Children Act 2004. I was also referred to section 1(1) of the Localism Act 2011.

(4)(a) Section 17 of the Children Act 1989

16. Subsections 17(1) and (6) of the Children Act 1989 provide as follows:

“(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

(a) to safeguard and promote the welfare of children within their area who are in need; and

(b) ...,

by providing a range and level of services appropriate to those children's needs.”

“(6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash.”

17. Subsection 17(10) of the Children Act 1989 defines what is meant by a child being “in need”. It is not disputed that, if the Claimant is a child, he is “in need”.
18. Paragraph 1 of Schedule 2 to the Children Act 1989 requires every local authority to take reasonable steps to identify the extent to which there are children in need within their area. In paragraph 32 of his speech in *R. (G) v. Barnet London Borough Council* [2004] 2 A.C. 208 Lord Nicholls held that:

“The first step towards safeguarding and promoting the welfare of a child in need by providing services for him and his family is to identify the child's need for those services. It is implicit in section 17(1) that a local authority will take reasonable steps to assess, for the purposes of the Act, the needs of any child in its area who appears to be in need.”

19. It is not alleged that the Defendant has carried out such an assessment in the present case.

(4)(b) Section 20 of the Children Act 1989

20. Subsection 20(1) of the Children Act 1989 provides as follows:

“(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) ...;”

21. When a local authority provides accommodation for a child pursuant to this subsection, that has consequences beyond the mere provision of accommodation. That is because the local authority is then “looking after” the child for the purposes of section 22 of the Children Act 1989, which imposes additional obligations on the local authority.
22. The Defendant contended that, even if the Claimant is a child, he is not someone “who appears to [the Defendant] require accommodation,” because he is already being accommodated in Brigstock House. I will consider this argument later. Subject to that argument, the Defendant accepted that, if the Claimant is a child, the Defendant owes him the duty imposed by subsection 20(1) of the Children Act 1989.

(4)(c) Section 11 of the Children Act 2004

23. Section 11 of the Children Act 2004 applies to the Defendant. Subsection (2)(a) provides as follows:

“Each person and body to whom this section applies must make arrangements for ensuring that—

(a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;”

24. I note that the functions referred to in this section are not limited to social services functions.

(4)(d) Section 1 of the Localism Act 2011

25. The provisions of sections 17 and 20 of the Children Act 1989 concern the Defendant’s duties to children. The Claimant may be a child, but he may be an adult. It was not disputed that the Defendant would have power to provide support and assistance to the Claimant pending the completion of his age assessment, even if he is in fact an adult. I asked the parties to identify the statutory basis for this, and they referred to section 1(1) of the Localism Act 2011, which provides as follows:

“A local authority has power to do anything that individuals generally may do.”

(5) The Statutory Guidance

26. The Claimant contended that the Defendant ought to follow the guidance contained in *Care for unaccompanied and trafficked children* (“the Statutory Guidance”), which was issued in July 2014 by the Secretary of State.

(5)(a) The Provisions of the Statutory Guidance

27. Paragraph 1 of the Statutory Guidance contains an uncontroversial, but important, statement of the context in which the issues arising in this case fall to be decided:

“Unaccompanied asylum seeking children and child victims of human trafficking are some of the most vulnerable children in the country. Unaccompanied children are alone, in an unfamiliar country and are likely to be surrounded by people unable to speak their first language. ... Both groups may have experienced emotional trauma in their country of birth, in their journey to the UK or through their treatment by adults in the UK. They are likely to be uncertain or unaware of who to trust and of their rights. They may be unaware of their right to have a childhood.”

28. Paragraph 22 of the Statutory Guidance is headed “Age determination”. It begins as follows:

“Many unaccompanied and trafficked children arrive in the UK without documentation or with fake documents. Where the age of a person is uncertain and there are reasons to believe that the person is a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with Article 10(3) of the European Convention on Action against trafficking in Human Beings.”

29. The second sentence of paragraph 22 accurately reflects Article 10(3) of the European Convention on Action Against Trafficking in Human Beings. However, it is not suggested that that Convention applies to the Claimant, and consequently the second sentence of paragraph 22 does not apply to the Claimant.

30. The Claimant relied primarily on the third sentence of the definition of “child” in the first sub-paragraph of paragraph 7 of the Statutory Guidance. That definition is in the following terms:

“Child: anyone who has not yet reached their 18th birthday. ‘Children’ therefore means ‘children and young people under the age of 18’ throughout this guidance. Note that, where the person’s age is in doubt, they must be treated as a child unless, and until, a full age assessment shows the person to be an adult.”

(5)(b) The Construction of the Statutory Guidance

31. The Claimant contended that the third sentence of this definition applied to him and that the effect of the Statutory Guidance was that he must be treated as a child unless, and until, a full age assessment showed him to be an adult. For the Defendant, Mr. Harrop-Griffiths contended that this sentence did not, on its true construction, apply to

the Claimant. He contended that it was no more than a reference to the second sentence of paragraph 22. In support of that contention are: the fact that paragraph 7 merely sets out definitions; and the fact that there is no other substantive provision in the body of the Statutory Guidance to which the final sentence of the definition of “child” could be referring.

32. I accept that it is an unusual drafting technique for an important substantive provision to be contained in a definition, and not referred to elsewhere. Nevertheless, the Claimant’s construction seems to me to be the correct one.

(5)(c) The Obligation to “Act Under” the Statutory Guidance

33. The Statutory Guidance was issued pursuant to section 7 of the Local Authority Social Services Act 1970 (“the 1970 Act”), which provides as follows:

“Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State.”

34. Section 1A of the 1970 Act provides that a local authority’s “social services functions” are its functions under the enactments listed in Schedule 1 to the 1970 Act. Those enactments include Part III of the Children Act 1989 (which includes sections 17 and 20). They do not include any provisions of the Localism Act 2011.

35. Mr. Harrop-Griffiths submitted that section 7 of the 1970 Act does not apply to the Statutory Guidance insofar as it concerned the provision of support and accommodation to individuals who are in fact (and are subsequently determined to be) adults, since the provision of support and accommodation to adults does not fall within the scope of the Children Act 1989 and therefore is not a social services function for the purposes of section 7 of the 1970 Act.

36. In my judgment, this submission takes too narrow a view of the scope of section 7 of the 1970 Act. A local authority is exercising its social services function of providing support for children not merely when it actually provides that support, but also when it carries out ancillary functions such as determining which individuals are and are not children, and dealing with individuals whose age is yet to be determined.

37. This conclusion is reinforced by the consideration that there would otherwise be a curious gap in the scope of section 7 of the 1970 Act as it applies in this case. By agreeing to carry out an age assessment in the Claimant’s case, the Defendant has accepted that the Claimant is someone who may be a child. Mr. Harrop-Griffiths submits that section 7 of the 1970 Act does not apply if the Claimant is in fact an adult, but that will not be determined until the age assessment has been completed. Meanwhile, however, the Claimant may be a child and, if he is in fact a child, that is a fact which, although it remains to be determined, currently exists. The consideration that the Claimant might prove to be an adult would not excuse the Defendant from the duties which it currently owes to him, if he is in fact a child, to exercise its social security functions.

38. It follows that the Defendant was obliged to follow the Statutory Guidance and to treat the Claimant as a child unless there were cogent reasons for departing from the

Statutory Guidance (see *London Borough of Tower Hamlets v. The Queen on the application of X* [2013] EWCA Civ 904, at paragraph 34).

39. Finally, I note that, if I were wrong about the scope of section 7 of the 1970 Act, then it would be necessary to consider the potential application of subsection 11(2)(a) of the Children Act 2004. As I have already pointed out, this subsection is not limited to social services functions. It is certainly arguable that arrangements for treating people in the Claimant's position as children would be arrangements for ensuring that the Defendant's functions were discharged having regard to the need to safeguard and promote the interests of children.

(6) The ADCS Guidance

40. The Claimant also relied on the *Age Assessment Guidance* ("the ADCS Guidance") published in October 2015 by the Association of Directors of Children's Services ("the ADCS").

(5)(a) The Authorship of the ADCS Guidance

41. Section 7 of the 1970 Act does not apply to the ADCS Guidance. However, its authors had considerable expertise in their field, as the Acknowledgments section makes clear:

"This guidance has been written by a group of specialist social workers and practitioners from local authorities and non-governmental refugee and legal sectors. We acknowledge the help and advice we have been given by other professionals and interested parties through feedback on drafts, as well as the guidance and oversight of members of the Age Assessment Strategic Oversight Group. The group was established by the Association of Directors of Children's Services and included representatives from the Home Office, Department for Education, Department of Health, Office of the Children's Commissioner for England, Royal College of Paediatrics and Child Health, United Nations High Commissioner for Refugees, British Red Cross, National Policing, Refugee Children's Consortium and Refugee Council. Feedback was provided by the British Association of Social Workers, British Red Cross, Coram Children's Legal Centre, Devon and Cornwall Refugee Support, Freedom from Torture, NSPCC, United Nations High Commissioner for Refugees, and a host of social workers around the UK."

42. When the ADCS Guidance was published, the Defendant's Director of Children's Services was Mr. Greenhalgh. He was also the Chairman of the ADCS's Asylum Taskforce, which was a sub-committee of the ADCS's Families, Communities & Young People Policy Committee. The Asylum Taskforce was responsible for endorsing the ADCS Guidance.

(5)(b) The Content of the ADCS Guidance

43. Pages 3-4 of the ADCS Guidance contain the following definitions:

“In this guidance, our use of the words “children” and “young people” has been very deliberate. In the majority of cases, we use the word “child” when it is very clear we are discussing an individual that is under the age of 18. We use the term “young person” when we are not yet sure whether the individual is under 18, but if they could very well be.”

44. Pages 10-11 of the ADCS Guidance contain a section entitled “Suitable accommodation” which states, inter alia, as follows:

“You will need to plan for suitable accommodation before, during and after the assessment. See the Department for Education statutory guidance on the ‘Care of unaccompanied and trafficked children’ for more help and information with regard to this.

Other than in exceptional circumstances, children and young people will be looked after under Section 20 of the Children Act 1989 whilst the age assessment process continues. ...”

“Bed and breakfast accommodation is not suitable for any child under the age of 18, even on an emergency basis.”

45. Pages 32-33 of the ADCS Guidance contain a section entitled “Conclusion” which states, inter alia, as follows:

“Social workers are justifiably concerned about the implications of taking an unknown adult into their care, and potentially placing them with vulnerable children. Many social workers have limited options when it comes to placement, but any placement decision should be taken carefully, taking into account the needs of anyone already in the placement, of the carers, and of the child or young person about whom you may know little at the start. The risks of placing a relatively unknown child or young person are mitigated by the fact that they will be supervised, either closely or at least on a regular basis by those employed to care for and support them. Where it becomes apparent that the placement is unsuitable because your understanding of the child or young person’s age and/or needs changes, you are able to intervene and make the necessary changes, through further planning and assessment. However, if your initial assessment means that the young person is no longer in your care then you will have no opportunity to continue to assess and change your perception unless the young person is supported in challenging your decision. This can prove difficult and time consuming, and irreparable damage may have been done before any challenge is resolved. Safeguarding the welfare of all children is the primary responsibility of social workers and any decisions about age and placement must be made with this in mind. Similarly, section 11 of the Children Act 2004 places other professionals under a duty to have regard to the need to safeguard and promote the welfare of children.

The dangers inherent in not taking a child into your care are multiple. With regard to their care, a child who is being treated as an adult will not receive the support given by local authorities which is deemed necessary for other

children and includes having safe accommodation, the support of a social worker and a foster care or keyworker/support worker, and support with all the other things a child needs, including access to education and health care. ...”

“In many cases it will not be possible to know definitively the age of the child or young person with whom you are working. Where there is doubt about whether or not the young person is a child, the dangers inherent in treating a child as an adult are in almost all cases far greater than the dangers of taking a young adult into your care.”

46. Appendix E to the ADCS Guidance is entitled “Accommodation and placements” and states, inter alia, as follows:

“The following principles should guide decision-making on placements for unaccompanied children and young people:

The accommodation must be safe, both for the child or young person and any other children living in the placement (for example, children and young people should not be placed with unknown adults. Similarly, young people who may be adults, but have not yet been assessed should not be placed in foster placements with other children).”

47. Thus, the ADCS Guidance reinforces the Statutory Guidance that, where a person’s age is in doubt, they must be treated as a child unless, and until, a full age assessment shows the person to be an adult. The ADCS Guidance also supports the Claimant’s contention that Brigstock House is unsuitable for children, since it states that children should not be placed with unknown adults.
48. The ADCS Guidance supports a contention made by the Defendant, namely that young people such as the Claimant who may be adults should not be placed with children. However, it also refers to ways of mitigating the risk of placing a “relatively unknown ... young person” (i.e. someone who may or may not be a child).

(5)(c) The Status of the ADCS Guidance

49. The Claimant contended that the Defendant was obliged to follow the ADCS Guidance unless it had cogent reason to depart from it. The Claimant contended that this followed from the judgment of Kenneth Parker J. in *Ali v. London Borough of Newham* [2012] EWHC 2970 (Admin). The Defendant disputed this, pointing out that that judgment concerned guidance which, although not subject to section 7 of the 1970 Act, had been issued by the Secretary of State.
50. I do not find it necessary to decide this issue. However, it is plain that the ADCS Guidance is relevant to any consideration of whether the Defendant had cogent reasons for departing from the Statutory Guidance, both because of the expertise of its authors and because of the involvement in its production of the Defendant’s own Director of Children’s Services.

(6) Departure from the Statutory Guidance

51. I am not persuaded that the Defendant had good reason for departing from the Statutory Guidance in this case. In that respect, I begin by observing that the Defendant has not offered any justification for its failure to carry out the assessment implicitly required by section 17 of the Children Act 1989. Its evidence and submissions focused instead on the issue of accommodation.
52. I accept that the presence of Lunar House and Brigstock House in Croydon may impose a particular burden on the Defendant's resources. However, the Defendant did not adduce any evidence on this point or its implications for the present case.
53. The only evidence adduced by the Defendant consisted of a statement by Mr. Richard Moorhouse, a social worker manager with the Defendant. He said that where a resident of Brigstock House approaches Croydon claiming to be a child, the age assessment is often expedited and undertaken within a few days. This is not such a case, and I say nothing about such cases.
54. Mr. Moorhouse went on to say that:

“The reason why Croydon does not automatically accommodate a Brigstock House resident pending age assessment or review is that he will have been through an initial screening process carried out by the Home Office and will have been considered to be an adult.”
55. In my judgment, this is not a good reason for departing from the Statutory Guidance in this case. Ex hypothesi, by agreeing to carry out an age assessment, the Defendant has disagreed with the Home Office's initial assessment that the Claimant is definitely an adult. It cannot be right that the Defendant can justify a departure from the Statutory Guidance by reference to a Home Office assessment with which it disagrees.
56. Another issue raised by Mr. Moorhouse in his statement is that “one has to consider safeguarding issues, i.e. the possibility of placing adults with young persons.” As I have said, as a general consideration, this is supported by the ADCS Guidance. However, the Defendant's evidence does not go so far as to state that the Defendant has nowhere safely to accommodate the Claimant.
57. Another argument advanced by Mr. Harrop-Griffiths was that Brigstock House can provide appropriate accommodation for a person such as the Claimant if accompanied by “welfare checks”. This is related to his argument that the Claimant was not a person “who appears to [the Defendant] to require accommodation” for the purposes of section 20 of the Children Act 1989.
58. The starting point is that Brigstock House is unsuitable for children. The Defendant's practice is to remove children from Brigstock House. I do not rule out the possibility that special measures might be taken so as to render suitable accommodation which would otherwise be unsuitable for a child. Any such arrangements would no doubt have to be subject to careful scrutiny. But in the present case the only evidence of “welfare checks” concerned one telephone call made on 31 October 2016. Again, that does not in my judgment amount to a good reason for departing from the Statutory Guidance.

59. For the sake of completeness, I should record that Mr. Harrop-Griffiths appeared at one stage in his submissions to be advancing an argument that the Defendant need not follow the Statutory Guidance because it was simply wrong. However, when I pointed this out, he did not pursue that argument any further.

(7) Summary

60. In my judgment, it is unlawful for the Defendant not to observe the Statutory Guidance and not to treat the Claimant as a child pending the determination of his age assessment.