

R (FZ) v London Borough of Croydon [2011] EWCA Civ 59:

Guideline Case on Correct Test at Permission Stage in an Age Dispute Case

On 1st February 2011, the Court of Appeal handed down its judgment in *R (FZ) v LB of Croydon [2011] EWCA Civ 59* and found in favour of the Appellant, an unaccompanied asylum-seeking minor, on all three grounds of his appeal.

This appeal presented an important opportunity for the Court of Appeal to set down the correct approach that the Administrative Court ought to take when considering the question of permission to seek judicial review in age dispute claims. The Court of Appeal also took the opportunity to lay down guidelines on the proper conduct by a local authority of an initial assessment of age.

The Appeal

The Appeal to the Court of Appeal (Sir Anthony May (President of the QBD), Smith LJ and Aikens LJ) raised three important questions.

- (i) whether a local authority is obliged to give the person whose age they are assessing an opportunity to respond to provisional adverse findings which they are inclined to make;
- (ii) whether the local authority should in fairness offer the young person the opportunity to have an appropriate adult present at any age assessment interview; and
- (iii) how the court should address the question of whether the factual issue of the young person's age is arguable; should it start by assessing the person's positive claim, or should it first examine the apparent integrity of the local authority's assessment?

Summary of Outcome:

The Appeal was allowed on all three grounds for the following reasons:

- (i) It is axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him: §21 of the judgment.
- (ii) A putative child should be offered the opportunity to have an appropriate adult present for the age assessment interview not least because he claims to be a child and he is vulnerable: §§23-25.
- (iii) The correct question for a judge considering permission in an age dispute claim is to 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. Otherwise permission should be granted: §§9 & 26
- (iv) The burden of proof does not feature at the permission stage. What the Claimant has to demonstrate is that he has a properly arguable case on the facts in the light of the evidence before the court, the local authority's assessment and other relevant facts or circumstances: §7.
- (v) There should be no starting presumption by the reviewing court that the local authority's decision was correct: §§6 & 27.
- (vi) Questions of general credibility are not sufficient for the court to refuse permission for a factual hearing. The Court would not necessarily be bound to make the same judgments as the assessing social workers. It is for the Court to determine for itself the fact of the young person's age: §29.

Facts of the Appeal

FZ is an unaccompanied asylum seeker from Iran who claims to have been born on 28th December 1993 and thus is now 17 years old. His claimed date of birth was accepted by the UK Border Agency on arrival in August 2009, and he was referred for child welfare services. The London Borough of Croydon disputed his age and eventually concluded that he was two years old than he claimed to be, being born in 1991 and now being 19 years old. FZ suffers from Post-Traumatic Stress Disorder and associated mental health difficulties including self-harming.

The initial age assessment was carried out in early September 2009 by two social workers. No appropriate adult was offered to FZ for the age assessment. He did not know what the purpose of the meeting was until he arrived for the assessment. At the end of the assessment, he was informed of the conclusion reached by the two assessors without being first given the opportunity to deal with adverse impressions relied upon for the disputed age. He was not provided with sufficiently detailed reasons to know what the main adverse points were which had influenced the decision.

A subsequent review was limited to consideration of a vaccination record produced on behalf of FZ. FZ was asked questions about the record, again without being offered an appropriate adult of his choice although a key worker was present. Croydon maintained that FZ was older than claimed as they did not accept that the vaccination record was proof of identity or date of birth.

Judicial review proceedings were issued challenging the council's assessment. Permission was refused by James Dingemans Q.C. sitting as a deputy High Court Judge on 26th November 2010. Permission to appeal was granted by the President of the QBD on 21st December 2010 and the substantive appeal was heard on 12th January 2011.

Who does this affect?

Age disputed unaccompanied minors, local authority social workers and the High Court are all affected by this decision.

This is the first Court of Appeal judgment to bring clarity to the way age dispute claims should be handled by both local authority assessors and the Administrative Court in the light of the Supreme Court's decision in *R (A) v LB of Croydon [2009] UKSC 8[2010] 1 All ER 469*. This was indeed one of the reasons that Sir Anthony May, President of the QBD granted permission to appeal in the present appeal and expedited the substantive appeal for hearing on 12th January 2011.

On fairness

Importantly, the Court of Appeal affirmed the guidelines set down by Stanley Burnton J (as he then was) in *R (B) v Merton LBC [2003] EWHC 1689 (Admin)* and further outlined what fairness demands in an age assessment case.

In effect, the Court of Appeal stressed that where a provisional and adverse view is formed against the putative child then he must be given an opportunity to consider and deal with the adverse points relied upon against him. Whilst not wishing to be overly prescriptive, the Court of Appeal provided some indication (at §21) of how fairness could appropriately be achieved in an age assessment, cautioning against reliance on questioning in the course of the interview as a reliable way to ensure fairness in the assessment process.

Thus, in the all too common situation where a local authority provides a summary sheet of reasons to a putative child which is vague and non-descript that process does not comply with the basic principles of fairness. Equally, where no reasons are provided, the assessment cannot be said to have been completed fairly so as to be lawfully relied upon.

Underlying fairness requires local authorities to afford the putative child the opportunity to have an appropriate adult present for the assessment. Although Croydon represented that it was the local authority's policy to offer an appropriate adult, the Court of Appeal noted that no written policy had been produced.. Certainly, in the case of *FZ*, there was no evidence of an appropriate adult being offered to him at the initial assessment or at the subsequent review. Given the known mental health difficulties of the Appellant and the fact of his claim to be a child, the failure to offer him an appropriate adult was held by the Court of Appeal to be procedurally unfair.

In succeeding on both contentions as to fairness, the Appeal demonstrates that conventional attacks on the procedural defects in an age assessment remain relevant at the permission stage and go to demonstrating the unreliability of the local authority's assessment and conclusion on age, and in the *FZ* appeal contributed to the grant of permission to seek judicial review.

The Court of Appeal's decision on fairness further illustrates the need for uniform guidance so as to ensure a good quality and consistent approach is taken by local authorities across the board. As

Lady Hale observed in *A v Croydon, supra*, 'the better quality the assessment, the less likely the court would come to a different conclusion.' In the absence of uniform guidance, it is likely that local authorities will need to revise their internal procedures for assessing age so as to bring them in line with the principles set down in this Judgment.

The correct test at permission stage

Although the Court of Appeal was not inclined to reformulate the test set down by Holman J in *R (F) v Lewisham LBC [2009] EWHC 3542*, the Court gave important guidance on the practical effect of this test by drawing an analogy with the test used in *Alexander v Arts Council of Wales [2001] 1 WLR 1840*.

Applying the *Alexander* test to age assessment cases has three important consequences:

First, it sets a low threshold to overcome and preserves the important principle that the benefit of doubt is to be afforded to the child - a concept underpinned by the best interests of the child (Article 3) under the UN Convention on the Rights of the Child. ('UNCRC');

Second, it does not presume that the local authority's assessment of age is correct; and

Third, the test puts the parties to the dispute on an even footing. It does not unnecessarily assign the burden of proof to any one party at the permission stage. In fact, the Court of Appeal observed that the issue as to the burden of proof plays no role at the permission stage: §7 of the judgment.

This must be right when one thinks of how age dispute claims come about. When the claimant brings a claim for judicial review in an age dispute case, he effectively presents the court with a proposition that he is the age he claims to be and provides material which he says supports that proposition. In circumstances where the judge notes that there is material supporting that proposition, unless the local authority can conclusively rebut that proposition, permission should normally be granted and the matter should proceed to the substantive fact-finding stage.

This acknowledges the precise reason for which a dispute about age arises. Although the young person may have some knowledge/evidence of his age, he does not have *proof* of his age, thus triggering the need for an age assessment. To impose a burden in those circumstances on a young person to *prove* his age would be unduly harsh and misunderstand the underlying principle of *Merton*, i.e. a holistic assessment of all of the evidence available.

If you have questions about any of the issues raised by this case, please feel free to contact us. We would be happy to discuss the case further with you.

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