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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JR194
FOR JUDICIAL REVIEW (No: 2)

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr Hugh Southey KC with Mr Robert McTernaghan (instructed by Phoenix Law Solicitors) for the Applicant
Mr Philip Henry KC (instructed by the Crown Solicitor's Office) for the Respondent

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COLTON J

Introduction

[1] This application raised two issues. Firstly, there was a dispute between the parties as to the assessment of the applicant's age. The court gave judgment on this issue on 6 June 2024 – *JR194, JR235 and JR256* [2024] NIKB 46.

[2] Secondly, the applicant complained about the delay in the determination of his claim for asylum.

[3] This judgment deals with the delay issue. It should be read in conjunction with the judgment delivered on 6 June 2024 for a full understanding of the background and circumstances of the application.

Factual background

[4] The factual background is set out in the judgment delivered on 6 June 2024 as follows:

"[2] The applicant is a Somali national. He came to the attention of the authorities in the United Kingdom in August 2019. He claimed asylum on 5 September 2019. He gave his date of birth as 22 April 2003. On 29 September 2019 he submitted his statement of evidence to the Home Office as the Single Competent Authority ("SCA") in support of a trafficking claim.

[3] He submitted a statement in support of his asylum claim on 9 December 2019. This included an account of his travels through Europe before reaching the United Kingdom. It transpired the applicant had claimed asylum in several countries. Under Regulation (EU) No.604/2013 ("the Dublin III Regulations"), the first country in which he claimed protection would have been deemed responsible for dealing with his case. However, the Covid pandemic and Brexit both intervened. The UK accepted it would deal with the applicant's case.

[4] In accordance with standard practice at that time a EURODAC search was undertaken. The search was based on the use of fingerprints. Everyone aged 14 years or over who claims asylum or international protection in participating countries is fingerprinted.

[5] The search revealed that his prints were taken in other participating States and recorded on the EURODAC system on the following dates:

- 9/6/15 - Finland (KEMI);
- 9/12/16 – Germany (Nuremberg);
- 15/2/17 – Germany (Hamburg);
- 18/10/17 – Germany (Neumünster);
- 8/9/18 – Sweden.

[6] As a result of this information requests under Article 34 of the Dublin III Regulations were made.

[7] The immigration authorities in Finland and Sweden confirmed that he claimed asylum there, and in Germany, before arriving in the UK.

[8] On 29 September 2020, the Home Office received a reply from the Swedish authorities confirming the applicant presented under a different identity, born on 22 April 2003 when he claimed asylum. Mr Henry has

confirmed that the applicant's name is not contentious in this case, only his date of birth.

[9] On 2 October 2020, the Home Office received a reply from the Finnish authorities confirming that the applicant was refused asylum there after presenting as an adult born on 1 September 1993. He absconded from Finland. The Finnish authorities confirm the applicant claimed asylum in Germany. Finland agreed to a take-back request made by Germany, but the applicant absconded before it could be actioned.

[10] Meanwhile in this jurisdiction, on 1 April 2020, a Care Order pursuant to Article 50 of the Children (Northern Ireland) Order 1995, in respect of the applicant was made in favour of the Belfast Health and Social Care Trust ("the Trust") by HHJ Miller KC. This was on the basis that the applicant was a child in accordance with his claimed date of birth of 22 April 2003.

[11] On 18 September 2020, the SCA decided the applicant was "a victim of modern slavery" in 2013 and 2018.

[12] In November 2020, the respondent informed the applicant's social worker of the information from Finland and Sweden and asked that an age assessment be carried out.

[13] The Trust reacted by emailing all of those involved with the applicant in Northern Ireland on 27 November 2020 setting out the information that had been provided by the respondent. The email concluded:

> "Could we devise a co-ordinated plan of how this information will be approached with (JR194)."

It did not include the respondent in this discussion. On 27 November 2020, the applicant's solicitor replied providing the Trust with general observations about reasons why asylum seekers sometimes supply the wrong date of birth to authorities. The email indicated that she would obtain clear instructions from the applicant to confirm the situation. In the correspondence the applicant's solicitor wrote:

"Given that there has been no concerns regarding (JR194's) age since his arrival in the UK, I would strongly advise the Trust to state to the Home Office that there are no concerns with [the applicants'] age."

[14] On 1 December 2020, the applicant's solicitor wrote to the applicant's social worker, the Trust and Barnardo's in the following terms:

'Hi all

Further to my consultation with (JR194), I have had the following confirmed:

1. (JR194) states that he was also in Greece with the adult referred to in the below email. This adult advised (JR194) to state that he was an adult, indeed, we believe the date of birth was given to the services on his behalf. (JR194) states that the authorities queried whether he was younger than what was stated, and after investigation, it was determined that he was a child.

2. The adult who was with him told (JR194) that if he were to say his true age, that would only cause problems for him in the future. In Sweden and Finland, the adult once again pressured (JR194) into stating that he was an adult.

3. In Sweden, (JR194) was on his own out getting milk one day and was arrested by the authorities (presumably for having no status) and it was then that he stated his real age without the pressure of the adult who was with him. (JR194) states that he was then age assessed in Sweden by a medical professional and determined to be a child as he had stated.

All of the above confirms my previous suspicions that (JR194) was pressured by the

> adult that was with him to state an incorrect age. Again, it is commonplace that young people in this position do claim that they are adults. I would strongly advise against any age assessment in light of the above, and in light of the fact that no doubts or queries were raised by any professionals in Northern Ireland about (JR194) since his arrival over a year ago. I would also strongly advise the Trust to get back to the Home Office without delay, as I understand that scheduling substantive interviews is imminent, and (JR194) has been waiting for an extremely long time for his interview. It is to his credit that he has displayed such patience in what has been a frustrating and traumatising wait for him. …'

[15] On 16 December 2020, a social worker on behalf of the Trust attempted to send a one sentence email to the Home Office declining the request to conduct an age assessment. I say attempted because it emerged from the affidavit evidence that the email, refusing to do the age assessment, was addressed to the wrong person and the wrong email address. Thus, it never arrived with the respondent. The court has now seen that email which indicates that having spoken to the various individuals involved, including the applicant's solicitor, the guardian ad litem and the key worker, the social worker/Trust was not going to conduct an age assessment:

> 'There is no information to suggest an age assessment was required.'

[16] The respondent sent emails to the Trust on 22 April 2021, on 29 April 2021 and 6 May 2021 in respect of the request for an age assessment.

[17] In the meantime the asylum application proceeded. In support of the application a psychiatric report was prepared by a Dr Labeeb Ahmed which was sent to the respondent on 27 January 2021.

[18] The applicant had his asylum interview with the respondent on 22 February 2021. The interview was conducted remotely because of public health issues arising from the Covid-19 pandemic. The interview

commenced but had to be terminated early because the applicant became upset.

[19] The applicant draws the court's attention to the fact that when taking the basic information on the first page, the interviewer did not tick a box which signals that age is disputed.

[20] Between May and September 2021, the applicant's solicitor was in regular contact with the Home Office seeking an update on the applicant's application.

[21] On 14 October 2021, a pre-action protocol letter was written on behalf of the applicant challenging the ongoing failure to make a decision in respect of the applicant's claim. Proceedings were issued on 19 November 2021 and leave was granted on 3 December 2021.

[22] On 23 December 2021, the respondent received further information from the Finnish authorities in the form of a school report, which contained a photograph of the applicant. The date of birth on the report was 1 September 1993.

[23] On 21 January 2022, the respondent wrote to the applicant's solicitor to request a further substantive interview with the applicant. The applicant's solicitor responded by stating that he had already been interviewed. The respondent replied, saying that the request had been made in error. Later that day the respondent wrote once more to the applicant's solicitor asking for the substantive interview to take place. An interview slot had been reserved for 24 January 2022 to allow the applicant to address evidence provided by the Finnish authorities and to address the respondent's continued concerns over his age.

[24] On 22 January 2022, the applicant's solicitor emailed the respondent to say that their legal representatives would not be able to accommodate an interview at such notice. Further, she advised she would need to take instructions on whether the applicant was fit for interview. As a consequence, the interview was cancelled.

[25] On 25 January 2022, the respondent wrote to the applicant's solicitor asking for a consent form to share medical details. Given that it was not possible to convene the interview at such short notice, the respondent sent six questions in writing to the applicant's solicitor on that date. Written questions and answers were to be used in lieu of an interview. However, the six questions put in writing were not answered. Instead, the solicitor's response of 28 January 2022 referred to a decision of Mr Justice Friedman and the respondent's Guidance document and asked how both had been considered. The guidance document was published on 26 November 2021 entitled "Eurodac and article 34 information for age assessment purposes." It states that "a degree of caution should be exercised using information obtained from Eurodac and article 34 of the Dublin III Regulation for age assessment purposes. One credible explanation for conflicting accounts of age was stated to be:

> 'The claimant could be a potential victim of exploitation or modern slavery and had been coerced by the perpetrators to claim to be an adult, to reduce the likelihood that their predicament would come to the attention of authorities and impede their exploitation by the perpetrators.'

[26] On 26 January 2022, the applicant's solicitor responded with the consent form in relation to medical details.

[27] On 10 June 2022, the respondent granted the applicant's asylum claim and he was granted refugee status. She also determined that the applicant's date of birth was not as asserted by him but rather the decision was made on the basis that his date of birth was 1 September 1993.

[28] On 27 September 2022 the respondent's solicitor sent a letter to the applicant's solicitor setting out the reasons for arriving at the conclusion in relation to the applicant's age.

[29] By these proceedings the applicant challenges the delay in granting the applicant refugee status until 10

> June 2022. The applicant further challenges the decision regarding the applicant's date of birth."

It will be seen from the chronology that this was a complicated case. At the outset the applicant's case was hampered by difficulties arising from the restrictions in place arising from the Covid-19 pandemic, and thereafter uncertainty about his age. That said, there clearly were periods of delay.

[5] The court analysed the law in relation to age assessment. It concluded on the facts of this case that the respondent's assessment of the applicant's age was unlawful and, therefore, his challenge in respect of that issue succeeded.

Delay – the applicant's case

[6] The applicant challenges the delay between his claiming asylum and the granting of asylum on 10 June 2022.

[7] That claim is based on a submission that his article 8 rights are engaged by the delay in determining his asylum application. It is argued on his behalf, that there has been an unlawful interference with those because of the delay and, as a consequence, he is entitled to a declaration and damages.

[8] The engagement and interference with article 8 rights in the context of delay in making asylum decisions was dealt with by this court in a written judgment in the case of *JR247* on 13 September 2024 – [2024] NIKB 72.

[9] That judgment should be read in full for a proper understanding of this decision.

[10] In *JR247*, the court analysed the applicable legal framework in relation to delay in this context. The conclusion in that case and the related guidance are set out in paras [84]-[100] of that judgment in the following terms:

> "[84] From a review of the authorities, I conclude as per *EB* and *BAC* that delay in determining an asylum claim may result in a breach of an asylum seeker's article 8 rights. The obligation on the State is to provide a statutory framework under which asylum claims are assessed and which provide an enforceable judicial mechanism to protect any individual rights under that system. Such obligations include a duty to examine claims in a reasonable time.
>
> [85] What amounts to a reasonable time is fact specific. It is not for the courts to be prescriptive in terms of any time limits in this context. There is no specified period

within which, or at which, an immigration decision must be made.

[86] What is important is that the system provides consistent and fair outcomes.

[87] Turning to the facts of this case, the applicant focuses on the insecurity inherent in her situation and, in particular, the interference with her right to establish and develop relationships with other human beings and the outside world. In truth, this is a general assertion, which could be made in respect of any asylum seeker awaiting a decision. The applicant points to no relevant or significant relationships, unlike *BAC*, or the applicant in *EB*. The only specific issue she raises is that of her mental health.

[88] True it is that mental stability has been held to fall within the scope of article 8. In *Bensaid v United Kingdom* [2001] 33 EHRR 10, the applicant was an Algerian national who was a schizophrenic suffering from a psychotic illness. He arrived in the UK as a visitor in 1989 and married a UK citizen in 1993. Since 1994 and 1995 he has been receiving treatment for his medical condition. On the basis that the marriage had been one of convenience, however, the Home Secretary decided to remove him. Relying on articles 3 and 8 of the Convention the applicant claimed that his proposed expulsion to Algeria placed him at risk of inhuman and degrading treatment and would violate his right to respect for his private life. The court in its assessment acknowledged at para [47] that:

> 'Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world. The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.'

[89] However, on the facts of that case it held that the implementation of the decision to remove the applicant did not violate article 8 of the Convention.

[90] Turning to the facts of this case on the issue of mental health I note that the first time the issue of the applicant's mental health was raised on her behalf was in a letter of 8 September 2022. All that was said at that time was "this delay is unreasonable and impacting her mental health."

[91] In her initial screening interview, the applicant was asked about whether she had any medical conditions. She referred to the fact that she had been bitten by a dog and which had caused a significant injury to her leg. In relation to potential mental health issues, she stated:

> 'I don't sleep very well. I will be awake all through the night. I might have depression. I don't know. I'm always worried.'

[92] True it is that after the substantive interview on 20 October 2020, a note made by the interviewer said that the applicant was "displaying signs of trauma, no professional assessment made, I would point out there are symptoms there, she did answer she has no mental health issues, but I would imagine there is potential PTSD, those displays of trauma were apparent throughout the interview, due to her getting extremely upset and also talking about flashbacks."

[93] In relation to any other evidence before the court on this issue, the applicant simply avers that:

> '28. Since 13 October 2021, there has been a heightened urgency of my asylum claim and this delay has a great effect on my own mental health and well-being.
>
> 29. The delay has only exacerbated these problems.
>
> 30. I highlighted these problems to the proposed respondent in my SAI (see Q12-Q14).

> 31. I have discussed these problems with my GP, and I feel my life is currently in a state of limbo. I have been prescribed sleeping tablets from my GP which is under review.'

[94] Having considered this evidence, it is difficult to see that the applicant has established a sufficient evidential basis for saying that there has been infringement with her article 8 rights.

[95] The respondent recognised her potential vulnerability and mental health issues and immediately referred her to the NRM procedure. Whilst she has been awaiting a decision, she has been provided with accommodation and an ARC card. The respondent has been in regular contact with her solicitor who has been assiduous in looking after the applicant's needs. There is no suggestion that she has been denied any access to health services, indeed, the opposite appears to be the case. The sort of substantial prejudice envisaged in *Anufrijeva* is plainly absent.

[96] The circumstances of this case are markedly different from the situation in *BAC*. There the uncertainty experienced by the applicant "far surpassed that of an applicant" awaiting the completion within a reasonable time of his or her asylum procedure. In *BAC,* despite a positive indication, the applicant was still awaiting a decision more than 12 years after his claim. During that time, he pointed to very specific prejudice he suffered as a result of the restrictions on his status. Importantly, at the time of the court's decision he was still awaiting a decision.

[97] In this case, notwithstanding any delay, the applicant has received a positive outcome. This alone weighs strongly against any finding of a breach of article 8.

[98] It may well be that the decision in this case should have been taken earlier. Plainly the evidence establishes that there is a significant backlog in the determination of asylum applications. This appears to be attributable to a number of factors including the volume of applications and available resources to deal with them. The applicant has been a victim of that backlog. The court has received

an account of how her claim was dealt with from which it is clear that there were delays in deciding her application. Quicker, more effective decisions would be desirable. Quicker decision-making would undoubtedly improve the overall situation regarding claims for asylum. It is not, however, for this court to set out timescales or direct that additional resources be provided to ensure quicker decisions. The State has provided a statutory framework under which asylum claims are assessed and which provide an enforceable judicial mechanism to protect any individual rights under that system. That system produces fair and consistent outcomes which are subject to consideration and review by Tribunals and ultimately the High Court.

[99] In conclusion, I am not satisfied that the applicant has established a breach of her article 8 rights arising from any delay in determining her asylum application. The application for judicial review is therefore dismissed.

Guidance

[100] In terms of overall guidance in relation to claims alleging a breach of article 8 rights in the context of delays in making decisions in asylum claims, it seems to the court that the following principles should be applied:

(i) In certain circumstances delays in making decisions may give rise to a breach of an asylum seeker's article 8 rights.

(ii) The court cannot be prescriptive about what constitutes an unlawful period of delay.

(iii) An important factor will be whether an actual decision has been made. If a decision has been made, then it would only be in exceptional circumstances that a breach of article 8 will be established. If a decision is pending then the court will have to make an individual assessment of the period of delay, the reasons for any delay and whether a decision is imminent. Any delay must be so excessive as to be regarded as manifestly unreasonable. In a case such as *BAC* it was easy for the court to determine that the relevant delay was inexcusable.

(iv) In order to establish a breach of article 8 in any case, the applicant will need to point to specific evidence-based factors which demonstrate an interference with article 8 rights, above and beyond what one would expect of any person awaiting such an important decision. Any impact on private or family life must be serious. This could include factors pointing to serious deprivation such as homelessness, lack of medical attention required in respect of significant health issues, impact on the welfare of children and significant interference with family or personal relationships."

Application of the legal principles

[11] It will be seen that in this case a decision in favour of the applicant has been made. That being so, in light of the court's analysis, the applicant will need to demonstrate exceptional circumstances to establish a breach of article 8.

[12] The applicant argues that the delay in this case caused the applicant substantial harm in a number of respects. It is argued that it affected his mental stability as demonstrated by the reports from Dr Labeeb Ahmed, Consultant Psychiatrist, dated 22 January 2021 and correspondence from Dr Elaine Harrison, a Consultant Clinical Psychologist, to the applicant's general practitioner on 20 September 2021 and 17 January 2022.

[13] Furthermore, the delay left the applicant without any stable status for a considerable period. During this time, he was in a precarious situation that was likely to have impacted on his relationships.

[14] On a more fundamental level, the applicant complains that the respondent was in breach of its duty to determine asylum claims promptly.

[15] The report from Dr Ahmed indicates that at the time of his assessment the applicant was suffering from a moderate depressive episode and Post Traumatic Stress Disorder in accordance with the diagnostic criteria as set out in the ICD-10.

[16] This is entirely unsurprising having regard to the harrowing journey the applicant endured after his escape from Somalia in 2015 until his ultimate arrival in the UK in 2019. His mental health difficulties are primarily attributable to witnessing his brother's death in the course of their perilous journey by boat and his escape from the camp in Somalia. It is also significant that he was tortured during that four-year period.

[17] As to his symptoms in the UK and their relationship to his asylum application Dr Ahmed reports that the applicant "… is concerned that he does not have appropriate documentation to stay in the country."

[18] It was his assessment that "… ongoing under-treated mental health symptoms, the uncertainty regarding his stay in the UK and lack of support from his family in the UK has led to further deterioration of his mental health." Furthermore, Dr Ahmed reported that "the ongoing stress related to legal status in this country can lead to poor prognosis."

[19] This opinion was endorsed by a letter from the applicant's social worker dated 4 June 2021 where she advises "Social Services would appreciate if a decision could be made promptly in relation to (JR194's) asylum claim, as any delay could be detrimental to his mental and emotional wellbeing."

[20] In similar vein Dr Harrison, Consultant Clinical Psychologist wrote to the applicant's general practitioner on 20 September 2021 where she indicates that the applicant reported that "he has found it increasingly difficult in relationships due to the uncertainty with regard to his immigration status and the length of time it is taking to process this since his interview in February 2021." On 17 January 2022, she again wrote to the plaintiff's general practitioner indicating that she was continuing to review JR194 with the aim of promoting psychological stabilisation. At that time he was living in Barnardos in supported living accommodation, but it was understood he would be moving away from this in the near future. He was doing English classes and information technology classes. She confirmed that she would continue to review him in the short term. She felt that his unresolved immigration status was a contra indication to proceeding to trauma-focused intervention.

[21] He obviously feared deportation to Somalia and the potential peril he would face as a result.

[22] This documentation demonstrates that the applicant was someone who was suffering from mental health issues. There was a concern about the delay in his immigration status having an impact on those mental health issues.

[23] It is also clear from the medical reports that the applicant was receiving appropriate medical support throughout the period of delay.

[24] Dr Ahmed recommended psychiatric intervention and from the correspondence it is clear that he was being looked after by a general practitioner and a consultant clinical psychologist. He was in receipt of medication prescribed by Dr Richie, CAMHS Psychiatry.

[25] It is also clear that throughout the relevant time the applicant was being treated as a minor. He was subject to a care order of the court, and he had the benefit of support from social workers.

[26] There is no affidavit from the applicant setting out any particular issues other than those that are documented in the reports to which I have referred.

[27] I note that in Dr Ahmed's report he records under the heading "Current Social Situation" that "(JR194) reported that he does not have any financial difficulties. He has a few friends in the UK. He reported that he lives alone, and the accommodation staff are present downstairs."

[28] It is also clear from the report from Dr Harrison that the applicant was engaged in constructive activities. He was involved in an English course, an IT course and football practice.

[29] Returning to the guidance set out in the judgment in *JR247* I do not consider that the applicant can establish an interference with his article 8 rights. I fully accept that he found the entire process stressful. I further accept that that stress has contributed to his mental health difficulties.

[30] That said I do not consider that it meets the level of intensity required to establish a breach of article 8. The applicant's circumstances can be contrasted with the situation in *Bensaid*. The delay in question in that case was one of 11 years. The unsuccessful applicant was a schizophrenic suffering from a psychotic illness. He required in-patient treatment.

[31] In contrast the applicant in this case has received the appropriate medical treatment for his condition. He has been treated as a minor. He has been provided with appropriate accommodation. He has received support from social workers and has had full access to legal representation.

[32] In short, on the facts of this case it cannot be said that he meets the level of interference necessary to establish a breach of his article 8 rights.

[33] Judicial review in respect of the applicant's complaint in respect of delay is therefore refused.