Neutral Citation No: [2021] NIQB 57	*Ref:*	**COL11491**
	ICOS No:	**17213/01**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**25/05/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY JR141 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION TO DISPUTE THE AGE OF THE APPLICANT

AND IN THE MATTER OF A REQUEST UNDER ARTICLE 34 OF REGULATION (EU) No. 604/2013 TO OBTAIN INFORMATION AND PERSONAL DATA RELATING TO THE APPLICANT AND SUBSEQUENT RETENTION AND PROPOSED USE OF THAT DATA

_____

Ms Helena Wilson (instructed by Phoenix Law Solicitors) for the Applicant
Mr Philip Henry (instructed by the Crown Solicitor's Office) for the Proposed Respondent

_____

COLTON J

Background

[1] The applicant entered the United Kingdom ("the UK") on 2 October 2019. He came to the attention of the authorities when he was travelling through Belfast with the aim of getting to England. He provided his name and asserted that he was a national of Eritrea with a date of birth of 15/11/02, which made him 16 years of age at that time. He had no documents or other evidence substantiating his name, nationality or age.

[2] He was referred to the Gateway Team at the Belfast Trust and was allocated a social worker and independent guardian as an unaccompanied asylum seeking child.

[3] It therefore falls on the proposed respondent, the Secretary of State for the Home Department ("SSHD") to determine the applicant's claim for asylum or international protection.

Chronology

[4] The chronology is as follows:

22/11/2019 Welfare interview conducted with the SSHD.

07/03/2020 Statement of evidence and supporting statement lodged on behalf of the applicant with SSHD.

Thereafter, there is a delay in arranging the applicant's substantive asylum interview because of the restrictions imposed arising from the Covid-19 pandemic.

There was correspondence on behalf of the applicant from his solicitor to the SSHD requesting that the case be decided on the papers, including pre-action protocol correspondence.

03/08/2020 The SSHD write to the applicant's solicitors indicating that an interview will be conducted within 16 weeks.

03/11/2020 The SSHD make a request for information concerning the applicant from Germany and Italy pursuant to Article 34 of Regulation 604/2013/EU.

25/11/2020 The SSHD request the Trust to carry out an age assessment of the applicant as a result of information received pursuant to the Article 34 request.

27/11/2020 The Trust confirms that it will not undertake any age assessment of the applicant.

17/12/2020 SSHD invitation letter for interview.

18/12/2020 Pre-action Protocol letter sent on behalf of the applicant challenging the Article 34 request and seeking an undertaking that no questions would be asked at interview concerning any data obtained as a result of the request.

22/12/2020 PAP response sent to applicant's solicitor.

22/12/2020 Substantive interview conducted via Skype in the course of which the SSHD referred to data obtained pursuant to the Article 34 request.

02/03/2021 Application for leave to apply for judicial review together with Article 53 Statement lodged.

The applicant's case

[6] The applicant challenges the SSHD decision to obtain information and data on the basis of Article 34 of Regulation 604/2013 EU and its proposed reliance upon that information in assessing the applicant's international protection claim.

[7] The applicant also challenges the decision of the SSHD to dispute his age in the course of the substantive interview.

[8] In short form the applicant contends that the SSHD did not comply with the requirements of Article 34 and that the information obtained as a result of the request was therefore obtained in breach of the Regulation and also was obtained unlawfully, constituting a breach of section 2(1)(a) of the Data Protection Act 2018. He further argues that the information was obtained in breach of the SSHD's own policy – "Dublin III Regulation – Transferring asylum claimants into and out of the UK where responsibility for examining an asylum claim lies with the UK or another EU Member State or Associate State."

[9] The applicant further contends that the request for personal data was in breach of section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the SSHD to discharge her functions with regard to the need to safeguard and promote the welfare of children.

[10] It is further submitted that the decision to request the data was in breach of section 6 of the Human Rights Act 1998 insofar as the request breached his protected Article 8 private life rights.

[11] The challenge in relation to the issue of the applicant's age is based on the fact that the Trust and social services who have cared for the applicant since 2 October 2019 have indicated that they will not carry out any age assessment of the applicant.

The applicable law

[12] Regulation EU No. 603/2013 provides for a system known as "EURODAC" to be established with the purpose of assisting and determining which Member State is responsible under Regulation (EU) 604/2013 (The Dublin III Regulations) for the examination for a claim for international protection lodged by a third country national. Article 11 of the EURODAC Regulations provides a list of data which is permitted to be stored in respect of an applicant for international protection in the central system.

[13] The Dublin III Regulations provide the criteria and mechanisms for determining the Member State responsible for examining a claim lodged in one of the Member States for international protection.

[14] Article 8 of the Dublin III Regulations provides that where the applicant for international protection is an unaccompanied minor, the State responsible is the one where a family member is legally present. In the absence of such a family member the Member State responsible is the State where the unaccompanied minor applicant has lodged his or her claim for international protection.

[15] Under Article 23 Member States can lodge a "take back" request to another Member State if that State is the one properly responsible for determining an application under the Regulations.

[16] The key provision in this application is Article 34 of the Regulations which sets out provisions for obtaining information between Member States.

[17] Article 34(1) provides as follows:

> "***Information Sharing***
>
> 1. *Each Member State shall communicate to any Member State that so requests such personal data concerning the applicant as is appropriate, relevant and non-excessive for:*
>
> *(a) Determining the Member State responsible;*
>
> *(b) Examining the application for international protection;*
>
> *(c) Implementing any obligation arising under this regulation."*

[18] Paragraph 2 provides the type of information referred to in paragraph 1 and provides as follows:

> *"2. The information referred to in paragraph 1 may only cover:*
>
> *(a) Personal details of the applicant, and where appropriate, his or her family members, relatives or any other family relations (full name and where appropriate, former names, nicknames or pseudonyms, nationality, present and former, date and place of birth);*

(b) *Identity and travel papers (references, validity, date of issue, issuing authority, place of issue, etc);*

(c) *Other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with the Regulation (EU) No. 603/2013;*

(d) *Places of residence and routes travelled;*

(e) *Residence documents or Visas issued by a Member State;*

(f) *The place where the application was lodged;*

(g) *The date on which any previous application for international protection was lodged, the date on which the present application was lodged, the stage reached in the proceedings and the decision taken, if any."*

[19] The Article provides for the facility to seek more detailed information but such a request involves a higher threshold for the requesting state. It must be necessary and requires the written approval of the applicant who must know for what specific information he or she is giving his or her approval. Paragraph 3 provides as follows:

> *"3. Furthermore, provided it is necessary for the examination of the application for international protection, the Member State responsible may request another Member State to let it know on what grounds the applicant bases his or her application and, where applicable, the grounds for any decisions taken concerning the applicant. The other Member State may refuse to respond to the request submitted to it, if the communication of such information is likely to harm its essential interests or the protection of the liberties and fundamental rights of the person concerned or of others. In any event, communication of the information requested shall be subject to the written approval of the applicant for international protection, obtained by the requesting Member State. In that case, the applicant must know for what specific information he or she is giving his or her approval."*

[20] Of further relevance are data protection provisions. The Data Protection Act 2018 provides:

> "***Protection of personal data***
>
> *(1) The GDPR, the applied GDPR and this Act protect individuals with regard to the processing of personal data, in particular by –*
>
> *(a) requiring personal data to be processed lawfully and fairly, on the basis of the data subject's consent or another specified basis."*

[21] The General Data Protection Regulation (EU) 2016/679 ("GDPR") provides that personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject to (Regulation 1(a)). Regulation 1(b) provides that the personal data shall be collected for a specified, explicit and legitimate purpose and not further processed in a manner that is incompatible with these purposes.

[22] Regulation 1(c) provides the principle of data minimisation which requires that the data shall be adequate, relevant and limited to what is necessary in relation to the purpose for which it is processed.

[23] The applicant also draws the court's attention to section 55 of the Borders, Citizenship and Immigration Act 2009 which requires the SSHD to discharge her functions to safeguard and promote the welfare of children who reside in the UK.

[24] Finally, the SSHD has published a number of policies relating to the Dublin III Regulations and the applicant draws the court's attention to and relies upon policy guidance in relation to Dublin III Regulations Version 4.0 published on 14 August 2020.

[25] The policy deals with transferring asylum claimants into and out of the UK where responsibility for examining an asylum claim lies with the UK or with another EU Member State or Associated State.

[26] In particular, the applicant refers to page 31 of the policy document which deals with making a request to another Dublin state. The policy document includes the following:

> *"Article 34 requests must not, however, be made without some indication of the basis upon which potential responsibility might be determined. This is to prevent Dublin States making excessive numbers of purely speculative requests to each other. A request for information must state the reasons why it is being made with reference to relevant information on the ways and*

means by which applicants enter the territories of the Dublin States, the specific and verifiable statements made by the applicant. Article 34(4) of the Dublin III Regulation gives further details."

The court's assessment

[27] The court notes that at the time the Order 53 application was lodged in this case the applicant did not have access to the actual requests made by the SSHD.

[28] Ms Wilson on behalf of the applicant in her well-marshalled written and oral submissions argues that there are three legal bases upon which the request made was unlawful.

[29] Firstly, the legal basis for making a request under Article 34(1) must be stated in the request. This was not done. Therefore, the request was *ultra vires*.

[30] Secondly, she is critical of the timing of the request made some 13 months after the applicant arrived in the UK and she invites the court to infer that the timing of the request was prompted by the fact that the SSHD was about to lose access to the EURODAC database because of the UK's withdrawal from the European Union.

[31] Thirdly, she argues that there was a clear breach of the policy requirement which prohibits speculative requests.

[32] On these bases she argues that the Article 34 request was not made lawfully. Therefore, the retention and proposed use of the data amounts to a breach of section 2 of the Data Protection Act 1998 and Regulation 1 of GDPR.

[33] At the leave hearing the court and the applicant for the first time had access to the actual Article 34 requests and responses from the relevant Member States. Mr Henry, who appeared on behalf of the proposed respondent, argues succinctly that when the court considers the context and the detail of the requests the application can be readily dismissed.

[34] On making his asylum claim the applicant consented to the provision of his fingerprints. When the prints were uploaded to the EURODAC centralised fingerprint data base of asylum claimants, the SSHD was informed of two "hits", i.e. the UK received an automated message to say the applicant had previously been fingerprinted in two EU Member States in connection with protection claims. This prompted the UK to make a request under Article 34 for information from those countries, namely Germany and Italy.

The Article 34 requests

[35] The requests are made on a pro-forma document headed "Requests for Information pursuant to Article 34 of Regulation EU No. 604/2013."

[36] The first section provides the date of the request and a reference number. The second section refers to the name of the individual concerned, his date and place of birth and his nationality. It includes "indicative evidence" namely a copy of the EURODAC results.

[37] The requests for information are described as concerning "other." Crucially, the details sought are as follows:

> *"Dear Sir/Madam*
>
> *Could you please confirm if the applicant claimed asylum in Germany? If so, can you provide the outcome of this application?*
>
> *Can you confirm what nationality, name and age the applicant provided/was assessed as and confirm if the applicant was fingerprinted and photographed?*
>
> *Please find attached a copy of the EURODAC match and copies of fingerprints to assist you in identifying the applicant.*
>
> *Many thanks for your assistance."*

[38] A response was received from Germany on 23/11/20. The response is also contained in a pro-forma document. It confirmed that the applicant claimed asylum there on 24/4/18, that he gave the same name as in the UK but a different date of birth, 31/12/99 – which would make him over 18 years of age when he claimed asylum in the UK. Germany also explained that they had made a "take back" request of Italy on 30/4/18 because the applicant had been fingerprinted in Italy before he travelled to Germany. In effect, the German government was saying that the applicant's case should be determined in Italy under the Regulations. The German response went on to indicate that on 15/5/18 Italy agreed to take the applicant back for the purpose of determining his asylum claim. However, it was explained that he was never returned to Italy because he absconded.

[39] The request to Italy was in identical terms to that made to Germany save that the details of the request obviously referred to Italy as opposed to Germany.

[40] Italy responded on 30/11/20. The response confirmed that the applicant provided the same name, although an alias was also provided. The applicant provided Italy with a third DOB, namely 5/10/98. The response said that the last trace of him in Italy was 14/2/18 and that his application was refused because he

absconded. The response also indicated that he was not transferred back to Italy from Germany within the relevant timeframe.

Were the requests Article 34 compliant?

[41] It will be recalled that under Article 34(1) each Member State shall communicate to any Member State that so requests such personal data provided the data sought is "appropriate, relevant and non-excessive."

[42] Furthermore, it will be recalled that under Article 34(1) the data could be sought for three purposes, one of which is "examining the application for international protection."

[43] In her submissions Ms Wilson focussed on the point that because the UK had started to deal with the asylum claim there was no basis for it to ask for information because there was no need to determine which country was responsible for his case. As indicated, however, this is not the sole basis for permitting such a request.

[44] Article 34(2) as set out above provides the type of information or data which may be sought under paragraph 1 and provides for 7 different types of information. In this case the SSHD sought three of the seven types of information.

[45] The SSHD is obliged to assess this application for international protection, which is a significant request. Initially, the only information available to her was that provided by the applicant. The SSHD became aware that the applicant had previously been fingerprinted in two EU Member States in connection with protection claims.

[46] The request for information from those Member States was made pursuant to Article 34 as was made clear in the pro-forma document.

[47] In my view the information sought was clearly "relevant" for the purposes of "examining the application for international protection" lodged by the applicant, which is one of the permitted purposes under Article 34(1). The applicant's identity, his country of origin and his date of birth are clearly relevant matters for the task to be carried out by the SSHD.

[48] The information sought in the request was of a very basic nature and fell squarely within the information referred to in paragraph 2 of Article 34. The SSHD did not request every category of information permitted within paragraph 2 but focussed on details of his name, age, nationality and whether he made any previous requests for asylum. In circumstances where very little is known about the applicant and very little is verifiable in my view the level of detail requested could not reasonably or arguably be classed as excessive or inappropriate.

[49] It is also clear that both states who received the requests replied promptly and raised no issues about the appropriateness of the request.

[50] This is not a case where the consent of the applicant was required. Such consent would be required in the event of the more detailed type of data/information sought under Article 34(3) which does not apply here.

[51] The applicant places considerable emphasis on the policy guidance published by the SSHD.

[52] On considering the policy however it is clear that the focus is on the issue of who is responsible for determining an application. This is clear from the introductory paragraph at page 31 of the relevant policy which provides:

> *"**Article 34** of the Dublin III Regulations provides a mechanism for information sharing between the Dublin States, **in particular, to make a preliminary check whether there is a criterion that is likely to determine another State's responsibility for examining the asylum claim.**"*

[53] This is also clear from the express wording of the paragraph relied upon by the applicant which refers to "some indication of the basis on which the potential responsibility might be determined." The fact that the paragraph goes on to refer to Article 34(4) of the Regulations is also significant as it focuses on the potential responsibility of the requested Member State.

[54] It seems to me therefore that the specific policy quoted refers to "in particular" paragraph (1)(a) rather than paragraph 1(b).

[55] However, in any event I take the view that whether the purpose is for paragraph 1(a), (b) or (c) Article 34 does not permit States to make excessive or speculative requests to each other.

[56] Ms Wilson is critical of the fact that the application does not specify the precise purpose under Article 34 for which the information is sought and that therefore the request is contrary to the policy to which I have referred and therefore unlawful. In this regard I note that the proposed respondent ticked "other" in the proforma document and did not elect to tick the option "Application for international protection."

[57] In this context it must be remembered that even if there is a breach of policy that does not in itself create an unlawful act. The purpose of the policy is to prevent excessive and speculative requests. Indeed, in any event, it seems to me this is a requirement of the Article itself. For the reasons I have set out I do not consider that the request in this case could in any way be regarded as either speculative or excessive. The basis for the request is within the lawful ambit of the Regulations.

[58] In relation to the question of the assessment of the applicant's age, on 25 November 2020 the SSHD wrote to Ms Ciara Stitt who was responsible for the care of the applicant on behalf of the Trust. The SSHD referred to the information received back from the authorities in Germany. It was pointed out that he had given a date of birth of 31/12/1999. The correspondence concluded:

> "*Given this information which has become available can you confirm in writing if social services will be completing a Merton compliant age assessment on (JR41). If an age assessment is not to be completed in this case can you provide written confirmation of this including why the evidence provided is not being accepted in this case.*"

[59] Ms Stitt emailed the applicant's solicitor on 26 November 2020 asking "*would it be possible to speak to JR141 regarding his explanation for claiming asylum in Germany?*"

[60] The applicant's solicitor, Ms Sinead Marmion, responded on 27 November 2020 in the following terms:

> *"I spoke with (JR141) and took instruction about this last night.*
>
> *As is common with young people seeking asylum across Europe, they often do not know why they are going when they are get (sic) on a lorry. They hope that they will arrive at the UK and seek safety. If they do not reach the UK, then they will state that they are adults so that they do not end up in the care system and that they can escape in order to flee that country and make their way onwards to the UK. Numerous young people I have represented have advised me of this method. Many state that the smugglers tell them to do this if they do not arrive in the UK.*
>
> *(JR141) confirmed to me that this was also what happened to him. He advised that he got on a lorry in the hope of reaching the UK, only to arrive in Germany. He gave that date of birth, ageing him as an adult, in order to be able to leave Germany and seek another route to the UK. (JR141) has always presented to me as extremely vulnerable and traumatised by his journey and by the asylum whole process (sic). He is now afraid about this issue with his age.*
>
> *I would urge you to respond to the Home Office and state that there are no concerns on the part of the Trust as to (JR141's) age in light of the above, and also in relation to the fact that*

> *there was no issue at any of the professional Trust meetings since (JR141's) arrival in the UK over a year ago.*
>
> *If you would like to discuss the matter, please do not hesitate to get in touch."*

[61] On 27 November 2020 there was internal correspondence between carers employed by the Trust, a copy of which was sent to the applicant's solicitor seeking to assure (JR141) that the Trust "are not" considering an age assessment in respect of him.

[62] Although the correspondence indicated that a letter would be sent to the Home Office "*from high level within the Trust*" it appears from an email of 6 May 2021 from the Trust to Ms Marmion that although there were a number of queries re other cases at that time and responses completed there was no response to the request in respect of (JR141).

[63] At the end of the leave hearing the court was made aware of the Home Office's guidance in "*assessing age*" in a related leave application (JR147). The guidance included the following:

> *"In cases where the claimant is claiming to be a child but there is doubt over their claimed age, or in cases where their claim to be an adult is doubted and they are suspected to be a child, decision-makers must:*
>
> - *Make the local authority aware that the Home Office has disputed the claimant's age."*

[64] Ms Wilson places considerable reliance on the fact that the local Trust has decided not to conduct an age assessment of the kind described in the case of **Merton**. The Trust is therefore treating the applicant as a minor, but has not conducted any assessment of his age. As is clear from the above the SSHD has explained to the Trust the reason for the request for an age assessment, namely that the applicant had supplied a different date of birth to an authority in Germany. In doing so it has complied with the guidance to which I have referred.

[65] The Trust's failure to carry out such an assessment is not, of course, determinative of the issue. That is a matter to be decided by the SSHD. The SSHD may well conclude that the applicant's date of birth is as per his asylum application. She will be obliged to take JR141's explanation and the Trust's position into account. The court notes that the substantive determination is still outstanding. It is clear from the substantive interview that the applicant made his case concerning his true date of birth to the SSHD and it will be for her to make the relevant assessment on this issue.

[66] Therefore, I come to the conclusion that the request made by the SSHD in this case was plainly lawful and *intra vires* Regulation 34. In those circumstances it cannot be argued, in my view, that the applicant can establish a breach of Regulation 34 or the Data Protection Act 2018 or the GDPR. In the event that the applicant still maintains a breach of the GDPR then of course a complaint can be made to the Information Commissioner.

[67] The data has been processed lawfully and fairly.

[68] The decision of the SSHD to refer to the data, particularly the applicant's date of birth, in the course of the substantive interview was therefore lawful.

[69] It was processed on a specified basis. It was adequate, relevant and limited to what was necessary in relation to the purpose for which the data was processed.

[70] The applicant does complain about the delay in dealing with his application. However, this was not related to the request for information about which the applicant complains. The delay arose from the restrictions imposed by the Covid-19 pandemic. The applicant has been well looked after in the interim period by the relevant authorities. It is correct that during the period of delay he asked that his case be considered solely on the papers, something which was done according to the applicant's solicitor (and I accept this) in many other cases. This alone rebuts the unsubstantiated suggestion that there has been some sort of blanket policy in relation to such applications.

[71] Ms Wilson did not pursue the Article 8 argument in the course of her submissions but, in any event for the sake of completeness, in light of my findings I do not consider that it is arguable that any breach of Article 8 has been established in the circumstances.

[72] In conclusion, the requests about which the applicant complained were for the kind of information that is permitted by Article 34, namely examining the application for international protection. They were appropriate and non-excessive. The information obtained was clearly relevant to the important decision to be made by the SSHD.

[73] The applicant has not established an arguable case and has no reasonable prospect of success.

[74] Accordingly, leave for judicial review is refused.