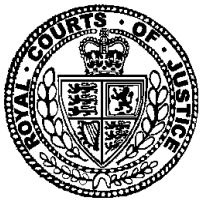

Neutral Citation Number: [2022] EWHC 1924 (Admin)

CO/4346/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2022

Before

MR JUSTICE SWIFT

- -

Between

The Queen

on the application of

HAM **Claimant**

- and –

London Borough of Brent **Defendant**

- -
- -

Philip Rule (instructed by **Instalaw Solicitors**) for the **Claimant**
Joshua Swirsky (instructed by **London Borough of Brent**) for the **Defendant**

Hearing date: 5 April 2022

- -

Approved Judgment

MR JUSTICE SWIFT

A. Introduction

1. The Claimant is a Sudanese national who arrived in the United Kingdom on 21 May 2021. On arrival he made a claim for asylum. This litigation does not concern his asylum claim, but rather the provision made for him pending determination of that claim. On arrival, the Claimant told Home Office officials at the Kent Intake Unit that his date of birth was 16 March 2004. On that basis he was aged 17 and should, for the purposes of provision of accommodation and support, have been treated as a child. The officials at the Kent Intake Unit did not believe the Claimant to be a child; they assessed him to be 23 years old with a date of birth as 16 March 1998. The Claimant was treated as an adult and provided with initial accommodation at a hotel in Wembley, in the area of the Defendant local authority.

2. Subsequently, social workers employed by the Defendant ("the Council") also assessed the Claimant to be 23 years old. That decision was made on 4 August 2021. In these proceedings, filed on 20 December 2021 and issued on 23 December 2021, the Claimant challenges that decision and a further decision evidenced by an email from the Council dated 30 November 2021. The further decision came about as follows. On 24 September 2021, solicitors acting for the Claimant sent a pre-action letter setting out a number of criticisms of the way the age assessment process had been conducted, overall, asserting that the assessment had not been lawfully conducted. The response to that letter was sent on 1 October 2021 (the letter bears the date 1 September 2021; it is common ground that was in error). In that letter the Council rejected the complaint made about the age assessment process. The next correspondence was an email from the Claimant's solicitors sent on 29 November 2021. That email enclosed "additional evidence" in respect of the Claimant's age, and requested the Council to reconsider its decision. The new evidence was a letter dated 26 November 2021 from Daniel Smith, a Senior Youth Case Worker at "Young Roots", a charity that provides support to asylum claimants aged between 11 and 25 years old. The material part of the letter said this:

> "I have met [the Claimant] on two occasions, both times at our "Ahlan" youth club which is set up specifically to support young males up to the age of 25 living in Home Office contingency hotels in West London. [The Claimant] is a regular attendee at this youth club where he enjoys playing pool, PlayStation, learning English and socialising with other young people. In the two meetings I had with [the Claimant], we discussed his welfare and wellbeing in the hotel. He told me he was finding it very hard to live amongst older people. I offered to assist him find legal representation as he was very confused about the legal process. It transpired that [the Claimant] already had legal representation for both his age dispute and his immigration matters but was seemingly unsure about who they were and struggled to understand their different roles. This type of confusion is very common in the young people we work with. [The Claimant] is friends with another young Sudanese male

> who he plays pool with at our youth club. This person has a claimed age as 16, a little bit younger than [the Claimant]. They are friends and comfortable socialising together. Young people tend to gravitate towards those of similar ages. It is rare for young people to befriend people who are significantly older or younger than themselves. I have not seen anything that suggests to me he is lying about his age. He presents like a 17 year old. From the interactions I have had with him, his appearance, demeanour and interactions with other young people indicate he is likely to be 17 years old."

The Council replied on 30 November 2021.

> "My client instructed that the additional evidence that you provided in support of your client's age is not enough for us to reconsider.
>
> Your client has had two assessments, one by KIU Intake Team and the second by ourselves. In fact your client himself told us he did not know if he was child or adult.
>
> In the circumstances, we maintain the conclusion made in the assessment filed on 04 August 2021."

3. So far as concerns the 4 August 2021 decision, the grounds of challenge set out in the Statement of Facts and Grounds largely follow the complaint made in the 24 September 2021 pre-action letter. The 30 November 2021 email is challenged on the basis that the decision not to reconsider the August 2021 decision was unlawful given both (a) the criticisms set out in the 24 September 2021 letter; and (b) the further information in Mr Smith's letter.

4. Although the parties, quite properly, plead their cases by reference to the facts of this case, the submissions for both sides have also been put on a wider basis: whether, and if so in what circumstances, a local authority may lawfully carry out an age assessment without conducting what is referred to in the submissions and commonly described as a "full, *Merton*-compliant assessment", but instead by conducting what was referred to in submissions as a "short-form assessment".

B. Fairness and the decision in *Merton*

5. If a person claiming asylum is under the age of 18 the local authority whose area he is in must exercise various powers available to it under Part III of the Children's Act 1989 ("the 1989 Act") to provide accommodation and support. For this purpose, whether the person concerned is under 18 years old is a question of jurisdictional fact: ultimately it is a matter for determination by a relevant court, not a question to be determined as a matter of reasonable assessment by the local authority subject only to the usual requirements of public law legality: see *R(A) v London Borough of Croydon* [2009] 1 WLR 2557. In practice, when in asylum cases there is a need for judicial determination

of a person's age, that task will be undertaken in proceedings before the Upper Tribunal Immigration and Asylum Chamber.

6. There is also a distinct requirement that age assessment decisions must be the product of a fair procedure. The initial emphasis in this area on the need for a fair procedure pre-dated the decision of the House of Lords in *A v Croydon*. Prior to that judgment, when determination of whether an asylum claimant was a child was a matter of assessment for the relevant local authority, there were obvious reasons for a heightened focus on the need for fair procedure. Notwithstanding the recognition in *A v Croydon* that whether a person was a child is, so far as concerns the duties under the 1989 Act, a matter of jurisdictional fact, the requirement for fairness has not diminished. If the decision has been taken by a process considered not to meet the legal standard of fairness it can be challenged and may be quashed on that ground alone, entirely independent of its substantive merit.

7. The benchmark for what fairness requires in this context is commonly referred to as a "*Merton*-complainant assessment" after the judgment of Stanley Burnton J in *R(B) v Merton London Borough Council* [2003] 4 All ER 280. The headnote in the All England Reports summarises the situation before the court in that case:

> "The claimant was an unaccompanied asylum seeker with no means of support in the United Kingdom. He claimed to be 17 years old. The Home Office did not consider him to be a minor and treated him as an adult. As a person aged under 18 and in need, he would have been owed a duty of part (iii) of the Children's Act 1989 by the local authority in whose area he was, including a duty to provide him with accommodation. The Defendant local authority interviewed him in order to assess whether he was a child in need. The interview was conducted by a social worker in person with an interpreter available on the telephone. The social worker considered there were a number of inconsistencies in the claimant's account of his history which led her to doubt his credibility, but she did not put those inconsistencies to the claimant. She determined that, while in need, the claimant was aged at least 18. He sought judicial review of that determination. The court was asked to give guidance of the requirements of the lawful assessment of the part (iii) of the 1989 Act by a local authority of the age of a young asylum seeker claiming to be under the age of 18 years."

8. Several passages in Stanley Burnton's judgment are taken to describe the elements of a fair procedure in this context. For sake of clarity I will set out those passages in this judgment.

> "20. In a case such as the present, the applicant does not produce any reliable documentary evidence of his date of birth or age. In such circumstances, the determination of the age of the applicant will depend on the history he gives, on his physical appearance and on his behaviour.

21. There is no statutory procedure or guidance issued to local authorities as to how to conduct an assessment of the age of a person claiming to be under 18 for the purpose of deciding on the applicability of Part III of the Children Act 1989.

…

27. Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.

28. Given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other

…

36. The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.

37. It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his

> credibility, and he will have to ask questions designed to test his credibility.
>
> 38. I do not think it is helpful to apply concepts of onus of proof to the assessment of age by local authorities. Unlike cases under section 55 of the Nationality, Immigration and Asylum Act 2002, there is in the present context no legislative provision placing an onus of proof on the applicant. The local authority must make its assessment on the material available to and obtained by it. There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child. Of course, if an applicant has previously stated that he was over 18, the decision maker will take that previous statement into account, and in the absence of an acceptable explanation it may, when considered with the other material available, be decisive. Similarly, the appearance and demeanour of the applicant may justify a provisional view that he is indeed a child or an adult. In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary.
>
> …
>
> 55. So far as the requirements of fairness are concerned … the decision maker must explain to an applicant the purpose of the interview. It is not suggested that that did not happen in this case. If the decision maker forms the view, which must at that stage be a provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can. In other words, in the present case, the matters referred to in paragraph 15 above should have been put to him, to see if he had a credible response to them. The dangers of misunderstandings and mistranslations inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the Claimant an opportunity to explain."

9. In the course of his judgment, Stanley Burnton J referred to other matters which while not requirements of fairness as a matter of law, might be advisable practical measures. For example: (a) he noted the existence of guidance by two London boroughs to the effect that it would be "beneficial" for the assessment to be undertaken by two social workers (paragraph 33); (b) he stated that where an interpreter was required it was "obviously greatly preferable" for the interpreter to be present in person to avoid risk of mistake (paragraph 52); (c) he observed that a verbatim note of the interview would "enable the court to be more confident" in its assessment of the process followed (paragraph 54). However, Stanley Burnton J was at pains to emphasise the practical limits of the courts role.

> "50. In my judgment, the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. Judicialisation of what are relatively straightforward decisions is to be avoided. As I have stated, in such cases the subject matter of decision is not complex, although in marginal cases the decision may be a difficult one. Cases will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The Court should not be predisposed to assume that the decision maker has acted unreasonably or carelessly or unfairly: to the contrary, it is for a claimant to establish that the decision maker has so acted."

10. Overall, several important matters can be taken from the judgment in *Merton*. *First*, when it is necessary to determine whether a person is a child (i.e. under 18 years old) for the purposes of the 1989 Act, there is no burden of proof, and so no assumption either way. Rather, the assessment required must be undertaken on its own terms. *Second*, the assessment decision must be made based on reasonable enquiry – the local authority must take the steps reasonable in the case in hand to obtain the information needed to take the decision it is required to take. What this requires will depend on the circumstances of the case. Stanley Burnton J recognised that there may be occasions when a decision that meets the requirement for fairness can be taken based on evidence of appearance and demeanour alone (see his judgment at paragraph 27). However, he also recognised that such occasions are likely to be rare, and that when the person being assessed might appear to be of an age close to 18 (say between 16-20), fairness might ordinarily require the decision-maker to make further enquiries, either through an interview with the person to obtain his history, or otherwise (see his judgment at paragraph 28).

11. *Third*, when such an interview or other form of enquiry was undertaken it must be undertaken fairly. One matter was emphasised. If the person's credibility was an issue that should be made clear and should be dealt with head on during the investigation process. In cases where the local authority was minded to conclude the person claiming to be a child was lying, that provisional view and the reasons for it should be explained to him and he should have an opportunity to respond before a final decision was taken.

12. *Fourth*, that although there may be a range of things that a public authority might do to ensure the procedure followed was fair, those matters would not be requirements of fairness in every case. This category included matters such as whether the assessment be conducted by one social worker or two; whether a medical opinion or information from other professionals such as resident social workers or teachers may be appropriate; whether the assessment should be completed during a single interview or be undertaken over a more extended period; whether there should be verbatim notes of interviews; whether when an interpreter was required it was necessary for him to be present in person rather than by phone or video call.

13. The judgment in *Merton* did not rule out the possibility that on the facts of other cases some or other of these measures might be requirements of fairness. However, it is

equally clear that Stanley Burnton J did not equate the legal requirement for any fair procedure with any sort of checklist. Fairness in this context, as in any other, is a matter of substance not simple form. This is the origin and essence of the observations at paragraph 50 of his judgment.

14. This seems to me to be critical. In submissions, Mr Rule, counsel for the Claimant, referred me to two judgments *VS v Home Office* [2014] EWHC 2483 (QB) and *R(AB) v Kent County Council* [2020] PTSR 746 which contain compendia of what are referred to as "guidelines" for the conduct of an age assessment. The list in *VS* runs to 14 items (see the judgment at paragraph 78); in *AB*, the list runs to 21 items (see the judgment at paragraph 21). It would be wrong to regard each item on each list as a requirement of fairness in every case, and it is important to note that neither judge suggested that is the position. Each list contains a collection of some matters that will very likely be requirements of fairness in all cases; other matters that may reach that level depending on the facts of a particular case; and still other matters that are unlikely ever to rise above the level of general guidance or good practice. When considering whether an age assessment has been conducted fairly the court must focus on the case before it. The three general considerations that were central to Stanley Burnton J's approach to *Merton* (see above at paragraphs 10 – 11) will be the most important matters. The other matters on lists such as those in the judgments in *VS* and *AB* might, on the facts of a particular case, be significant if, on those facts they are necessary to give effect to one or more of the general considerations. But, if on the facts of the case that is not so, those matters will not serve to identify what the legal standard of fairness requires. Compliance with that standard is a matter of function and substance not merely form.

15. One further point to be made is that the legal requirement of fairness may not be the only relevant legal requirement. If a public authority has adopted a policy on how it will undertake age assessments, it should be held to that policy unless on the facts of the case at hand there is sufficient reason to depart from it. That is a requirement that will be distinct from the legal requirement for fairness, and will operate subject to what is required as a matter of fairness.

16. Thus far, I have focused on the judgment in *Merton* case and the issues of principle set out in that judgment. I consider that is the correct approach. There are many subsequent first instance decisions. However, it is important to recognise that each of those has, for the most part, simply sought to apply the general principles set out in *Merton* to the circumstances of the case before the court.

17. Some of those cases have, on some matters, been thought to have gone further or to state, as a rule, that fairness requires measures going beyond those considered in *Merton*.

18. Two specific themes are worth considering. The first is whether it is a requirement of fairness that an assessment must be carried out by two social workers. For this purpose a convenient starting point is paragraphs 43 to 46 of the judgment of Burnett LJ in *R(ZS Afghanistan) v Secretary of State for the Home Department* [2015] EWCA Civ 1137.

> "43. The question whether *Merton*-compliance for the purposes of the policy invariably requires an assessment to be conducted by two social workers is not entirely straightforward, nor is the question when (if that be the case) it became a necessary

> ingredient of *Merton*-compliance. Stanley Burnton J supported the desirability of two "workers" making the assessment. His approbation of the Hillingdon guidelines did not amount to a stipulation to that effect. Even then it is unclear whether what was contemplated by Hillingdon was two qualified social workers. The reference in *R(Z)* to the development of a practice (which on any view is beneficial) was not expressed as being a requirement.
>
> 44. The desirability of two heads rather than one adds confidence that the assessment of age is more likely to be right in an environment where the determination of the young person's age has a profound impact on his life and the decision can be a difficult one. The Home Office policies import the concept of *Merton*-compliance not only to make sure that the process has been fair, but also to provide confidence that the decision reached by the local authority is right.
>
> 45. A number of decisions at first instance have proceeded on the basis that an assessment conducted by only one social worker is not Merton-compliant. Examples before us include *R(AAM) v Secretary of State for the Home Department* [2012] EWHC 2567 (QB) at [94] where the assessment was conducted by a social worker with another worker present to provide support to the young person but who was not involved in the assessment itself; and *R(J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) at [13] where the assessment was carried out by a single social worker.
>
> 46. Thus it can be seen that something considered to be desirable if it was practical, developed first into a widespread but not universal practice, before fructifying into a requirement. I understand that to be the universal current understanding of Merton-compliance in this context but the question whether that current understanding is right is not before us."

As is clear from paragraph 46, the specific issue was not decided in *ZS*; it was not an issue before the court on that occasion. However, on closer consideration the authorities referred to in support of the proposition that, as a requirement of fairness, assessment must be undertaken by two social workers, *AAM* and *J*, do not make that proposition good. In her judgment in *AAM* at paragraph 94, Lang J stated as follows;

> "94. The *Merton*-compliant standards of good practice and fairness which the assessment failed to meet in this case are, in my view, as follows:
>
> a) There was no appropriate adult present. See *R(NA) v Croydon LBC* [2009] EWHC 2357 (Admin); *R(AS) v London Borough of Croydon* [2011] EWHC 2091 (Admin); *R(J) v Secretary of State*

> *for the Home Department* [2011] EWHC 3073 (Admin); *R(FZ) v London Borough of Croydon* [2011] EWCA Civ 59.
>
> b) The assessment was conducted by one social worker, not two. See *R(J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin); *A v London Borough of Croydon* [2009] EWHC 939 (Admin); *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin); *R(A) v London Borough of Camden* [2010] EWHC 2882 (Admin).
>
> c) The Claimant was not given an opportunity to comment on the social worker's adverse findings. See *R(FZ) v London Borough of Croydon* [2011] EWCA Civ 59; *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin); *R(J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin)."

19. Sub-paragraph (b) is relevant for present purposes. None of the cases cited decides there is a requirement for two social workers. One of the cases referred to is *Merton* itself: that does not decide the point, see per Stanley Burnton J at paragraph 33. Another case cited is the judgment of Collins J in *R(A) v London Borough of Croydon* [2009] EWHC 939 (Admin). In that judgment Collins J referred to paragraph 30 of the judgment in *Merton* where Stanley Burnton J referred to guidance issued by the London Boroughs of Hillingdon and Croydon to the effect that it was "beneficial" for an assessment to be undertaken by two social workers rather than one making the point that "two heads may be better than one". Later passages in Collins J's judgment have been said to state the conclusion that fairness requires an assessment be undertaken by two social workers and to this extent his judgment reaches beyond the conclusion stated in *Merton*. I do not consider that to be a fair reading of Collins J's judgment, not the least because the defendant in Collins J's case was the London Borough of Croydon, one of the sources of the guidance referred to at paragraph 33 of the judgment in *Merton*. If any part of Collins J's judgment can be read as referring to a two social worker requirement, the source would be that defendant's own guidance rather than any free-standing legal obligation of fairness. The third judgment Lang J refers to, *J*, is not authority for the proposition either. At paragraph 13 of his judgment in *J*, Coulson J relies on the judgment of the Court of Appeal in *R(Z) v Croydon Borough Council* [2011] PTSR 748. However, there was no issue in that case as to whether an assessment had to be undertaken by two social workers: see per Sir Anthony May P at paragraphs 12 (on the facts) and 18 (the issues in that case). The last of the four authorities cited at paragraph 94 (b) of Lang J's judgment in *AAM* is *A v Camden*. In that case, the judge (HHJ McMullen QC) did no more than refer to *Merton* (see his judgment at paragraph 24). Overall, therefore, there is no binding determination to the effect that an assessment undertaken by a single social worker cannot, for that reason alone, meet the legal standard of fairness. The situation might be different if there was professional consensus that accurate age assessment required involvement of two social workers. On that premise the substance of the legal requirement of fairness might be informed by that professional consensus. But, so far as I can tell, that is not the tenor of the case law.

20. The second theme is whether if a person claiming to be a child is interviewed as part of the process of age assessment, the interview must be conducted in the presence of an appropriate adult. I start again with the judgment of Burnett LJ in *ZS*, this time at paragraphs 51 to 53. The gist of those paragraphs is that by the time of the judgment of the Court of Appeal in *Z v Croydon* "… the need to provide an opportunity for an independent adult to be present during an age assessment interview was by then a required part of the process" (per Burnett LJ at paragraph 52). The relevant parts of the judgment of Sir Anthony May P in *Z v Croydon* are paragraphs 23 and 25.

> "23. As to the second question it is generally accepted in a variety of contexts that, where children or other vulnerable people are to be interviewed, they should have the opportunity to have an appropriate adult present. Reference may be made in this respect to the Police and Criminal Evidence Act Code C, at paragraph 11.17; *R (DPP) v Stratford Youth Court* [2001] EWHC 615 (Admin) at paragraph 11; and the Home Office Guidance for Appropriate Adults. Apparently, Croydon do adopt this procedure in many of their cases, but they did not make the offer at the assessment on 4th September 2009. However, the appellant's key worker was present at the reviewing interview on 16th April 2010. The requirement does not feature in their written procedure, or in the attached form. In an age assessment case, the young person will at least claim to be a child. The present appellant did so and at the time it was agreed that he was. Additionally, he was known to have mental health problems. In *R(NA) v London Borough of Croydon*, Blake J recognised at paragraph 50(1) the need in that case for the claimant to be asked whether he wanted to have an independent adult present.
>
> …
>
> 25. In our judgment, the appellant should have had the opportunity to have an appropriate adult present, and the fact that he was not given this opportunity contributes to our decision whether he should be given permission to proceed."

One matter to note is that the issue before the Court of Appeal in *Z* was an appeal against a decision refusing permission to apply for judicial review. The Court's final decision was to grant permission to apply for judicial review and transfer the case to the Upper Tribunal for substantive hearing. This is one part of the context to what is said at paragraph 25. The other part is the mental health problems of the claimant in that case (see paragraph 23, penultimate sentence). Looked at overall, and given what is said by Burnett LJ at paragraph 52 of his judgment in *ZS*, and not without considerable hesitation, it seems to me that the stage has not yet been reached when an interview conducted without the opportunity for an independent adult to be present will, without more, fail to comply with the legal requirement of fairness. The example given by the Court of Appeal in *Z* concerned the practice adopted by the police when questioning a child suspect or witness. That is a very different context from an interview conducted by a social worker. This example alone does not warrant a "one size fits all" approach

that requires an appropriate adult to be present whenever an age assessment interview takes place. In reaching my conclusion on this point I have also taken account of the statement in the "Age Assessment Guidance" issued in October 2015 by the Association of Directors of Children's Services ("the ADCS guidance") that "A child or young person undergoing an age assessment must have the opportunity to have an appropriate adult present with them during the interviews". I do not consider this professional guidance to be sufficient to give rise to a legal requirement that an appropriate adult must be present. Whether or not fairness requires the presence of an appropriate adult should depend on the circumstance of a case; what needs to be considered is the functional importance of the opportunity to have an appropriate adult present, in the case in hand.

21. I have considered these two matters at some length simply to emphasise that in every case when deciding whether an age assessment has been conducted consistent with the requirements of fairness, there is no substitute for testing the matter against the basic principle, by reference to the circumstances of the case under consideration, and by reference to whether the decision rested on reasonable investigation and whether that investigation was undertaken fairly. In practice, this latter requirement is likely to focus on whether any interview with the person was conducted to permit him properly to contribute, and properly to respond to matters going to his credibility which the local authority considers weigh against his contention to be a child.

C. "Short-form assessment"

22. The general point raised in this appeal concerns in what circumstances a local authority might lawfully decide whether a person was a child by what was referred to as "short-form assessment". To this end I was referred to the judgments of Thornton J in *R(AB) v Kent County Council* (above); DHCJ Squires QC in *R(M) v Waltham Forrest London Borough Council* [2022] PTSR 150; Henshaw J in *R(MA) v Coventry City Council* [2022] EWHC 98 (Admin); and Bennathan J in *R(SB) v Royal Borough of Kensington and Chelsea* [2022] EWHC 308 (Admin).

23. The logical premises of the submission for the Council in the present case are that (a) there is one class of case where fairness requires a "*Merton*-compliant" form of assessment; (b) there is a second class of case where the requirements of fairness are met by something less than a full, *Merton*-compliant process; and (c) what is required in that class of case can itself be readily particularised. I do not accept these premises. In various ways, each is either false or rests on an incorrect reading of the judgment of *Merton*.

24. *First*, while the judgment in *Merton* identified relevant operating principles it did not establish a checklist. What is required is such investigation as is reasonable on the facts of the case. The purpose of the investigation is so that the local authority has an appropriate (in public law terms) basis to decide whether the person concerned is a child. If an interview or interviews are required as part of the investigation, then those interviews must be conducted fairly. What that requires will depend on what is an issue in any case and the circumstances of the person concerned. The premise for the suggestion that there is a class of case that requires a full, *Merton*-compliant assessment reads the *Merton* judgment not as a set of principles but rather as the beginning of a "to do list" which the outcomes of subsequent cases have lengthened. On this analysis the present requirements of a *Merton*-compliant assessment would be those in the list at

paragraph 21 of the judgment in *AB v Kent County Council*. That is not correct. While a local authority that faithfully follows each of those steps will, in all probability, meet the legal requirement of fairness, the converse is not true. To hold otherwise is to embrace a "judicialisation of what are relatively straight forward decisions" the very consequence Stanley Burnton J was at pains to avoid. Rather, in each case the steps taken to investigate and the way they are taken must be considered and evaluated on their own terms.

25. *Second*, what is meant by "short-form assessment" cannot readily be understood. At one extreme it could mean the situation referred to in the *Merton* judgment as the "very obvious" case where from appearance and demeanour alone it is clear that the person is not a child. Alternatively, it could mean a situation falling short of that but where the assessment was conducted only through a single interview rather than through a series of meetings over a more extended period. Then again, it might refer to a situation when an interview has been conducted but without one or more of the safeguards contained in the list at paragraph 21 of the judgment in *AB*: for example, an interview conducted by one social worker not two, or an interview conducted without an appropriate adult being present.

26. The idea of "short-form assessment" seems to have arisen from the practice of the Home Secretary when trying to ensure that children are not, save in exceptional circumstances, subjected to immigration detention. To that end, paragraph 55.9.3.1 of the Home Secretary's *Enforcement Instructions and Guidance* document states the Home Secretary will accept that a person claiming to be under 18 years old is under 18 years old unless certain criteria are met. One criterion is that a "*Merton*-compliant" age assessment by a local authority is available stating that they are "18 years of age or over"; another of the criteria is that the person's "… physical appearance/demeanour very strongly suggests that they are **significantly** over 18 years of age and no other credible evidence exists to the contrary" (emphasis in the original). On most occasions where a person first comes to the Home Secretary's attention there will have been no *Merton* assessment. For that reason, a further Home Office immigration policy document "*Assessing Age*" explains how such situations should be approached and the circumstances in which, for the purposes of immigration control decisions taken by the Home Secretary, a person claiming to be a child might still be treated as an adult. This approach includes a notion of "initial age assessment" which relies on consideration of appearance and demeanour. In various different ways this Home Office guidance encourages immigration officers to act conservatively and, if in doubt, proceed on an assumption that the person is a child. When initial assessment does result in a conclusion that the person involved is an adult, the guidance states the person must be told he can approach a relevant local authority for an age assessment. What is clear is that the Home Secretary's notion of initial assessment is a means to an end in a particular context – i.e. when there is a need to take a prompt decision on whether or not a person is a child so as to permit further decisions to be taken on whether that person could be detained or should be provided with asylum support by the Home Secretary. Further, when on initial assessment the conclusion is that the person is an adult, it is anticipated that that decision could be provisional in the sense that the person might request a local authority to carry out a further assessment.

27. None of this reads-over to the situation where a local authority is undertaking an age assessment for the purposes of determining what (if anything) to do in exercise of its

powers under the 1989 Act. Thus, whatever may be the Home Secretary's practice in that specific context, it is no guide to what is required of a local authority.

28. For this reason, I do not agree with one part of Thornton J's analysis in *AB v Kent County Council*. In that case the parties agreed that what was described as "abbreviated assessment" was, in principle, permissible. The submissions appear to have distinguished "abbreviated assessment" from the notion of "initial assessment" described in the Home Secretary's guidance, but I cannot readily see what the distinction between the two was thought to be unless it was that the local authority's exercise had been undertaken by social workers not immigration officers. Thornton J concluded that abbreviated assessment was permissible if the final decision made on such an assessment allowed for a "margin of error", and that what that margin of error should be would depend on the facts of the case: see her judgment at paragraphs 44 and 46. Thornton J's final conclusion was as follows:

> "56. The Council's decision letter contains no express acknowledgement of the margin for error in its assessment. Nonetheless, Ms Rowlands pointed to the conclusion that AB presented as twenty to twenty-five years and said this was consistent with any requirement to acknowledge the margin for error and appropriate in the circumstances of this case. However, given the potential margin for error identified above, I am of the view that Kent Council should have given AB the benefit of the doubt and conducted a Merton compliant assessment. Ms Mead assessed AB as 'around' twenty to twenty-one years. The formal decision assessed him at twenty to twenty-five years. In the circumstances of this abbreviated assessment, the assessed age is too close to the cut-off of eighteen years for the Council not to give AB the benefit of the doubt."

29. The only questions before the court in *AB* were the *Merton* questions – was the age assessment decision made following reasonable enquiry, and was it made in accordance with the legal standard of fairness? Whether or not the local authority's substantive conclusion (i.e. was the person a child) allowed for a margin of error is logically irrelevant to these questions. Rather, importing the notion of a margin of error wrongly re-defines the substantive issue the Local Authority is required to decide: that question is whether the person is a child, not whether he is within an age range that puts him close to being a child. Re-defining the question in this way distorts the entire exercise, i.e. of what steps amount to reasonable enquiry and what fairness requires. There is a logic for the Home Secretary to formulate her guidance by reference to whether a person is significantly over the age of 18. That reflects a precautionary approach to the exercise, for example, of her immigration detention powers. As I have already said that logic does not read over to the local authority's function under the 1989 Act to determine whether a person is a child to decide whether to exercise other powers in respect of that person.

30. *Third*, the premise of some form of abbreviated assessment is that fairness can be reduced to a check list. This repeats the error inherent in the present notion of full *Merton*-compliant assessment.

31. I consider the correct position to be this. The supposed distinction between a full, *Merton*-compliant age assessment and short-form age assessment is legally irrelevant. As Bennathan J put it in his judgment in *SB* (above, at paragraph 32) "the depth of enquiry required of a local authority is not binary". In other words, the approach is neither "one size fits all", nor "two sizes fit all".

32. The correct approach in all cases starts with the principles identified in *Merton* of reasonable investigation and fair process: see above at paragraphs 10 – 11. What is required in each case depends on the circumstances for that case. Check lists can be useful aides-memoire, but they are not rigid prescriptions. As Stanley Burnton J stated in *Merton*, if the case is an obvious one what is required by way of reasonable enquiry may be brief. There will be some instances where lawful decisions can be taken on the basis of appearance and demeanour alone. In other cases, further investigation will be required. When further investigation is required whether that need take the form of a single interview, or more than one interview, or whether the investigation need consider the views of other relevant professionals (for example, residential social workers) must depend on the circumstances of that case. On this issue the important matter is that the obligation on the local authority is one of reasonable investigation: reasonable does not mean exhaustive; and what is reasonable is specific to circumstance. If the investigation does comprise one or more interviews with the person whose age is being assessed, those interviews must be conducted fairly. A fair interview will permit the person who is being assessed a genuine opportunity to explain his position to answer questions that may be put to him and to respond to matters adverse to his case. What is necessary for this purpose must take account of the circumstances of the person, for example whether an interpreter is required or whether he should be given an opportunity for an appropriate adult to be present.

33. I appreciate that in practice all local authorities place a high premium on certainty. If the requirements of fairness could be reduced to a checklist it would in every case, be clear what the law required. That would be true. But what underlies the Council's general submission in this case is that the full, *Merton*-complaint checklist has become too long and too onerous to be applied in every case where an age assessment needs to be undertaken. Hence the contention that there is some other, shorter, checklist ("short-form assessment") that is both sufficient as a matter of law and manageable in practice. However, any such prior prescription would be hostage to fortune because the requirements of fairness are sensitive to circumstance.

34. The better approach is for local authorities to determine the scope of the reasonable investigation, step by step. In practice this is what happens in most cases. In any case where there is cogent documentary evidence that the person is not a child that may be both the beginning and the end of the enquiry. When that is not so (likely to be most cases) the social worker or workers undertaking the assessment will ordinarily meet the person concerned. That will start the process, and the social worker will need to decide as the investigation progresses whether the information reasonably required for a decision has been identified, or whether further and if so what steps are necessary to obtain information that is reasonably required. True it is that the ultimate decision on whether a fair procedure has been followed is a decision for the court, but that court decision will always be made paying close regard to the explanation given by the decision-maker for why some steps were taken and others were not. As Bennathan J put it in his judgment in *SB* (at paragraph 31) local authorities "should not be hobbled

by the Courts taking a highly technical approach … demanding that every box is ticked, but should instead allow practical and flexible procedures to be deployed".

D. The present case

35. The Claimant arrived in the United Kingdom on 21 May 2021. Home Office officials considered him to be an adult and he was given accommodation at an hotel in Wembley. On 22 June 2021 a local GP referred him to the Council for age assessment. On 25 June 2021 a social worker (Ms Prest) visited the Claimant. In a statement made on 24 February 2022 for the purpose of these proceedings, Ashu Bisong, a social worker and Team Manager employed by the Council, explained that Ms Prest formed the opinion that the Claimant was older than his claimed age but "was unable to take the matter any further because she was alone and there was an issue as to whether or not the Claimant could be brought to the Civic Centre that day".

36. On 28 July 2021 Mr Bisong and Nicolette Kirkland-Shirley (a social worker employed by the Council) visited the Claimant at the hotel to interview him for the purpose of the age assessment. The interview did not proceed that day because there was a problem with the interpreter (who was present by phone). The interpreter was an Arabic interpreter, but the Claimant was described on the assessment form as "… adamant that he would not go ahead with the assessment without the use of a Sudanese Arabic Interpreter". The interview was therefore rearranged for 4 August 2021. Following that meeting, the decision that the Claimant was not a child, and was in fact 23 years old, was set out in the Council's pro-forma age assessment document.

37. In these proceedings the Claimant contends both that the decision that he was not a child was substantively wrong, and that the Council undertook the age assessment unfairly. It is common ground that the dispute on the former issue should be transferred to the Upper Tribunal for determination through an appropriate evidential hearing. So far as concerns the latter challenge, the fairness of the assessment undertaken by the Council, the Claimant's case is set out at paragraph 13 of the Statement of Facts and Grounds. The points that are raised there may be summarised as follows.

(1) The interpreter should have been present in person, not by phone.

(2) The assessors did not conduct the interviews with an open mind. This, it is said, is the conclusion to be drawn from the opening sentences in Section 5 of the assessment document:

> "The London of Borough of Brent decided to conduct a short age assessment upon carrying out an initial visit to [the Claimant]. Observation made at the time indicated that he is not putative child and further exploration was required."

(3) The interview was conducted without an appropriate adult.

(4) The assessors placed too much reliance on their opinion of the Claimant's appearance and demeanour; not enough weight was given to aspects of the Claimant's appearance that suggested he was a child (*viz* "no evidence of facial hair").

(5) The assessors incorrectly concluded that the Claimant was "reticent" as part of an attempt to avoid saying anything that might hinder his application. The assessors saw this as relevant to the Claimant's veracity and credibility. This was wrong since any reticence was (or was more likely to be) the consequence of previous traumatic events.

(6) The assessors failed to realise that if the Claimant was reticent that reticence could be because he did not wish to say anything that might prejudice his asylum claim, and not because of any matter relevant to the age assessment.

(7) There was no "minded to" process; the Claimant was not given the opportunity to meet the assessors' concerns about his credibility.

(8) The assessors did not recognise the need to give the Claimant the benefit of the doubt on unclear matters, or recognise "a margin of error".

The same matters are set out and addressed further at paragraph 16 of Claimant's Skeleton Argument. Further, in his oral submissions Mr Rule contended that a full *Merton*-compliant assessment was required in all cases unless the person being assessed was "very obviously, not a child". The present case, he submitted, was not in that "very obviously" category.

38. Some of the eight points listed above are not complaints about the fairness of the process followed, they are complaints that the Council reached the wrong conclusion. Points (4), (5), (6) and (8) fall into this category. Each of points (4), (5) and (6) is a complaint to the effect that the Council should have evaluated evidence before it differently. Each goes to whether the Council's conclusion that the Claimant was not a child was the correct conclusion. That substantive decision will be looked at afresh in the proceedings in the Upper Tribunal. There is, therefore, no reason to distort or re-cast complaints that obviously question the substantive outcome to pretend they are instead criticisms about the process leading to that decision.

39. Nor is point (8) a complaint about the process that was followed. There is no requirement of fairness, in this context, that the person assessed be given the "benefit of the doubt". What is said at paragraph 38 of the judgment in *Merton*, that for this purpose notions of any burden of proof are inapt, remains true. Once this is understood the Claimant's "benefit of the doubt" submission can only be a point directed to the Council's substantive conclusion. It is a variation on the contention that the Council mis-evaluated the evidence available. The same conclusion applies to the submission that the Council failed to apply a "margin of error". This is not a submission about fairness or fair procedure. If it is anything at all it is a submission that, when deciding whether the Claimant was a child, for the purposes of its duties under the 1989 Act, the Council asked the wrong question. On this analysis it is a submission that cannot succeed regardless of whether it is aimed at the substance of the decision or the procedure by which the decision was taken. A person is a "child" if he is under the age of 18: see 1989 Act, section 105(1). That is the relevant question; not whether the person is of an age within a range immediately higher than 18. The only respect in which consideration of a "margin of error" could be relevant is that it is a reminder to anyone undertaking an age assessment that the task is difficult and can be particularly difficult to distinguish between, say, some persons who are just under 18 years old and others who are a little older. However, that is no more than pragmatic caution. It does not give rise to any legally relevant standard.

40. The conclusion that the complaint is about the substantive decision not the fairness of the process also applies to the Claimant's submission that insufficient attention was paid to Mr Smith's evidence (the evidence provided under cover of the 29 November 2021 email). I accept that the Council considered this evidence. So far as concerns a fair procedure, the Council did that which was required of it.

41. The next point to consider is the submission that fairness requires a full, *Merton*-complaint assessment in all cases, save for where the person being assessed is "very obviously, not a child". For the reasons in Sections B and C of this judgment I reject this submission: see at paragraphs 10 – 11, 13, 24, 31 – 32, and 34 above. In each case, the local authority must take reasonable steps to equip itself with relevant information; if it interviews the person being assessed the interview must be conducted fairly; and if the assessed person's credibility becomes an issue he should before any final decision is reached, have the chance to address matters thought to go to his credibility.

42. The steps required for these purposes must depend on the circumstances of the case. If the case is, for some reason or other, an "obvious case" the steps required may be shorter. But there is no invariable line between "obvious cases" and others, not least because reasonable people could reasonably disagree on the limits of the class of "obvious case", and there is and can be no rule that all "non-obvious" cases require a full, *Merton*-compliant assessment (when what is meant by that is a slavish adherence to a checklist such as the one described by Thornton J in *AB*).

43. I turn now to the Claimant's remaining submissions, the points at (1), (2), (3), and (7) in the list of paragraph 37 above. No particular emphasis was given to the submission that the interpreter should have been present in person. Although the meeting on 28 July 2021 was abandoned when it became apparent that the interpreter did not speak Sudanese Arabic, by the time of the 4 August 2021 meeting an appropriate interpreter was available. The interpreter was present by phone. I accept that that arrangement turned out to be satisfactory. For that reason this submission does not demonstrate that the Council adopted an unfair decision-making process.

44. I do not consider what is said at Section 5 of the standard assessment document suggests that the assessment was not conducted with an open mind. Section 5 sets out the history of events prior to the 28 July 2021 interview. The sentence that records the opinion formed by Ms Prest (the social worker who visited the Claimant on 25 June 2021) is part of that history (and it should also be noted that the remainder of Section 5 recalls all other information available to the Council prior to 28 July 2021 including information from the Claimant's solicitors which contended the Claimant was a child). Ms Prest was not one of the two social workers who met the Claimant on 28 July and 4 August 2021 to undertake the age assessment. There is nothing that leads me to conclude that either Mr Bisong or Ms Kirkland-Shirley approached the task with anything other than an open mind. This ground of challenge rests on a significant over-reading of a sentence within Section 5. I reject this ground of challenge.

45. The next submission is that the interviews with the Claimant on 28 July and 4 August 2021 were conducted unfairly because the Claimant was not given the opportunity to have an appropriate adult present. I have already said that I do not consider the case law to date supports the conclusion that fairness requires and appropriate adult be present at every age assessment interview (see above at paragraph 20). What is required

depends on the circumstances of the case. The ADCS guidance includes the following passages on the role of an appropriate adult:

> "The appropriate adult must be independent of the local authority, have the relevant skills and training to undertake their role, and be experienced in working with children and young people. They need to be clear and confident about their role, have the skills to support the child or young person in the interview(s) and challenge social workers if they feel the interview is not being conducted appropriately. An appropriate adult should advocate on behalf of the child or young person, represent their best interests and ensure that the child or young person's welfare needs are met during the interview process.
>
> …
>
> Their role is to ensure the child or young person understands the questions posed to them, and that the accessing social workers conduct the age assessment in a child-friendly, clear and transparent manner. The appropriate adult may also support a child or young person to clarify questions posed by social workers, but cannot coach or answer questions on behalf of the child or young person".

46. A court's decision on whether fairness requires an appropriate adult to be present must take account of any relevant observations made by the social workers conducting the interview. In this case the information at Section 7 of the standard assessment document records that the Claimant spoke confidently and was "able to advocate for himself", and notes that the Claimant's insistence on a need for a Sudanese Arabic interpreter was also evidence of his maturity and ability to speak up for himself. In these circumstances I consider that the interviews conducted were not unfair for want of an appropriate adult. This Claimant was able to understand questions put and, when necessary, to ensure his point of view was expressed and understood. For these reasons, on the facts of this case, this ground of challenge also fails.

47. The final submission for the Claimant is that there was no opportunity for him to address the assessors' reasons to doubt his credibility. Mr Rule submits there was no "minded to" process.

48. At the end of the interview on 4 August 2021 some matters of concern were put to the Claimant for his comment. The relevant note is at Section 14 of the standard assessment document.

> "It was put to [the Claimant] that physically he did not look like he was 17 and that we felt that the age [23] on his Home Office documents was accurate. This meant that we were not going to accommodate him as a child. [The Claimant] responded as follows "I don't know if I am a child or not". He went on to add

> that he does not know his date of birth but that the people in his family have big bodies."

49. The decision then taken is recorded at Section 15 of the assessment document which is described as being the place within the standard document to set out "key indicators of the conclusion".

> "[The Claimant] engaged well during the assessment and appeared confident in his rapport throughout.
>
> [The Claimant] was observed to be fluent in recalling aspects of his journey from Sudan to the UK, and discussing his family composition and history. He was however vague and reticent when there were questions being asked about the finer details, his life, social history, and childhood activities; choosing to respond with "I don't know".
>
> There have been some inconsistencies in the information that he has shared primarily in regard to has he attending school or not and regarding how he learnt of this date of birth. [The Claimant] at times appeared unsure of the ages to use so tended to give responses regarding the same in ranges. For example, asked the age he left Sudan he stated he was 14 or 15 and observed to take a long pause. When asked to be more specific; he did the same when asked about the age when he started studying the Quran (7, 8, 9, 10). Yet he was very specific regarding his date of birth, or the years his brothers were born or the fact his sister passed away two days after birth.
>
> Finally [the Claimant] himself informed that he did not know if he was a child or adult and was unsure of this date of birth. This single variable casts serious doubt on his entire narrative. It is the clearest indication that he is not minor."

50. The submission for the Claimant is that certain matters which it is clear from consideration of the whole of the assessment document did cause the social workers to doubt the Claimant's credibility were not put to him. These were: (a) that the Claimant had given inconsistent answers when asked how he knew his date of birth, saying at the beginning of the interview that he had been told by his uncle, but at the end of the interview saying that he had been told by his mother; (b) that the Claimant appeared to have no memories of his childhood, and answered many questions "I don't know"; (c) that he told the social workers he did not go to school, but had told Home Office officials he had spent 4 years at Quran school. The Council's response is to the effect that the point of greatest importance in this case – that the Claimant was thought to look 23 years old – was put to him, and that his response "I don't know if I am a child or not", was the decisive matter.

51. I do not accept the Council's submission on this point. I am satisfied that in this case it is artificial to seek to separate the point about the Claimant's appearance, that was

put to him, from the points at (a) – (c) above that were not put to him. The latter points, which were thought to go to the Claimant's credibility feed into the conclusion that his apparent age (not his claimed age) was his real age. For that reason, those points should, in fairness, have been put to the Claimant. The Claimant's response to what was put to him, that he did not know if he was a child or not, is not to the point. The point here being the fairness of the procedure, not whether the conclusion was correct.

52. In submissions Mr Rule also suggested that the "minded to" phase was unfair as it had taken place at the end of the 4 August 2021 interview rather than later, or on a separate occasion. There is no substance at all to this submission. There is nothing in the circumstances of this case to suggest a legal requirement that matters going to the Claimant's credibility be put to him at a different interview or on a separate occasion. At the risk of tempting providence, it is difficult to envisage the circumstances which could plausibly found such a submission.

E. Conclusion and disposal

53. The Claimant's claim succeeds but only to the extent explained at paragraph 51 above.

54. So far as concerns the relief that should follow, I have considered the submissions made at the hearing and the written submissions made at my request following circulation of the draft judgment. My conclusion is that appropriate relief will be in the form of a declaration. At the hearing and in his written submissions, Mr Rule contended that I should quash the age assessment decision and direct the Council to undertake the process again. I do not consider relief to that effect to be appropriate. As I have already stated, the parties are agreed that the part of the challenge concerning the Council's substantive decision was correct will be transferred to the Upper Tribunal for determination. The decision on that issue will be the one of practical importance to the Claimant. Mr Rule submitted that if the assessment were remitted to the Council that could result in a decision that at the date of the August 2021 assessment the Claimant was a child. That is possible. However, this submission misses the wood for the trees. The Upper Tribunal will decide whether at the material time the Claimant was a child. It is better that decision is made sooner rather than later. Mr Rule also submits that unless the Council has undertaken a fairly conducted age assessment process any proceedings before the Upper Tribunal may start from a false premise. I do not accept this submission either. In the Upper Tribunal proceedings, I expect the Council will contend that, at the relevant time, the Claimant was not a child. No doubt too, as part of that contention the Council may rely on the assessment undertaken by its social workers. But in those proceedings the Upper Tribunal must decide the Claimant's age for itself – it will be the finder of primary fact. The error I have identified going to the fairness of the process adopted by the Council in this case will not result in any distortion or difficulty for the Upper Tribunal in the performance of its task.

55. Further, and as a matter of discretion, an appropriate declaration is sufficient recognition of the error that I have found to have occurred in this case, and the extent of any injustice to the Claimant consequent on that error. Mr Rule points to other cases where a local authority, having been found to have conducted an age assessment unfairly, has been required to re-take an age assessment decision. But those are other cases, decided on their own circumstances (I am told, for example, that in *AB* both parties agreed that there should be an order requiring the local authority to undertake that age assessment again). In this case several matters combine to support the

conclusion that as declaration is sufficient recognition of the legal error that has occurred. The error that I have identified, rendering the decision-making process unfair is not an error of the most serious nature. It is now well-established that whether a person is a child for the purposes of the obligations under the 1989 Act is a matter of jurisdictional fact; it can only be definitively determined, at a fact-finding hearing before the Upper Tribunal. following the judgment of the House of Lords in *A v Croydon*, that is the operative decision. It is better for that process to be commenced sooner rather than later. That is particularly so in this case, when the Claimant, even on his own evidence, is now aged over 18. In this case, now that the judgment of this court has been given, there is little in terms of any public interest requiring the Council to revisit this matter, and much to be said for the contention that the Council's finite social services resources ought not to be expended further on this matter.

56. All this being so, I make the declaration in the form set out in the order, and I direct that this claim now be transferred to the Upper Tribunal for determination of the remaining issue in this claim: whether, at the material time the Claimant was a child for the purposes of the Council's obligations under the 1989 Act.
